Flexible Accommodation: Another Case of British Exceptionalism?

Stephen Tierney

Introduction

The period of territorial decentralization which began in the United Kingdom in 1998 has been dramatic. Since the election of a Labour government in 1997, the UK has experienced the greatest period of constitutional change since the 19th century and possibly since the Parliamentary union of Scotland and England itself in 1707. It is also notable that these changes have been, and continue to be, effected in an ad hoc manner, piece by piece without an overall grand plan for how they might fit within, or bring about the amendment of, the existing doctrines of the unitary constitution, most notably the legislative supremacy of the UK parliament, the constitutional dogma which offers a narrative of second-order power in the absence of a written constitution.

The fact that the process did not involve one overarching design for territorial decentralization or culminate in one foundational moment of constitutional renewal suggested to many in the late 1990s that the changes were likely to fail. But despite the fact that none of the designs for the ideal federal constitution developed within the academic literature over many decades were deployed to transform the unitary British constitution into a federal prototype, it is difficult to resist the conclusion after 15 years that the gradual devolution process, bringing about different models of government for each of Scotland, Wales, and Northern Ireland has been a remarkable success. The majority of citizens in these three territories, and even those of England who were not accorded devolved government, are content with devolution, albeit that many, particularly in Scotland, aspire to the decentralization of further powers. Furthermore, there has been a notable absence of
serious disputes over the divisions of competences between the center and the devolved territories, with very few cases coming before the courts contesting vires limits of powers exercised by devolved organs of government.

In this chapter I will seek partly to endorse this positive conclusion. I will do so by exploring how the unique model of accommodation applied in the UK is in fact heavily contextualized by the specific history of these islands and how it was designed in a way that is highly sensitive to both the long-standing and the more recent political particularities of each of Scotland, Wales, and Northern Ireland; in other words, devolution in the UK might appear to be ad hoc but in fact from place to place it was carefully tailored to meet the United Kingdom’s particular and very complex model of national pluralism. I will then explore the nature of the devolved settlement and in particular the asymmetry of “accommodation,” and again, nodding to the historically tuned nature of each devolution settlement, I will again endorse the flexible approach which allowed the devolved models to emerge easily and which has also facilitated their further development over time.

The conclusion, however, cannot be one of simple self-satisfaction. I will also turn to the greatest challenge now facing the United Kingdom in the form of the Scottish government’s planned referendum on independence which will be held in 2014. This promises the possible break-up of the state itself and as such it must logically raise the question: How can the Scotland Act 1998 be seen as a success story if less than two decades later Scots vote to leave the UK? But before all of this, I want to say something about the term “accommodation” as a tool of analysis in assessing the constitutional aspirations of substate nations within a plurinational state. This term is not entirely satisfactory in helping us to understand the dynamics of constitutionalism in the context of deep societal pluralism, and only by explaining this can we begin to comprehend the nature of the United Kingdom state’s success as a union of national partners.

Beyond accommodation: substate national societies and the quest for equality

I have elsewhere addressed the three main constitutional aspirations of substate national societies within plurinational states such as the UK, Canada and Spain as autonomy, representation, and recognition.1 The term “accommodation” is frequently used to describe the demands of substate national societies for forms of constitutional reform short of