

Chapter 2

Devolution, debate and change: Changing the UK's constitutional settlements

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Abstract

Devolution has been 'a process not an event' resulting in new constitutional settlements. This chapter covers the processes of devolution, processes which mirror the first 50 years of the Open University and the first 22 years of the OU Law School. The chapter explores the devolution of powers to parliaments in Scotland and Wales. It begins with the referendums of the early 1970s and traces events leading up to both the initial transfer of powers and those resulting in subsequent transfer of powers. The process has not been without its critics and the use of differing models helped create complexity re-enforcing historical legacies. Devolution created new legal orders and challenged accepted traditional constitutional theory. The story is not yet over.

1. Introduction

The establishment of The Open University (OU) in 1969 changed the landscape of higher education in the United Kingdom (UK). Its mission of being 'Open to people, places, methods and ideas'¹ and its promotion of social justice through high quality education² has challenged thinking around educational practices. In the 50 years since it was established it has transformed the lives of many through its work and partnerships. It has students in over 90% of UK postcodes³ and continues to hold a unique position within the UK's Higher Education sector working across, and receiving funding from, all four UK nations. In celebrating its 50th anniversary its Vice Chancellor expressed pride in being the UK's only four nations university.⁴

During the OU's 50-year history there have been significant changes and challenges within the higher education landscape. These mirrored the significant political, legal and constitutional changes taking place within the UK itself. Changes regarded as unlikely by many fifty years ago have now transformed the educational, legal and political landscapes within the UK. This chapter will focus on one aspect of those changes, the creation of new legislatures within the UK in Scotland and Wales.

¹Mission: About the university < <http://www.open.ac.uk/about/main/strategy-and-policies/mission> > (accessed 9 October 2020).

² Ibid 1.

³ Data from 2019.

⁴ '50. A movement of millions a mission of one' Open University 2019 <<http://www3.open.ac.uk/documents/1/vs19080444243116.pdf>> accessed 9 October 2020.

2. The referendums: Politics as a driver and inhibitor

To provide context this section considers the calls for devolution that re-surfaced and grew in the 1960s. As politicians were considering a 'University of the Air'⁵ they were also making commitments to some form of devolution.⁶ The Welsh Office had been established in 1965 (the year in which planning for the OU began in earnest) and the Northern Ireland Office in 1972 (The Scottish Office had been in existence since 1885). Further, and more significant, plans for change were to follow.

In 1966⁷ and 1967⁸ both the Welsh and Scottish nationalist parties won parliamentary seats in by-elections. By 1969 both parties were gathering momentum and seen as possible contenders for further Labour parliamentary seats in both Wales and Scotland. There were growing successes in local elections too. Disagreement in the Labour Cabinet⁹ as to how to respond to this threat in Labour strongholds grew and led to the establishment of a Royal Commission on the Constitution in 1969. The Commission's remit was broad and included examining various structures of the constitution including local government administration. It considered, amongst other matters, devolution, federalism¹⁰ and the possible division of the UK into separate sovereign states. The work took some four and a half years to complete¹¹ and the final report was not unanimous. Several commissioners published their own views under a Memorandum of Dissent. Independence or federalism was rejected in favour of elected devolved assemblies. The Memorandum of Dissent reflected the disagreements over both the terms of reference and interpretation of the evidence gathered.¹²

In a parliamentary debate on the Royal Commission on the Constitution in 1973 Lord Beaumont of Whitley noted:

Now that the debate over Europe is, with due respect [...] more or less over, this debate and subject will become more and more important and will be the main constitutional one in forthcoming years.¹³

He went on:

Our position is simple: we agreed with the analysis contained in the Majority Report to the extent that: 'Government is remote and insufficiently sensitive to the views and feelings of the people.' [...] we endorse the belief expressed [...] in their Memorandum of Dissent when they say that the necessary reforms should have three main objectives: first, to counter the decline they consider has taken place this century in the extent to which the British people govern themselves; secondly, to reduce the

⁵ See <<https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/collections/1/parliament-and-the-1960s/jennie-lee/>> accessed 9 October 2020.

⁶ Edward Heath 'Declaration of Perth' 1968 in which the Conservative party committed to Scottish devolution. This was followed in 1970 by a report led by Sir Alec Douglas-Home, then Foreign Secretary, recommending the creation of a Scottish Assembly.

⁷ Gwynfor Evans MP first Plaid Cymru MP. Elected to represent the Carmarthen constituency.

⁸ Winnie Ewing SNP to represent the Hamilton constituency. In local elections the same year the SNP gained 69 seats. In local elections in 1968 the SNP gained 40% of the vote.

⁹ Harold Wilson became UK Prime Minister on 16 October 1964. Following a general election in 1966 he held power until 1970. Elected in 1953 to the Huyton constituency as a Labour MP having previously held the seat of Ormskirk. Harold Wilson is associated with the establishment of the Open University. The Open University represents the realisation of his plans for a 'University of the Air' outlined in the mid 1960s.

¹⁰ The Royal Commission on the Constitution 1969 also considered the UK's economic and constitutional relationships with the Isle of Man and Channel Islands.

¹¹ The first chair Lord Crowther died in 1972 and Lord Kilbrandon took over. The report is also referred to as the Crowther and Kilbrandon Report.

¹² Royal Commission on the Constitution: Papers and Evidence: the National Archives <<https://discovery.nationalarchives.gov.uk/details/r/C9085>> accessed 9 October 2020.

¹³ HL Deb 12 December 1973 vol 347 cols 1157-76.

present excessive burdens on the institutions of Central Government; thirdly, to provide adequate means for the redress of individual grievances.¹⁴

By the time the report was published a Conservative government¹⁵ was in power. In 1974¹⁶ a White Paper 'Democracy and Devolution: proposals for Scotland and Wales'¹⁷ was published. The paper proposed handing over certain governmental and administrative powers to directly elected Assemblies for Scotland and Wales, with the Scottish Assembly having legislative but not tax-raising powers and the Welsh Assembly having executive powers only. A further report followed in 1975, 'Our Changing Democracy: Devolution to Scotland and Wales'.¹⁸ In their response to this paper the Scottish Law Commission noted:

'much depends upon the precise way in which the devolved and retained matters are specified, but it is clear that any system which envisages the specification of both will enhance the difficulty of ascertaining the precise scope of the devolved powers [...] it follows that there will be room for considerable uncertainty as to scope, and difference of opinion depending on whether the matter is viewed from an English or from a Scottish standpoint.'¹⁹

By 1974 both the Labour and Conservative parties were making commitments in their manifestos²⁰ to a Scottish Assembly and powers to spend a share of the UK's budget.²¹ Labour promised to also create an elected Assembly in Wales.

In 1976 a Scotland and Wales Bill was published.²² During the second parliamentary reading in the House of Commons the Prime Minister, James Callaghan, noted:

I doubt whether any major measure has come before the House after such extensive discussion, certainly not in recent years. That is as it should be in the case of a constitutional measure of such great scope and lasting importance. This is a measure for Wales and Scotland and a measure for preserving the unity of the United Kingdom.

[...]

We do this because we believe the people of Scotland and of Wales look to Parliament to reach a definite conclusion on the Bill and not just to allow it to be filibustered into oblivion. Now that the Government have placed the Bill before Parliament, Scotland and Wales are entitled to a clear verdict and not just an interminable and never-ending flow of argument.

The parliamentary debate on the Bill will be one of great constitutional importance.

[...]

¹⁴ HL Deb 12 December 1973 vol 347 col 1159.

¹⁵ A Conservative government under Edward Heath had come to power in June 1970.

¹⁶ The February election of 1974 was won by a Labour majority of 4 seats. Labour became a minority government. In an October election the same year they held on to power with a majority of 3 seats.

¹⁷ Democracy and Devolution: proposals for Scotland and Wales: the national Archives <<https://discovery.nationalarchives.gov.uk/details/r/C3081357>> accessed 9 October 2020.

¹⁸ Our Changing Democracy: Devolution to Scotland and Wales: the National Archives <<https://discovery.nationalarchives.gov.uk/details/r/C11121883>> accessed 9 October 2020.

¹⁹ Scottish Law Commission Memorandum No. 32 Comments on White Paper 'Our Changing Democracy: Devolution to Scotland and Wales' para 6. These concerns continue to also have resonance today.

²⁰ Each published separate manifestos for Scotland and Wales.

²¹ 'Putting Britain First' 1974 Conservative manifesto and 'Britain will win with Labour' 1974 Labour manifesto.

²² HC Deb 13, 14 and 15 December 1978 Vol, 922, col 974-1150, col 1249-1486, col 1559-1661, col 1735-1876.

The purpose of the Bill, therefore, is to give the Scottish and Welsh people a surer guarantee and a more relevant instrument of national identity.²³

The second reading was made possible by a concession, an agreement that referendums would be held in the nations of Scotland and Wales. Significant parliamentary time had been allowed for the debates, but the bill faced fierce opposition and failed to get through all necessary parliamentary stages. The hopes that it would not be 'filibustered into oblivion' proved fruitless.²⁴ It was a blow to those seeking to more fully recognise the diversity of the UK and highlighted the significant political differences that existed. Devolution and the politics associated with it were fracturing existing political party politics, crossing boundaries and alliances. Similarities can be drawn with debates over European Union (EU) membership. Constitutional debates in the UK appear to sit uncomfortably in the arena of politics.

Following swiftly on from the 1976 defeat further legislation was introduced and in 1978 both the Scotland Act and the Wales Act²⁵ were passed. Differing devolution settlements had always been proposed for Scotland and Wales but at this stage a new approach of separate legislation was adopted. That approach began the process which created an unequal public understanding. One that lasted well into the second decade of the next century.

The bills were both introduced in November 1977. They progressed together through the parliamentary approvals process receiving Royal Assent in July 1978.²⁶ However, throughout the debates and progress of the bills the Scottish Bill was always placed first in debates.²⁷ Whilst there was widespread coverage of the Scotland Bill there was minimal coverage of the Wales Bill outside Wales.²⁸ Coverage also often concentrated on the political issues and debates as new alliances were created and MPs worked together in new partnerships to either support or defeat²⁹ the bills. The different provisions for devolution, including the differing character of the settlement proposed for Wales compared to Scotland were not widely appreciated or understood. This approach laid the groundwork for subsequent proposals creating a form of unintentional bias and perpetuating both State and political behaviour.

The Scotland and the Wales Acts received Royal Assent in 1978 but could only become law if voted for by a majority of voters in Wales and Scotland. Referendums³⁰ were held on 1 March 1979. A small majority of Scots voted 'Yes'³¹ but only a minority voted 'Yes'³² in Wales. In each case the 40% threshold imposed was not met. The result had significant and long-term political implications for the UK³³ and the Scotland Act and the Wales Act were repealed in June 1997 by Order in Council³⁴. What had started as an intention to recognise the diversity and history of the UK, to protect the Union and safeguard votes had led to division, an upending of traditional party politics and growing nationalism. Negotiating constitutional

²³ HC Deb 13 December 1976 vol 922, col 975.

²⁴ The Government had to abandon the Bill when it failed to survive a guillotine motion (45 Labour MPs abstained).

²⁵ HC Deb 14 November 1977 Vol 939, col 51-214, 1978 Wales Act and Scotland Act 1978.

²⁶ HC Deb 25 January 1978 vol, 942, col 1424-1553 at 1543. At committee stage an amendment from Labour backbencher George Cunningham was introduced. This required the Secretary of State to lay before Parliament an order repealing the Act unless at least 40% of the eligible electorate voted "yes". The amendment was approved by 166 votes to 151.

²⁷ eg HC Deb 26 July 1977 vol 936, col 313-28 Mr Cledwyn Hughes at 317 and response at 318.

²⁸ London based press dominated the debate. They outsold local newspapers in Wales by around 7:1. The debate was not widely communicated to the Welsh electorate either.

²⁹ See eg the press coverage of the 'gang of six' Welsh Labour MPs who opposed devolution.

³⁰ HL Deb 21 July 1997 vol 581, col 1240-74 at 1245. These were advisory referendums.

³¹ Turnout was 63.3%. 32.9 % voted 'Yes', 30.8 % voted 'No'.

³² Turnout was 58.8%. 20.3 % voted 'Yes' 79.7% 'No'.

³³ HC Deb 28 March 1979 vol, 965 col 461-590 at 461 and 584. The Labour Government lost the no confidence vote by one vote. In May 1979 a Conservative Government was elected. The Conservatives held power for the next 18 years.

³⁴ Wales Act 1978 (Repeal) Order 1979. Scotland Act 1978 (Repeal) Order 1979.

change presented challenges for every political party.³⁵ The traditional centralised Westminster model was being challenged in ways not seen before. A position not helped by the role of the Westminster Parliament³⁶ as both State-wide and Nations legislature.

The referendums in 1979 were not the end of the matter. Changes again began to be called for in the 1980s and 1990s as the pattern of political support in Scotland and Wales³⁷ began to differ significantly from England. These calls were recognised in the Labour Party manifesto for the 1997 election, which contained a commitment to hold a referendum on devolution in Scotland, Wales and Northern Ireland.³⁸ The Labour Government³⁹ published a White Paper, 'A Voice for Wales'⁴⁰ and 'Scotland's Parliament'⁴¹ in July of the same year. The white papers outlined proposals for a devolved Assembly in Wales and a Scottish Parliament. Referendums were held in Wales and Scotland on 18 September 1997.

In the House of Lords debates Lord Sewel, Parliamentary Under-Secretary of State for the Scottish Office, noted:

As someone who was born and brought up in England, pursued part of my education in Wales and has lived most of my life in Scotland--I value the Union. But the enduring value of the Union is its diversity. What we are doing is to establish structures of government that not only recognise that diversity but encourage it to flourish.

I have said that our proposals are about revitalising democracy. We want to revitalise democracy in Scotland and Wales. We want a new politics--a more inclusive, consensual politics. That is why we have devised an electoral system that will ensure the fair representation of different points of view. That is why we place great emphasis on a strong committee system and ideas like pre-legislative scrutiny.

While many of us enjoy the theatre of this House and of Parliament generally, we must recognise that many of our fellow citizens are deterred from making a contribution to public life by the adversarial and confrontational style of our politics⁴². We want to change that. We want a parliament and an assembly in which a much wider range of people will wish to participate. And I say quite frankly that that is going to be a challenge to the political parties and their selection processes, but we need it. The two countries--the UK--need a change in their approach to politics. It needs a more inclusive legislature.⁴³

The emphasis in the devolution debates was now refocused on political change, democracy and strong pre-legislative scrutiny. The bills were debated at the same time and passed through the parliamentary process in tandem.⁴⁴

³⁵ See also the 1975 UK wide referendum on membership of the European Community.

³⁶ Referred to here as the Westminster Parliament. The Royal and Parliamentary Titles Act 1927 section 2(1) gives the full title as the Parliament of the United Kingdom of Great Britain and Northern Ireland. Throughout these referendums and during the 'Troubles' the position of Northern Ireland received less attention in constitutional debates despite the 1973 referendum on Northern Ireland sovereignty.

³⁷ The combination of the policies of the UK Conservative Government in the 1980s and the Conservative Party's low levels of electoral support in Wales led to renewed calls for Wales to have its own legislature.

³⁸ 'Devolution: Strengthening our Union' 1997 Labour Party manifesto.

³⁹ The Labour Party won the general election with a majority of 179. Share of votes: Labour 45%, Conservative 31%, Liberal Democrat 17% and other 7%. In Scotland the SNP polled a 22% share of the vote in Scotland and Plaid Cymru a 10% share in Wales.

⁴⁰ A Voice for Wales- the Government's Proposal for a Welsh Assembly (Cm 3718, 1977)

⁴¹ Scotland's Parliament (Cm 3658, 1977)

⁴² This remains in evidence at the UK's Prime Ministers Question Time.

⁴³ HL Deb 30 Jul 1997 vol 582, col 186.

⁴⁴ Alongside the Northern Ireland Bill which followed the 1998 Belfast Agreement.

As an aside, as it touches upon matters of devolved competencies, in the same debate Lord Sewel also noted:

There have been a number of questions about our proposals for giving the Scottish parliament and the Welsh assembly a say in European Union affairs. The Scottish executive and parliament and the Welsh assembly will have important roles in relation to European Union issues. Both will have the fullest and most direct possible involvement in policy formation within the United Kingdom. The Scottish and Welsh voices must be heard in relevant negotiations on policy at all levels, up to and including the Council of Ministers, including the scope to speak directly on behalf of the UK in those negotiations.⁴⁵

Evidence from recent years is that this commitment to full involvement has yet to be realised.⁴⁶

In Scotland turnout for the referendum was 60.2 per cent. A majority (74.3 per cent of those who voted) supported devolution. A further 63.5 per cent voted for tax-varying powers⁴⁷. In Wales turnout for the referendum was 50.1 per cent. A small majority (50.3 per cent of those who voted) supported devolution. Because no thresholds had been stipulated, a simple majority vote was all that was required to give a mandate for devolution.

The process of devolution began and in 1999 new legislatures in Scotland and Wales were established.⁴⁸ Despite the emphasis at the time on democracy and political change the move to devolved powers in three of the four UK nations has led to significant constitutional implications. The constitutional statutes creating the new legislatures, and the subsequent amendments, have challenged notions of the 'English' constitution written about by Bagehot, Dicey and Bingham.⁴⁹

The referendum results themselves did not lead to the breakup of the Union so feared by many politicians but they were of their time and the subsequent referendum on EU membership⁵⁰ has not only changed the UK's political landscape even further but has also changed opinions around the devolved settlements and the future shape of the UK itself.

3. Devolution: Scotland

The Scotland Act 1998 established the Scottish Parliament and outlined the law-making process, as well as on what matters laws can be made. The Scottish Parliament has full legislative competence⁵¹ (it can pass both primary and subordinate legislation) in devolved areas.

Devolution took the form of a reserved powers model; Schedule 5 contained a list of 'reserved matters'.⁵² These were matters which were to be reserved for the UK Parliament⁵³ and on which only the UK Parliament could make law. There was, however, no similar list of devolved

⁴⁵ HL Deb 30 July 1997 vol 582, col 188.

⁴⁶ In particular around negotiations with the EU as international policy is a reserved matter. Many EU policies however touch on matters which are devolved and over which the Nation governments have exclusive competence.

⁴⁷ This question was not included on the Wales ballot in 1997.

⁴⁸ Also, in Northern Ireland

⁴⁹ Walter Bagehot 'The English Constitution' (London: Chapman and Hall, 1867), Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (MacMillan, 1885), Tom Bingham, *The Rule of Law* (Penguin 2010).

⁵⁰ 23 June 2016. England 53.4% leave 46.6% remain. Scotland 38% leave 62% remain. Wales 52.5% leave 47.5% remain. Northern Ireland 44.2% leave 55.8% remain. UK overall 51.9% leave 48.1% remain.

⁵¹ s29 Scotland Act 1998 as amended.

⁵² Schedule 5 Scotland Act 1998 as amended.

⁵³ From this point in the chapter the Westminster Parliament will be referred to as the UK Parliament as an indicator of its reserved powers across the UK and to distinguish it from the Scottish and Welsh Parliaments.

matters on which the Scottish Parliament could legislate. Matters on which the Scottish Parliament can legislate are, in effect, all those matters that are not 'reserved'.

The Scotland Act 1998 was the beginning and devolution in Scotland has not stood still. It has been an evolving process, and one which, at times, has been a direct political response from the UK Government to changes in both Scottish society and politics.⁵⁴

The third elections to the Scottish Parliament were held in 2007. For the first time the SNP held more seats than Labour.⁵⁵ In August 2007, the Scottish Government published 'Choosing Scotland's future: a national conversation: independence and responsibility in the modern world'.⁵⁶ The purpose was to promote 'conversation' on Scotland's constitutional future, a discussion around possible independence amongst other matters. One outcome was the unification of the opposition parties within the Scottish Parliament. The leaders of the three opposition parties issued a joint statement opposing any plans for an independence referendum.⁵⁷

Within Scotland public awareness of the work of the Scottish Parliament was high. Its work had proved popular within Scotland and it had the ability to respond to local and national issues. A number of its legislative provisions led the way for other UK legislatures.⁵⁸ Transparency and public engagement were at the core of its work.⁵⁹ This, together with a changing political landscape led, in 2007, to an agreed review. In December 2007, in a parliamentary debate⁶⁰ around the agenda for the future of Scotland, it was noted:

That the Parliament, recognising mainstream public opinion in Scotland, supports the establishment of an independently chaired commission to review devolution in Scotland; encourages UK Parliamentarians and parties to support this commission also and proposes that the remit of this commission should be: To review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to better serve the people of Scotland, that would improve the financial accountability of the Scottish Parliament and that would continue to secure the position of Scotland within the United Kingdom, and further instructs the Scottish Parliamentary Corporate Body to allocate appropriate resources and funding for this review.⁶¹

The Conservative Party leader noted:

Strengthening devolution while continuing to secure the position of Scotland within the United Kingdom is not just an honourable but a highly important commitment. It is bigger than any one political party, because it dwarfs party politics. We are talking about shaping the constitutional direction of travel of our nation for the future, not just because it is sensible and pragmatic to do that eight years on, but because it overwhelmingly reflects what Scotland wants to happen.⁶²

⁵⁴ As a response to the referendum on Scottish independence held in September 2014.

⁵⁵ SNP 47 seats, Scottish Labour Party 46 seats, Scottish Conservative Party 17 seats, Scottish Liberal Democrats 16 seats. The SNP formed a minority government. Alex Salmond was appointed as First Minister.

⁵⁶ Scottish Government 'Choosing Scotland's Future: A National Conversation: Independence and Responsibility in the Modern World' 2007.

⁵⁷ See BBC 13 August 2007 < <http://news.bbc.co.uk/1/hi/scotland/6944185.stm>> accessed 9 October 2020.

⁵⁸ See for eg on health and social care, environment, alcohol minimum pricing, period products in schools.

⁵⁹ This includes public engagement and legislative consultations across Scotland, a five-star tourism award, events and annual awards.

⁶⁰ SP OR 6 December 2007, col 1. S3M-976 was moved by the Labour leader in the Scottish Parliament, Wendy Alexander. Motion agreed: For 76, Against 46, Abstentions 3.

⁶¹ SP OR 6 December 2007 cols 4133-85.

⁶² Ibid col 4143.

The Commission on Scottish Devolution⁶³ (The Calman Commission⁶⁴) was supported by the UK Parliament and formally announced by the Secretary of State for Scotland, Des Browne.⁶⁵

The Government welcome that Parliament's support for the aim of strengthening devolution and securing Scotland's place in the Union. We are therefore giving our full support to this cross-border, cross-party review.

The remit of the Calman Commission was to:

review the provisions of the Scotland Act 1998 in light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the UK.⁶⁶

The remit had not gone far enough for everyone though as Scottish independence had not been included:

Although we welcome any contribution to the national conversation, we regret that the Parliament has agreed to establish a commission that deliberately excludes independence—not just the favoured option of the largest party in the Parliament, but the favoured option of a substantial proportion of the Scottish people.⁶⁷

Following wide-ranging consultations, the Commission made a number of recommendations in its final report.⁶⁸ Recommendations were made in relation to fiscal autonomy, further devolution of powers, improvements to intergovernmental relations (IGR) and the legislative processes of the Scottish Parliament. It saw devolution as a success that could be built on.

In the UK Government's response 'Scotland's Future in the United Kingdom. Building on ten years of Scottish devolution' Gordon Brown noted:

The Scottish Parliament and the other devolved legislatures are now firmly entrenched in the United Kingdom's constitution. They help to make that constitution one fit for the 21st century. But there is more reform and modernisation to come. The plans in this White Paper are an important part of that.⁶⁹

Acknowledgement of the changes within the UK's constitution was being made and the role played by devolution becoming more widely recognised. Focus had, for the time being, moved from the politics. In a Westminster Hall debate on the Scotland Act 1998 in April 2008 it was noted:

Everyone in this Chamber agreed that more powers are required for the Scottish Parliament. Who would have believed that the Conservative, Liberal, Scottish National and Labour parties would now demand more powers for the Scottish Parliament? It is

⁶³ Commission on Scottish Devolution 'The future of Scottish devolution within the Union: a first report' December 2008 and final report 'Serving Scotland Better: Scotland and the United Kingdom in the 21st Century' 2009.

⁶⁴ Known by this abbreviation the Commission was chaired by Professor Sir Kenneth Calman.

⁶⁵ HC 25 Mar 2008: Col 7WS.

⁶⁶ Ibid 63 and HC 25 Mar 2008: Col 8WS. The terms of reference mirrored the motion approved by the Scottish Parliament December 2007.

⁶⁷ SP EU 11 December 2007 The Deputy First Minister, Nicola Sturgeon.

⁶⁸ Ibid 63.

⁶⁹ Scotland Office 'Scotland's Future in the United Kingdom: Building on ten years of Scottish devolution' (CM 7738, 2009).

remarkable, and we should take a moment to appreciate its full significance and importance. [...] Now everyone is talking.⁷⁰

The UK Government's commitment to implementing the Calman report resulted in The Scotland Act 2012. This made several changes to the devolution settlement for Scotland. These included the renaming of the Scottish Executive as the Scottish Government,⁷¹ Paragraph 8 of the explanatory notes to the 2012 Act state that:

As the Act changes the devolution settlement for Scotland, the Act contains provisions which alter the legislative competence of the Scottish Parliament (for example, relating to air weapons) and provisions which alter the executive competence of the Scottish Ministers (for example, relating to the power to prescribe drink-driving limits). The Scottish Parliament gave its consent to the provisions in the Act that trigger the Sewel Convention on 18 April 2012.⁷²

In the 2011 elections the SNP achieved a majority⁷³ in the Scottish Parliament and the question of independence once more became a focus. As the 'constitution' was a reserved matter there were questions as to who had power to call and hold a referendum. A solution needed to be found and the Edinburgh Agreement⁷⁴ reached in 2012 made provision for a referendum. An Order in Council approved by both Houses of the UK Parliament and the Privy Council gave the Scottish Parliament powers to hold, on or before 31 December 2014, an independence referendum.⁷⁵

A Scottish Referendum Bill⁷⁶ was presented to the Scottish Parliament and received Royal Assent in December 2013. The electoral franchise was extended, and 16 years olds were able to vote in a Scottish referendum for the first time⁷⁷. The referendum was announced in March 2013 and held in September 2014. Fierce campaigning took place, particularly during the later stages of the campaign. The UK Government made several commitments to extend the powers of the Scottish Parliament in an aim to cement the Union. Two days before the referendum a statement signed jointly by David Cameron, Nick Clegg and Ed Miliband⁷⁸ promised voters 'permanent and extensive new powers' and that the Scottish Parliament would have a say in how much was spent on the NHS in Scotland.⁷⁹

Whilst there were debates over a proposed independence date the referendum result was in favour of staying within the UK. In a turnout of 86.4 per cent the vote 55.3 per cent voted no and 44.7 per cent yes. Immediately following the referendum Lord Smith of Kelvin was tasked with overseeing and delivering a cross-party agreement on the shape of improved and enhanced devolution for Scotland.

⁷⁰ HC Deb 2 Apr 2008: Column 270WH. Pete Wishart MP Shadow SNP Spokesperson (Cabinet Office).

⁷¹ S 12 2012 Scotland Act. See also associated legislative consent motion S4M-02625: Lodged: 16 April 2012 Debated 18 April 2012.

⁷² See <<https://www.legislation.gov.uk/ukpga/2012/11/notes/division/2>> accessed 9 October 2020.

⁷³ SNP 69, Scottish Labour Party 37, Scottish Conservatives 15, Scottish Liberal Democrats 5, Scottish Green Party 2, Independent 1.

⁷⁴ HM Government and the Scottish Government 'Agreement between the United Kingdom Government and the Scottish Government on an Independence Referendum for Scotland'. Signed 15 October 2012.

⁷⁵ The Scotland Act 1998 (Modification of Schedule 5) Order 2013

⁷⁶ See <<https://www.parliament.scot/parliamentarybusiness/Bills/61076.aspx>> and <<https://www.parliament.scot/parliamentarybusiness/Bills/60464.aspx>> both accessed 9 October 2020.

⁷⁷ Forming part of wider SNP policy this was widely supported by other political parties including Labour, the Liberal Democrats and Green party.

⁷⁸ Leaders of the UK Conservative Party, Liberal Democrats and Labour Party respectively.

⁷⁹ Opinion is divided as to whether the promises were delivered see eg <<https://www.channel4.com/news/factcheck/factcheck-qa-westminster-broken-promise-scotland>> accessed 9 October 2020.

The 'Report of the Smith Commission for further devolution of powers to the Scottish Parliament'.⁸⁰ was delivered in November 2014. In his forward Lord Smith noted:

This agreement is, in itself, an unprecedented achievement. It demanded compromise from all of the parties. In some cases that meant moving to devolve greater powers than they had previously committed to, while for other parties it meant accepting the outcome would fall short of their ultimate ambitions. It shows that, however difficult, our political leaders can come together, work together, and reach agreement with one another.⁸¹

The report had been agreed by all five of the main Scottish political parties and outlined further powers for the Scottish Parliament. In carrying out his work Lord Smith had 'sought to give a voice to the public and the various organisations that make up the fabric of Scottish life'.⁸² The Scotland Act 2016 which resulted transferred additional powers to the Scottish Parliament.

The powers of the Scottish Parliament have grown significantly since the original devolution settlement.⁸³ Their growth has been incremental and piecemeal but before moving on it is worth looking back to consider the opinions of those initially tasked with the setting up of the Scottish Parliament. Key features include its openness, transparency of process and proactivity in engaging with the Scottish public. For all this work the Scottish Parliament has received international recognition. In events to mark the 20-year anniversary 'expectation versus reality', Holyrood's original steering group delivered their assessment of the Scottish Parliament at twenty:

World class legislation on, among other things, different approaches to the funding of higher education, climate change, free personal care, the smoking ban, proportional representation in local government elections, land reform and many other areas has more than vindicated the case for a legislative body in Scotland. The Scottish Parliament is now a fundamental and valued aspect of public life in Scotland and both the institution and its Members enjoy high recognition levels among the country's electorate.⁸⁴

The journey of devolution in Scotland is not over. More twists, turns, straight stretches and dead ends lay ahead. With the departure of the UK from the EU it remains unclear how and to whom the exclusive competencies of the devolved legislatures and governments will return. Gains made under devolution may be lost and power concentrated once again at the centre in Westminster. Calls for independence also remain.⁸⁵

Having explored devolution in Scotland, the next section will consider the process in relation to Wales.

⁸⁰ Smith Commission (2014b) 'Report of the Smith Commission for further devolution of powers to the Scottish Parliament'.

⁸¹ Ibid 4. < https://webarchive.nationalarchives.gov.uk/20151202171029/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf> accessed 9 October 2020.

⁸² Ibid 80.

⁸³ Now often referred to as the most powerful devolved legislature in the world. See eg BBC News Report May 2016 < <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-35716653>> accessed 9 October 2020.

⁸⁴ Consultative Steering Group 'Reflections on 20 years of the Scottish Parliament' 2019. The report also commented on the apparent polarisation of politics see para 4 and 8.

⁸⁵ See Referendums (Scotland) Act 2019 approved December 1999, received Royal Assent January 2020 and eg BBC News January 2020 < <https://www.bbc.co.uk/news/amp/uk-scotland-scotland-politics-51284836>> accessed 9 October 2020.

4. Devolution: Wales

Proposals for devolution in Wales differed significantly from that in Scotland. The UK Government adopted an asymmetrical model for devolution. This difference was justified on several grounds including historical differences and a sense of citizenship⁸⁶. Wales' journey over the past twenty years has been a complex one. This complexity has led, on occasion, to a lack of public engagement and support.⁸⁷ It was the Secretary of State for Wales, Ron Davies, who, in 1997, described devolution as "a process not an event".⁸⁸ No-where has this been truer than in relation to Wales.

The White Paper 'A Voice for Wales' proposed an Assembly of 60 members which would assume most of the former powers of the UK Government's Secretary of State for Wales. These include executive powers, and powers to make law in the form of 'secondary legislation',⁸⁹ where these powers had been granted under an Act of Parliament passed by the UK Parliament. There were no plans for the Assembly⁹⁰ to have primary law-making powers.⁹¹ The model adopted was one of transferred powers⁹² and of executive devolution. This model was derived partly from the precedent of local government, with ministerial functions and powers over secondary legislation belonging to the Assembly.

Following the referendum vote the Government of Wales Act 1998⁹³ provided for the establishment of an Assembly of 60 members⁹⁴. The Welsh Assembly had authority to pass secondary legislation affecting Wales (in specified areas) and executive powers as to how UK laws were implemented in Wales⁹⁵. It could not pass primary legislation or raise taxes, although it was able to debate issues that extended to Wales.

The Welsh Assembly was welcomed by many and several positive outcomes resulted. Public access was greater and an inclusive and consensual rather than divisive style of politics developed. It had achieved the aim of bringing decision making closer to the people. However, there were several challenges that led to calls for further change. The model of a single corporate structure adopted⁹⁶ was problematic with both legislative and ministerial functions in one body.⁹⁷ It differed significantly from the Scottish 'reserved' model. As noted on Law Wales:

⁸⁶ Although by this stage there were few differences between the powers of the Secretary of State for Scotland and the Secretary of State for Wales.

⁸⁷ See, for example, voter turnout.

⁸⁸ Address to the Institute of Welsh Affairs Gregynog Seminar, 9-10 Jan. 1999; 'Datganoli: proses nid achlysur=Devolution: a process not an event' (Gregynog Papers, vol. 2, no. 2), 4 Feb. 1999

⁸⁹ Secondary legislation is traditionally associated with the UK Parliament. In Scotland and Wales, the term subordinate is more commonly used. This is a more descriptive term reflecting the type of legislation. Differing processes and procedures exist in each parliament.

⁹⁰ Unlike Scotland there was a single corporate structure which had its own legal personality. There was no formal division between executive and legislative authority. This raised question around the separation of powers.

⁹¹ Primary legislation is used to describe laws passed by the legislative bodies of the UK e.g. Acts of the UK Parliament, Scottish Parliament, Welsh Parliament and Northern Ireland Assembly. Subordinate legislation or secondary legislation is delegated legislation made by a person or body under authority given by primary legislation.

⁹² The Scottish Parliament was created under a reserved powers model.

⁹³ Assembly for Wales (Transfer of Functions) Order 1999 transferred of powers to the National Assembly.

⁹⁴ Divided into 40 constituency representatives and 20 members for regional seats.

⁹⁵ This could have the important consequence that legislation might be brought into force in Wales but not in England, or vice versa.

⁹⁶ Which arguably had implications for the principle of the rule of law in the UK's constitution and the doctrine of separation of powers where governance is traditionally divided into three branches each with separate and independent powers and responsibilities: an executive, a legislature and a judiciary.

⁹⁷ This settlement did not reflect the devolved settlements in other Nations. Some saw this as re-enforcing traditional attitudes and approaches.

In the early years of devolution many struggled to differentiate between those who exercised power (the cabinet of Ministers appointed by the First Minister as leader of the main political party in the National Assembly) and the National Assembly itself as an institution.

Although a system of delegations of power from the National Assembly to the First Minister and from the First Minister to other Ministers and staff was put in place reflecting a traditional division between an executive and legislature, in practice this system proved difficult to understand and operate.⁹⁸

In 2002, discussions and debates took place that led to a resolution by the Assembly to separate the roles of the executive and legislative as far as was as possible and the term 'Welsh Assembly Government' was introduced to highlight the difference between the work of the Executive, the Cabinet and the Assembly. The debates led to the establishment of an independent commission, the Richards Commission⁹⁹ to consider the powers and electoral arrangements of the Assembly.

The Richards Commission¹⁰⁰ reported in 2004.¹⁰¹ Its recommendations¹⁰² had major implications for the future of devolution in Wales. These included the separation of the legislature and the executive, their establishment as separate legal entities, electoral reform and the suggestion of enhancing the powers of the Assembly so that it operated in a similar way to the Scottish Parliament. It concluded that this would enable the current difficulties to be overcome. Finally, it noted, that the Assembly needed more powers to meet the needs of the people in Wales.¹⁰³

Following the report, the UK Labour Government published a White Paper 'Better Governance for Wales'¹⁰⁴ in 2005. In his introduction the Secretary for State for Wales, Peter Hain,¹⁰⁵ noted:

With equal numbers of male and female members, and pioneering commitments to open government, sustainable development and equal opportunities, the Assembly has been a progressive institution, which has rapidly established itself as part of our political landscape and attracted interest from around the world. The Assembly has given Wales a stronger, more democratically accountable voice in Britain and in Europe. And the partnership with the UK Government has worked well.¹⁰⁶

This consultation was followed by the Government of Wales Act 2006¹⁰⁷ which made a number of significant changes to the devolution settlement including powers for the Assembly to seek permission to create legislation on devolved issues¹⁰⁸ separating the executive and legislature

⁹⁸ Law Wales: Branches of Government in Wales < <https://law.gov.wales/constitution-government/intro-to-constitution/three-branches-government/?lang=en#/constitution-government/intro-to-constitution/three-branches-government/?tab=overview&lang=en> > accessed 9 October 2020.

⁹⁹ An appointments process was used to ensure transparency. Five Commissioners were appointed following open competition and interview.

¹⁰⁰ Evidence was widely gathered with 115 evidence sessions, 3 seminars, 2 consultation papers, over 300 written submissions and 9 public meetings with the final one held at the National Eisteddfod in Meifod.

¹⁰¹ Report of the Richard Commission 'Commission on the Powers and Electoral Arrangements of the National Assembly for Wales' 2004.

¹⁰² Which were unanimous although on Commissioner, Ted Rolands a former Labour MP for Merthyr, wanted to see a referendum before further powers were given.

¹⁰³ See eg BBC news report 31 March 2004 <<http://news.bbc.co.uk/1/hi/wales/3585575.stm>> accessed 9 October 2020.

¹⁰⁴ Ysgrifennydd Gwladol am Wales, Trefyn Lywodraethu well I gymru (Cmd 6582, 2005). Secretary of State for Wales, Better Governance for Wales (Cmd 6582, 2005).

¹⁰⁵ Labour MP for Neath.

¹⁰⁶ Ibid 104, 2. The introduction went on to say that devolution had strengthened the United Kingdom and reduced Nationalism. A claim that was to become outdated less than a decade later.

¹⁰⁷ The act has been significantly amended since 2006.

¹⁰⁸ These took the form of Assembly Measures and enabled enhanced legislative powers to be gained.

by establishing the Welsh Government as an executive body and making provision for further referendums on extending the powers of the Welsh Assembly¹⁰⁹.

However, Devolution Guidance Note 9¹¹⁰ noted:

From May 2007, the legislative competence of the National Assembly for Wales will be much more limited in scope than the executive functions of the Welsh Ministers. This is a direct consequence of the unique nature of the Welsh devolution settlement.¹¹¹

Although a response to the Richards Commission, the 2006 Act did not go far enough for many. Growing public awareness and a sense of opportunity created by the support shown within Wales for greater powers for the Welsh Assembly and by the UK Government led to calls for further change.

In 2007 the 'One Wales'¹¹² coalition was created by Plaid Cymru and Labour. They committed to the principles of social justice, sustainability and inclusivity whilst noting the work that had been undertaken to reach a joint agreement they set out a vision for the future of Wales.¹¹³ Opportunities offered by the 2006 Act were to be built on. The commitment included:

There will be a joint commitment to use the Government of Wales Act 2006 provisions to the full under Part III and to proceed to a successful outcome of a referendum for full law making powers under Part IV as soon as practicable [...]

Both parties will then take account of the success of the bedding down of the use of the new legislative powers already available and, by monitoring the state of public opinion, will need to assess the levels of support for full law-making powers necessary to trigger the referendum.¹¹⁴

In 2010¹¹⁵ Assembly Members voted to support a referendum on further law-making powers. The UK Government passed the necessary legislation¹¹⁶ and a non-binding referendum¹¹⁷ was held in March 2011. The question put to voters concerned the powers of the Welsh Assembly and whether it should have full law-making powers in the twenty areas under its jurisdiction. The majority voted for full law-making powers. This resulted in amendments to existing legislation giving powers to the Assembly law in relation to all 20 devolved areas.¹¹⁸

¹⁰⁹ The National Assembly now had the power to make laws for Wales in defined areas. However, the process was complex and usually achieved through Legislative Competence Orders approved by the National Assembly and by both Houses of the UK Parliament. It was also done by framework powers conferred directly on the National Assembly through sections that were included in Acts of the UK Parliament.

¹¹⁰ Devolution Guidance Notes are issued for Whitehall Departments by the UK Government. Guidance Note 9 outlined arrangements for managing new legislation affecting the responsibilities of either the National Assembly for Wales or the Welsh Assembly Government. See < <https://www.gov.uk/government/publications/devolution-guidance-notes>> accessed 9 October 2020.

¹¹¹ Devolution Guidance Note 9: Post-devolution primary legislation affecting Wales Para 8.

¹¹² 'One Wales: A progressive agenda for the government of Wales. An agreement between the Labour and Plaid Cymru Groups in the National Assembly' published 27th June 2007.

¹¹³ The vision included both visionary and practical policies such as the all Wales coast path.

¹¹⁴ Ibid 112, 6.

¹¹⁵ An All Wales Convention had been established by the Welsh Assembly Government. The purpose was to gauge public understanding of the devolution settlement and assessing whether a referendum could be successful. It concluded that the settlement was not well understood but "that a 'yes' vote in a referendum was a possibility.

¹¹⁶ This was done by Statutory Instrument and not Act of the UK Parliament see The National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum Etc.) Order 2010.

¹¹⁷ Turnout was 35.6 %, (the second lowest in a major referendum; turnout for the London Mayoral election had been lower). 50.3% voted yes and 49.7% no. The campaign had not sparked popular interest and the complex nature of the devolution settlement posed a challenge in explaining what was being proposed.

¹¹⁸ Schedule 7 of the Government for Wales Act 2006 as amended.

The power came into effect almost immediately in May 2011. Wales had now moved to a conferred powers model of devolution.¹¹⁹

In 2013 a memorandum of understanding¹²⁰ (MoU) was published. This set out principles outlining how the UK Government and governments of the devolved administrations¹²¹ would work together. It also created a Joint Ministerial Committee, attended by representatives of the three devolved administrations and the UK Government. The MoU noted:

However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.¹²²

This will be returned to later and is included here as events have been considered in a chronological order.

Following the 2011 referendum and transfer of greater powers¹²³ the UK Government established the Silk Commission to consider the future of the devolution settlement in Wales. The remit of the Commission was:

Part I: Financial Accountability: To review the case for the devolution of fiscal powers to the National Assembly for Wales and to recommend a package of powers that would improve the financial accountability of the Assembly, which are consistent with the United Kingdom's fiscal objectives and are likely to have a wide degree of support.

Part II: Powers of the National Assembly for Wales: To review the powers of the National Assembly for Wales in the light of experience and to recommend modifications to the present constitutional arrangements that would enable the United Kingdom Parliament and the National Assembly for Wales to better serve the people of Wales.¹²⁴

In 2012, the Silk Commission published Part I¹²⁵ of its report, making recommendations on the financial powers of the Assembly. Part II making recommendations on the Assembly's future legislative powers and arrangements was published in 2014.¹²⁶ In Part II it was concluded:

We believe that the people of Wales will be best served by a clear, well-founded devolution settlement; and by political institutions that operate effectively and efficiently and work together in the interests of the people they serve. Devolution of power to Wales should benefit the whole of Wales and the United Kingdom.

¹¹⁹ As noted in Silk II 'Empowerment and Responsibility – Legislative Powers to Strengthen Wales' at 2.2.5 'the fourteen years of devolution in Wales have seen broadly three stages of development'.

¹²⁰ Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Presented to Parliament by Command of Her Majesty and presented to the Scottish Parliament and the Northern Ireland Assembly and laid before the National Assembly for Wales. October 2013.

¹²¹ The Scottish Government, Welsh Government and Northern Ireland Executive.

¹²² Ibid para 14.

¹²³ Law making powers in 20 specified areas without involvement from the UK Parliament or Whitehall.

¹²⁴ Comisiwn ar Ddatganoli yng Nghymru, Commission on Devolution in Wales 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales' 2014. See Box 1.1 in 1.1.9.

¹²⁵ Comisiwn ar Ddatganoli yng Nghymru, Commission on Devolution in Wales 'Empowerment and Responsibility: Financial Powers to Strengthen Wales' 2012.

¹²⁶ Comisiwn ar Ddatganoli yng Nghymru, Commission on Devolution in Wales 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales' 2014.

Any proposed changes to the devolution settlement should be tested according to the principles of accountability, clarity, coherence, collaboration, efficiency, equity, stability and subsidiarity.¹²⁷

The Wales Act 2014 resulted from Part I of the Report. This created several new financial powers enabling the Assembly to legislate¹²⁸ on devolved taxes¹²⁹ and made technical changes¹³⁰ to the Government of Wales Act 2006. Part II recommended that Wales move to a reserved powers¹³¹ model for devolution. In response to this recommendation the UK Government undertook a consultation and published 'Powers for a Purpose' in 2015.¹³² In the introduction the Secretary of State for Wales, Stephen Crabb,¹³³ noted:

I want to establish a clear devolution settlement for Wales which stands the test of time. I firmly believe that there should always be a clear purpose for devolving new powers to the Assembly, and that the Assembly and the Welsh Government should use any new tools and levers to put Wales in a stronger position to develop as a nation. [...]. Discussions will continue as we move to implement this agreement, particularly with regards to developing the reserved powers model. I believe we now have a strong blueprint for a new Wales Bill in the next Parliament.¹³⁴

A blueprint for further devolution and a move to a reserved powers model was outlined. The 2017 Wales Act followed. The National Assembly and the Welsh Government became a permanent part of the UK's constitutional arrangements.¹³⁵ The Act amended the Government of Wales Act 2006.¹³⁶ Powers to relation to Assembly elections¹³⁷ and other matters such as speed limits and marine licencing¹³⁸ were also outlined.

In addition, the 2017 Wales Act gave powers to the Assembly to change its name. By this time, it had commonly become known as the Senedd. To reflect the move to a reserved powers model Assembly members agreed unanimously that the name of the Assembly should reflect its constitutional status as a national parliament. There was however disagreement over possible names.¹³⁹

In February 2019 the Elections (Wales) Bill was introduced. The Bill proposed to lower the voting age for Assembly elections to 16 and change the name of the Assembly. The Senedd and Elections (Wales) Act 2019 came into force in January 2020 and on 6 May 2020, the Assembly formally changed its name to Senedd Cymru or Welsh Parliament.¹⁴⁰

¹²⁷ Ibid 126. Paras 3.4.1 and 3.4.2.

¹²⁸ The need for a referendum on Welsh rates income tax was removed by the Wales Act 2017.

¹²⁹ See subsequently The Tax Collection and Management (Wales) Act 2016 and The Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017.

¹³⁰ These changes included lengthening the term of an Assembly to 5 years and preventing an individual from being an MP and AM simultaneously.

¹³¹ Anything not reserved would be devolved, and the National Assembly for Wales would be able to pass laws in those areas. This would put the Assembly on the same footing as the Scottish Parliament.

¹³² Secretary of State for Wales 'Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales' (Cm9020, 2015).

¹³³ MP Preseli Pembrokeshire, Conservative Party.

¹³⁴ Ibid 132 pp 6-7.

¹³⁵ s A1 Government of Wales Act 2006. They could not be abolished without the agreement of the people of Wales. In a similar fashion to the way in which the Scottish Parliament and Scottish Government have been placed as a fixture of the UK's constitution.

¹³⁶ In particular s 108A, Schedule 7A and Schedule 7B.

¹³⁷ In December 2017 the Expert Panel on Assembly Electoral Reform recommended lowering the voting age for Assembly elections to 16. 16-year olds vote in the 2021 May elections for the first time.

¹³⁸ However, unlike Scotland Wales does not have its own separate legal jurisdiction.

¹³⁹ See BBC news 9 November 2019 <<https://www.bbc.co.uk/news/uk-wales-politics-49973487>> accessed 9 October 2020.

¹⁴⁰ More commonly referred to as the Senedd.

Welsh devolution has been a complex journey and the complexity continues. Both England and Wales share one legal jurisdiction¹⁴¹ and both the Welsh and UK Parliaments can now create laws within that jurisdiction. In 2017 the Welsh Government, firmly committed to an open and transparent system of laws and law-making set up 'The Commission on Justice in Wales'. The report¹⁴² that followed set a long-term vision for the future of justice in Wales. It noted:

We address our report to the Welsh Government. It has been our privilege to be given the opportunity by the Welsh Government to undertake this task. We hope that we have discharged the heavy responsibility placed on us. The evidence we obtained about the current justice system in Wales is presented in an unvarnished manner. Our recommendations, radical though some need to be, will give the people of Wales a better means of achieving a system which provides access to justice, can be trusted to deliver justice and puts justice again at the heart of their nation and its prosperity.

It remains to be seen whether calls for the devolution of justice are answered. Scotland had retained its separate legal jurisdiction, so the question had not arisen as part of the devolution settlement there.

5. Legislative process and legislative competence: transparent or opaque?

Having considered the process of devolution this section considers specific aspects in relation to the Welsh and Scottish Parliaments.

The Scottish and Senedd Cymru¹⁴³ both follow set processes in law making. These are set out in the legislation creating¹⁴⁴ their legislative powers. Although more streamlined than those used in the UK Parliament¹⁴⁵ they still require several stages to be followed and there is emphasis on legislative scrutiny at committee stages. If these processes are not followed, then any legislation produced as a result is void.

Both the Scottish Parliament and Senedd Cymru can also only act within their legislative competence. This is generally considered against a number of criteria: that the UK Parliament can only legislate for or in relation to Scotland or Wales in relation to reserved matters; the UK Parliament cannot modify certain enactments (these include the Human Rights Act 1998, certain provisions of the Acts of Union 1705-6 and the European Communities Act 1972¹⁴⁶); any legislation must be compatible with the European Convention on Human Rights (ECHR) and with European Union¹⁴⁷ law and the Scottish Parliament cannot remove the Lord Advocate from their position as head of the system for criminal prosecution. The concept of legislative competence is important because in both the Scottish Parliament and Senedd Cymru the legislative competence of any Bill has to be assessed before it is introduced, and an opportunity provided for it to be challenged after a Bill is passed but before it becomes law.

¹⁴¹ Wales and England have shared one legal jurisdiction and court system since the abolition of the Court of Great Session in Wales in 1830. Though the abbreviation English Legal System (or ELS) has been in widespread use and is misleading.

¹⁴² The Commission for Justice in Wales Report 'Justice in Wales for the people of Wales' 2019.

¹⁴³ The Scotland Act 1998 and The Government of Wales Act 1998. Section 36(1) of the Scotland Act 1998 required there to be at least three distinct stages to which Bills are subject, including a stage when MSPs can debate and vote on the general principles of a Bill, a stage when they can consider and vote on its details and a final stage when the Bill can be passed or rejected.

¹⁴⁴ Some authors use the word creating, others use devolving.

¹⁴⁵ For the UK Parliament see <<https://www.parliament.uk/about/how/laws/passage-bill/>>. For the Scottish Parliament see <<https://www.parliament.scot/visitandlearn/100530.aspx>>. For the Welsh Parliament see <<https://senedd.wales/en/bus-home/bus-legislation/Pages/bus-legislation.aspx>>.

¹⁴⁶ Reference is now to retained EU law.

¹⁴⁷ Ibid 146.

Legislative competence¹⁴⁸ has become a way of determining whether an Act has been produced within the powers of the Scottish Parliament or Senedd Cymru. This represents a change in the legal culture of both Scotland and Wales. Practising and academic lawyers had, until this point, been taught that an Act of Parliament was law. With the introduction of the Scottish Parliament and Senedd Cymru they must now question whether an Act of Parliament *is* law. If an Act of the Scottish Parliament or Senedd Cymru has been passed in an area where there is no legislative competence, that Act can be challenged.¹⁴⁹ Where such issues arise, they will be determined by a court. The final court for the determination of these issues is the Supreme Court of the United Kingdom.

However, there are many twists and turns in the narrative of devolution. Legislative competence and compliance with EU law have been brought into sharp focus in recent years by the debates and negotiations around UK Government plans for leaving the EU. Both Welsh and Scottish Governments have questioned the plans and sought to have their voices heard.¹⁵⁰ The UK Government has failed to liaise on several occasions leading to challenges and opposition. It remains unclear how the exclusive competencies of the Scottish Parliament and Senedd Cymru will be returned from the EU. Plans for these to go to UK Government Ministers and then be delegated were, at one time, felt appropriate by the UK Government. Politics once again seems to have intervened in what have become constitutional settlements.

There is on-going debate and tension between a return to a centralised model and one of subsidiarity. In 2018 the House of Commons Public Administration and Constitutional Affairs Committee published a report on 'Devolution and Exiting the EU: reconciling differences and building strong relationships'.¹⁵¹ The committee noted that:

Devolution is now an established and significant feature of the UK constitutional architecture and should be treated with respect to maintain the integrity of the United Kingdom. The Government needs to bring clarity to the situation by setting out, in response to this Report, its Devolution Policy for the Union¹⁵²...

At the time of writing there has been no UK Government response.

In a twist that relates to the concept of 'Parliamentary Sovereignty'¹⁵³ the legislation which sets out the powers of the Scottish Parliament and Senedd Cymru¹⁵⁴ states 'But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the [...] Parliament'. Legislative consent motions have been the result.¹⁵⁵ Defined by the UK Parliament as 'the means by which a devolved legislature indicates that it is content for the UK Parliament to pass a law on a devolved matter',¹⁵⁶ and

¹⁴⁸ Initial challenges were often brought on grounds under the Human Rights Act, however, since 2008 challenges based on legislative competence alone have grown.

¹⁴⁹ A declaration of incompatibility is issued in relation to the UK Parliament and the legislation remains law unless the UK Parliament repeals it.

¹⁵⁰ 'First Ministers call on the Prime Minister to work with, not against, the devolved nations' Press Release September 2017. Also eg statements made by the First Ministers including 19 December 2018 at <<https://www.gov.scot/news/brexit-talks-3/>> accessed 9 October 2020 and Y Cyfarfod Llawn (Plenary Session) 5 September 2019 at 245.

¹⁵¹ House of Commons Public Administration and Constitutional Affairs Committee 'Devolution and Exiting the EU: reconciling differences and building strong relationships' Eighth Report of Session 2017-19, HC 1485.

¹⁵² Ibid 150. Summary section, 3.

¹⁵³ A much-used phrase in recent years by politicians in relation to the UK's departure from the EU. It is a multifaceted concept, but the view espoused often draws upon is the work of A.V. Dicey an English Jurist writing in the early twentieth century and his 'Introduction to the Study of the Law of the Constitution' n 49 above.

¹⁵⁴ The Scotland Act 2016 s 2 which amended the Scotland Act 1998 and the Wales Act 2017 s 2 which amended the Government of Wales Act 2006.

¹⁵⁵ Legislative consent memoranda are laid before the Scottish Parliament or Senedd Cymru.

¹⁵⁶ UK Parliament Glossary < <https://www.parliament.uk/site-information/glossary/legislative-consent/>> accessed 9 October 2020.

sometimes referred to as Sewel motions,¹⁵⁷ they provide an example of a convention which was put on a statutory basis.¹⁵⁸ They cover three areas: legislation which changes the law in a devolved area of competence, alters the legislative competence of a devolved legislature or alters the executive competence of devolved minister. In theory the powers of the Welsh or Scottish parliaments or Welsh or Scottish ministers cannot be reduced. However, to be successful, the convention relies upon trust and cooperation between governments and political parties, and events in the recent decade including increasing polarisation between political parties and changes in voting patterns have helped highlight its limitations. Plans for the UK and its four Nations post EU membership are unclear¹⁵⁹ and the UK Supreme Court views legislative consent motions as a convention which are not subject to judicial review.¹⁶⁰

However, in the previous decade the UK Parliament enshrined both the Scottish Parliament and Senedd Cymru as part of the UK's constitution.¹⁶¹ This was not done via referendum but formed part of the evolving piecemeal approach to the devolution settlements. This can only be overturned by vote of those living in each Nation. A contradictory approach has emerged. There are new constitutional features which resulted from referendums in Scotland and Wales, there has been no referendum on the subject in England, the underlying constitutional principles draw on the work of English constitutional lawyers and the concept of Parliamentary Sovereignty is used by politicians to overcome all.

In a further twist in 2015 the House of Commons approved a change in its Standing Orders.¹⁶² This created a process known as 'EVEL' or 'English Votes for English Laws'. The Speaker of the House of Commons determines whether a bill can go through this process. The changes introduced additional stages in the parliamentary process between the Report Stage and Third Reading of a Bill. If a Bill goes through this process only MPs representing English constituencies receive a vote. However, the acronym is misleading as the process can also be applied to Bills which cover both England and Wales.¹⁶³

6. Conclusion

Common themes emerge through the discussions surrounding devolution; a devolving of powers in the interests of strengthening the Union, political divide, debates around democracy and constitutional change, recognising diversity, consultations, reports, transparency and referendums. Devolution has not been a straightforward narrative or journey, whether in Scotland or Wales and debates over the UK's exit from the EU add additional twists and turns.

Neither the Scottish Government or Welsh Government are content with the current position, with the UK Government's policy on EU negotiations or the lack of consultation on matters within their exclusive jurisdiction under the 'reserved powers' model they now share. Calls for independence are growing in both Nations.¹⁶⁴ The Welsh Government recently published a

¹⁵⁷ Lord Sewel, then Parliamentary Under-Secretary of State for Scotland announced the policy in the House of Lords during the passage of the Scotland Act 1998.

¹⁵⁸ Ibid 153.

¹⁵⁹ On 8 January 2020 Scottish Parliament voted to withhold consent for the EU (Withdrawal Agreement) Bill.

¹⁶⁰ R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5

¹⁶¹ S 63A Scotland Act 2016. Government of Wales Act 2006 s A1.

¹⁶² Implementing Conservative Government Policy but also seen by some commentators as highlighting a disjunct between the nature and purpose of the Union. See 'Governing England English Identity and Institutions in a Changing United Kingdom' published in 2018.

¹⁶³ In which case MPs representing English and Welsh constituencies receive a vote. For more detail see <https://www.parliament.uk/about/how/laws/bills/public/english-votes-for-english-laws/> accessed 9 October 2020.

¹⁶⁴ Referendums (Scotland) Act 2020. Scottish Government 'Protecting Scotland, Renewing Scotland: The Government's Programme for Scotland 2020-2021' 2020. 'Poll: Support for independence hits historic high of 58%' 14 October 2020 <<https://news.stv.tv/politics/poll-support-for-independence-hits-historic-high-of-58?top>> accessed 3 December 2020. For Wales see YouGov poll January 2020 and coverage eg <<https://nation.cymru/news/support-for-welsh-independence-up-5-in-new-yougov-poll/>> accessed 9 October 2020.

report on the reforms that they see as necessary to put the Union on a sustainable footing for the future. That concludes:

Future constitutional developments in the United Kingdom should be considered on a holistic basis and on the basis of constitutional principle, rather than by way of ad hoc reforms to particular constitutional settlements. This should be undertaken by a constitutional convention. The case for a written constitution should form part of the convention's deliberations.¹⁶⁵

However, whilst devolution remains mired in political debates and traditional constitutional thinking the way forward remains unclear. Politicians may talk of a Union that is stronger together, but the successes of the Scottish Parliament and Welsh Parliament raise questions about the future constitutional shape of the UK. However, discussions around the changing nature of parliamentary sovereignty tend to remain in academic publications and the court room. In 'Reforming our Union: Shared Governance in the UK'¹⁶⁶ the First Minister of Wales commented on the vacuum in the UK's Government thinking. A House of Commons paper noted:

there are different views on where sovereignty, and therefore where ultimate authority, lies. The UK Government's position is that the sovereignty of the Westminster Parliament is a constitutional fact. Yet the range and extent of areas where Parliament can legitimately exercise its power have been altered by the devolution settlements, which has introduced political considerations that has arguably qualified sovereignty within the UK. It is the exact nature of that qualification which is contested between the devolved administrations and the UK Government.

[...]

Any discussion of devolution would be incomplete without serious consideration of the position of England within the constitutional architecture of the UK. We received evidence pointing to a significant asymmetry between the representation of the people of England within the Union when compared with the people of Scotland, Wales and Northern Ireland. We recommend that the Government sets out, as part of its statement of 'Devolution Policy for the Union', how the different parts of England are to be fairly and effectively represented.¹⁶⁷

The United Kingdom exists because of a series of historical events and the Union has been a pragmatic one. This century will see some of its greatest challenges, challenges that come from within. It is unclear at what point calls for a UK-wide conversation around the UK's constitution would be heeded and whether the opportunities created by devolution will be used to inform that conversation. Lord Beaumont of Whitley's thoughts expressed in the parliamentary debate on the Royal Commission on the Constitution remain as relevant today as they were in 1973.

7. Finally

We began this Chapter noting the 50th anniversary of the OU. The university accepted its first law students in February 1998 and planning for the law degree mirrored the debates and referendums on devolution. Law School academics work across all four UK nations and have

¹⁶⁵ Llywodraeth Cymru: Welsh Government 'Reforming our Union: Shared Governance in the UK' 2019 Chapter 9 Annex 1 para 20.

¹⁶⁶ Ibid 163.

¹⁶⁷ Ibid 150 see summary on p 3.

watched and debated the devolution process over the past twenty years. We hope this chapter has helped provide an insight into devolution in two of the UK's nations.