THE DAVID HUME INSTITUTE

THE START OF A NEW SONG

The Hume Lecture 1998
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FOREWORD

Vernon Bogdanor's Hume Lecture 1998 was given on the day the Scotland Act 1998 received the Royal Assent. The lecture provided a characteristically incisive and far-reaching analysis of the constitutional and political effects of that legislation. Professor Bogdanor argues that the long-established doctrine of the supremacy of the Westminster Parliament—to which, he suggests, Hume himself would have contentedly subscribed—will become practically and politically difficult to exercise in Scotland. Power devolved will be power transferred, and the relationship between Edinburgh and Westminster will become quasi-federal, with the sovereignty of Westminster much attenuated. This quasi-federalism will also have an impact upon what happens at Westminster itself: only with regard to England will MPs have full powers of scrutiny. Professor Bogdanor goes on to assess the "West Lothian Question" in the light of this analysis, finding an answer in the continuing application of the Barnett formula for public expenditure throughout the United Kingdom. He also reflects upon the asymmetric nature of the new quasi-federal state, which raises issues about devolution for England. Doubts are raised about the viability of an English Parliament, and Professor Bogdanor invokes the words of Gladstone to air the possibility of devolution to English regions. He concludes with some thoughts about whether devolution will lead to further separation, suggesting that it may rather split the nationalist movement in Scotland and so reinforce the Union.

These bold and challenging conclusions stimulated considerable discussion and debate amongst Professor Bogdanor's audience on the evening when they were first delivered. It is with every confidence that we can say of the printed version presented here that the debate can and should now be carried forward in a wider arena. Professor Bogdanor more than lived up to the high standards set by previous Hume Lecturers, and while we are bound to say that the views expressed are his own and not those of The David Hume Institute (which, as a charity, is debarred from espousing any particular political standpoint), we can certainly express our gratitude to him for an invaluable contribution to our understanding of the issues at stake in the creation of the Scottish Parliament.

Hector L MacQueen and Brian G M Main
Directors of The David Hume Institute
1 December 1998

THE START OF A NEW SONG

I

In thanking you for your generosity in inviting me to give this lecture, may I confess that my acceptance was not unmixed with a certain trepidation. For I remember indeed the reception of an English MP who was added to the First Scottish standing committee in 1988, when it was to consider the Civil Evidence (Scotland) Bill. The MP, David Tredinnick, the Conservative member for Bosworth—he was later to attract notoriety as one of the two MPs involved in the "cash for questions" scandal—was greeted by Donald Dewar in the following way:

> No doubt his education at Eton, the Mons Officer Cadet School and the business school at Cape Town University qualify him admirably and will give him the necessary discipline to last through a Scottish Law Reform Bill Committee.[1]

It is a sign of the generosity of The David Hume Institute that it has invited someone to deliver its annual lecture whose qualifications for talking about anything to do with Scotland are, you may think, even more exiguous than those of Mr. Tredinnick. For I have never attended the Mons Officer Cadet School nor the business school at Cape Town University. I cannot even claim an education at Eton. However, unlike Mr. Tredinnick, I shall not be considering—you will be relieved to hear—the intricacies of the Scottish law of evidence—of which I know nothing. I am, however, undoubtedly English, a nation which Hume once dismissed as "relapsing into the deepest Stupidity, Christianity & Ignorance".[2] At another time he referred to the English as "the barbarians who inhabit the Banks of the Thames".[3]

I am particularly gratified that the President of The David Hume Institute, Sir Samuel Brittan, is here. He has always seemed to me to combine to an admirable degree those qualities of scepticism, liberality and clear-headedness which so characterised Hume himself.

I am glad also that Neil MacCormick, who has done so much to advance the cause of devolution, has agreed to chair this lecture. My own understanding of the case for devolution has been much advanced through reading the book by Neil's father, John MacCormick, "King John", *The Flag in the Wind: The Story of the National Movement*, published in 1955. In that book, John MacCormick declared that:

> We had no feeling of hatred or even of dislike for things English nor did we labour under any deep sense of grievance or injustice. [But], It seemed obvious to us ... that the submission of Scotland in an incorporating Union with England was not only bad for Scotland but was also detrimental to the well-being of the whole island and of Europe too. It was as though what should have been a quartet in the concert of nations had degenerated into a one-man band.[4]

MacCormick also noticed

> a subtle and scarcely definable dividing line which separated one section of Nationalists from another, and which to this day has persisted. It had little really to do with moderation or extremism or with statements on policy. It was rather a difference in mental approach which made itself felt in any discussion of any question. On the one hand there was what I can only call a kind of cantankerousness, as though those who displayed it felt themselves, however unconsciously, to belong to a defeated and conquered nation and must, therefore, always stand on their dignity and look out for every slight. They seemed to me to look at Scotland through green spectacles and despite a complete lack of historical parallel to identify the Irish struggle with their own. On the other hand there were those whose nationalism was a perfectly healthy desire for a better form of union with England than that which had been freely negotiated *(sic)* in 1707, and who never, either consciously or unconsciously, thought of Scotland as having anything other than an equal status with England, however unfortunately the incorporating Union of Parliaments might reflect itself in modern Scottish life. I am glad to say, and I think it is

> significant of the temper of the Scottish people, that it is the latter state of mind which, in the long run, has predominated in the National Movement.[5]

There has never been any doubt in my mind on which side of that dividing line in the Nationalist movement Neil himself stands.

II

I have been wondering what Hume would have thought about devolution. My speculative conclusion, for what it is worth, is, might I dare to say, contrary to that offered in last year's David Hume lecture by the distinguished judge, Lord Hope of Craighead.[6] For I believe that Hume would have been opposed to devolution. It was, after all, fundamental to his political philosophy that the constitution should provide for power to be undivided. With the source of power not open to dispute, it would be easier to secure habitual obedience from the people. They would have less reason to question authority than with a constitution where the dividing line was "uncertain and contentious".[7] It has been said that "The doctrine of parliamentary sovereignty is almost entirely the work of Oxford men"[8]—Hobbes, Blackstone and Dicey. Hume shows that this generalisation is untrue. For he shared with these Oxford men that reverence for the sovereignty of Parliament which would have made him very unwilling to contemplate the creation of a competing parliament, even a constitutionally subordinate one such as the Scottish Parliament is to be.

Of course, it seems that devolution will in theory preserve the sovereignty of Parliament. The White Paper, *Scotland"s Parliament*, Cm. 3648, stated the constitutional position after devolution in stern Diceyan tones in paragraph 42 that "The United Kingdom Parliament is and will remain sovereign in all matters", while section 28(7) of the Scotland Act proclaims that "This section", which provides for the Scottish Parliament to make laws, "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland".

Constitutionally, then, the Scottish Parliament will be subordinate. Politically, however, it will be anything but subordinate. For the Scotland Act creates a new locus of political power The most

important power of the Scottish Parliament will be one not mentioned in the Act, that of representing the people of Scotland. The basic premise of devolution, after all, is that there is a separate political will in Scotland. The First Minister in Scotland will be seen as an executant of that political will, backed as he will be by a popular majority in Scotland. It will be the First Minister who will speak for Scotland, and he or she will claim more right to do so than Westminster MPs or the Secretary of State who will have been denuded of his powers, and who, in any case, may represent a party unable to command a majority in Scotland. In practice, therefore, the First Minister in Scotland is likely to be seen as the real leader of Scottish opinion; he or she is likely to be seen as the Prime Minister of Scotland.

It will thus not be easy to bring into play the constitutional restraints in the Scotland Act. For it would be difficult to imagine an issue more likely to unite Scottish opinion than a conflict between the Scottish Parliament and Westminster. Even if Westminster were to get its way in the end, this would probably be at the cost of considerable political disaffection and loss of support in Scotland. In practice, therefore, Westminster will find it extremely difficult to exercise its much vaunted supremacy.

In the Government of Ireland Act of 1920, there can be found a far more ringing declaration of supremacy than anything to be found in the 1998 Scotland Act. Section 75 of the Act provides that:

> Notwithstanding the establishment of the Parliament of Northern Ireland, or of anything contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things in Northern Ireland and every part thereof.

Yet Westminster found it extremely difficult to exercise its supremacy over Northern Ireland. There was only one occasion when a British government seriously considered exercising its reserve powers to withhold assent to Northern Ireland legislation. That was when, in 1922, the Northern Ireland Parliament proposed to abolish proportional representation for local government elections in the province. The British government's protests were met,

however, with a threat of resignation from the government of Northern Ireland and the British government was forced to give way.

If Westminster found itself incapable of exercising its supremacy over the Northern Ireland Parliament, how much more difficult its task will be vis-a-vis Scotland. For Northern Ireland did not see herself as a separate nation within the United Kingdom, nor had she sought devolution. Therefore she had every incentive to avoid conflict with the British government. The Scottish Parliament will have no such incentive. It will speak, moreover, not for an artificially created province in danger of being extruded from the kingdom against its wishes, but, as it conceives itself to be, the representative of a nation. Independence is therefore a very real option for Scotland which it never was for Northern Ireland

We have seen that the White Paper, *Scotland's Parliament,* insisted that supremacy remained with Westminster. Many Scots, however, and by no means only those who vote for the SNP, take the view that, if Scotland is a nation, it enjoys an inherent right to self-determination. That indeed was the position of the *Claim of Right,* the foundation document of the Scottish Constitutional Convention. It declared that:

> We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government suited to their needs.

Sovereignty, on this view, lies with the Scottish people not with Westminster, a claim perhaps implicitly accepted by the government elected in May 1997 which restricted the vote in the devolution referendum to electors registered in Scotland.

If the new arrangements work as intended, the Scottish Parliament will be the supreme authority over Scottish domestic affairs. The normal convention will be that Westminster ceases to legislate for Scotland, or to intervene in her domestic affairs. In the words of the Scottish Office minister, Lord Sewel, "we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament".[9] The devolution of powers to the Scottish

Parliament is likely to be accompanied, as it was with Northern Ireland, by the removal of ministerial responsibility for Scottish domestic affairs from Westminster. No doubt the convention will be adopted as it was in Northern Ireland that questions about Scottish domestic affairs can no longer be asked at Westminster since there is no minister responsible for them. If so, then it will hardly be possible for Westminster to continue to legislate for Scottish domestic affairs in the absence of that continuous scrutiny and calling to account of ministers which is the hallmark of ministerial responsibility. It is difficult to see how Westminster could continue to legislate for the domestic affairs of Scotland when it will no longer be debating them and no longer holding ministers to account for them.

It is then in constitutional theory alone that full legislative power remains with Westminster. It is in constitutional theory alone that the supremacy of Parliament is preserved. Power devolved, far from being power retained, as implied by constitutional theory, will be power transferred, as dictated by political reality; and it will not be possible to recover that power except under pathological circumstances, such as those of Northern Ireland after 1968. Thus the relationship between Westminster and Edinburgh will be quasi-federal in normal times and unitary only in crisis times. For the formal assertion of Parliamentary supremacy will become empty when it is no longer accompanied by a real political supremacy.

In Scotland, then, the supremacy of Parliament will bear a very different and attenuated meaning after the setting up of her Parliament. It will certainly not mean the supremacy over "all persons, matters and things" of the 1920 Government of Ireland Act. For Westminster, instead of enjoying a regular and continuous exercise of supremacy, will possess merely a nebulous right of supervision over this Parliament. Political authority, however, depends upon its regular and continuous exercise; it is not the mere incursion of legislative authority once every ten, fifteen or twenty years. In these circumstances, the assertion of supremacy becomes, in Enoch Powell's words, "so empty that it could eventually be given effect only by what would in reality be a revolutionary act".[10] Thus Westminster's supremacy in Scotland, which was once a real power to make laws affecting Scotland's domestic affairs, will become

merely the power to supervise *another* legislative body which will make laws over a wide area of public policy.

In relation to the Scottish Parliament, then, the supremacy of Westminster is likely to bear a highly attenuated meaning. It will probably mean no more than:

(a) The more or less theoretical right to legislate on Scotland's domestic affairs against the wishes of the Scottish Parliament, something never done in Northern Ireland; and

(b) The right to abolish the Scottish Parliament. It is, however, by contrast with the experience of Northern Ireland, difficult to see this happening against the wishes of the Scottish Parliament and people, especially as the Scottish Parliament, unlike the Northern Ireland Parliament established by the Government of Ireland Act in 1920, has been validated by a referendum. It would be difficult to abolish it without another referendum in Scotland.

It will not even be easy for Westminster unilaterally to alter the devolution settlement to Scotland's disadvantage. There may, for example, be a case for revising the needs assessment determining the size of the block fund going to Scotland which, so it is alleged, is unduly favourable to Scotland. It will, however, be much more difficult to do this with a Scottish Parliament in existence than it was before. For, although the provisions of the Scotland Act can in theory be altered by a simple Act of Parliament at Westminster, it would in practice, be very difficult to do so on a matter which the Scots regard as affecting their interests without the consent of the Scottish Parliament. Thus, in practice, the supreme body with the power to alter the provisions of the Scotland Act will be, not Westminster alone, but Westminster together with the Scottish Parliament. Insofar as any major amendment of the Scotland Act is concerned, then, Westminster will have lost its supremacy.

In his *Introduction to the Study of the Law of the Constitution,* Dicey declared that one of the fundamental characteristics of a sovereign parliament was that under it there was no distinction between fundamental and ordinary laws. The Scotland Act, however, might

well come to enjoy the status of a fundamental law. For it will not in practice be alterable in the same way as other legislation.

Thus the Scotland Act, although nominally an Act providing, as its Long Title declares, for "changes in the government of Scotland", creates in reality a new constitution for Britain as a whole. This is because it does more than devolve powers. It *divides* the power to legislate for Scotland between Westminster and Edinburgh, creating a quasi-federal relationship between the two Parliaments. Moreover, as in a federal system, the operation of the Scotland Act will continually raise questions about the limits of authority of both Edinburgh and Westminster. A constitution which divides powers requires therefore a court to police the division. The Scotland Act provides for this also in that the division of powers will be adjudicated by the Judicial Committee of the Privy Council, which will come to assume the role of a constitutional court on devolution matters.

Of course, the Judicial Committee will be able to pronounce only on Scottish and not on Westminster legislation. It will be able to declare that a Scottish statute is repugnant to the constitution, i.e. that it contravenes the Scotland Act, but not that an Act of the Westminster Parliament is repugnant to it, since the supremacy of Parliament is in theory preserved.

Nevertheless, if the Judicial Committee decides a dispute in Scotland's favour, it would be difficult for Westminster to legislate for Scotland on that matter when the Judicial Committee had ruled that it lay within the scope of Scotland's transferred powers. The decisions of the Judicial Committee, therefore, may well come to have the consequence that the prerogatives of Westminster are diminished. If that happens, Westminster will lose yet another of the characteristics of a sovereign parliament, the right to make laws from which there is no appeal. For both Westminster and the Scottish Parliament will have come to depend upon the Judicial Committee for the protection of their sphere of action, a condition characteristic of federal systems of government.

Of course, the whole concept of the supremacy of Parliament is shakier now than it was when the Government of Ireland Act was passed in 1920. That is because Britain is now a member of the

European Union and Westminster seems, in consequence, voluntarily to have abrogated its sovereignty. Indeed, the *Factortame* cases seem to have shown that judges may refuse to apply United Kingdom legislation which contravenes European Community law.[11] Although of course the transfer of legislative powers to Scotland is quite different from the transfer of powers to the European Union, for it is not a transfer to a superior legal order, nevertheless it is not impossible to imagine a future phase of judicial activism whereby judges would refuse to allow provisions of the Scotland Act, which they might come to regard as fundamental constitutional legislation, to be impliedly repealed by Westminster. What is certain is that Parliamentary supremacy no longer possesses the clarity and firmness which it enjoyed when the Government of Ireland Act was passed in 1920.

In the *Law of the Constitution*, Dicey detected "three leading characteristics of completely developed federalism – the supremacy of the constitution – the distribution among bodies with limited and co-ordinate authority of the different powers of government – the authority of the courts to act as interpreters of the constitution".[12] The Scotland Act not only in effect distributes powers. It also introduces a judicial element into the determination of that distribution. It provides therefore for an enacted constitution establishing a quasi-federal system of government and in effect a constitutional court to interpret the distribution of powers. Moreover, the Scotland Act will in effect though not in form supersede the sovereignty of Parliament since Westminster will not in practice be able to alter its provisions without the consent of the Scottish Parliament. It would be difficult to imagine a more profound constitutional revolution in the government of the United Kingdom.

III

Moreover, devolution will very radically alter the role of Westminster itself, by introducing the spirit of federalism into its deliberations. Hitherto, this spirit has been absent from Westminster, with the *de minimis* exception of Northern Ireland between 1921 and 1972. With this exception, there has been no element of federalism in a House of Commons in which every MP was responsible for scrutinising both the domestic and the non-domestic affairs of every

part of the United Kingdom. After devolution, by contrast, MPs will normally play no role at all at Westminster in legislating for the domestic affairs of Northern Ireland or Scotland, nor in scrutinising secondary legislation for Wales. Only with respect to England will MPs continue to enjoy the power which, until now, they have enjoyed for the whole of the United Kingdom, that of scrutinising both primary and secondary legislation. Thus Westminster, from being a parliament for both the domestic and non-domestic affairs of the whole of the United Kingdom, will be transformed into a parliament for England, a primary legislation parliament for Wales and a federal parliament for Northern Ireland and Scotland.

This kind of asymmetrical federalism is sometimes thought of as anomalous. It would be wrong, it is sometimes suggested, for Scottish MPs, after devolution, to be able to vote on English domestic affairs, when English MPs will no longer be able to vote on Scottish domestic affairs. This of course is the notorious West Lothian Question.

I have to confess that I never been able to appreciate the force of this Question. For English MPs have never shown much interest in Scottish domestic affairs. Even under the pre-devolution arrangements, Scottish legislation remained largely the concern of Scottish MPs. Hardly any non- Scottish MPs have taken an interest in it, and any who did were likely to be regarded as intruders by Scottish MPs. In 1968, Richard Crossman had it in mind to attend a Second Reading debate on the Social Work (Scotland) Bill, but

> Just as we were going in we realised that the Scots would suspect some poisonous English conspiracy so we would have to keep out, come what may. I quote this to show how deep is the separation which already exists between England and Scotland. Willie Ross [the Scottish Secretary] and his friends accuse the Scot. Nats. of separatism but what Willie Ross himself actually likes is to keep Scottish business absolutely privy from English business. I am not sure this system isn't one that gets the worst of both worlds which is why I'm in favour of a Scottish Parliament.[13]

There was already in the House of Commons a Scottish sub-system. Devolution will have the effect of transferring that sub-system to

Edinburgh and placing it under direct electoral control. But, why should Scottish MPs continue to vote on English domestic affairs? They need to continue to enjoy this right because public expenditure is, inevitably, given its size, driven by the needs of England. Under the Barnett formula, and, inevitably in a multi-national state in which England is by far the largest nation, expenditure in Scotland is largely determined by expenditure in England. The funds available to the Scottish Parliament will depend upon the skills of English spending ministers in such departments as education and health in protecting their budgets, both against the Treasury and against ministers dealing with reserved matters such as foreign affairs and defence. Were a future Conservative government in London, for example, to raise the defence budget and cut the education budget in compensation, that would clearly entail a cut by means of the Barnett formula in the monies available to Scotland. Or suppose that a future Conservative government were to decide to introduce tax incentives for private health insurance, reducing spending on the National Health Service and cutting income tax. That would lead automatically, under the Barnett formula, to a cut in the block grant for Scotland. Yet the Scottish Parliament might well not wish to follow Conservative policy by reducing National Health Service spending.

Thus any issue at Westminster involving the expenditure of public money must be of concern to all parts of the United Kingdom since it might directly affect the level of the block grant going to a devolved body, and therefore its level of expenditure.

It is questionable, therefore, whether there are any specifically "English" domestic issues in the sense of issues which have no consequential effects in Scotland. If that is so, then the West Lothian Question is wrongly posed.

What the West Lothian Question does do, however, is to draw attention to the fact that devolution is turning Britain from a unitary state into a quasi-federal state, with Westminster becoming the quasi-federal parliament of that quasi-federal state.

IV

The prime reason why the new constitution of the United Kingdom is asymmetric is that the devolution legislation does not propose any alteration in the arrangements by which England is governed. Yet England, although hardly mentioned in the devolution legislation, is, in many respects, the key to the success of devolution. This is because any devolution settlement has to be acceptable not just to the Scots and the Welsh but also to the English who return 539 of the 659 Members of Parliament to Westminster and who constitute 85% of the population of the United Kingdom. The success of devolution will depend in large part upon whether English opinion believes it to be a fair and equitable settlement.

There may, at first sight, seem to be no reason why devolution to Scotland and Wales should have any consequences for England at all. Devolution, after all, involves the transfer of power only over Scottish and Welsh domestic matters, and the legislation provides that the central instruments of economic management, together with all major economic and industrial powers, remain with Westminster. Moreover, the government will continue to be responsible for the nationwide allocation of resources throughout the United Kingdom on the basis of need. Devolution, then, seems restricted to those matters which primarily affect those living in Scotland and Wales and which can be administered separately without deleterious consequences on those living in England. The Long Title of the Scotland Act refers to its providing for "the establishment of a Scottish Parliament and Administration and other changes in the government of Scotland"; the Long Title of the Government of Wales Act refers to its purpose as being "To establish and make provision about the National Assembly for Wales". They make no reference to the fact that they are making very radical changes to the government of the United Kingdom as a whole. They therefore imply that the establishment of a Scottish Parliament and a Welsh Assembly will not prejudice the interests of England.

Devolution, however, will accentuate an already existing constitutional imbalance in favour of Scotland and Wales. They already have their own Secretaries of State pressing their case at Cabinet level; they are over-represented in the House of Commons by comparison with England; and there is a good case for arguing

that Scotland, although not Wales, benefits more from public spending than those English regions whose GDP per head is lower. After devolution, Scotland and Wales will have control over local government spending on devolved services; they will have freedom to establish their own expenditure priorities; their powerful political status will give them an advantage in bidding for industry, and very possibly a greater opportunity of putting their case directly to the European Union. Above all, they, but not the English regions, will be able to negotiate with the government on any revisions of the Barnett formula or the assessment of needs; and this may well give them what amounts to a veto on changes deleterious to their interests. The Scottish Parliament and the Welsh Assembly are thus likely to enjoy very considerable political power and influence.

Those living in the more under-privileged English regions, such as the north-east or the north-west, may already regard themselves as second-class citizens because they have no territorial ministers able to argue their case in Cabinet. After devolution, they may come to believe that they are third-class citizens, since they have no assemblies either. It is by no means clear that a constitutional imbalance, which has been broadly acceptable until now, will continue to be accepted after devolution.

For it is misleading to regard devolution simply as a process by which the Scots and the Welsh manage their own domestic affairs. The Scottish Parliament and the Welsh Assembly may well be able to use their influence to ensure that they achieve a greater share of resources than they obtain at present. If that occurs, it is likely to be the less well-off regions of England which will suffer. It will be difficult for the English regions, lacking representation in the Cabinet, and without assemblies of their own, to counter this influence. In this way, the *constitutional* imbalance accentuated by devolution could lead to a serious *economic* imbalance favourable to Scotland and Wales but unfavourable to the less privileged English regions. One consequence of this imbalance might be the generation of powerful regional lobbies in England. Whether that happens or not, the consent, or at the very least the acquiescence of England, is essential to the success of devolution.

In his poem, *The Secret People*, G. K. Chesterton wrote, "Smile at us, pay us, pass us, but do not quite forget; for we are the people of

England that have never spoken yet". England has not yet spoken because, constitutionally, England does not exist. "England", it has been said, "is a state of mind, not a consciously organised political institution".[14] There has been no English Parliament since 1536. There is no English Office comparable to the Scottish, Welsh or Northern Ireland Offices, the "English" ministers being so only because their non-English functions have been hived off to the territorial departments. The "English" legal system comprises both England and Wales. The Treaty of Union which the Scots claim to have agreed with the "English" in 1707 was agreed with the English state but with the English and Welsh people.

England has long been the stumbling-block for supporters of devolution. For England, since the time of the Union with Scotland in 1707, has resisted integration, while remaining unsympathetic to federalism. It is the supposedly unified and homogeneous nature of England which has in large part been responsible for the preservation of the unitary state. It is largely for this reason that England has not until now sought devolution. Until she does, governments have taken the view that she ought not to have devolution thrust upon her. There can indeed be no justification for requiring England to accept devolution against her wishes just because there has been devolution to Scotland and Wales. To force devolution upon England, far from assuaging resentment against Scotland and Wales, could well intensify it.

In February 1998, however, the Conservative leader, William Hague called for changes to be made in the government of England, following devolution to Scotland and Wales. He put forward as suggestions an English Grand Committee or an English Parliament. There is already in fact provision in the standing orders of the House of Commons for a Standing Committee on Regional Affairs. This comprises all MPs representing English constituencies, together with 5 additional members. It is, therefore, a kind of English Grand Committee. But that Committee has not met since 1978 for the very good reason that it proved to be little more than an unwieldy and cumbrous talking shop.

In January 1998, the Eurosceptic Conservative back-bencher, Teresa Gorman, moved a private member's bill calling for a referendum on Hague's other proposal, an English Parliament. The main purpose of

such a parliament would be to resolve the West Lothian Question by making devolution symmetrical. Yet it would be pointless to "resolve" the West Lothian Question by a massive upheaval in England unless that was also desired for other reasons, and unless it served to make government more effective. An English Parliament, however, would yield a form of "Home Rule All Round" which would be highly unbalanced in population terms. Indeed an English Parliament could hardly avoid becoming a real rival to Westminster. "A federation consisting of four units—England, Scotland, Wales and Northern Ireland—would", the Royal Commission on the Constitution warned in 1973,

> be so unbalanced as to be unworkable. It would be dominated by the overwhelming political importance and wealth of England. The English Parliament would rival the United Kingdom federal Parliament; and in the federal Parliament itself the representation of England could hardly be scaled down in such a way as to enable it to be outvoted by Scotland, Wales and Northern Ireland, together representing less than one-fifth of the population. A United Kingdom federation of four countries, with a federal Parliament and provincial Parliaments in the four national capitals, is therefore not a realistic proposition.[15]

Moreover, an English Parliament would do nothing to remove the problems of over-centralisation and lack of democratic accountability which comprise the dynamic behind devolution. Were an English Parliament to be set up, there would still be a need to disperse power within England. So an English Parliament, while it might create symmetry, would not resolve the problem to which devolution is the answer. Devolution in England, therefore, if it is to serve the same ends as devolution in Scotland and Wales, must be devolution to the English regions, not to an English Parliament. It is no doubt for this reason that, in the preface to the White Paper, *Scotland's Parliament*, Cm. 3658, Tony Blair indicates that his government's "comprehensive programme of constitutional reform" involves as well as "a Scottish Parliament and a Welsh Assembly", "more accountability in the regions of England" "The Union", the document goes on to say, will be strengthened by recognising the claims of Scotland, Wales and the **regions with strong identities of**

their own". Great Britain, then, consists, for the purposes of devolution, not of three nations, but of two nations, together with the English regions. That is the policy adopted by New Labour. It was also the policy of Mr. Gladstone who, in his second Midlothian speech in 1879, insisted that devolution should be not to the four nations of the United Kingdom, but to three nations and the English regions. "If", he declared, "we can make arrangements under which Ireland, Scotland, Wales, **portions of England,** can deal with questions of local and special interest to themselves more efficiently than Parliament now can, that, I say, will be the attainment of a great national good".(Emphasis added) The Labour government's proposals for devolution are in essence Gladstonian and not nationalist.

V

For the moment, however, there will be no devolution to the English regions. Thus devolution to Scotland and Wales will create an asymmetrical state. Will it yield a stable settlement?

Dicey believed that a federal system, in order to be successful, requires "a very peculiar state of sentiment among the inhabitants of the countries which it is proposed to unite. They must desire union, and must not desire unity. If there be no desire to unite, there is clearly no basis for federalism".[16] This "peculiar state of sentiment" will also be needed if the quasi-federal arrangement established by the Scotland Act is to prove workable. The sense of common feeling will have to prevail over the sentiment of states rights. Indeed, because it creates governmental relationships of some complexity, quasi-federalism probably requires a ***greater*** sense of loyalty to the whole, to the United Kingdom, than is necessary in a unitary state.

Will the new constitutional settlement preserve the unity of the United Kingdom; or will it prove a springboard for separatism? In the debate on the White Paper on Wales in the House of Commons, a senior Welsh Labour back bencher, Donald Anderson, declared that devolution was the beginning of a "mystery tour" whose final destination was unclear. "I recall", Anderson went on, "the fine story of a Welsh mystery tour by bus from Cwmrhydyceirw in my constituency. There was a sweep about where the tour would end, and it is said that the driver won. The people of Wales are driving

this mystery tour. They will decide the pace and the direction ...".[17] The same is true in Scotland. It will be the people of Scotland who will decide whether devolution yields a stable settlement, or whether it proves but a staging-post on the way to further constitutional change and perhaps to separation.

The argument that devolution will inevitably lead to separation has been well rehearsed. Yet, in other parts of Europe, Catalonia and the Basque country, for example, devolution seems to have weakened the demand for independence, not strengthened it. Indeed, the nationalist movement in Spain has come to be divided. The main nationalist parties no longer seek independence, while electoral support for parties campaigning for separation has declined. Perhaps, in Britain too, devolution will lead to a split in the nationalist movement rather than a split in the United Kingdom. Separatism, then, is by no means the necessary or even the most likely outcome of devolution to Scotland. Instead, the nationalist parties may find that they have achieved not independence, but rather a dispersal of power, the greatest reversal of the trend to centralisation in government for many years. Indeed, many of those who have supported the nationalist parties have sought, not separation, but the humanisation of the state through a reduction in the scale of government. If they succeed, then the economic and technological developments whose tendency has been to make men and women more and more alike will have found themselves checked by political pressures—the search for identity and the urge to participate. It was Rousseau who was the first to understand that these emotional needs demand satisfaction if men and women are to lead truly fulfilling lives. The demand that government be made more responsive and less remote, that its scale be smaller, may be seen as the reassertion of a human imperative against the dominant economic and technological forces of the age. "Mankind has lost its home", Franz Kafka once said, "Men always strive for what they do not have. The technical advances which are common to all nations strip them more and more of their national characteristics. Therefore they become nationalist. Modern nationalism is a defensive movement against the crude encroachments of civilisation".[18] If there are powerful centrifugal forces at work in Britain today, it might well be that the best way to strengthen national unity is to give way to them a little so as the better to disarm them. Then those

deep underlying forces which tend to hold the United Kingdom together can be allowed to operate without arousing antagonism or disenchantment.

Political science has been much concerned with the key question of how political societies are held together. To that question, the traditional British answer has been to concentrate responsibility and political authority in one undivided central parliament. But the case that centralisation makes for national unity is something that needs to be argued for and not simply asserted. An alternative answer is possible—that a society may be held together through what Gladstone once called a "recognition of the distinctive qualities of the separate parts of great countries".[19] If that answer is correct, then devolution will strengthen the United Kingdom, not weaken it.

Endnotes

1 Scottish Standing Committee, 16 June 1988, col. 4.

2 Nicholas Phillipson, *Hume* (Weidenfeld and Nicolson, 1989), p.13.

3 E.C. Mossner, *The Life of David Hume* (Clarendon Press, Oxford, 1970), p. 405.

4 John MacCormick, *The Flag in the Wind*, (Gollancz, London, 1955), p. 46.

5 Op.cit., p. 67.

6 Lord Hope of Craighead, *Judicial Aspects of Devolution*, The David Hume Institute, Edinburgh, Occasional Papers No. 54, 1998), p. 1.

7 Phillipson, *Hume*, p. 50.

8 R.F.C. Heuston, *Essays in Constitutional Law*, (Stevens, London, 1961), p. 1.

9 House of Lords Debates, 21 July 1998, col. 791.

10 House of Commons Debates, 5th series, 19 January 1977, vol. 924, col. 458.

11 *R v Secretary of State for Transport ex parte Factortame Ltd.* [1990] 2 AC 85; *R v Secretary of State for Transport ex parte Factortame Ltd. (No.2)* [1991] 1 AC 603; and *R v Secretary of State for Transport ex parte Factortame Ltd. (No.3)* [1991] 2 Lloyd's Rep 648.

12 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edition, (Macmillan, London, 1959), p. 144.

13 Richard Crossman, *Diaries of a Cabinet Minister*, (Hamish Hamilton and Jonathan Cape, London, 1977), vol. 3, p. 48.

14 Richard Rose, *Understanding the United Kingdom*, (Longman, London, 1982), p. 29.

15 Cmnd. 5460, para. 531.

16 *The Law of the Constitution*, p. 141.

17 House of Commons Debates, 6th series, 25 July 1997, vol. 298, col. 1164.

18 Gustav Janouch, *Conversations with Kafka*, 2nd edition, (André Deutsch, London, 1971), p. 175.

19 Speech at Swansea, 4 June 1887, in A.W. Hutton and H.J. Cohen, (eds.), *The Speeches and Public Addresses of the Right Hon. W.E. Gladstone*, vol. ix, 1886-1888 (Methuen, London, 1894), p. 225.

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