

American Federalism and Post-1997 Devolution in Britain

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LOUIE WOODALL, JUN 30 2011

At first, the different definitions accorded to 'federalism' and 'devolution' suggests that there can be no likeness between the American and British governmental structures. While federalism mandates a clear *division* of sovereignty and powers between national and sub-national governments, devolution mandates only the *transfer* of sovereignty and powers "from a superior to an inferior political authority" (Bogdanor 1999, 2). However, the principal features of American federalism have altered somewhat over the last century as a result of political, economic and social forces, and several are now more comparable to the British devolutionary system than contrasting. On the other hand, in many respects these features remain an alien quantity to devolutionary Britain. The first Blair government was believed to be encouraging decentralisation by devolving powers to Wales and Scotland in 1997, and to Northern Ireland under the 1998 Good Friday Agreement. However, twelve years after this radical constitutional change Britain has arguably retained its unitary structure and only superficially resembles the system prevalent in America.

The principal features of American federalism include: a constitutional framework that guarantees the integrity of sub-national governments, a doctrine of shared sovereignty and a legally defined, regulated approach to intergovernmental relations. Depending on the attitude with which one approaches British devolution, it is possible to argue that the post-1997 arrangement either reflects many of these American features or none at all.

Both the British and American states operate within a constitutional framework. They are each divided on a territorial basis between central and peripheral institutions, and these divisions are organised by the different constitutional apparatus that operate in each country, within which "centre-periphery relationships are conducted" (Heywood 2007, 158). The United States and Britain possess very different constitutions, which goes some way towards explaining the contrast between their structures of government. The former consists of a codified document published in 1787, while the latter comprises a myriad different bills, statutes, traditions and authoritative written works that have not been consolidated into a single body of text (Jones et.al 2007, 84).

The federal system in America is guaranteed by this codified Constitution, which defines the powers that belong to the central government and those that belong to the states. For example, the Constitution grants the states the right to equal representation in the Senate, jurisdictional integrity, the right to a republican form of government, and protection from invasion and domestic conflict (Mackay 2009, 66), while granting the central government the power to "levy and collect taxes, to pay debts, and to provide for the common defence and general welfare" (Francis 2003, 77). On the republic's founding this constitutional framework envisaged the creation of a system of "dual federalism", one where the national and state governments were to operate exclusively within their own separate spheres of activity (Francis, 83). In recent decades, this arrangement has evolved more into a system of "cooperative federalism", where the different levels of government exercise powers, such as tax-levying, concurrently (Francis, 83). However, the fundamental principle of a multi-level government where power is jointly exercised remains enshrined in law through the Constitution (Francis). The relations between national and state governments are regulated under this legal framework, which cannot be altered except through the complicated process of constitutional amendment (Heywood, 163).

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In contrast, Britain's historical and constitutional evolution has created a predominantly unitary system of government, one where all sovereign power is vested in the Westminster Parliament. The doctrine of parliamentary sovereignty is one of the few constitutional rights guaranteed to Westminster, one which has complicated the process of devolution as it essentially overrides those rights and powers granted to the devolved assemblies in Scotland, Wales and Northern Ireland. Unlike in America, the UK government has the constitutional power to abolish its constituent assemblies, as sub-national government is not enshrined in the British constitution as it is in its American counterpart (Mackay, 66). Other features of the British constitutional system also make the state incompatible with the model of American federalism. These include the Acts of Union which bound the separate kingdoms of Wales, Scotland and Northern Ireland to England and the Westminster parliament and remain integral to the constitutional legitimacy of the United Kingdom itself. The traditional unity of the British state means there is no constitutional tradition or mechanism for the accommodation of devolution. The result has been that in contrast to the formalised federal system in America, Britain's attempt at sharing sovereignty has been "incoherent, centralist or inherently unionist" and resulted in the rise of a complicated web of power-sharing assemblies, parliaments and agencies rather than clearly defined and separate state governments as in the US (Bradbury 2006, 565).

On the other hand, the constitutional structures of both states are not fixed, but fluid, and in recent decades the changing interpretation of the US constitution has led some commentators to suggest that federalism is slowly becoming a less rigid arrangement with more in common with the structure of devolved Britain. This transformation is manifest in the shift away from the balanced system of "dual federalism" towards the more centre-biased "coercive federalism" prevalent today (Mackay, 164). Arguably this imbalance was precipitated by the steady growth of federal power that occurred after Roosevelt's New Deal, which led to the expansion of the centre's power "into areas that were traditionally the domain of state and local governments" (Francis, 85). Mackay notes how since Roosevelt the states have become increasingly reliant on federal funding and more restricted in their actions by centrally imposed mandates and laws that pre-empt their traditional powers (2009, 85). Indeed, the central funding of state governments is one feature of American federalism comparable with the post-1997 relationship between Westminster and Britain's constituent states. The US federal government funds the states through a series of "grants-in-aid", commonly divided into two categories- block and categorical (Mackay, 72). The former consist of monies allocated on a general basis, to be used at the discretion of the state legislatures, while the latter are allocated to fund specific programmes mandated by the central government, and as such can be regarded as instruments of federal control. For example, the Urban Renewal Program of 1949 granted exclusive monies to the states on the basis that they would be spent on regenerating cities (Mackay, 72). Similarly, the UK government funds the Welsh Assembly and Scottish Parliament with a block grant of £7 billion and £31.3 billion respectively, and controls the budgets of the Regional Development Agencies that act as semi-autonomous executives for the English regions (Jones et. al, 32; The Economist 2008). While the Scottish Parliament reserves the right to raise limited revenues through tax-varying powers amounting to 3p in the pound, in reality the devolved institutions rely on central funds as much as the American states (Bogdanor, 203). Naturally, the control of funds allows both Westminster and Washington to influence the sub-national policy process and impede regional attempts to initiate legislation concerning matters reserved for the centre. Therefore it is fair to conclude that while the constitutional nature of American federalism stands in contrast to British unionism, in practice the relationships between the US government and its states are comparable with those between the UK government and the devolved regions.

A second principal feature of American federalism is the doctrine which insists upon the equal and fair distribution of sovereignty between states. Each state has a right to its own legislature and executive (in the form of a Senate and Governor) and is guaranteed the right to a degree of self-determination by the 10th Amendment, which maintains that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (The Constitution of the United States).

Conversely, the British system features no such provision for the sharing of sovereignty. As a result, the devolutionary measures of the first Blair government did not result in an equal distribution of sovereignty amongst the constituent states and Westminster, but created an asymmetrical network of governments where the boundaries delineating the rights of Parliament and the lesser assemblies were left amorphous and open to exploitation by the centre. The Scottish Parliament, for example, was granted certain primary legislative and tax-varying powers while the Welsh Assembly was only empowered to introduce statutory instruments and secondary legislation (Jones et. al, 316).

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Furthermore, in contrast to the federal principle of semi-autonomy for constituent states, Westminster has an unrestricted right to legislate for the entire United Kingdom, regardless of whether centrally imposed laws conflict with sub-national prerogatives. This is spelt out in the Scotland Act in a statement confirming that the new power vested in Edinburgh “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland” (Bognador, 202). In addition, twelve years after devolution Westminster still retains vestigial Secretaries of State for Wales, Scotland and Northern Ireland in Parliament whose vague mandates trespass on the authority of the devolved legislatures. Indeed, Jones states that “most experts agree that the exact division of powers between Cardiff and London is unclear” (2007, 317) and much the same can be said for Edinburgh and Belfast. The tension arising from such blurred boundaries was made manifest during the first elections to the Welsh Assembly, which saw Alun Michael- the Secretary of State for Wales- enter office as First Minister (Jones et. al, 316). Michael was widely derided as Tony Blair’s “poodle” and struggled to win support from an Assembly that regarded him as an agent of Westminster (Bradbury 2003, 559). This incident was seen as emblematic of Tony Blair’s and Westminster’s undemocratic tendency to “choreograph the selection of people it liked in local leadership roles” (Jones et. al, 318). It certainly cannot be denied that the UK government has a very elastic respect for the autonomy of its constituent states and, in contrast with America, an institutional disdain for peripheral politics.

However, in some respects devolutionary Britain is coming to adopt the principle of shared sovereignty that is a feature of American federalism. In modern America, “many voters expect state rather than federal authorities to be responsible for a wide range of public policies” (Mackay, 82), an expectation that Scottish nationals have also begun to harbour. While the US government has sovereign power over national defence and the imposition of taxation and in modern times over social policy and the economy, state governments have retained sovereignty over more domestic issues such as the provision of welfare and justice (Francis, 77). Similarly, post-devolution Westminster exercises control over defence, foreign affairs, and the economy, but Holyrood has authority over traditional ‘home’ policies including education, health, planning and heritage, while Stormont will be granted powers over policing and justice on April 12th 2010 (BBC, 2010). It is thus fair to agree with Bognador’s conclusion that the sovereign relationship between Westminster and Scotland, Ireland (and to a lesser extent) Wales is “quasi-federal” rather than unitary (1999, 290).

Another defining feature of American federalism is that both levels of government, central and state, operate through their own agencies and exercise their authority over the people under their jurisdiction independently of one another. The federal government employs a civil service separate from that of each of the states, and neither can interfere with the activity of the other. Hence the variety of public policy in each of the American states- in Utah, for example, the selling of liquor is tightly controlled, while in Louisiana such restrictions are virtually non-existent (Mackay, 64). In addition, the institutions linking the state governments with the federal are clearly defined and regulated- each state has the ability to express its people’s views through their representatives in the Senate, while the Supreme Court monitors all legislative activity to ensure federal bills do not infringe on the rights of states (Francis, 78).

In contrast, there are only limited means for the constituent states of Britain to express their wishes to the centre and no formal separation of agencies. The parliamentary acts mandating devolution did not include provisions for the creation of separate Scottish and Welsh civil services, while the existing parliamentary secretaries for the devolved states provide the only links between the sub-national administrations and the Cabinet (Bognador, 212). In addition, Westminster MPs continue to have a considerable amount of influence over regional policy. Bradbury suggests that Scottish executive in 2005 was constrained in their ability to initiate legislation by the fear that any contentious legislation could have a negative effect on the national Labour party in General Election (2005, 288). Furthermore, Scottish MPs such as former speaker Michael Martin continue to involve themselves in regional matters such as Scottish hospitals despite these being issues reserved for the devolved assembly (Bradbury, 2005, 289).

On the other hand, certain political bodies can be said to regulate centre-periphery relations in a manner comparable to that which exists in America. On the creation of the Northern Ireland Assembly, Whitehall established a British-Irish Council to coordinate issues of common interest to Whitehall and Stormont (Bradbury 2003, 560). While not an elected assembly like the Senate, this council can be seen as an informal mediator intended to regulate quasi-federal communications between the national and sub-national governments. In addition, the intergovernmental relations between Westminster and its constituent regions have increasingly come to resemble the new arrangements that link

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Washington and the states. During the 'Great Society' era introduced by President Johnson, the central government began to circumvent traditional federal channels and bypass state legislatures entirely in order to implement and fund policy directly at the local level (Mackay, 72). Just as Washington is the chief provider of redistributive and development policies in America, Westminster designates those areas that qualify for EU developmental aid and centrally allocated assistance grants (Jones et. al, 318). The convergence in styles of intergovernmental relations has led Mackay to comment that "a much more confused and fragmented situation exists" (2009, 70) in federal America than originally envisaged, one that resembles the diverse range of policy networks that link the constituent states of the United Kingdom.

Ultimately, it is fair to conclude that while the principal features of American federalism remain inviolable, the evolution of the federal system over the last few decades has increased the similarities it shares with post-devolution Britain. There remain features of the American system that are incompatible with the British system, such as the legal division of sovereignty and separation of agencies. However, it can be argued that in the modern age one can identify as many features of federalism that are as comparable with devolutionary Britain as are contrasting. The amalgamation of state and federal powers, the increased capacity of the central government to control the states through grants and mandates and the growing convergence of central and peripheral policy are all features of the "competitive interdependence" form of federalism that can be seen reflected in the new British governmental structure (Mackay, 81). Indeed, the evidence would seem to suggest that it is American federalism that is coming to resemble British devolution, not the other way round.

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