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Citation for published version:

MacQueen, H 2015, Alan Peacock Dissenting: The Problem of Devolution. in R Perman (ed.), *Alan Peacock Dissenting: Essays on the Life and Work of the Founder of The David Hume Institute*. The David Hume Institute, Edinburgh, pp. 15-21.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

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Alan Peacock dissenting: the problem of devolution

Hector MacQueen

Back in the autumn of 1974, when a fresher in the Law Faculty at Edinburgh University, I had to write a short tutorial essay about the Kilbrandon Report on the Constitution, published just a year before. That was probably the first time I came across the name of Alan Peacock. As a member of the Royal Commission that produced the report, he, together with Lord Crowther-Hunt, had published as its second volume a “Memorandum of Dissent”. That title scarcely does justice to what was actually, as the authors noted, “a largely self-contained alternative report”.¹ Over some 250 pages they set out a scheme of constitutional reform which was not limited to Scottish and Welsh devolution, but applied to the whole of the United Kingdom. Indeed the memorandum developed an analysis of the effects of United Kingdom membership of the Common Market from 1 January 1973 which, the authors thought, would “have a major impact on the working of our main institutions of government”.² In consequence they believed “it makes no sense today to seek to move ‘sovereignty’ downwards when in more and more subjects it is actually moving upwards – to Brussels”.³ They also anticipated –or were perhaps the first to formulate – what came to be known the West Lothian question:⁴

“We cannot believe it is right or acceptable that the Westminster Parliament should be precluded from legislating for Scotland and Wales in a wide range of subjects (including education, housing and health) while at the same time, about 100 Scottish and Welsh M.P.s at Westminster would have a full share in legislating in these same matters for England alone ...”⁵

The dissentient pair argued for a scheme of devolution across the United Kingdom, with England in particular to be sub-divided into five regions that could be built from the then existing “outposts” of central government and regional health and water authorities. To the powers of these authorities should be added the powers which the Scottish and Welsh Offices already enjoyed in relation to education and housing, together with transport, police and fire services. All the authorities would also have planning powers in relation to, not only the traditional town and country questions, but also economic and social matters more generally. Each would have an Assembly elected by way of the single transferable vote system of proportional representation “so we can be sure that minorities will be fully represented – which is

¹ Royal Commission on the Constitution 1969-1973 Volume II Memorandum of Dissent by Lord Crowther-Hunt and Professor A T Peacock, October 1973, Cmnd 5460-I, p ix para 3.

² Ibid, p viii para 2(e); and see further Chapter III.

³ Ibid, p viii para 2(g)(i). The contrary idea that sovereignty is not ‘monocular’ but can be and is frequently shared was a favourite theme of the late Neil MacCormick, formerly a Vice President of the David Hume Institute: see his *Questioning Sovereignty* (1999).

⁴ The phrase ‘West Lothian question’ is apparently to be attributed to Enoch Powell, who used it to encapsulate Tam Dalyell’s repeated reference in Parliamentary debates on the Scotland Bill of the later 1970s to the problem of why he as MP for West Lothian should be entitled to vote on matters affecting Blackburn, Lancashire, when that area’s MP would be unable to vote on matters affecting the town of Blackburn in Dalyell’s West Lothian constituency. See further Dalyell’s autobiography, *The Importance of Being Awkward* (2011) chapter 8. It is said that the general question was first raised by Gladstone during the Irish Home Rule debates in 1886.

⁵ Memorandum of Dissent, p viii para 2(g)(iii).

particularly important in those areas where recent voting patterns suggest one party could be in a 'perpetual' majority".⁶ The Assemblies would have power to make "ordinances – which in many respects will be similar to the bye-law making power of local authorities";⁷ that is, be concerned with good government, general welfare and the suppression of nuisances within their area. While these powers would have to be subject to general United Kingdom legislation and policies, the Assemblies and authorities "would also recommend to the United Kingdom Government and Parliament such additions to, or changes in, existing legislation and general policies as appear to be necessary and desirable".⁸ The regional governments should have some independent revenue raising powers: for example by way of a supplementary income tax; a low rate *ad valorem* retail sales tax additional to nationally levied excise duties and VAT; and motor and fuel taxes transferred from central government. Each region's freedom to determine its own expenditure patterns was essential to the scheme, with central government's role being confined to the control of the total amount of spending by the regional governments.

All this has come strongly back to mind in the discussion of a revised constitutional settlement following the Scottish Independence Referendum held on 18 September 2014. The Memorandum made other points too which, although not so immediately resonant with the post-referendum debate, have certainly had echoes in other, but still relatively recent, constitutional discussions in the United Kingdom: the possible introduction of proportional representation for elections to the House of Commons; reform of the House of Lords to bring in representatives of the regional authorities, with a primary function of the second chamber being at least the delay of measures unduly limiting regional governments; the introduction of a Constitutional Court to adjudicate on the vires of regional government actions;⁹ and public funding of political parties.

In a separate note Alan laid out the principles informing his dissent: equality of political rights for all citizens of the United Kingdom; regional participation in government which did not decrease the powers already devolved to Scotland and Wales; better allocation of national resources if regions had a measure of fiscal independence; and the rights of individuals to make the major decisions affecting their lives, with governments in general needing to do much more to make its citizens less reliant on its support. Alongside Lord Crowther-Hunt, he also made the important point that the scheme of devolution proposed by the Kilbrandon majority "at best would not result in any significant reduction in the burdens on Whitehall and Westminster; and, indeed, ... is all too likely in our view to increase these burdens still further".¹⁰ Experience from 1999 certainly suggests that partial devolution has added significantly to the complexity of the business of government in Britain, albeit that a not insignificant factor in that complexity is the ignorance in much of both

⁶ Ibid, p 101 para 249.

⁷ Ibid, p 98 para 242.

⁸ Ibid, p 89 para 219.

⁹ Quite inappropriately it was proposed that this Constitutional Court be a division of the High Court of England & Wales: *ibid*, p 119 para 308.

¹⁰ *Ibid*, p viii para 2(g)(iv).

Whitehall and Westminster of what devolution actually entails for them as much as for the devolved territories.¹¹

For the rest of his life Alan maintained opposition to devolution that did not embrace the whole of the United Kingdom, and that also failed to consider it as part of the totality of government and governance in the country.¹² On that basis he would surely have been severely critical of the Smith Commission proposals for further devolution in Scotland only, especially when it brought into play both tax and welfare powers; and he would also, I think, have disliked the quite separate attempt by the UK Government to deal with the West Lothian question by some system or other of ‘English votes for English laws’ in the Westminster Parliament.¹³

There were – and are - however at least two major difficulties with the grand over-arching scheme which Alan and Lord Crowther-Hunt proposed in 1973. The first is the popular rejection of regional governments in England apart from the London Assembly. However wrong-headed the bases for such rejection may be, it is too widespread and deep-rooted to be simply over-ridden. But the more significant difficulty, at least for present purposes, is that England (which for these purposes incorporates Wales), Scotland and Northern Ireland are each long-established distinct jurisdictions within the United Kingdom. In matters of law, the United Kingdom is not, and never has been, a unitary state. While Wales and Welsh law were finally subsumed within the jurisdiction of English law through the Laws in Wales Acts passed by the English Parliament between 1535 and 1542, the Union with Ireland in 1800 continued the laws and courts in existence in Ireland at that time subject only to an appeal to the House of Lords as a court. The Government of Ireland Act 1920, by which Northern Ireland was created with a Parliament empowered to make laws, provided that “All existing laws, institutions, and authorities in Ireland, whether judicial, administrative, or ministerial ... shall, except as otherwise provided by this Act, continue as if this Act had not passed, but with the modifications necessary for adapting them to this Act”. While Northern Ireland’s many vicissitudes since 1920 have led from time to time to the suspension and replacement of its legislature, its laws and courts have remained distinct from those of other parts of the United Kingdom apart from the final appeal to (now) the United Kingdom Supreme Court.

In the case of Scotland, Article XVIII of the 1707 Anglo-Scottish Union agreement provided for the continuation of Scots law after the Union, excepting only the “Laws concerning Regulation of Trade, Customs and Excises”, which were to ‘be the same in Scotland, from and after the Union as in England’. Legislative change to other Scots laws was allowed under the Article, but in matters of “private right” such change had to be for the “evident utility” of the Scottish people. Only in matters of

¹¹ As a trivial example, I have had to explain to an English MP on a Westminster Parliamentary committee that consumer law is not a matter within the legislative competence of the Scottish Parliament: see Hansard, 11 February 2014, Consumer Rights Bill Committee, col 21 question 44 (accessible at <http://www.publications.parliament.uk/pa/cm201314/cmpublic/consumer/140211/am/140211s01.htm>).

¹² See e.g. *The Device of Devolution* (Hume Occasional Paper No 50, 1996); ‘The political economy of devolution: the British case’, in *The Political Economy of Economic Freedom* (Edward Elgar, 1997), chapter 19; ‘The distraught geometry of asymmetric devolution’ in *Calling Scotland to Account: Policy Options for Spending and Taxation* (Policy Institute, Edinburgh, 2001), 64-67.

¹³ The acronym ‘EVEL’ is awkward for proponents of the cause.

“public right” might the aim be simply to make the law the same throughout the United Kingdom.¹⁴ Article XIX laid down that the principal Scottish courts, the Court of Session and the High Court of Justiciary, should “remain in all time coming” as they were then constituted, subject only to such regulations for the better administration of justice as the new British Parliament might choose to make. The Article also stated that all the other Scottish courts should remain, “but subject to Alterations by the Parliament of Great Britain”. Finally, Scottish cases were not to be dealt with in the English courts “in Westminster-hall”. (This did not cover appeals to the House of Lords, which came about after and outside, but not against, the conclusion of the 1707 Union.) There was of course no need for similar provisions to protect the English courts or laws from Scottish take-over. While through the following three centuries there has been much amendment and indeed repeal of parts of the Act of Union under which the surviving 1707 Articles have statutory force today, Articles XVIII and XIX remain untouched; and there have been occasional indications from the Scottish courts that in their perspective at least these Articles are indeed inviolable.¹⁵

Alan and Lord Crowther-Hunt did not deal with Northern Ireland (although they thought their scheme could be extended to include the province¹⁶); but I think their regional assemblies making ordinances having the character of local authority bye-laws fall somewhat short of what the people of Scotland and (in the event) Northern Ireland can legitimately look for given the legal context with which their history has provided them. The Memorandum did in a sentence cite “the present separate criminal law of Scotland” as an example of a matter which might be within the policy-making scope of the region’s assembly, being one of the “occasions when an Area has special needs or special aspirations which are not catered either implicitly or explicitly by United Kingdom legislation or general policies”.¹⁷ The other example given of such a need or aspiration was the role of the Welsh language in Wales. But these two examples are simply not commensurate in terms of their social and political significance.

Further, referring only to criminal law completely bypasses another instance of a matter which by definition is not the subject of United Kingdom legislation: civil, or private, law in Scotland –

... the body of principles and doctrines which determine personal status and relations, which regulate the acquisition and enjoyment of property and its transfer between the living or its transmission from the dead, which define and control contractual and other obligations, and which provide for the enforcement of rights and the remedying of wrongs ... matters which inevitably touch the lives of all citizens at many points from the cradle to the grave ...¹⁸

¹⁴ For the meanings of public and private right see Hector MacQueen, ‘Public law, private law, and national identity’, in Cormac Mac Amlaigh, Claudio Michelon, and Neil Walker (eds), *After Public Law* (Oxford, 2013) 168-198, 177-184.

¹⁵ *MacCormick v Lord Advocate* 1953 SC 396 at 412 (Lord President Cooper); *Gibson v Lord Advocate* 1975 SC 136 at 144 (Lord Keith).

¹⁶ Memorandum of Dissent, p 107 note 1.

¹⁷ *Ibid*, p 90 para 220.

¹⁸ Lord Cooper of Culross, *Selected Papers 1922-1954* (1957), 174.

It is not the case, as a footnote in the Memorandum of Dissent put it, that the authors' proposed Scottish Assembly and Government would, relative to their counterparts elsewhere in the United Kingdom, "have a still wider range of *administrative* functions because of the *special* nature of Scots law".¹⁹ Scots law is not of a special nature; it is simply different from English law in content, and administered by different courts deploying their own remedies and procedures. Moreover, the differences between Scots and English criminal and private law in particular are substantial, and so have legislative rather than merely administrative significance. Hence the pre-devolution practice of having specific Westminster legislation on Scots law demarcated with "(Scotland)" in the Act's titles, or, within Acts also applying to England and Wales, specifically Scottish parts or, at the very least, "application to Scotland" sections. Responsibility for such Scottish legislation before 1999 lay mainly with the Scottish Office and the Lord Advocate (then the chief UK Government Law Officer in Scotland). But before 1999 there was a serious problem in getting time at Westminster to consider, never mind pass, specifically Scottish legislation. It could hardly be argued politically that the best response to this problem was to abolish the Scottish legal system altogether (much though some Whitehall departments might have liked that). That would have been of at least doubtful legality within the context of the 1707 Union. Indeed it would also have been contrary to the Peacockian principle that existing powers in Scotland and Wales should not be decreased.²⁰ On this basis as well as the more prosaic grounds of governmental efficiency and the need to ensure that the law in Scotland was at least as responsive to social change and need as in other UK jurisdictions, the devolved assembly there needed – and needs - to have power to legislate not only in criminal but also in many significant areas of civil law without having to conform to some as yet unidentified legislative norm set down by Westminster.²¹

That once conceded, it also becomes clear that Scottish devolution cannot but be different from devolution to regional authorities in England. It is practically unthinkable that such authorities should have the power to legislate in such a way that the present unity of English civil and criminal law could be lost or diminished. True, in so far as that unity encompassed Wales after 1535, it has begun to lessen since the Welsh Assembly gained significant law-making powers under the Government of Wales Act 2006. Lord Hope spoke deliberately of "Welsh law" in a Supreme Court case in 2012,²² and the Law Commission of England & Wales too is, under its present Welsh chairman, taking seriously its responsibilities to the law-makers of the Welsh Assembly as well as the Westminster Parliament.²³ There is also a movement for recognition of Wales as a jurisdiction in the legal sense that holds good for England with Wales at present as well as for Scotland and Northern

¹⁹ Memorandum of Dissent, p 91 note 1 (emphasis supplied).

²⁰ See above, text between notes 9 and 10.

²¹ Local government within Scotland is another example of an important area in which the Scottish polity has been quite distinct from its England & Wales counterpart because so it was in 1707, so it remained in 1999, and so it continues in 2015. Like private and criminal law, local government is not so much devolved as never reserved.

²² *Local Government Byelaws (Wales) Bill 2012 (Reference by Attorney General for England and Wales)* [2012] UKSC 53 para 71.

²³ See e.g. the publication of its Twelfth Programme of Law Reform in Welsh (Y Ddeuddedfed Rhaglen O Ddiwygio'r Gyfraith) as well as English; and see also paras 1.10-1.13, 1.16, 2.9-2.12, 2.20-2.22 (http://lawcommission.justice.gov.uk/docs/lc354_twelfth_programme_welsh.pdf).

Ireland.²⁴ At least some historical continuity justifies what seems to be happening with Wales: it is unlikely, however, that a legislative devolutionary division of England can be achieved by a revival of Wessex, Mercia, and the other ancient kingdoms of the Anglo-Saxon era.²⁵

None of this is intended to assert that there cannot be devolution within England because of English law; nor is it intended to deny the possibility of devising a scheme of English votes for English laws without creating a devolved English Parliament. My argument is simply that a basically uniform scheme of devolution within the United Kingdom along the lines to which Alan Peacock remained committed from 1973 on would not and will not work. This is because the history that produced the United Kingdom has also left us with distinct jurisdictions and laws within that otherwise united realm. The dissolution of one or more of these legal systems is altogether too high a price to pay for the achievement of a new constitutional dispensation.²⁶ Again, that is not to say that moving towards harmonisation and, indeed, unification of laws within the Union is a bad thing. Such a process has been going on in the United Kingdom since at least 1707, especially in fields of “single market” or commercial law such as intellectual property and insurance. It is ongoing within the European Union, and has also taken place in federations such as the United States of America, Canada and Australia. These processes in both the United Kingdom and the European Union are ones in which I have been happy, indeed proud, to take part over the last twenty years.²⁷ But they are not susceptible to short or even medium term fixes.

When first I proposed the title “Alan Peacock dissenting” for this piece, I had in mind to write, not only about devolution, but also about some of his other battles with received wisdom over the years on matters such as climate change, arts and heritage funding, sustainable development and welfare. The depth and insight of his take on devolution left me room only to tackle that; and I do not suppose for a moment that he would have been persuaded by any of the criticisms I have just offered against his position. Alan relished controversy with those with whom he disagreed, the sense of combat in meetings or open floor debates possibly heightened by his being sometimes unable to make out what his opponents were saying because of the deafness in one ear that resulted from the perforation of an eardrum at birth. The walking stick on which latterly he leaned and which he occasionally flourished could give him a somewhat belligerent air on these occasions. If therefore some (especially Presidents of the British Academy and the Royal Society of Edinburgh) thought of him as a turbulent priest, for me and many

²⁴ Theodore Huckle, “Wales a jurisdiction? Society of Legal Scholars Centenary Lecture 15 November 2012”, *The Reporter: The Newsletter of the Society of Legal Scholars*, no 46, Spring 2013, 5-10.

²⁵ It may be worth noting here that the gavelkind of the kingdom of Kent survived until abolished by the Administration of Estates Act 1925, section 45(1).

²⁶ Compare the asymmetric and ‘rolling’ devolution within Spain, where the Código Civil of 1889 provides a generally applicable private law but each of the autonomous regions recognised by the Constitución española of 1978 that had its own private law at that point may continue to develop and codify it. Catalonia provides an especially noticeable example of this: see Antoni Vaquer, “Spain”, in *Elgar Encyclopedia of Comparative Law*, 2nd edn (ed Jan M Smits), 2012.

²⁷ In the European context, as a member from 1995 to 2003 of the Commission on European Contract Law and, from 1999 to 2008, of the Study Group on a European Civil Code; in the UK context, as a Scottish Law Commissioner working on joint projects with the Law Commission of England & Wales since 2009.

others to whom I was introduced by Alan over the years, he was quite simply one of the finest minds and most generous personalities that we ever encountered. Any debate was always, in what is said to be Hume's phrase about the pursuit of truth, an argument amongst friends. That is the spirit I want to invoke here. Alan's light never flickered or faded, and now in memory it remains still and always bright.