CHAPTER 2

The structure of the United Kingdom

A. The historic structure

While the external identity of a state is a matter for international law, it is constitutional law which regulates the internal relationships of the various territories which make up the state. In the past, writers often used the word 'English' in referring to the constitution. Dicey and Bagehot, for example, wrote about the English constitution when they were dealing with the British constitution or, to be completely accurate, with what was then the constitution of the United Kingdom of Great Britain and Ireland. The active political consciousness of Ireland since the 19th century, and that of Scotland and Wales more recently, means that today constitutional lawyers must choose their geographical adjectives with care. When in 1969 a royal commission on the constitution was appointed, among its duties was 'to examine the present functions of the central legislature and government in relation to *the several countries, nations and regions* of the United Kingdom'.[1] Some of the deliberate vagueness of the words in italics was dispelled when the commission's report referred to England, Scotland, Wales and Northern Ireland as the four countries which make up the United Kingdom of Great Britain and Northern Ireland.

The United Kingdom has often been described as a unitary state, since there is no structure of federalism. But while the authority of the Crown and Parliament extends to all the United Kingdom, three legal systems exist, each with its own courts and legal profession, namely (*a*) England and Wales, (*b*) Scotland and (*c*) Northern Ireland. A unifying influence is that the Supreme Court for the United Kingdom is the final court of appeal from all three jurisdictions, except for criminal cases in Scotland. When Parliament legislates, it may do so for all the United Kingdom (for example, on income tax or immigration), for Great Britain (for example, on social security or trade union law), or separately for one or more of the countries within the United Kingdom.

Legal definitions

In law, the expression 'United Kingdom' means Great Britain and Northern Ireland; it does not include the Channel Islands or the Isle of Man.[2] For purposes of international relations, however, these islands are represented by the UK government. So are the remaining overseas territories of the United Kingdom, such as Bermuda, the Falkland Islands and Gibraltar.[3] The term 'British Islands' is defined in the Interpretation Act 1978 as meaning the United Kingdom, the Channel Islands and the Isle of Man. The Republic of Ireland is of course outside the United Kingdom and now a completely separate state. 'Great Britain' refers to England, Scotland and Wales: these became a single kingdom by virtue of the Treaty of Union between England and Scotland in 1707. The Wales and Berwick Act 1746 provided,

[1] See section B in this chapter.

[2] Interpretation Act 1978, Sch 1. By the British Nationality Act 1981, s 50 (1), the United Kingdom includes the Channel Islands and the Isle of Man for purposes of nationality law. They are today referred to as Crown Dependencies: see HC 56 (2009–10).

[3] For a recent account, see Hendry and Dickson, *British Overseas Territories Law*.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

curiously to our eyes today, that where the expression 'England' was used in an Act of Parliament, this should be taken to include the dominion of Wales and the town of Berwick-upon-Tweed. But by the Welsh Language Act 1967, s 4, references to England in future Acts do not include Wales.[4]

The adjective 'British' is used in common speech to refer to matters associated with Great Britain or the United Kingdom. It has no single legal connotation, and the term 'British law' is best avoided. In legislation 'British' is sometimes used with reference to the United Kingdom, particularly in the context of nationality.[5]

Historical development of the United Kingdom

1. Wales[6]

While there is no need to summarise the lengthy history by which England became a single entity, it is worthwhile briefly to examine the historical formation of the United Kingdom. The military conquest of Wales by the English reached its culmination in 1282, when Prince Llywelyn was killed and his principality passed by conquest to King Edward I of England. Thereafter the principality (which formed only part of what is now Wales) was administered in the name of the Prince, but the rest of Wales was subjected to rule by a variety of local princes and lords; at this period English law was not extended to Wales, where the local customs, laws and language prevailed. From 1471, a Council of Wales and the Marches brought Wales under closer rule from England, and the accession of the Tudors did much to complete the process of assimilation. In 1536, an Act of the English Parliament united Wales with England, establishing an administrative system on English lines, requiring the English language to be used, and granting Wales representation in the English Parliament.[7] In 1543, a system of Welsh courts (the Courts of the Great Sessions) was established to apply the common law of England. The Council of Wales and the Marches was granted a statutory jurisdiction which it exercised until its abolition in 1689. In 1830, the Courts of the Great Sessions were replaced by two new circuits that operated as part of the English court system. After the union with England, Acts of Parliament applying exclusively to Wales were rare.[8]

The mid-19th century saw the beginning of a political and educational revival and occasional Acts of Parliament applying only to Wales began again to be passed.[9] In 1906 the Welsh Department of the Board of Education was established, the first central department created specifically to administer Welsh affairs.[10] In 1914 was passed the Welsh Church Act, which disestablished and disendowed the Church of England in Wales. From time to time, the identity of Wales was recognised as new administrative arrangements were made.[11] In 1964, the post of Secretary of State for Wales was established and the Welsh Office emerged as a department of the UK government. Thereafter administration of Wales through the Welsh Office was to an extent based on the model of the Scottish Office.[12] Wales and England

Copyright © 2018. Pearson Education, Limited. All rights reserved.

[4] On the boundary between England and Wales, see Local Government Act 1972, ss 1(12), 20(7) and 269; Interpretation Act 1978, Sch 1.

[5] British Nationality Act 1981.

[6] Kilbrandon Report, ch 5, and Andrews (ed.), *Welsh Studies in Public Law*, especially chs 2 (D Jenkins), 3 (H Carter) and 4 (I L Gowan).

[7] 27 Hen VIII, c 26. The Statute Law Revision Act 1948 called this the Laws in Wales Act 1535, but recent Welsh writers have called it the Act of Union of 1536: *Welsh Studies*, p 28.

[8] See e.g. Welsh Bible and Prayer Book Act 1563: *Welsh Studies*, pp 38–9.

[9] See e.g. Sunday Closing (Wales) Act 1881: *Welsh Studies*, p 48.

[10] *Welsh Studies*, p 49.

[11] E.g. creation of the Welsh Economic Planning Council in 1966.

[12] See *Welsh Studies*, ch 4 (I L Gowan); and HLE, vol 8(2), pp 50–4.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

share a common legal system,[13] but some statutes make special provision for Wales. By the Welsh Language Act 1967, the Welsh language may be spoken in any legal proceedings within Wales, by any person who desires to use it; and Welsh versions of any official document or form may be used. The Welsh Language Act 1993 created the Welsh Language Board, to further the principle in Wales that public authorities and the courts should treat the English and Welsh languages on a basis of equality.

2. Scotland[14]

Unlike Wales, Scotland maintained its independence of England during the Middle Ages. Scotland retained its own monarchy and only in the 16th century did the two royal lines come closer with the marriage of Henry VII's daughter, Margaret, to James IV of Scotland. On the death of Elizabeth I in 1603, James VI of Scotland, great-great-grandson of Henry VII, became James I of England. This personal union of the two monarchies had the legal consequence that persons born in England and Scotland after the union both owed allegiance to the same King.[15] During the conflicts of the 17th century, there was a brief period under Cromwell when the Commonwealth of England, Scotland and Ireland was subject to a single legislature and executive. But apart from this, and despite the personal union of the monarchies, the constitutions of the two countries were not united and the English and Scottish Parliaments maintained separate existences.[16] Following the ousting of James II/VII in 1688, the Scottish Parliament for the first time asserted independence of the royal will (see, in particular, the Claim of Right Act 1689). There followed a contest of wills between the English and Scottish Parliaments, marked by religious disputation and by keen rivalry to profit from expanding ventures in world trade, against a deeply insecure European background. In 1704, the Scottish Parliament went so far as to provide that if Anne died without heirs, the Parliament would choose her successor, 'provided always that the same be not successor to the Crown of England', unless in the meantime acceptable conditions of government had been established between the two countries.[17] Following a strong initiative from the English government, the two Parliaments authorised negotiations between two groups of commissioners representing each Parliament but appointed by the Queen. The Treaty of Union was drawn up by them and was approved by Act of each Parliament together with an Act to maintain Presbyterian Church government within Scotland.[18]

The Treaty of Union came into effect on 1 May 1707: it united the two kingdoms of England and Scotland into one by the name of Great Britain; the Crown was to descend to the Hanoverian line after Anne's death; there was to be a Parliament of Great Britain including 16 Scottish peers and 45 elected members in the Commons. Extensive financial and economic terms were included in the Treaty. Guarantees were given for the continuance of Scottish private law (art 18) and the Scottish courts (art 19), as well as for the maintenance of the feudal jurisdictions in Scotland and the privileges of the royal burghs in Scotland. The Act to maintain the Presbyterian Church in Scotland was incorporated in the Treaty and it provided for the maintenance of the Scottish universities. The Treaty was described as an incorporating union: it did not establish a federal system and did not maintain any role for

[13] See e.g. Constitutional Reform Act 2005, ss 7–9.

[14] Kilbrandon Report, ch 4; Donaldson, *Scotland: James V–James VII*; Ferguson, *Scotland, 1689 to the Present*; HLE, vol 8(2), pp 54–72 and Devine, *The Scottish Nation 1700–2000*, pt 1. Also Wicks, *The Evolution of a Constitution*, ch 2.

[15] *Calvin's* case (1608) 7 Co Rep 1a. And see C Russell [2005] PL 336.

[16] See Donaldson, ch 15, and Terry, *The Scottish Parliament 1603–1707*.

[17] APS XI, 136.

[18] Scottish Act: APS XI, 406, English Act: 6 Anne c 11; *Halsbury's Statutes*, vol 10(1), 4th edn, 2013 reissue, p 136. On the making of the union, see Riley, *The Union of England and Scotland* and Devine, ch 1.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

the previous Scottish and English legislatures. But it gave extensive guarantees to Scottish institutions. Guarantees of a similar kind for English institutions were not required as it was obvious that the English would be predominant in the new Parliament of Great Britain.[19]

In the years after 1707, the new unity of Great Britain was challenged by the Jacobite uprisings in 1715 and 1745 but without success. Various expedients were resorted to for governing Scotland from London and, from time to time, new laws were made for Scotland by the Parliament of Great Britain. Some of these, for example abolition of the Scottish feudal jurisdictions in 1747, were considered in Scotland to be a breach of the Treaty of Union. The Scottish Privy Council having been abolished in 1708, for much of the 18th and 19th centuries the Lord Advocate, the chief law officer in Scotland, occupied the primary role in politics and government, managing affairs in Scotland on behalf of the Crown. In 1885, a post of Secretary for Scotland was created, and in 1928 this was raised to Cabinet status with the title of Secretary of State for Scotland. Demands for home rule for Scotland were expressed from the late 19th century onwards: the response of the government was to develop the Scottish Office as the department responsible for Scottish affairs.[20] Political demands for a Scottish legislative assembly were firmly resisted, although greater use was made of committees of Scottish MPs in the Commons. After 1707, Parliament often legislated separately for the English and Scottish legal systems. In particular, the structure of private law, the criminal law, the courts, education and local government in Scotland has always differed from the English pattern.

From 1945 to 1999 the Scottish Office comprised four or five departments of the UK government, located in Edinburgh but headed by the Secretary of State for Scotland.[21] The officials in these departments were members of the British civil service. The functions entrusted to the Scottish Office included agriculture and fisheries, education, health, housing, local government, police, prisons, social services, transport (except road freight and rail) and town planning. Other functions (such as inland revenue, social security, employment and control of immigration) were exercised in Scotland by British or UK departments. As well as having direct responsibility for the Scottish Office, the Secretary of State had an indirect interest in all matters affecting Scotland, enabling a Scottish view to be heard in a wide variety of decisions made in Whitehall.

Although the direction of government remained centralised in the Cabinet, the Scottish Office system enabled much Scottish business to be handled by civil servants resident in Scotland and, latterly, some financial autonomy was conferred on Scottish ministers. On many matters, uniform social and economic standards were maintained throughout Great Britain (for example, financing of higher education), but in some services higher levels of expenditure in Scotland were accepted. One drawback was that subjects requiring separate legislation for Scotland had to compete for a place in Westminster's legislative programme. The political legitimacy of the system was brought into question whenever, as from 1970 to 1974 and from 1979 to 1997, the majority of MPs from Scotland were in the Opposition at Westminster. For instance, despite the fact that only ten Conservative MPs (out of 72) were elected from Scotland at the 1987 election, the Conservative government in 1989 abolished domestic rates for financing local government in favour of the notorious poll tax (community charge), one year earlier in Scotland than in England and Wales.[22] Although the Scottish Office system was sometimes referred to as 'administrative devolution', it was in essence a form of direct rule of Scotland by the UK government.

[19] On the legal effect of these guarantees, see ch 3 D and J D Ford [2007] CLJ 106. Also E Wicks (2001) 117 LQR 109; and (same author), *The Evolution of a Constitution*, ch 2.

[20] See H J Hanham in Wolfe (ed.) *Government and Nationalism in Scotland*, ch 4.

[21] See Drucker (ed.) *Scottish Government Yearbook 1980*, ch 8 (M Macdonald and A Redpath); Keating and Midwinter, *The Government of Scotland*; Milne, *The Scottish Office*. And HLE, vol 8(2), pp 69–71.

[22] See C M G Himsworth and N C Walker [1987] PL 586 and authorities cited in ch 3, note 195.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

The place of Scotland within the Union remains hotly contested. The Scottish National Party – whose ideological lodestar is independence for Scotland – has been the dominant political party in Scotland for a decade, forming the Scottish government (as either a minority or majority government) since 2007 and returning the largest number of MPs for Scottish seats in Westminster in both the 2015 and 2017 general elections. The SNP announced in January 2012 that it wished to hold a referendum on Scottish independence, and later that year the British government at Westminster agreed to make provision for that referendum.[23] The referendum was held on 18 September 2014, after a lengthy campaign which saw opinion polling figures considerably narrow and the SNP publish detailed plans for what independence might look like (including retaining the monarchy, the currency and the BBC).[24] Concerns of unionist parties about the level of support for independence caused the leaders of the Conservative, Labour and Liberal Democrat parties to jointly vow in the closing stages of the campaign to devolve greater powers to the Scottish Parliament. The final result was that 55 per cent of Scots voted 'no' to the proposition: 'Should Scotland be an independent country?'.[25] Although it was assumed at the time of the referendum that the outcome would settle the issue for the foreseeable future, the result of the referendum on Britain's membership of the European Union – in which the country as a whole voted to leave, but Scotland voted to remain by 62–38 per cent – has reignited talk of a further independence referendum. The degree of popular support for a second bite at the independence cherry may partly depend upon the terms upon which Britain exits and the nature of its agreed future relationship with the EU.

3. Northern Ireland[26]

The history of Northern Ireland is inextricably linked with that of Ireland itself. As an entity, Northern Ireland dates only from the partition of Ireland in the early 1920s. Ireland itself came under English influence in the 12th century when Henry II of England became Lord of Ireland. As settlers came from England, courts modelled on those in England were established. While an Irish Parliament began to develop, some English legislation was extended to Ireland by ordinance of the King of England. In 1494, the Irish Parliament passed the statute known as Poyning's Law, which required that all Irish Bills be submitted to the King and his Council in England; only such Bills as the English Council approved were returned for the Irish Parliament to pass. In 1541, the title of Lord of Ireland was changed to King of Ireland. During the 17th century, Ireland had its share of religious bitterness and conflict. William of Orange defeated the former King James II at the Battle of the Boyne in 1690. To resolve a dispute over the power of the Irish House of Lords to hear appeals from Irish courts, the British Parliament in 1720 declared that it retained full power to legislate for Ireland and deprived the Irish House of Lords of all its judicial powers. Pressure from Ireland for greater autonomy led in 1782 to repeal of the Declaratory Act of 1720 and to the recognition by the British Parliament of the Irish Parliament's legislative independence, although there was no

[23] After some dispute as to whether or not the Scottish Parliament could legislate to hold the referendum itself (see N Aroney [2014] PL 422), the British government made the Scotland Act 1998 (Modification of Schedule 5) Order 2013, permitting the Scottish Parliament to do so. The Scottish Parliament subsequently passed the Scottish Independence Referendum Act 2013 and the Scottish Independence Referendum (Franchise) Act 2013.

[24] Scottish Government, *Scotland's Future* (2013). The document is some 650 pages long.

[25] A Tomkins (2014) 130 LQR 215; S Tierney [2015] PL 633.

[26] For the earlier history, see Donaldson, *Some Comparative Aspects of Irish Law*; for the 1920 Constitution, Calvert, *Constitutional Law in Northern Ireland*, and Kilbrandon Report, ch 6. Also Hadfield, *The Constitution of Northern Ireland*; Hadfield (ed.), *Northern Ireland: Politics and the Constitution*; C McCrudden, in Jowell and Oliver (eds), *The Changing Constitution*, 3rd edn, ch 12; Morison and Livingstone, *Reshaping Public Power*; HLE, vol 8(2), pp 72–93.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

change in the position of the monarchy.[27] But legislative independence was short-lived, and after the rising of the United Irishmen in 1798, the British government proceeded to a legislative union with Ireland.

The Union agreement between the two Parliaments was broadly similar to the Union with Scotland, although fewer guarantees were given to Ireland than had been given to Scotland. Article 1 created the United Kingdom of Great Britain and Ireland and arts 3 and 4 provided for Irish representation in the Parliament of the United Kingdom. Article 5 provided for the (Protestant) United Church of England and Ireland, whose continuance was stated to be an essential and fundamental part of the Union. Within the enlarged United Kingdom, all trade was to be free; the laws in force in Ireland were to continue, subject to alteration by Parliament from time to time. As with the Scottish Union, the terms of the Union were separately adopted by Act of each of the two Parliaments concerned.[28]

The Irish Union with Britain was less stable than the Union of 1707. For much of the 19th and 20th centuries, the Irish question was one of the most difficult political and constitutional issues within the United Kingdom. Catholic emancipation in 1829 opened the way for demands for further reform, often associated with militant action and violence. The Irish Church was disestablished in 1869 despite the guarantee for its existence contained in the Act of Union.[29] Gladstone's two Home Rule Bills in 1886 and 1893 were both defeated in Parliament, the first in the Commons, the second in the Lords. After the Parliament Act 1911 had taken away the power of the Lords to veto legislation,[30] the Government of Ireland Act 1914 became law, but it never came into effect because of the outbreak of world war; its parliamentary history had been marked by the extreme determination of Ulster Protestants not to be separated from Britain.

The Easter rising in Dublin in 1916 was further evidence of nationalist feeling in Catholic Ireland. In 1919, the Sinn Fein movement established a representative assembly for what was proclaimed to be the Irish Republic. In 1920, the Government of Ireland Act was passed by the UK Parliament, providing for two Parliaments in Ireland, one for six northern counties and one for the remainder of Ireland, with cooperation between the two to be maintained by means of a Council of Ireland. The Act was ignored by Sinn Fein and, after a period of bitter civil war, an Anglo-Irish Treaty was formally concluded in 1922. This recognised the existence of the Irish Free State (excluding the six northern counties), on which Westminster conferred what was described as the status of a self-governing dominion within the British Empire.

The dominion status of the Irish Free State proved no more than a transitional stage, and the Irish Constitution of 1937 declared that Eire was a sovereign independent state. During the Second World War, Eire was neutral. In 1949, the state became the Republic of Ireland. The UK Parliament at last recognised that Eire had ceased to be part of Her Majesty's dominions although it was, perhaps anomalously, also declared that Ireland was not to be regarded as a foreign country.[31]

Under the Government of Ireland Act 1920, a scheme of devolution was created for the six counties of Northern Ireland that featured an executive (Governor, Prime Minister and Cabinet) and a legislature of two houses sitting at Stormont.[32] Subject to the legislative supremacy of Westminster and except for many matters that were reserved to Westminster,

[27] Cf *Re Keenan* [1972] 1 QB 533.

[28] For the Union with Ireland Act 1800, see *Halsbury's Statutes*, vol 32 (2011 reissue), p 49.

[29] *Ex p Canon Selwyn* (1872) 36 JP 54.

[30] Ch 8 D.

[31] Ireland Act 1949, ss 1(1) and 2. And see Roberts-Wray, *Commonwealth and Colonial Law*, pp 32–5.

[32] See note 26. Also Birrell and Murie, *Policy and Government in Northern Ireland*; Buckland, *The Factory of Grievances*; Lawrence, *The Government of Northern Ireland*, ch 10.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central,
http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

the Stormont Parliament had power 'to make laws for the peace, order and good government of Northern Ireland'.[33] If an Act of the Stormont Parliament exceeded its competence (for example, by legislating with respect to the armed forces),[34] it could be held invalid, but the courts rarely had to interpret the Act of 1920.[35] Since the (Protestant) Unionist party was in power throughout the life of Stormont, the Catholic community was in a permanent minority and their accumulated grievances led to serious unrest from 1968 onwards.[36] In 1972, direct rule of Northern Ireland from London was resumed; the 1920 constitution was suspended, and brought to an end one year later.[37] There followed nearly three decades in which various attempts were made to establish a new Assembly, elected by proportional representation, and a new form of executive based on the concept of power-sharing. These attempts included the Sunningdale agreement (to which the Dublin government was a party) in 1974, an increase in Northern Ireland's representation at Westminster from 12 to 17 seats,[38] and in 1985 the Anglo-Irish Agreement signed by the British and Irish Prime Ministers at Hillsborough.[39] The 1985 Agreement led Unionists to protest at the recognition of the Dublin government's interest in Northern Ireland.[40]

Both direct rule and terrorist activity continued during most of the 1990s. In 1993, the 'Downing Street Declaration' of the two Prime Ministers renewed the assurance that the status of Northern Ireland would not be changed without majority consent and confirmed that the British government would not oppose a united Ireland for which there was popular consent.[41] But only after the general election in 1997 was a more fruitful initiative taken, in the form of the Belfast (or Good Friday) Agreement reached on 10 April 1998.[42] Strand One of the agreement provided for an elected Assembly in Northern Ireland of 108 members. Strand Two created a North/South Ministerial Council, representing the Northern Ireland and Irish governments and with machinery for implementing policies agreed by the Council. Strand Three provided for a British–Irish Council, representing the British and Irish governments, as well as the devolved governments of Northern Ireland, Scotland and Wales, and also a British–Irish Inter-governmental Conference to discuss Northern Ireland matters that were not devolved, such as policing. In this elaborate way, the Good Friday Agreement made possible a scheme of devolution for Northern Ireland.

In the next section, we examine aspects of the current devolution legislation applying to Scotland, Wales and Northern Ireland. Emphasis will be given to structural issues, rather than the detail of how these schemes of devolution are operating.[43]

[33] Government of Ireland Act 1920, s 4(1).

[34] See *R (Hume)* v *Londonderry Justices* [1972] NILR 91; Northern Ireland Act 1972.

[35] See *Londonderry CC* v *McGlade* [1925] NI 47; *Gallagher* v *Lynn* [1937] AC 863; *Belfast Corporation* v *OD Cars Ltd* [1960] AC 490.

[36] See Cmnd 532, 1969 (the Cameron report).

[37] Cmnd 5259, 1973; Northern Ireland Assembly Act 1973; Northern Ireland Constitution Act 1973.

[38] House of Commons (Redistribution of Seats) Act 1979.

[39] Cmnd 9690. And see Hadden and Boyle, *The Anglo-Irish Agreement*.

[40] For an unsuccessful legal challenge, see *Ex p Molyneaux* [1986] 1 WLR 331.

[41] Cm 2442, 1994.

[42] *The Belfast Agreement: An Agreement Reached at the Multi-Party talks on Northern Ireland*, Cm 3383, 1998; B Hadfield [1999] PL 599 and D O'Sullivan [2000] Dublin Univ LJ 112. On subsequent events, see Jowell and Oliver (eds), *The Changing Constitution* (6th edn, 2007), ch 10 (C McCrudden).

[43] See the Constitution Unit's series on this subject, including Hazell (ed.) *The State of the Nations 2003*; Trench (ed.) *Has Devolution made a Difference?*, *The Dynamics of Devolution* and *The State of the Nations 2008*. Also Hazell and Rawlings, *Devolution, Law Making and the Constitution*; Mitchell, *Devolution in the United Kingdom*; Bogdanor, *Devolution in the United Kingdom*; and symposium 'Devolution, Ten Years On' (2010) 63 *Parliamentary Affairs* 85–172.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

B. Devolution of government

The Labour government elected in 1997 was committed to securing devolution of government to both Scotland and Wales and to renewing efforts to establish peace and order in Northern Ireland. This commitment caused Westminster in 1998 to legislate separately for Scotland, Wales and Northern Ireland.[44] It is an indication of the asymmetric structure of the United Kingdom that differences between the three schemes are almost greater than the similarities, although the positions of Scotland and Wales have been steadily moving closer over the subsequent 20 years.

Devolution is not a term of art in constitutional law. Unlike federalism, its nature within the United Kingdom depends not on a written constitution, but on the devolution legislation and on the operation of the new structures. It can mean what the respective parties to it need and want it to mean at any given time. In essence, devolution denotes the vesting of legislative and executive powers in elected bodies in Scotland, Wales and Northern Ireland, who have political responsibility for the devolved functions. The legislation specifies the areas of government that are devolved, arrangements for funding, and measures to ensure legal and political accountability. The scope of devolution, and even the models of it, have substantially evolved since 1998; like the remainder of the constitution, devolution is a flexible rather than a fixed element. Despite the devolution of many functions, the Parliament and government in Westminster retains ultimate authority over all of the United Kingdom.

Precursors to devolution in 1998

The schemes of devolution created in 1998 were influenced by the abortive attempt in the 1970s to establish devolved government for Scotland and Wales. In 1973, the Royal Commission on the constitution (the Kilbrandon report)[45] made proposals for devolution that were far from unanimous. For Scotland, eight of the 13 members recommended legislative devolution, but only six members favoured a similar scheme for Wales. Nonetheless, the Labour government decided to create a Parliament for Scotland and an Assembly for Wales. The Scotland Act 1978 and the Wales Act 1978 were eventually enacted, but in referendums in March 1979 the scheme for Wales was heavily defeated; the Scottish scheme was approved by a small majority of those voting, but their number did not satisfy the controversial '40 per cent rule' that had been applied to the referendum to guard against a low turnout of voters.

Between 1979 and 1997, the Conservative government opposed all proposals for devolution within Great Britain, apart from minor changes in Scottish business at Westminster.[46] The Labour and Liberal Democrat parties supported the Scottish Constitutional Convention, a non-governmental body endorsed by many groups and organisations in Scotland. In 1995, the Convention proposed a scheme of devolution which sought to improve on the Scotland Act 1978.[47] In 1997, the Labour and Liberal Democrat parties agreed that there would be an early referendum in Scotland on the Convention's scheme. For Wales, they favoured an elected assembly to oversee Welsh affairs.

The Referendums (Scotland and Wales) Act 1997 authorised referendums in Scotland and Wales on the government's schemes for devolution.[48] In 1997, of the 60 per cent who voted in Scotland, 74 per cent supported the proposed Parliament and 63.5 per cent agreed

[44] Scotland Act 1998; Government of Wales Act 1998; and Northern Ireland Act 1998.

[45] Cmnd 5460, 1973. And see T C Daintith (1974) 37 MLR 544.

[46] See HC S0 94A–94H (1995); HC Deb, 29 November 1995, col 1228, and 19 December 1995, col 1410.

[47] *Scotland's Parliament, Scotland's Right* (1995); J McFadden [1995] PL 215; D Millar (1997) 1 Edin LR 260.

[48] *Scotland's Parliament*, Cm 3658, 1997; and *A Voice for Wales*, Cm 3718, 1997.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

that the Parliament should be able to vary the basic rate of income tax for Scottish taxpayers. In Wales, only 50 per cent of the electorate voted, of whom no more than 50.3 per cent supported the proposed Assembly. Yet legislation to implement both schemes was enacted and elections to the Parliament and Assembly were held in May 1999.

Devolution to Scotland[49]

Under the Scotland Act 1998, there is a unicameral Parliament of 129 members: 73 are elected from single-member constituencies by simple majority vote and 56 are elected from regions under an 'additional member' system of proportional representation.[50] Elections are held every four years (s 2), but elections may exceptionally be held at other times, for example if two-thirds of the members vote for a resolution dissolving the Parliament (s 3). The electoral system is less likely than a 'first past the post' system to give an absolute majority to a single party. In 2007, the Scottish National Party won the largest number of seats (47) and formed a minority government, but in 2011 the party won an absolute majority of seats (69). Members of the Scottish Parliament (MSPs) are not barred by law from being members of the House of Commons or the Lords, or of the European Parliament.

The Scottish Parliament has a broad power to make laws for Scotland, known as Acts of the Scottish Parliament (s 28(1)), but this power does not extend to matters reserved to Westminster. 'Reserved matters' include the Crown, the Union, foreign affairs, the civil service, defence and the armed forces, and a long list of domestic matters under 11 headings, including finance and the economy, aspects of home affairs (such as misuse of drugs, data protection and immigration), trade and industry, energy, social security, regulation of the professions, employment, broadcasting and equal opportunities.[51] The Act provides for the list of reserved matters to be amended by an Order in Council, made with the approval of the Houses at Westminster and the Scottish Parliament (s 30(2)). The Scotland Act 2012 extended further powers, particularly in respect of taxation and borrowing, implementing recommendations of the Calman Commission.[52] Following the independence referendum vote, and the promises made by the main Westminster parties for greater Scottish devolution, a further report was issued by the Smith Commission recommending substantial amendments to the 1998 Act settlement.[53] These recommendations were implemented in the Scotland Act 2016, which devolved: the rates and bands of income tax, air passenger duty and the assignment of VAT revenues; increased responsibility for welfare policy and delivery in Scotland; increased devolution in a variety of areas ranging from oil and gas extraction to road signage; and gave the Scottish Parliament greater autonomy over its own powers and procedures. It also increased the financial accountability of the Scottish Parliament alongside an amended fiscal framework. The Scotland Act 2016 also legislated for some political commitments, addressed below.

The fundamental architecture of the 1998 Act, however, remains in place. If the Scottish Parliament were to legislate on a 'reserved matter', that provision would not be law (s 29(1)). Other limits on its competence are that a Scottish Act may not affect the law of any country outside Scotland and may not conflict with European Union law or with the European Convention on Human Rights (s 29(2)(a), (d)).

[49] Himsworth and Munro, *The Scotland Act 1998*; Jowell and Oliver (eds), *The Changing Constitution* (6th edn, 2007), ch 9 (B K Winetrobe); Himsworth and O'Neill, *Scotland's Constitution: Law and Practice*, chs 4–6.

[50] The size of the Parliament was originally linked to the number of Westminster MPs from Scotland, but that link was removed by the Scottish Parliamentary Constituencies Act 2004.

[51] Schedule 5 to the 1998 Act contains general and specific reservations; detailed provisions modify the effect of the general headings. See Himsworth and O'Neill, pp 119–40.

[52] *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (2010).

[53] *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014).

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

By Part 2 of the 1998 Act, the Scottish Government (as the 2012 Act re-named the Scottish Executive) comprises the First Minister, other ministers and the law officers (the Lord Advocate and the Solicitor-General for Scotland) (s 44). The First Minister is appointed by the Queen after having been nominated by the Parliament (ss 45, 46). The First Minister and other ministers must be MSPs, and the nomination of other ministers must be approved by the Parliament before their formal appointment (s 47). All ministers must resign if the Parliament resolves that the Government no longer enjoys its confidence (ss 45(2), 47(3)(c), 48(2)). The Government is thus accountable to the Parliament, which may scrutinise acts of the ministers and civil servants who staff the Scottish Administration (s 51). For this purpose, the Parliament has a system of committees, dealing with all aspects of the work of the Government.

The Government's powers are based on a transfer of functions from the UK government. It exercises the powers of the Crown in Scotland, including prerogative powers, unless they are reserved to Westminster (s 53). In general, these functions relate to matters within the Parliament's legislative competence. Like the Parliament, the Government may not take decisions that are contrary to EU law or conflict with Convention rights (s 57).

The bulk of the income of the Scottish Administration comes in a block grant from Westminster (Parts 3 and 4 of the 1998 Act). The grant is calculated on the basis of the 'Barnett formula', which produces a sum that is treated as Scotland's share of public expenditure.[54] Within that total, the Scottish Government may set its priorities for expenditure: thus it has adopted its own policy on university tuition fees and on personal care for the elderly.[55] The Scottish Government has yet to fully employ its tax varying powers under any of the Acts which have steadily increased those powers.

While it is inherent in the devolution of powers that the Scottish authorities should make their own decisions (one of the most controversial being the decision by the Minister of Justice in 2009 to permit a Libyan prisoner convicted of complicity in the Lockerbie air-disaster to return to Libya), there are safeguards against decisions that would be outside the devolved powers. When a Bill is introduced, the minister and the presiding officer must separately consider whether it is within the competence of the Parliament (s 31); the Supreme Court for the United Kingdom may be asked to decide whether a Bill is within competence (s 33). The 1998 Act also provides for the decision of 'devolution issues' (Schedule 6). Such issues arise when a Scottish Act or an executive decision is challenged on the ground that it is not within the devolved powers, including questions as to compatibility with the European Convention on Human Rights. A devolution issue that arises in any court or tribunal may be referred to the Court of Session or the High Court of Justiciary; a further appeal may lie to the Supreme Court. In such cases, interpretation of the 1998 Act (as amended) has constitutional significance.[56] Since these Acts impose many limitations on the powers of the Scottish authorities, the range of questions that may have to be decided is potentially very wide, and the Scottish Parliament has actively legislated across varied areas. Many cases have concerned the question of compliance with the European

[54] The formula, dating from 1979, is used to calculate a population-based proportion of future expenditure for each of Scotland, Wales and Northern Ireland, reflecting proposed changes in spending on comparable services in England: see HM Treasury, *Funding the Scottish Parliament, National Assembly for Wales and the Northern Ireland Assembly* (2000); Trench (ed.), *The Dynamics of Devolution*, ch 8 (D Bell and A Christie); House of Commons Library Research Paper 07/91, *The Barnett Formula* (2007) and *Serving Scotland better: Scotland and the UK in the 21st Century*, 2009 (the Calman report), ch 3.

[55] On the latter, see Hazell (ed.), *The State of the Nations 2003*, ch 9 (R Simeon).

[56] See P Craig and M Walters [1999] PL 274; S Tierney (2001) 5 Edin LR 49; Himsworth and O'Neill, *Scotland's Constitution: Law and Practice,* pp 395–410.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

Convention on Human Rights.[57] Some have concerned compliance with EU law.[58] Relatively few cases have arisen from other provisions of the 1998 Act.[59] In 2011, in *AXA General Insurance Ltd, Petitioners*,[60] insurance companies challenged the validity of the Damages (Asbestos-related conditions) (Scotland) Act 2009: the Act made it easier for those claiming for personal injuries caused by exposure to asbestos at work to claim compensation from the former employers' insurers. The companies claimed unsuccessfully both that the legislation deprived them retrospectively of their possessions (thus breaching ECHR, First Protocol, art 1) and, relying on common law grounds of judicial review,[61] that the Act was irrational, unreasonable or arbitrary. If reliance on those common law grounds had succeeded, this would have been a serious limitation on the authority of the Parliament imposed by the judges. The Supreme Court held that while the 1998 Act had not excluded the supervisory jurisdiction of the courts, and that an Act of the Scottish Parliament was not to be equated with primary legislation of the Westminster Parliament, it would have to be a very extreme case in which review at common law should be applied to the work of a democratically elected legislature.

The Edinburgh Parliament has been an active legislature. Moreover, Westminster retains power to legislate for Scotland (s 28(7)) and it has done so frequently. On devolved matters, there is a firm convention, known as the 'Sewel convention', that Westminster will not normally legislate on devolved matters without the prior consent of the Scottish Parliament. The consent is given in the form of a 'legislative consent motion', the form of which is not itself part of the convention. This use of Westminster's continuing supremacy has sometimes been controversial but is often convenient.[62] One of the recommendations of the Smith Commission, enacted in the Scotland Act 2016, was to place the Sewel convention on a legislative footing: see now s 28(8). We have seen in Chapter 1 how the Supreme Court unanimously held that this legislative step did not render the convention legally enforceable, but was rather a purely political commitment.[63]

Critics of devolution have argued that it is an essentially unstable structure that creates the risk of conferring too little autonomy to be worthwhile or of fuelling a desire for ever increasing powers. In 2009, a cross-party commission chaired by Sir Kenneth Calman reported on the need for changes in the system of Scottish devolution.[64] The report concluded that devolution had been a 'real success' and that it was to Scotland's advantage that the United Kingdom, despite the asymmetry of its union structure, enjoyed a highly integrated economy. It would appear that the decisive rejection of independence in the 2014 referendum indicates an

[57] These include *Brown* v *Stott* [2003] 1 AC 681 (car owner's duty to inform police of identity of driver); *R* v *Lord Advocate* [2002] UKPC D3, [2004] 1 AC 462 (duty of court to stay delayed prosecution); *Cadder* v *Lord Advocate* [2010] UKSC 43, [2010] 1 WLR 2601 (police questioning of suspect in absence of lawyer). And see Reed and Murdoch, *A Guide to Human Rights Law in Scotland*.

[58] *Moohan* v *Lord Advocate* [2014] UKSC 67, [2015] AC 901 (prisoners not being enfranchised in the independence referendum); *Scotch Whiskey Association* v *Lord Advocate* [2016] CSIH 77, 2016 SLT 1141 (minimum alcohol pricing).

[59] But see *Whaley* v *Lord Watson* 2000 SC 340, *Adams* v *Scottish Ministers* 2004 SC 665 and *Martin* v *Lord Advocate* [2010] UKSC 10, 2010 SLT 412. On the difficult overlap between devolution issues and claims under the Human Rights Act, see *Somerville* v *Scottish Ministers* [2007] UKHL 44, [2007] 1 WLR 2734; and now Scotland Act (2012), s 14 and part 4. See also *H* v *Lord Advocate* [2012] UKSC 24, [2013] 1 AC 413 and *Kinloch* v *HM Advocate* [2012] UKSC 62, [2013] 2 AC 93.

[60] [2011] UKSC 46, 2011 SLT 1061. See C Himsworth [2012] PL 205; A Page (2012) *Juridical Review* 225; and A McHarg (2012) 16 Edin L R 224.

[61] See ch 24.

[62] For the 'Sewel convention', see Himsworth and O'Neill, pp 140–3; *Memorandum of Understanding* (Cm 4444, 1999), para 13; A Page and A Batey [2002] PL 501; Hazell and Rawlings, ch 2 (B Winetrobe).

[63] *R (Miller)* v *Secretary of State for Exiting the EU* [2107] UKSC 5, [2017] 2 WLR 583; see pp 29–30 above.

[64] See *Serving Scotland Better: Scotland and the UK in the 21st Century*, June 2009.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

essential agreement with that proposition. However, the febrile political and constitutional atmosphere engendered by the Brexit referendum and process means that devolution – even the extensive further devolution provided in the Scotland Act 2016 – cannot provide a sufficient answer alone. Leaving the EU will require careful consideration of the domestic constitutional settlement; there will be an immediate issue of whether and how repatriated areas of competence from the EU are to be devolved, and a longer-term concern about whether Scotland will be content to remain within a United Kingdom no longer a full member of the EU.

What is apparent is the effective permanence of the Scottish Parliament and the Scottish Government. Its precise forms and the extent of its competencies have varied, but there has been no suggestion by any mainstream political party that the process of devolution should be reversed. It is presently almost inconceivable that the British government at Westminster would seek to abolish the devolution regime in Scotland without a clear mandate from the (Scottish) public to do so. In that political context, it is unsurprising that the recommendation of the Smith Commission that there be a formal legal statement of the permanence of the devolved institutions in Scotland was readily provided for in the Scotland Act 2016. That introduced a new s 63A into the 1998 Act having affirmed the permanence of the Scottish Parliament and Government and the commitment of the British Parliament and government to them. It also expressly requires a referendum of the people of Scotland to support abolition of either. Section 63A is purely political window-dressing. The Westminster Parliament retains the ability to repeal those provisions at any time as the supreme legislature. The devolution settlement is ultimately a matter of politics, a political constitution, provided for within a legal framework.

Devolution to Wales[65]

Although both schemes were created in 1998, devolution to Wales differed markedly from devolution to Scotland. Under the opaque and bureaucratic Government of Wales Act 1998, the National Assembly for Wales had no general power to make laws and was seen as a kind of executive body, limited to making secondary (or delegated) legislation by transfer from the Secretary of State for Wales. In composition, the Assembly was and remains a smaller version of the Scottish Parliament: 40 members are elected in single-member constituencies by simple majority, and 20 members by regions under proportional representation. In 2004, a commission appointed by the Assembly, chaired by Lord Richard, recommended that the Assembly should have a broad power to make laws for Wales and that there should be a clear distinction between legislative and executive powers.[66]

What emerged in 2006 was a second Government of Wales Act, re-enacting much of the 1998 Act but containing new provisions. Assembly elections are held every four years, except that an extraordinary election may be held if at least two-thirds of all members vote for it, or if the Assembly fails to nominate a First Minister within the requisite time (2006 Act, s 5). No person may be nominated on a party's regional list of candidates who has been nominated for election in an Assembly constituency (s 7). The Assembly has a broad power to appoint committees and sub-committees (s 28). Since the Assembly under the 2006 Act initially had no general legislative power, the Act enabled it to be consulted each year before the UK government settled its legislative programme (s 33), and some laws were made in this way to meet Welsh needs.[67]

[65] See Jowell and Oliver (eds), *The Changing Constitution* (6th edn), ch 11 (B Hadfield); A Trench [2006] PL 687. On the Government of Wales Act 1998, see Rawlings, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution.*

[66] Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, 2004; R Rawlings [2005] PL 824.

[67] E.g. Public Services Ombudsman (Wales) Act 2005 and Commissioner for Older People (Wales) Act 2006.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

Executive powers are vested in the Welsh Ministers: the 'Welsh Assembly Government' (s 45) comprises the First Minister, the Welsh Ministers, deputy ministers, and the Counsel General to the Welsh Government, who is legal adviser to ministers and the Assembly (s 49). The Assembly may scrutinise the activities of Welsh public bodies.

The model of Welsh devolution was different from that in Scotland; instead of general competence unless a subject matter was reserved, the Welsh Assembly and government only had power where it had been specifically devolved to it. This significant difference was altered by the Wales Act 2017, which has moved Wales to a reserved powers model, but with a greater list of reserved matters than applies in Scotland.

Legislation by the Assembly is now contained in Bills, which when approved become 'Acts of the Assembly'. The first legislation to be enacted by this procedure (the Local Government Byelaws (Wales) Bill) was referred to the Supreme Court, when it was argued that a simpler procedure for making local byelaws in Wales proposed in the Bill could not dispense with the need for certain byelaws to be confirmed by the Secretary of State for Wales. The argument was rejected by the Court, and the validity of the Bill was upheld.[68]

Despite the widening of its powers since 2006, the Assembly remains subject to many restrictions on its competence, for instance it may not breach international or European obligations of the United Kingdom (the latter will change after Brexit), and may not act inconsistently with the Human Rights Act 1998. As with Scotland, the Assembly is primarily funded by an annual block grant from Westminster calculated with reference to the Barnett formula, and within this figure it can set its expenditure priorities. Unlike the Scottish Parliament, and despite the 2017 Act amendments, the Assembly has no power to vary the basic rate of income tax, but has acquired new borrowing powers, and power over landfill charges and stamp duty on property transactions.[69]

The Wales Act 2017 also enacted equivalent political commitments to the permanence of the Welsh devolution institutions, and the Sewel convention. Those provisions are the subject of precisely the same conclusions as their equivalents in the Scotland Act 2016, discussed above.

Devolution to Northern Ireland

The Belfast Agreement was endorsed on 22 May 1998 by separate referendums in both parts of Ireland and elections for the new Assembly were held in June 1998. By the Northern Ireland Act 1998, Northern Ireland will remain part of the United Kingdom until a majority of the electorate, voting in a poll held for the purpose, decide to the contrary (s 1); in that event, the Secretary of State shall lay proposals to give effect to the majority wish before the Westminster Parliament. The Assembly is, in principle, elected every four years. The electoral system is that of the single transferable vote, with each of the 18 Westminster constituencies returning six members.

A complex scheme of power sharing between the main parties provides for key decisions to be taken on a cross-community basis, either by parallel consent of a majority of unionist and nationalist designations or by a weighted majority (60 per cent) of members present and voting, including at least 40 per cent of unionist and nationalist designations. These key decisions include election of the Assembly chair, the First Minister and the Deputy First Minister. The Executive Committee of the Assembly comprises the First Minister, the Deputy First Minister

[68] *A G's Reference, re Local Government Byelaws (Wales) Bill 2012* [2012] UKSC 53, [2013] 1 AC 792. For subsequent challenges see: *AG for England and Wales v Counsel General for Wales* [2014] UKSC 43, [2014] 1 WLR 2622 and *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016; and for comment on the need for judges to interpret the devolution legislation to protect Welsh devolution see Dame Mary Arden [2014] PL 189.

[69] *Empowerment and Responsibility: Financial Powers to Strengthen Wales*, November 2012.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

and other ministers appointed by a formula that divides ministries between the main parties on the basis of voting at the previous election. All ministers must take the prescribed pledge of office.[70] The First Minister and Deputy First Minister must represent the largest and second-largest parties, which has operated – as anticipated – to mean a Unionist First Minister and a Nationalist Deputy. The Assembly is, however, a power-sharing system in its true sense: if the parties cannot agree to share power and govern together, the Assembly cannot function, and direct rule is restored to Westminster. In early 2017, a significant fallout between the DUP and Sinn Fein following a number of scandals around DUP ministerial competence effectively brought power sharing to a standstill. The tensions were not eased by the DUP entering into a formal confidence and supply agreement with the Conservative government at Westminster, whose role was to broker an agreement to restore devolved power sharing.

Certain matters (such as the Crown, defence, immigration, elections and political parties) are *excepted* from devolution (s 4 and Sch 2). Other matters (including civil aviation, law, emergency powers, telecommunications, consumer protection and data protection) are *reserved* from devolution (s 4 and Sch 3). *Transferred* matters, which fall within the scheme of devolution, are neither excepted nor reserved. The Assembly may make laws on transferred matters, but this does not affect the power of Westminster to make laws for Northern Ireland (s 5). The Assembly may not adopt measures that would extend outside Northern Ireland, would be incompatible with the Human Rights Act 1998 or EU law (for the moment) or would discriminate on grounds of religious belief or political opinion (s 6). As in Scotland, there are safeguards against the Assembly exceeding its competence (ss 11, 14) and provision for the decision of 'devolution issues' (s 79, Sch 10).

The 1998 Act gives effect to other aspects of the Belfast Agreement, such as the North/South Ministerial Council and the British–Irish Council and the appointment in Northern Ireland of a Human Rights Commission (ss 68–70) and an Equality Commission (s 73). All public authorities must promote equality of opportunity (s 75) and it is unlawful for a public authority to discriminate on grounds of religious belief or political opinion (s 76).

The progress of devolution was impeded by continuing difficulties in the peace process, in particular as regards decommissioning of arms and other aspects of the security situation. For many months between 2000 and 2007, the Assembly was suspended while Northern Ireland returned to direct rule by the Secretary of State. Since elections in 2003, the Democratic Unionist Party and Sinn Fein were the leading parties from the two communities. Disagreements between them after 2003 prevented the Assembly from resuming its operations, and UK ministers became responsible for all Northern Ireland departments. In July 2005, the Provisional IRA announced the end of its armed campaign and the independent international commission on decommissioning (formed in 1997) reported that the Provisional IRA had decommissioned all its weapons. In October 2006, the St Andrews Agreement was concluded between the two governments and the major parties in Northern Ireland, and a timetable was set for elections, the formation of a four-party power-sharing government, and the return of devolution.[71] Devolved government under the (amended) Northern Ireland Act 1998 was restored in May 2007, with the Northern Ireland Executive Committee comprising the First Minister, the Deputy First Minister and ten departmental ministers. Debate continued into 2010 over devolving the sensitive function of policing and justice.[72] Agreement having at last been reached between the representatives of the two communities, policing and justice were devolved in April 2010.[73] A Minister of Justice with

[70] See Northern Ireland Act 2000.

[71] Northern Ireland Act 2006, Northern Ireland (Miscellaneous Provisions) Act 2006 and Northern Ireland (St Andrews Agreement) Act 2007.

[72] See Northern Ireland Act 2009, and the Hillsborough Castle Agreement of 5 February 2010.

[73] Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010; SI 2010/976.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

responsibility for policing and justice was elected by a cross-community vote in the Assembly; but the direction and control of the Police Service of Northern Ireland remain with the chief constable of Northern Ireland. Notwithstanding these governmental changes, there have continued to be difficulties over the control of sectarian parades and the flying of the Union flag from public buildings.

C. Government in England

Devolution within the United Kingdom is asymmetrical. The position in England presents a sharp contrast to Scotland, Wales and Northern Ireland. With the possible exception of Greater London, which enjoys a form of regional government in transport, economic and environmental matters,[74] democratic decision-making has not been devolved to a regional level. In 1994 Whitehall divided England outside London into eight regions for official purposes,[75] but in 2004, in a referendum in north-east England held by postal ballot, 78 per cent of those voting rejected the proposal for a regional assembly of 25–35 members elected by proportional representation: the scale of the defeat ensured that the referendum would be the last of its kind.[76]

There is not the space in a book of this nature to attempt to detail the extraordinarily complicated thicket of legislation governing the powers and duties of local government in England, or even the various layers of metropolitan, county, district and parish councils. While much of the broad structure remains set out in the Local Government Act 1972, Parliament has legislated on substantive and procedural areas of local government in England (and Wales) in 1974, 1978, 1982, 1986, 1988 1989, 1992, 1999, 2000, 2003, 2009, 2010, 2011, 2012 and 2016. That list is by no means complete, and some years included more than one statute. Much of it has concerned the almost impenetrable workings of local government finance. The breadth of legislation is important: local authorities have responsibility for housing, libraries, adult and child social services, public health, planning and some education functions. A considerable proportion of the interaction between the citizen and the state concerns matters which are the responsibility of local, rather than national, government. Indeed, there are few Acts of Parliament passed which do not have some impact on local government functions.

Major changes have been made in recent years. The Local Government Act 1999 allows the Secretary of State to take over control of some or all of a local authority's functions where he believes the authority is failing to perform efficiently and effectively.[77] The Localism Act 2011 radically overhauled the nature of local authority governance and standards, introduced referendums on council tax rises, as well as making significant policy changes in the planning and housing fields. The Health and Social Care Act 2011 imposed new public health functions on local authorities as it reorganised the National Health Service. The Police Reform and Social Responsibility Act 2011 abolished local police authorities (largely populated by local councillors) and introduced directly elected police and crime commissioners to set strategic policing

[74] Trench (ed.) *Has Devolution made a Difference?*, ch 6 (M Sandford) and *The Dynamics of Devolution*, ch 5 (M Sandford and P Hetherington).

[75] Regional Development Agencies Act 1998.

[76] See Cm 5511, 2002 and the Regional Assemblies (Preparations) Act 2003. See Trench (ed.), *The Dynamics of Devolution*, ch 5 (M Sandford and P Hetherington).

[77] These powers (see s 15 in particular) have been exercised in relation to Doncaster Metropolitan Borough Council following repeated failings and allegations of corruption, Rotherham Metropolitan Borough Council following child sexual abuse scandals and the London Borough of Tower Hamlets following various concerns about the elected mayor's grant of public contracts.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

priorities for their local police forces. The Local Democracy, Economic Development and Construction Act 2009 and the Cities and Local Government Devolution Act 2016 have introduced an ability for local authorities to combine into a single regional authority, adopt an elected mayor model (who also acts as the police and crime commissioner) and have, as a consequence, greater powers devolved to them from central government. This regional government model is explicitly modelled (as it had been in the late 1990s and early 2000s) on the successfully embedded creation of an elected mayor for Greater London exercising considerable powers under the Greater London Authority Act 1999. In 2017, six regions elected a mayor to be responsible for a new combined authority with devolved powers: Greater Manchester, Liverpool, Tees Valley, West Midlands, West of England and Cambridgeshire and Peterborough. Each of those new authorities has a different devolution settlement and a different set of powers and responsibilities. Regional devolution remains highly fragmented.

Nor has an answer been found to the 'West Lothian question' or, as it is sometimes called, the 'English question'.[78] This question takes the form of asking why Scottish MPs may debate and (more importantly) vote at Westminster on, for instance, issues about the NHS, housing policy or education in England, when English MPs are barred from considering these matters in Scotland (or Wales or Northern Ireland, as the case may be). The short answer is that Westminster serves both as the Parliament for the United Kingdom and for England: but how can it best fulfil these two functions?

In 2013, an independent commission, chaired by Sir William McKay, a former Clerk to the Commons, failed to find a clear solution to this question.[79] In examining the consequences of devolution for the Commons, the commission considered how in the light of powers devolved to Scotland, Northern Ireland and Wales the House might best deal with legislation that affected only England. The commission formulated the principle that decisions at the UK level that had a separate effect on England should normally be taken only with the consent of a majority of MPs for England: the principle should be adopted by resolution of the Commons, but the right of the whole House to decide on legislation should remain. The commission rejected the idea that MPs elected for constituencies that were not directly affected by a Bill should be barred from voting on it. The underlying political difficulty is that a government with a majority in the whole House may not have a majority if MPs from devolved areas are barred from voting on certain topics. Immediately following the Scottish independence referendum, Prime Minister Cameron announced a desire to implement a system of 'English votes for English laws', which was subsequently given effect through a series of complex Standing Orders of the House of Commons in 2015. The details of those are discussed in Chapter 8.[80]

D. Conclusion

It might be said that three of the four countries that make up the United Kingdom each now has a written constitution. But each of these 'constitutions' gives no more than a partial account of the government of these countries. For one thing, their operation cannot be understood without reference to the elaborate array of 'Concordats', namely, the agreements reached between Whitehall departments and the devolved executives as to how the two levels of government should relate to each other.[81] Important functions are still exercised by the

[78] B Hadfield [2005] PL 288; Hazell (ed.), *The English Question*.

[79] Report, *The Consequences of Devolution for the House of Commons* (May 2013).

[80] See pp 199–200 below.

[81] See *Memorandum of Understanding and Supplementary Agreements*, Cm 4444, 1999, and works cited in note 43 above. Also R Rawlings (2000) 106 LQR 257 and J Poirier [2001] PL 134.

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.

Westminster Parliament and by Whitehall. The Secretaries of State for the three countries remain in being, albeit with far fewer functions than before devolution, and the activities of each Secretary of State are overseen by a select committee of the Commons. Westminster retains power to alter the present arrangements (and it frequently has, although so far only to increase devolution), but use of that power cannot ignore the politics of devolution.

Whether or not the devolution legislation renders the institutions it created and regulates a permanent legal feature of the constitutional landscape, it is presently hard to envisage circumstances in which Westminster would legislate to remove them, even if Westminster might wish to do so, without at the very least clear popular support. If Westminster took such a step, it is highly likely that the Union would fall as a result. As Lord Denning MR once put it in relation to Westminster having removed its own power to legislate for various colonies in 1931, 'freedom once given cannot be taken away'.[82]

Is devolution leading to the break-up of the United Kingdom, as some of its opponents predicted?[83] The position of Northern Ireland must be set on one side, since there is general agreement that the future of the six counties must be decided by their people. The SNP's campaign for Scottish independence has plainly been assisted by the party's success in elections for the Edinburgh Parliament (and the Westminster Parliament in 2015 and 2017), but the referendum in September 2014 did not support independence, and in 2017 polling figures have not significantly altered, even in the light of Brexit. While in neither Scotland nor Wales will devolution be put into reverse, one effect has been increased complexity in the making of statute law, and in the administrative structure that underlies the political process.[84] One important aspect of devolution is the developing network of governmental relationships, both within the United Kingdom and extending into Europe.[85] At one time devolution was defined as involving 'the delegation of central government powers without the relinquishment of sovereignty'.[86] That conclusion is not sustainable today except on a simple view of sovereignty that leaves out of account both Europe and the new centres of political power in the United Kingdom.[87]

[82] *Blackburn v AG* [1971] 1 WLR 1037, 1040.

[83] E.g. Dalyell, *Devolution, the End of Britain?*

[84] See HL Paper 192 (2003–4), App 1 (C M G Himsworth); Hazell and Rawlings, *Devolution, Law Making and the Constitution*. Also A Ross and H Nash [2009] PL 564 (examining the ways in which EU environmental law is implemented within Great Britain).

[85] See *Devolution: Inter-institutional Relations in the United Kingdom*, (HL Paper 28, 2002–3); and Trench (ed.) *The Dynamics of Devolution,* ch 7 (A Trench) and ch 9 (C Jeffery). Also R Rawlings, 'Cymru yn Ewrop: Wales in Europe', in Craig and Rawlings (eds), *Law and Administration in Europe*, ch 13.

[86] Kilbrandon Report, para 543.

[87] MacCormick, *Questioning Sovereignty*, p 74, says in respect of Scotland: 'The unitary sovereignty of the incorporating union agreed in 1707 seems to be at best in its twilight.'

Copyright © 2018. Pearson Education, Limited. All rights reserved.

Bradley, A., et al. Constitutional and Administrative Law EBook PDF 17th Edition, Pearson Education, Limited, 2018. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5418645.
Created from ed on 2022-05-03 12:59:23.