

THE FEDERAL TRUST
for education & research

enlightening the debate on good governance

Devolution in England: A New Approach

Andrew Blick



April 2014

This pamphlet is published by the Federal Trust and Unlock Democracy.

Up-to-date information about the Federal Trust and Unlock Democracy can be found on the internet at:

www.fedtrust.co.uk and www.unlockdemocracy.org.uk

The two organisations are publishing this pamphlet as an important contribution to topical debate. The pamphlet is not necessarily a statement of view by either of these organisations.

© Andrew Blick 2014

ISBN 978-1-903403-95-2

The Federal Trust is a Registered Charity No. 272241

31 Jewry Street

London EC3N 2EY

United Kingdom

Company Limited by Guarantee No. 1269848

Design by Fred Fieber

Printed in the European Union

Devolution in England: A New Approach

Andrew Blick

About the author

Dr Andrew Blick is a writer and researcher in the field of democratic reform. He is a Lecturer in Politics and Contemporary History at the Centre for Political and Constitutional Studies, King's College London, and was formerly a Senior Research Fellow at the Democratic Audit, University of Liverpool. Dr Blick has written numerous books, articles and pamphlets, including a history of special advisers to ministers, and a history of Prime Ministerial aides. He is currently writing a book on the contemporary relevance of Magna Carta to tie in with the 800th anniversary of this document in 2015. He is a member of Unlock Democracy's Council and a Senior Researcher at the Federal Trust.

Contents

Introduction	6
Democratic variety: devolution in the UK	6
The position of England	9
Future options	13
Specification for a way forward	17
The proposal: a description and discussion	20
Conclusion	24
Appendix:	24
The English Devolution Enabling Act: an outline	24
<i>Devolving powers</i>	24
<i>Creating new authorities</i>	26
<i>The legal mechanism</i>	27
<i>Safeguards and oversight</i>	28
<i>Primary legislation</i>	28

Introduction

Variety has always been a feature of the United Kingdom (UK) constitution. This quality, thanks to devolution, has become even more pronounced in recent years. In many ways the uneven nature of UK democracy is beneficial. It has allowed Northern Ireland, Scotland and Wales to develop along their own paths towards decentralised self-government. However, England is now left behind. The largest nation within the UK does not enjoy the benefits of devolution outside Greater London. Signs exist that English opinion is now turning against existing arrangements and the discrepancies involved. With these trends in mind, this paper makes the case for an English Devolution Enabling Act. The purpose is to make a contribution to the existing debate about how to introduce greater self-governance to England, alongside other valuable interventions already made in this area, including the 'Illustrative draft Code for central and local government', issued by the House of Commons Political and Constitutional Reform Committee.¹

The paper considers the present position and difficulties arising from it; then discusses solutions that have been proposed to date, and their problems. It proposes a way forward that would allow localities and regions within England to take on powers previously exercised by central government, helping to close the democratic gap that has opened up with the remainder of the UK. The appendix provides a more specific idea of how the proposed English Devolution Enabling Act could work.

Democratic variety: devolution in the UK

Long before the term 'devolution' came to prominence in the 1990s the UK enjoyed an 'asymmetrical' system of government. Scotland possessed a distinct legal, educational and local-government system, and its own established church. Northern Ireland had a devolved Parliament from 1921, suspended in 1972. Wales had a Secretary of State from 1964 and the Welsh Office became operational the following year. Consequently, while the UK was often described before the 1990s as having a 'unitary' system, it was not as homogeneous as this term might imply.

¹ See: <http://www.parliament.uk/documents/commons-committees/political-and-constitutional-reform/revisecodeandnotesforWEBSITE2012amended22Feb.pdf>

The introduction of devolution to Northern Ireland, Scotland and Wales from 1998 continued and magnified an already existing tendency for geographical variations in constitutional arrangements for the UK. The systems established differ in a number of ways. The precise institutions created are not the same. Nor are the electoral systems used for the assemblies (or in Scotland, the Parliament) and the rules of government formation. The powers of the assemblies and ministers differ, as do the ways in which those powers are defined and controlled. This complex devolution can be seen largely in a positive light. It enables different parts of the UK to be governed in ways that accord with their particular political and cultural characteristics. The arrangements in place in Northern Ireland were conceived as part of a peace process to reconcile historic divisions in the province, giving antagonistic groups a stake in the system and providing them with certain protections.

Associated with the concept of divergence is that of dynamism. Particular areas are able to take on different constitutional characteristics at various stages. The picture is not static. Before devolution significant changes occurred at various points. The church was disestablished in Ireland (under the Irish Church Act 1869) and Wales (under the Welsh Church Act 1914). In the devolution era that began in the late 1990s, all the systems introduced have passed through significant alterations, generally involving the downward transfer of power from UK level. The Welsh Assembly under the Government of Wales Act 2006 has gained new legislative powers in two stages. If Scotland, when the referendum on this subject is held in September 2014, chooses to remain within the Union, its Parliament will take on important new functions, including some tax-raising, under the Scotland Act 2012. A possible outcome of the devolutionary momentum may eventually be, in some senses, less rather than more divergence between the different territories. All of them, spurred by the example of whichever is the most advanced on the devolutionary path, might converge on maximum autonomy. However, in this scenario the discrepancy between these self-governing territories and the part of the UK that has not yet developed devolution might become even more pronounced.

The variety and flexibility of devolution, building to some extent on already-existing features of the unwritten UK constitution, have probably contributed to the most notable feature of this experiment in governance: its overall success. Devolution has many accomplishments to its credit. First, it can be said to have brought important aspects of public decision-taking closer to the people directly affected by them. This democratic gain is of particular importance in the UK. Notwithstanding the constitutional arrange-

ments noted above, the UK has had an exceptionally centralised system, with a doctrine of a sovereign Parliament – in practice often dominated by the executive – held to override all other levels of governance. Devolution has tended to offset this quality by creating new dispersed centres of political authority in parts of the UK, where as a consequence it has been possible to take varied approaches to policy in health and education.

Other democratic gains that might be held to have arisen from devolution have included the development of different political approaches, including electoral systems and institutional practices that promote consensual conduct, rather than the adversarial culture characteristic of Westminster. Improvements have also been made in gender balance amongst elected representatives, if compared with patterns at Westminster. A further advantage comes because the laws establishing and limiting the devolved institutions provide in some ways a beginning of a written constitution for the political communities involved. Such legislation creates a degree of clarity and legitimacy about the system of government that was previously lacking, and continues to be absent in non-devolved parts of the UK. It also introduces protections against abuse of authority by the elected legislatures that do not apply to the UK Parliament.

A further feature of the success of devolution is that it has become swiftly and deeply embedded in UK political practice and culture. The path towards this major constitutional development was long and difficult. In some ways as a concept it dates to the nineteenth century, and perhaps even earlier. A false start took place in the 1970s, when referendums in Scotland and Wales did not deliver the required levels of support to establish the envisaged institutions (in Scotland there was a majority in favour, but the super-majority requirement was not met). Even in the 1990s devolution in these nations did not have universal support from the political parties. Opponents included the Conservative Party (though it was committed to changes in Northern Ireland as part of the cross-party and international peace process). The Labour Party had moved to a more supportive position and saw through the implementation of devolution from 1997.

But crucially devolution has proved popular where it has been introduced; and people, once given some devolution, have tended to want more. In Northern Ireland it has received cross-community support; and has been an important component of the achievements in reducing conflict, though it has at times been suspended. In Wales devolution had in the past been a

divisive idea. In the referendum of 1997 it was approved only by the narrowest of margins (on a turnout of 50.1 per cent, 50.3 voted 'yes'). But the 2011 referendum on expanding the legislative scope of the Assembly produced a 'yes' vote of 63.49 per cent (albeit on a turnout of only 35.2 per cent). In Scotland, where initial support for devolution was higher, opinion research suggests that given a choice between the status quo ante, independence, and an expansion of devolution, the third option would be the most popular in Scotland, though it will not be on offer to voters in 2014.

There has been a shift towards wider acceptance of devolution across the spectrum of political parties. Mechanisms and agreements have appeared to ensure relations with the UK centre function smoothly. Devolution is now so well embedded in the UK political scene that its position is guaranteed for the foreseeable future; and the tendency towards the greater transfer of powers is likely to continue. In a strict legal sense it is vulnerable to the changing majorities of the UK Parliament. But in reality it is as close to being a fixed part of the constitution as is possible in the UK, with each particular component underpinned by a referendum (or in Wales, two referendums). In a sense it represents the UK having taken on some of the features of a federal system, in which powers are divided between federal and state-level institutions, each with its own protected sphere of operation. Devolution is a major change in the way we are governed. That it has come with certain problems should be acknowledged. A decline has taken place in attachment to the UK or Britain as a collective political community, and while producing decentralisation from London, some perceive it as leading to a concentration of power within devolved territories themselves. But the perceived benefits are great for those who have experienced devolution, and few want to reverse this change.

The position of England

Much of devolution can be seen in a positive light. However, there is another form of differentiation in our constitutional arrangements that is more problematic. It arises from the absence of devolution to England outside Greater London. The Labour government that initiated devolution initially hoped to introduce it to England by stages, establishing first unelected then directly elected assemblies to work with Regional Development Agencies in each of the English regions. In November 2004 the first of what was

intended to be a series of referendums to authorise their introduction took place, in the North East region. Voters rejected the proposal, with 77.9 per cent opposed, on a 49 per cent turnout. The government consequently abandoned this particular policy for English devolution altogether. The enormous changes that have occurred in the political systems and culture of Northern Ireland, Scotland and Wales have therefore not occurred in England. The most significant transformation to have taken place is the establishment of a Greater London Authority (following a referendum in 1998), with a directly-elected Mayor and Assembly. This change amounted to devolved government for one of the nine English regions, though some might hold it was the reintroduction of the London-wide local government that had been abolished in the 1986.

The exclusion of most of England from devolutionary development is particularly significant when considered in conjunction with the status of English local government and the centralised nature of the UK constitution. Though responsible for delivering the services that are most vital to people in their everyday lives, local government exists in a position of dependency. The overriding legal authority of the UK Parliament has, particularly since the Second World War, allowed local government progressively to be stripped of revenue-raising power and policy autonomy, and the influence of central government to increase. Accompanying this diminution of local authority has been regular alteration of the structure of local government, again at the behest of the centre. Units have changed in size, and whole tiers been introduced and removed. The Local Government Act 1972 abolished a structure that included 83 County Boroughs and 58 County Councils, replacing them with a new organisation comprising six Metropolitan County Councils and 47 County Councils. New methods of organisation, moving away from the traditional committee system, were imposed. While recent UK governments have committed themselves to reversing the erosion of local government, they have in practice continued it. A practice of seeking to transfer specific powers to vaguely defined 'communities' has detracted from the position of elected, multi-functional local government. Policies such as academy and free schools undermine the role of local authorities in the provision of public services. Initiatives supposedly intended to increase local flexibility have often been heavily steered from the centre, devised in line with its policy objectives. Other efforts to increase local autonomy have had negligible impact. Introducing directly-elected mayors was intended to encourage greater public interest in local politics, but they have made no discernible difference in this regard in the areas that have adopted this

innovation. The low turnouts at local elections are perhaps unsurprising given how little relevance their outcome has. It is hard to find any democratic country where there is less territorial dispersal of political power than in the UK, with arrangements in England making the greatest contribution to this tendency. The consequence of devolution not being introduced to England means that over eighty per cent of the UK population has no significant tier of government between it and the Westminster/Whitehall core.

A further problem associated with lack of devolution for England is sometimes grouped under the general heading of the 'West Lothian Question'. It comes about because, since devolution, the UK Parliament has ceased to legislate in a substantial range of policy areas for Northern Ireland, Scotland and Wales; while it continues to do so for England. Yet all MPs in the House of Commons vote on bills, regardless of whether they are returned by a constituency inside or outside England, and can take part in debates about such issues. Consequently MPs elected from the devolved areas play a part in governing England that MPs from English constituencies do not for Northern Ireland, Scotland and Wales.

It might be held that, if the people in England do not strongly object in large numbers to the constitutional imbalances of devolution, then they are not a problem. Initially there was no sign of widespread vehement resentment. However there is evidence that latterly perceptions in England have begun to alter. Research carried out by Cardiff University, the University of Edinburgh and the Institute of Public Policy Research has identified significant changes. They involve the development of a greater sense of English national identity. Since the second half of the last decade there has been a shift among the English towards regarding themselves as being more 'English' and away from an emphasis upon being 'British'. A link exists between the extent to which people specifically feel English, and the likelihood and extent to which they will regard the consequences of devolution for the UK as unbeneficial. The position of Scotland is a particular subject of resentment. A widespread complaint in England involves the idea that Scotland is somehow gaining greater financial and economic benefits than it merits, as compared with England. Overall in 2011, 35 per cent of English respondents felt that the Scottish Parliament had had a negative impact upon the governance of Great Britain, 20 per cent that it had not made a difference, and 18 per cent that it had led to an improvement. In 2007, the respective figures were more favourable towards devolution: 14, 55 and 12. In Wales, the same options for 2011 (with the 2007 figures in

brackets) were negative: 31 per cent (11), no impact: 24 per cent (58), positive: 17 per cent (11).²

Not only England as a whole is regarded as suffering relatively unfair treatment. A large majority of English people polled believe that some parts of England are better supported by the policies of the UK government than others. London and the South East are often regarded as the most fortunate regions. Even a majority of Londoners believe that the area they live in is better treated by the UK government than other parts of England. This notion of internal variation within England could suggest that any attempt to address problems in the position of England should not only take into account England as a single unit but consider smaller sub-entities. Nonetheless, a clear sense seems to exist that England is collectively losing out. In 2012 62 per cent of those surveyed in England felt the UK government could not be relied upon to work for the benefit of England as a whole.³

At the same point only 21 per cent of English respondents felt the existing constitutional arrangements for England, with the full UK Parliament legislating for England, should be retained. When asked to rank priorities for constitutional change, English people placed the arrangements for governing England in the post-devolution era second only to UK relations with the EU, ahead of issues such as the electoral system and the House of Lords.⁴ Yet though there is plain evidence of dissatisfaction, the idea of some distinctive democratic institutional representation has been slow to make its way onto the agenda of the mainstream parties. Though there are now clear signs of change in this regard, firm proposals have yet to appear. While this 'English issue' does not seem to be a significant influence on the way in which people in England cast their votes, given the existence of negative feeling over the impact of devolution, it should not be assumed the matter will remain off the central political agenda permanently. Moreover, it is preferable to attempt to deal with the problems raised by an un-devolved England before they become a controversy with potentially divisive consequences for England and the UK as a whole.

² See: R. Wyn Jones, G. Lodge, A. Henderson and D. Wincott, *The dog that finally barked: England as an emerging political community* (ippr: London, 2012), p.9.

³ R. Wyn Jones, G. Lodge, C. Jeffery, G. Gottfried, R. Scully, A. Henderson and D. Wincott, *England and its two unions: the anatomy of a nation and its discontents* (ippr: London, 2013), p.11.

⁴ Ibid. pp.35-6. devolution

Future options

If it is accepted that action is required about England, what are the options on offer? The Labour government elected in 1997 originally envisaged the introduction by stages of directly-elected assemblies at regional level in England. This goal was achieved with Greater London, but nowhere else. There are a number of arguments in favour of this model. On the one hand, it would entail governing in units of a size large enough that few would dispute their potential to take on meaningful strategic policy roles in land-use planning, transport and major infrastructure projects. On the other hand, these units are small enough compared with the UK as a whole to mean that genuine devolution would have taken place, from the larger, more remote central government to a smaller one, closer to those it served. Moreover, there is reasonable similarity of scale between these units. While disparities of population size exist, none of these regions is large enough to dwarf its equivalents in England, or Northern Ireland, Scotland and Wales (though there has been some discussion about whether the South East region would need to be split). If a desire existed to move towards a more federal UK, it is possible to conceive such a system composed of devolved entities within this size-range as being practically viable. Moreover, the regions already had some practical grounding, forming administrative units for Whitehall (with a Government Office and Regional Development Agency in each) and European Union purposes. They are also used as constituencies for the European parliamentary elections.

However, there were various flaws with the Labour plan and its execution. Though they had a bureaucratic existence, the regions suffered from a lack of cultural or political resonance, and popular attachment. There was no meaningful comparison to the national consciousness of, for instance, Wales. In some cases sub-national identities do exist in England, for instance in Cornwall, but often they do not necessarily match the boundaries of the regions. The North East was believed to be the region most likely to vote 'yes' to an elected Assembly, but it did not come close to an affirmative verdict. Another difficulty was that the Labour government did not treat the extension of devolution to the English regions as a high priority. The 'yes' campaign in the North East was criticised as poorly run. Moreover, the type of assembly on offer at the time of the North East referendum possessed negligible powers, some of which were intended to be drawn upwards from local authorities, some of which would be abolished. From this perspective its introduction would have been a centralising measure. It

might be argued that, once established, a dynamic similar to that in other devolved areas, towards greater autonomy from the centre, would have taken hold. Moreover a top-down approach to devolution, using boundaries devised at the centre, is not necessarily wrong, and can promote subsequent changes of outlook and the emergence of new popular identities. However, in terms of practical politics, the crucial initial test was failed.

After the North East referendum, in November 2004 the Labour government abandoned the idea of moving straight to directly-elected regional assemblies. It continued experimenting with assemblies that were not directly elected, and later appointed regional ministers at UK level who answered to regional select committees in the House of Commons. But another version of English regionalism was appearing. The city-regional model became increasingly fashionable within government. This concept involves the idea of large conurbations as drivers of economic growth, with a reach that expands far beyond their formal political boundaries. While city-regions would as devolved units potentially be more in accordance with existing cultural tendencies, they present various problems. Defining their boundaries might be problematic, particularly in areas where they overlap with each other. It might also be difficult to achieve complete coverage of England, with some areas not clearly falling into any city region. Attempts to resolve such demarcation difficulties could produce unpalatable propositions. For instance, the idea of locating Cornwall within, for instance, a devolved Plymouth city region will always face objections from within Cornwall.

The coalition government formed in 2010 took steps to dismantle much of the administrative paraphernalia of the nine English regions, but took an interest in the cities as a possible platform for decentralisation. In May 2012 it held referendums in eleven English cities on whether to introduce directly-elected mayors. The proposal did not in itself amount to a significant downward transfer of power, but could perhaps have formed a basis for greater development in this direction in future. As in the North East, the electorate proved unenthusiastic. In only one case, Bristol, did a city assent to this new directly-elected office. The city councils of Leicester and Liverpool had already opted to introduce a directly-elected mayor without a referendum. Another coalition policy involves the establishment of a new elected regional tier of government, operating in a limited field, through the introduction of directly-elected Police and Crime Commissioners. Voters were not invited to approve this policy through a referendum, and turnout in

the elections in 2012 was low, at an overall level of around 15 per cent. Apart from proposals for executive mayors and police commissioners, there has been little progress under the coalition with regard to greater democratic input to public policy at regional level; and none is on the immediate agenda.

Of the possible means of rectifying the problematic position of England post-devolution, regional devolution in its various forms is the only one to have been attempted. Other ideas are available. One is the introduction of an English Parliament. Campaign groups exist to promote this goal. Some mainstream politicians have shown an interest in the idea, but a major parliamentary party has not yet adopted it. In its favour an English Parliament would be a meaningful national equivalent to similar bodies in Scotland and Wales, perhaps operating within a UK of an increasingly federal nature. It would attach itself to a concept with more resonance than the nine English regions. Indeed, English identity is, as already noted, strengthening, and increasingly taking on a political dimension. An English Parliament could provide a positive outlet for an English national consciousness that currently often defines itself – politically speaking – in negative terms.

However, an English Parliament would not address the issue of over-centralisation in a meaningful way, since it would involve handling policy for a population level not much less than that of the full UK – about 53 million instead of 63 million. Furthermore, it would potentially produce difficulties. An English Parliament would account for more than 80 per cent of the UK population, and perhaps an even larger proportion of its economic activity. It could comprise a destabilising force within the UK. It might well pose a challenge to the status of the UK Parliament; and an English executive, however the powers were formally divided, could be a clear rival to a UK government. The history of federal experiments in other parts of the world suggests that when one component of the federation is so much greater than any other, the arrangement is difficult to sustain. The desire of England to achieve an influence equivalent to its population and wealth might be difficult to reconcile with the perceived need among the other parts of the UK for guarantees and protections.

Another approach, supported by the Conservative Party, is specifically focused on the West Lothian question. Sometimes known as ‘English votes for English laws’ (EVEL), it seeks to correct the perceived unfairness of MPs who were not returned by English constituencies involving themselves in

English business in Parliament. In January 2012 the Coalition government established the Commission on the Consequences of Devolution for the House of Commons (or 'McKay Commission'), charged with investigating means by which the Commons could handle laws that did not apply to the whole of the UK. The Commission reported in March 2013. It found discontent in England over the West Lothian question. The report then ruled out a series of options as a means of achieving progress in the area with which it was concerned: abolishing devolution, preserving existing arrangements, enhancing the powers of English local government (though it was not opposed to this change in principle), introducing a federal system, and electoral reform. It proposed instead the introduction of a tenet that the agreement of a majority of MPs from English (or in some circumstances English and Welsh) constituencies should be required for decisions with specific consequences for England (or England and Wales).

It is difficult to justify an arrangement whereby, potentially, Parliament could pass a law directly impacting only on England that did not receive the assent of a majority of elected representatives from English constituencies in the Commons. Moreover, if it could be realised, EVEL could be the most straightforward change of those discussed above, not involving the creation of a new institution or tier of government. It seems to be the most popular approach among English voters, at least of those currently under discussion. The research project cited above on English attitudes found in 2012 that 36 per cent supported what is in effect EVEL – though the conductors of this project stressed it was only a plurality, not a decisive view. This figure compares with 21 per cent favouring existing arrangements for making laws for England; 20 per cent agreeing with an English Parliament; and 8 per cent inclined towards elected regional assemblies in England. 16 per cent said they did not know.⁵

But sceptics have drawn attention to possible difficulties with EVEL. There may be complexities involved in identifying specifically 'English' or 'English and Welsh' laws, and it could well involve breaking down bills into individual clauses with different territorial impact (though others claim the challenge is surmountable). Some hold that EVEL would have a negative impact on the solidarity of the UK, fracturing the unity of the UK Parliament through establishing different classes of MP within it. MPs, it could be held, are not solely representatives of the geographical area that returns them, but deliberate collectively on behalf of the whole UK. Legislation, though it may technically be English, can have wider consequences across internal UK borders. It also normally has financial implications, with consequences

⁵ Ibid. p. 13.

for the allocation of funding throughout the UK. Another criticism of the EVEL idea involves a scenario in which a party that had a majority of MPs in the Commons did not have an 'English' majority. In such circumstances, two different governments would be possible according to the particular policy involved: a difficult proposition. Moreover, like the English Parliament proposal, EVEL does not address the issue of over-centralisation of political power applying to England, since English policy-making and legislation would take place at the same level as presently, but with a slightly smaller number of MPs involved.

Of the three broad models discussed above: regional devolution, an English Parliament, and English votes for English laws, each has shortcomings. Moreover, English opinion has not yet decisively come to favour any one option. Yet there is evidence that support for prevailing arrangements is dropping. It is therefore important to consider whether there are other approaches that could help resolve some of the problems identified in this paper.

Specification for a way forward

This paper makes the case for an approach to English devolution that:

- Brings the exercise of political power closer to people in England, through enabling the transfer of significant functions presently exercised at UK level to directly-elected and democratically accountable authorities in England (referred to here as 'devolution'), which could be existing local government institutions rather than to specially created devolved entities;
- Employs administrative units that are significantly smaller than the UK – in other words, does not simply involve the operation of powers at the level of England as a whole;
- Is based on genuine demand from below for particular powers to be transferred to specific geographical localities, instigating a 'bottom-up' approach as the alternative to the 'top-down' method previously pursued to devolution within England;
- Provides genuine flexibility to those on whom power was devolved, rather than requiring them to contribute towards the policy

imperatives of the UK government;

- Makes it possible for governments in the localities of England to choose to combine. It should allow for the creation of democratic regional government; and even an all-England Parliament, if sufficient desire exists;
- Allows for change and development in the system, while establishing protection from unilateral interference or reversal from the centre;
- Permits areas that do not initially exercise their option to call down powers to do so at a later stage. Institutions that take on authorities could also add to them at a later stage. The geographical boundaries of these units need not be permanently fixed.

In meeting these specifications, the system proposed here is not intended primarily to provide for a political-institutional expression for English national consciousness through an English Parliament. At the same time, it would not preclude attempts to address this issue by those who felt such action was necessary, and could conceivably be used for this purpose. It does not specifically seek to answer the 'West Lothian' question of the voting rights of MPs in the House of Commons. The McKay commission found that enhanced local government would deal with issues internal to England rather than the overall position of England, and therefore would not help with 'West Lothian'. Yet the proposal here could to some extent reduce the salience of 'West Lothian' by increasing the extent to which English matters were handled democratically at a sub-UK level. Nor is the broad approach advocated here conceived of necessarily as a means of achieving blanket devolution throughout the UK, though potentially it could lead to this outcome. It is not, furthermore, concerned with how territorial units in England might link together at a UK level into some kind of federal superstructure. Once again, however, the pursuance of the present proposal is not inimical to a federal objective, and could aid progress towards it in the longer run, if demand existed.

The objective that this scheme seeks expressly to bring about is that of closing the democratic gap between England and other parts of the UK that has opened up since the instigation of devolution. It is designed to enable those areas that want to, to achieve greater self-governance in a fashion that suits them. The idea of bringing devolution to England is not new, and

was part of the overall plan of the Labour government first elected in 1997. Plans to expand the remit of local government have also been put forward by successive governments, though they have never been able to override the grip of ministers and civil servants intent on preserving departmental dominance. However, the difference between this proposal and earlier efforts is that the former is designed to be driven from below, rather than above. The overall framework would have to be set at the level of the UK Parliament, in the form of primary legislation. But it would be designed in such a way as to enable the localities to take the initiative over the substance of the powers they were to assume, and the way in which they were to exercise them. It could have the effect of making sub-UK democracy in England more meaningful, with voters making genuine decisions about policy at election time.

A model that might usefully be adapted in seeking to fulfil the ends addressed above is that employed within the Spanish constitution of 1978. Under this system different 'Autonomous Communities' of Spain can adopt varying degrees of self-government, according to their specific characteristics. Initially it was intended to allow particular areas to define themselves as wishing to exercise self-government, setting (within reason) their own geographical boundaries, and not necessarily to devise a set of regions covering the whole of Spain. However, the agenda soon developed and a total of seventeen regions emerged, with no physical gaps. The precise powers possessed by each Community vary, in accordance with the particular preferences of each one. At the outset the 1978 constitution allowed for a twin-track approach: fuller autonomy, requiring approval by two referendums in the Community, or a more basic level of self-government that would be expanded later. Within this system there was acknowledgement of those parts of Spain that possessed their own distinctive national consciousness (though the possibility that they might be 'nations' rather than 'nationalities', the official term used, was a subject of controversy). The Basque Country, Catalonia, and Galicia were permitted to assume the enhanced form of autonomy without needing to fulfil the referendum requirements. Andalucía joined them at the forefront of the movement to self-rule, but had to secure the full consent of its population through referendums. The remainder of the Autonomous Regions opted for the lesser set of powers. Subsequently the roles of these latter Communities have expanded, closing the gap somewhat, though some of the more advanced Communities have in response moved further forward still. In other words, there has been a competitive shift towards autonomy, or devolution.

In Spain the status of the Autonomous Community is set out in a Statute of Autonomy tailored to each territory. Though the initiative for the form it will take comes from the relevant Community, the Spanish Parliament ('Cortes Generales') approves the Statute – being unable to repeal it without the agreement of the Community. Communities can, with approval from the centre and within specified limits, determine both the powers they will possess and their internal governmental arrangements. There is often a significant overlap of responsibility between Community and central authorities. They coordinate with each other constantly. Spain has established a system that has entailed it moving towards an increasingly federal status, while not fully adopting a system of this sort – it does not, for instance, incorporate the Communities into a central body equivalent to the United States Senate. Spain shares certain qualities with the UK. It has diverse cultural characteristics within it, contributing to internal asymmetry. But unlike the UK it has managed to provide not only for areas with a strong 'nationality' or national identity to become more self-governing, but for other regions of less definite consciousness to take on more power at their own pace. In this sense, while the process has produced some complications and tensions, the UK may have something valuable to learn from Spain.

The proposal: a description and discussion

The specific scheme advanced here would allow existing local authority units, or combinations of such units, to call down powers from a central menu. Initially, the powers on offer would be of an executive nature, rather than involving the ability to issue the equivalent of primary legislation or raise taxes. In this sense, it is deliberately modest. However, it is envisaged that the scope could and should be expanded in time, in particular to provide greater financial autonomy. This proposal does not underrate the importance of self-financing self-government, rather it wishes properly to prepare the ground for it in England. The developments in this regard in the devolved territories of the UK, that are themselves in their very early stages, will probably provide valuable lessons.

Specific procedures would need to be followed to bring about the devolution of powers and the establishment of new combinations of local authorities. Often, the local authority itself would decide; while in some cases the local populations would play a direct role through referendums, and local constitutional conventions would be formed to deliberate. The decision over

whether and what to devolve would be left at local level. Once transferred downwards, protections would apply against powers being encroached upon or removed by the central government. It would be possible to operate within the existing local-government framework, or at a regional or even all-England level. Certain safeguards would remain in place. The dismemberment of existing local authorities would be prohibited. All powers, at whatever level they were exercised, would remain subject to public financial auditing procedures, freedom of information requests, judicial review and human-rights standards.

Some might hold that this mechanism would lead to an overly intricate set of constitutional arrangements permanently fluctuating and detrimental to the effective conduct of public policy. Yet, as we have seen, differentiation in governmental arrangements has always been a core characteristic of the UK. It has become more pronounced since the late 1990s, and is continuing to grow. At present the position of England is a pronounced part of this divergence. In some ways, enabling the devolution of power within England would be to reduce the level of discrepancy, bringing this nation into line with the other parts of the UK where devolution already exists. Though it might create complexities in other senses, such an outcome is not necessarily an argument against this change. Indeed constitutional diversity might be seen as a quality worth encouraging if it is of the sort that enables different areas to govern themselves in ways appropriate to their particular characteristics. But what of the possible objection to this proposal that it would stimulate ongoing governmental upheaval? This condition already prevails. For decades, central government and the UK Parliament have constantly altered the form and content of local government. Boundaries have shifted, types of local authority have come and gone, and responsibilities have changed hands. This proposal, if successful, will lead to another process of change, that might grow over time (and presumably eventually subside). What would distinguish this development would be that the decisions would be made not at UK level, but by those who would have to bear their consequences; and it could lead to more dispersal of authority, rather than the forced march towards the centre that has previously taken place in England.

Some will query whether, with only a modest set of powers initially on offer, much can be made of them. The capacity for local ingenuity should not be underestimated. At the outset of Celtic devolution similar doubts were cast about whether devolved institutions would amount to more than talking

shops. They proved misconceived. Moreover, in time extra powers – including some responsibility for finance – should be included amongst the range of responsibilities made available. Others might question whether the desire exists at local level for taking on more autonomy. Perhaps it does not. In which case, making powers available is at worst a harmless exercise, wasting no more parliamentary time and public resources than any other piece of legislation with minimal impact. However, it is likely that some localities will be attracted by the powers available, possibly deploying them and working in conjunction with each other. If they are seen to make a success of the experiment, then others will follow as momentum gathers. In time pressure could build to expand the range of responsibilities available for devolution. As elsewhere in the UK the supply of devolution could create its own demand.

A further likely objection to variable devolution is that it would prove impractical. Opponents might argue that transferring individual functions from UK to local level presents organisational challenges that would be difficult to overcome. Some issues will need to be resolved, such as the role and allocation of civil servants currently attached to Whitehall. But if this scheme is introduced, it is assumed it will be accompanied by a strong political desire to make it viable, that will find its way into the dealings between the aspirant devolved English institutions and the centre. Devolution arrangements elsewhere in the UK have, with cooperation and goodwill on both sides, functioned relatively smoothly. As in these earlier cases, the core legislation would need to be supplemented by concordats, institutional arrangements, and an intention on the part of all involved to make a success of the relationship. The outlook and habits of ministers and officials would need to adjust to take into account the change in their overall remit. So too would those of MPs representing constituencies in England, as have those of MPs from Wales, Northern Ireland and Scotland in the post-devolution era.

It might be held that this variable devolution proposal creates the danger that powers will be transferred to an authority with a population too small properly to exercise them. It may be that certain safeguards could be built into the legislation in this regard. However, it is also important to be aware of comparisons within the UK and internationally. Each of the old English regions was larger than Northern Ireland, so devolution on this scale need not present problems. Moreover, in Switzerland, the extent of the powers possessed by the 26 Cantons exceeds that envisaged for devolution under the plan presented here for England. Yet the population of some Cantons

numbers only in the tens of thousands, broadly similar to that of the smallest unitary authority in England, Rutland County Council. The largest Canton, Zurich, has a population of approximately 1.4 million: a similar figure to that served by Kent County Council. While conditions applying in Switzerland and England are not identical, on this evidence fears of excessive devolution in England should not be overstated.

Some critics may present scenarios in which local authorities take on functions for which they are unprepared, or which they deploy irresponsibly, leading either to poor performance or even disaster, possibly requiring intervention by central government at considerable cost to UK taxpayers as a whole. But variety in local services provided, and inevitably the quality, is part of the essence of this proposal. Each area is entitled to find its own way and make its own mistakes – and there will not, in any case, be universal agreement about what is and is not an error. Some apocalyptic predictions contain an anti-democratic strand since they imply people cannot be entrusted with the running of their own affairs. The English population would not be offered anything more – and initially less – than is available to their counterparts in other parts of the UK. Problems may emerge. In the first instance, they would be a matter between governmental institutions and the voters to whom they were accountable in their areas. Constructing extreme sets of circumstances of failure does not necessarily create a definitive argument against proceeding with a potentially valuable democratic reform. The UK government has proved willing to entrust responsibility for public services, such as the creation and management of schools, to the hands of individuals and groups who are subject to no local democratic accountability. Compared with this practice, variable devolution seems a lower-risk option. Furthermore, the track record of central government in deploying its powers responsibly and effectively is far from perfect. Indeed, some would hold that if Whitehall and Westminster were not as overloaded with functions that should be handled at a lower level, it might perform more effectively itself in future in its national strategic role. Finally, in many cases local authorities might simply be recovering powers they possessed previously, and possibly recreating tiers of governance that have existed in similar forms in the past. Regardless of the precise merits of such decisions, there is no reason to suppose they will lead to cataclysm when they did not before.

Conclusion

The lack of devolution in England needs to be taken seriously. It is a problem that will not go away by itself, and becomes worse as time passes. The English public are starting to take notice. Successive UK governments have showed some awareness that all is not well. They have attempted limited remedies. But they have not pursued them properly and have used flawed models. Other options yet to be tried present difficulties of their own. Consequently there is nothing to be lost and much to be gained by considering a new approach. A system of devolution that allows devolution to be driven not by the UK government but from the areas to which devolution will take place has much to commend it. It places the initiative for self-government where it should be; and offers the possibility of generating momentum for further decentralisation in future.

Appendix

The English Devolution Enabling Act: an outline

Following on from the preceding analysis of the existing problem of excessive centralisation of political authority in England and the broad principles of a plan to reduce this problem, this appendix gives an example of how an English Devolution Enabling Act ('the Act') could work in practice.

The general principle underpinning the Act would be that a clear set of powers should be made available for transfer from central government to English local authorities; or other larger units that these bodies might form. Furthermore, decisions about transfers of those powers should be made in the localities themselves; and there should be a degree of protection in place against them being removed at the initiative of the centre. Finally, the geographical boundaries and size of local authorities should be determined within the localities and not at the centre; and it should be possible to create new directly-elected bodies such as regional authorities or even an all-England body.

Devolving powers

The provision for devolved powers proposed for the Act is modelled in some respects on the Government of Wales Act 1998 (superseded by the

Government of Wales Act 2006). Following this model, executive powers would be devolved to a particular English local authority, either pre-existing or nascent, or a new larger body. Powers previously vested in UK government ministers would be transferred to the local authority.

The powers that could be devolved would be included within a list of fields, attached as a schedule to the Act:

Agriculture, forestry, fisheries and food;

Ancient monuments and historic buildings;

Culture (including museums, galleries and libraries);

Economic development;

Education and training;

The environment;

Health and health services;

Highways;

Housing;

Industry;

Local government (though not including the exercise of powers allotted to the Secretary of State by the Act itself);

Social services;

Sport and recreation;

Tourism;

Town and country planning;

Transport;

Water and flood defence; and

Promotion of languages.

A notable absence from this list is finance. However, there is every reason to believe that, with the system established as a success, it could and should be added to the list: indeed this outcome would be a key goal of the whole project. Local authorities may demand its inclusion in some form. If during discussions leading to the introduction of this Act, there were strong demands for finance to be included from the outset, then it could be included.

It would be possible for a single field, or a group of them, or particular powers within one or more to be transferred to a local authority. The transfer of responsibility to an authority could be carried out on the initiative of an authority, with a simple majority of members required. If it chose, the authority could at a later date return the power to the centre, though a minimum time period would then apply before the area could acquire it again.

Creating new authorities

The Act would enable two or more local authorities above town and parish level to combine in new ways. Both the size of the new authority – which could cover a county or region – and the powers transferred to it would be determined in the area. The process would be initiated either by simple majority votes by the members of each of the local authorities or by petitions of 10 per cent of the electorate of each of the local authorities.

A local constitutional convention would then be convened along lines set out in a schedule to the Act. This convention would comprise elected local representatives, and could also include members of the public selected at random from the electoral registers of the local authorities. It would consider the constitution of the new proposed authority and the particular powers which would be transferred to it (within the terms of the Act), in addition to existing statutory local-authority powers that it may possess. Matters to be considered would include whether a single new authority would be created, or if an elected authority might co-exist with elected sub-authorities, either pre-existing or newly established. Safeguards would protect against the problematic secession of areas from within existing local authorities, such as the possibility for ministerial intervention, subject to clear guidelines and possible challenge in the courts.

The convention would produce a proposal within six months that would be

subject to a referendum in all of the local authority areas covered by it. A simple majority across the entire area covered by the intended new authority would mean the proposal was approved and would be implemented; except where it was proposed that one or more pre-existing local authorities within the overall area be abolished or have powers transferred away from them to the new authority. In cases of this kind a simple majority would be required in any area with an authority which it was proposed would be abolished or have powers transferred away from it.

The Act would create a specific procedure allowing for the creation of a directly-elected all-England authority. A petition signed by five per cent of individuals on English electoral registers would trigger the establishment of a constitutional convention, again in accordance with details set out in a schedule to the Act. The convention would produce a proposal within 12 months. Matters with which it would deal would include the constitution and powers of the English authority and its relationship with English local government (and other tiers of government that may have been established by this time such as regional government). Safeguards for the status and powers of English local authorities would be included in the Act. The proposal would then be subject to approval through an English referendum, requiring a simple majority across the whole of England.

The legal mechanism

Once the procedures for the reconstitution of and/or devolution of powers to authorities had been met, the Act would require the Secretary of State to issue an order, not subject to parliamentary approval, giving effect to the change. The details of the authority concerned and the powers transferred to it would be added to a schedule to the Act.

The Secretary of State would be authorised exceptionally to decline to issue an order giving effect to such changes, or to modify the proposed changes, on a basis of clearly defined UK policy issues, set out in a schedule to the Act. In using this power the Secretary of State would be required to issue a statement explaining the reasoning for the decision, and would be subject to possible judicial review. Such an order would require affirmative approval from both Houses of Parliament.

Safeguards and oversight

Any devolved powers would be subject to political accountability in the same way as any other actions within the authority, according to the particular structure it adopted.

All the activities of a local authority, as at present, would be subject to judicial review. If a particular action fell outside the powers that the local authority possessed or contravened the European Convention on Human Rights or European law, it could be quashed by a UK or European court, with the possibility that the local authority could be ordered to provide some form of remedy.

The Secretary of State would possess under the Act a power exceptionally to prevent or compel certain actions by an authority within the scope of powers that had been devolved to it under the terms of the Act. This power could be exercised only on a basis of UK policy concerns set out precisely in a schedule to the Act. When exercising the power the Secretary of State would be required to give detailed reasons and would be subject to possible judicial review.

Though perhaps beyond the terms of the Act, it is advisable that a joint committee of the two Houses of the Houses of the UK Parliament be established to consider the operation of the system established under the Act including the role of the Secretary of State. It would take written and oral evidence and produce reports, possibly including recommendations designed to ensure the Act achieved its objectives more effectively, or that the scope of the system be expanded.

Primary legislation

Primary law-making powers would not be devolved and would continue to be exercised by the UK Parliament. The Act would specify a form of consultation through the Local Government Association that would be required before the UK government introduced a bill to Parliament intended to bring about statutory alteration to any powers falling within the list of fields which it was possible to devolve.

If the UK government sought to alter the Act itself through primary legisla-

tion, a bill introduced to Parliament would be required to state expressly that it was intended to amend the Act. Consequently any attempt to alter arrangements for variable devolution would be subject to fuller public scrutiny than if they were brought about by legislation that amended the Act less explicitly. Through including provision to protect sections in the Act from 'implied repeal', the Act would also be protected against legislation which might otherwise alter it inadvertently rather than intentionally. The Act would thereby become partially entrenched as a new part of the UK constitutional settlement, finally providing England with a chance to reap the benefits of devolution, that have been available to its fellow members of the union for well over a decade.

Variety has always been a feature of the United Kingdom constitution. This variety has allowed Northern Ireland, Scotland and Wales to develop along their own paths towards decentralised self-government. However, England, the largest nation within the UK, has been left behind. Signs exist that English opinion is now turning against existing arrangements and the discrepancies involved. With these trends in mind, this paper makes the case for an English Devolution Enabling Act. It proposes a way forward that would allow localities and regions within England to take on powers previously exercised by central government, helping to close the democratic gap that has opened up with the remainder of the UK. The appendix provides a more specific idea of how the proposed English Devolution Enabling Act could work.



9 781903 403952 >