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**Scotland, Devolution and Justice**

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## Abstract

When and how are regional differences, inequalities and divergences within the UK justified? How does devolution relate to equality, justice and social justice? As several authors have noted, these questions have not been adequately debated. They are addressed here in relation to the notions of territorial equity and so-called postal-code lotteries.

Often, 'social justice' is used merely as a laudatory term to signify whatever the user happens to approve of. 'Social justice' as articulated by David Miller would seem, *prima facie* at least, to clash with devolution. However, this is not necessarily a criticism of devolution. Although the term 'social justice' might be rhetorically forceful, the *rationale* for its advocacy has yet to be established.

Regional inequalities in general and those associated with devolution in particular are not necessarily unjust, when justice is conceived in a more orthodox and traditional manner, in terms of impartial treatment and the honouring of due rights.

## Introduction

According to Paxton and Gamble, 'In the UK, progressive governments have historically failed adequately to confront the relationship between social justice and democracy. One specific oversight has been the lack of serious debate of when to accept devolution and local differences'. (Paxton and Gamble, 2005, p. 218) They say of the implications and effects of devolution to Scotland, Wales and London that: '... the fundamental questions that they raise for Britain's welfare state and for social justice have been largely ignored. It is untenable to continue to sweep these issues under the carpet' (p.219). A similar sort of claim is made by Bogdanor when he writes:

'It is a paradox that our new constitution, although promulgated by Labour, exemplifies liberal rather than social democratic values. It limits the incursions that governments can make into our civil rights, while implying a preference for diversity over uniformity. It makes it harder for a government of the left to secure equality of conditions in different parts of the kingdom. The welfare state was based on the principle that benefits and burdens would depend on need, not on geography. Devolution negates that philosophy.' (Bogdanor, 2003)

Bogdanor was alluding to Donald Dewar, who wrote in the preface to 'Social Justice – a Scotland where EVERYONE matters.'

'We are committed to promoting social justice and equality of opportunity for everyone in Scotland... we can build on the commitment to social justice which lies at the heart of political and civic life in Scotland. We need to harness the efforts of many to the greater good of all, and establish social justice as the hallmark of Scottish society.'

Notice – if the idea is a coherent one - that if everyone in Scotland had an equal opportunity, they would be unlikely to have an opportunity that was equal to the opportunity of the people in, say, the south east of England, the north east of England or the people in the UK as a whole. However, it says on the blurb of *From Social Justice: Building a Fairer Britain*, (Pearce and Paxton, 2005) ' ... what can the government do to build a fairer society in the UK? The result is a book that clearly articulates the principles of social justice and sets out the radical reforms needed to create equality of opportunity in the UK'. How does 'social justice' for the UK relate to 'social justice' for parts of the UK such as the North East of England or Scotland?

There is a need for debate about the general question of the justification of inter-regional differences, inequalities and disparities within Britain, many, but not all, of which are related to devolution. (See Morgan, 2002) The more specific questions of how such differences, inequalities and disparities relate to justice

and to 'social justice' also need to be addressed. We shall, first of all, consider what is meant by the terms 'justice' and 'social justice'.

## **Justice and the State**

In our view, justice should be considered with reference to rights; rights should always be considered in relation to duties. People are treated unjustly when they are denied that to which they have a right of recipience (See McLachlan, 2005a). People have a right of recipience to something or other when some person or agency has a duty to give it to them: to act towards them in a particular way or, to refrain from acting towards them in a particular way. For instance, if someone is murdered, then he is treated unjustly since someone who had a duty not to kill him has failed to fulfil it. His right not to be killed in the particular way that he was killed has been infringed. If someone dies then, however unfortunate such an occurrence is, it is not in itself an injustice. We have a right not to be killed in particular ways and circumstances but we do not have a right to immortality. No one could and no one is obliged to provide us with it. Death, even premature death is not in itself an injustice. There are two types of justice, legal and moral, dependent upon the nature of the right in question.

It is not only people who can have legal rights of recipience and can thus be treated justly and unjustly. Some particular sorts of social categories can have a corporate identity and make corporate decisions and so forth. The Women's

Institute for instance has legal rights and duties although the category of women as a whole and men as a whole does not have rights and duties. Acts of injustice against particular women cannot be remedied by the compensation of other particular women. There are sorts of regional organisations and agencies that can have legal rights and can thus be treated justly and unjustly. However, geographical areas as such do not have legal rights.

The question of whether it is only people who can have moral rights is an interesting and complex one. Even if some sorts of social categories can be the bearers of moral rights, it does not seem to us that geographical areas as such can be.

Injustices are wrong, sometimes very wrong. However, inequalities as such, either between individuals or groups are in themselves neither good nor bad. It all depends on how and why they come about. They might but might not be indications of other occurrences and behaviour that are unethical. For instance, there are differences in life expectancy between those living in deprived and those living in wealthy areas. Suppose that, somehow or other, those people now living in affluent areas became less healthy than they are. Suppose that life expectancy in such areas was thereby reduced such that it became equal to the present life expectancy of those people living in deprived areas. It would seem to us to be absurd to regard such equality as a moral improvement on the current unequal state of affairs. The government seems tacitly to acknowledge this point

in their policies on inter-regional growth rates where the measures only count if the disparity is reduced by the bottom moving towards the top.

Suppose that the health of those living in deprived areas was to increase greatly. Suppose that it were to increase to such an extent that the life expectancy of those living in deprived areas became very much higher than that of those living in affluent areas. Would such an inequality *qua* inequality be an injustice or in any other way morally undesirable? We cannot imagine why it would be. It would seem ludicrous to say that it would be good if the health of those in deprived areas improved as long as it did not improve too much.

Outcomes and treatment that are equal in some respects will be unequal in others and we cannot use the notion of equality to decide which equalities matter and which ones do not. For instance, if a lecturer were to give all of his students 35% for their essays, he would be treating them all equally but few of them justly. What is central to just treatment in this context is the notion of impartiality. Individual people, regardless of who they are and what they are should be treated differently by official agents and agencies when there are relevant reasons for treating them differently and treated the same when there are no relevant reasons for treating them differently. In some, although not all, contexts, people have a right to such impartial treatment.

Notice that there is a distinction between equality of individual treatment and equality of collective outcomes. If a lecturer were purposely to mark his students' essays such that the average mark for, say, male and female or black and white students was the same, he would be treating the individual people concerned unfairly and unjustly. He would be failing to treat the individual people impartially.

### **Miller on 'Social Justice'**

Traditionally, conservative thinkers have been wary of the notion of 'social justice'. (See, for instance, Hayek, 1976) However, nowadays, the Conservative Party, no less than the Labour Party, are keen to be associated with it. David Cameron and Ian Duncan Smith are, in particular, enthusiastic users of the term. (See <http://www.centreforsocialjustice.org.uk/default.asp> ). How does 'social justice' differ from justice? What, if anything, does it mean?

Miller thinks that '... there is no single objective that defines social justice', he says that 'social justice' is to do with re-shaping society '... so that each person gets a fair share of the benefits, and carries a fair share of the responsibilities of living together in a community'. (Miller, 2005, p. 3) What is a fair share? What counts as a 'community'? Do we all live in one? Might not some people live in several and some live in none at all? Does Scotland count as a community? Does the UK count? Does Bearsden count? Does, say, the North East of



England count as a community? These questions are fudged. Nonetheless, it would seem that however 'communities' are delineated, there is a conflict, even if not a formal contradiction, between 'social justice' as Miller envisages it and geographical, regional and national variation and inequality. What would be considered a fair allocation of rights and duties (however 'fairness' is defined) for a particular individual who is classified as a member of community X might not be considered to be a fair allocation when that individual is thought of as a member of the broader community Y or when he is compared with another typical individual who lives in another subset of Y, community Z. Similarly, what would count as an income sufficient to finance a socially acceptable life style would vary from community to community as would the life style.

According to Miller: 'Social justice tells us how different types of goods and bads should be distributed across a society. Because goods are diverse, the principles of distribution should be diverse too. For instance, it would be folly to propose that income should be allocated by the same criteria as healthcare. But the core idea of social justice is contained in the following four principles...'. (Miller, 2005, p. 5) These he cites as: equal citizenship; the social minimum; equality of opportunity; fair distribution. It is not clear that these are four ethical principles rather than, say, rhetorical slogans or political dogmas. They are as follows:

**'Equal citizenship'**: Every citizen is entitled to an equal set of civil, political and social rights, including the means to exercise these rights effectively.

***The social minimum:*** All citizens must have access to resources that adequately meet their essential needs and allow them to live a secure and dignified life in today's society.

***Equality of opportunity:*** A person's life-chances, and especially their access to jobs and educational opportunities, should depend only on their own motivation and aptitudes, and not on irrelevant features such as gender, class or ethnicity.

***Fair distribution:*** Resources that do not form part of equal citizenship or the social minimum may be distributed unequally, but the distribution must reflect relevant factors such as personal desert and personal choice'. (Miller, 2005. p. 5)'

In our view, it is not the nature of the goods that affects the nature of justice relative to their distribution but how they are distributed. For instance, because there is an NHS, it becomes a matter of justice how health care is distributed. Similarly, if, say, orange juice or sex were distributed free at the point of delivery by the state, it would become a matter of justice how they were distributed. However, it is not similarly a matter of justice that health care, orange juice and sex are distributed by the state. If the state distributed such goods and services, it ought to do so impartially. However, perhaps it ought not to be involved in their distribution. (See McLachlan, 2005b)

To say how things should be distributed is not the same as saying how the state should distribute them. From the proposition that such and such ought to happen, nothing follows about how any particular person or how the state ought to act. It might, for instance, be for the best if it were to happen that Great Aunt Freda were to die. (See McLachlan and Swales, 1999) It would not follow that the state or any one else should kill her.

Furthermore, it is not clear that it actually would be good if what Miller says should happen were to happen (no matter how it came about). It is not clear that goods and 'bads' should- nor that they could- be distributed as Miller says they should.

That which the state distributes should be distributed impartially by the state. However, not everything is or should be distributed by the state. Even when the state is the distributor, it is not true 'the distribution must reflect relevant factors such as personal desert and personal choice'. Sometimes such factors will be relevant but not always. The state ought to distribute impartially but that is another matter. For instance, in the past, orange juice and school milk were distributed, and not unjustly so, on the basis of factors other than personal desert or need. In some circumstances, it might be appropriate to raise a conscript army. Personal desert and personal choice need have nothing to do with a just

selection of soldiers. Age and sex discrimination in combination with a random selection of names is likely to be far more appropriate

If the notion of 'social justice' is applied to the UK as a whole then, devolution and regional variations and inequalities would, *prima facie*, seem to clash with each of the four elements cited by Miller. For instance, even without devolution, such rights and duties that people in the UK have as citizens depend on where within the UK such people happen to be citizens. Residents in, say, Edinburgh have different rights and duties from those of, say, London. For instance, one can get married at sixteen in Edinburgh but, in London, one cannot get married (without parental consent) before the age of eighteen. If someone gets a divorce in Scotland, on, say, the basis that he has a residence in the Mull of Kintyre, he might well be required to pay his former wife far less than he would have been if the case had been heard in England. Residents of Scotland but not England have a right to free personal care in addition to free health care in the event of the geriatric need of it. There is a host of other such differences in rights and duties. Similarly, there are regional differences pertaining to opportunities, socially expected life-styles and the distribution of resources that would seem to fit uneasily with the notion of 'social justice'. Whether such differences are unjust is, as we shall see, another matter.

## **Territorial Equity**

According to Gibbons, Green, Gregg and Machin:

‘Geographical disparities in economic and social outcomes, for the broad regional to the community level, have been a concern to those seeking social justice for centuries.... In essence, the concerns have two components. The first is a simple sense of territorial equity, namely that people should not be disadvantaged by where they live. The second, deeper, concern is that spatial imbalances can have substantial economic and social costs’. (Gibbons, Green, Gregg and Machin, 2005, p. 301).

Spatial imbalances can, of course, produce substantial economic benefits. They can be springs of economic trade, motive forces of the sort of transactions from which all transacting parties can benefit even if, as often happens, one party might benefit more than another. However, we shall focus here on the suggested notion of ‘territorial equity’.

Is it true to say that: ‘people should not be disadvantaged by where they live’? It is far from clear that it is. Would the world be a better place if no one were advantaged or disadvantaged by where they lived? Cannot disadvantages be turned by ingenuity, industry and luck into comparative advantages? Even if it were true, it is not clear what if anything would follow from the vague, general claim concerning public policy.

Suppose that we are born in, say, Scotland rather than, say, California or the south-east of England. However, advantageous or disadvantageous it might be to be born in Scotland, no one has a right to be born here or a right not to be born here. No one has a right to born elsewhere. No one has or had a duty to ensure that those who were born in Scotland were born in Scotland. No one has or had a duty to ensure that those who were born in Scotland were born elsewhere. Similarly, it is not a matter of justice or injustice – whether moral or legal- where in, say, Scotland we were born if we were born in Scotland. Some things are a matter of luck rather than justice.

It might be unfair that some people are born in, say, the south-east of England rather than Scotland or born, say, in the 21<sup>st</sup> century rather than the 17<sup>th</sup> century or born, say, to working class parents rather than to other ones. Unfairness, however defined, is not the same as injustice. It is not the job of the Scottish Executive or Her Majesty's government or any similar agencies to combat unfairness or promote fairness as such. There is, as has been argued, a difference between what happens and what is done. Hence, even if it were true that people should not be disadvantaged by where they live, it is not clear what if anything would follow. There are no discernable policy implications. It is not at all clear how the moral and legal duties of individual people or of governments mesh with the alleged principle that people should not be disadvantaged by where and when they live.

It is a matter of equity that people should be or not be treated in particular ways. Whether it is a matter of equity- while it may be of concern on other grounds and worthy of attempted rectification- that certain things should or should not happen to them is debatable. For instance, if someone is struck by a mugger, the action is clearly an injustice. If, however, someone is struck by lightning, however unfortunate the event might be, it would not count, in our and in most notions of justice, as an injustice even although he was struck because of where he happened to be at the time and even although he was thereby disadvantaged by where he happened to live

Sometimes, but not always, it would be wrong to **discriminate against** people on the basis of where they live but that is not the same as saying that people should not be **disadvantaged** by where they live. Discrimination and disadvantage are different. How and why things come about and not merely what comes about matters in relation to ethics in individual conduct and public policy. Not all disadvantage is the result of discrimination. For instance, some but not all of the differences in the typically different experiences of men and women are the result of discrimination. In Scotland, men are, on average, taller and physically stronger than women. This might be advantageous or disadvantageous but it is not in itself the result of discrimination - whether unjust or just discrimination – although it might lead to discrimination.

## **Justice, Social Justice and Public Spending in Scotland and in the UK**

Justice requires the state to treat individual citizens impartially rather than equally. Thus if, say, the prison population in Scotland represents a bigger proportion of the total population than the prison population in England, this is not necessarily unfair or unjust. In the provision of penal policy, the fair and just thing to do is clearly not to give every one in the UK an equal time in prison. Nor should the proportion of the population in prison be necessarily equalised between England and Scotland. Similarly, consider, for instance, unemployment benefit and family allowances. Justice requires that such payments are made to individual claimants on the basis of relevant criteria. If it turns out that more money is paid out per-head thereby to people who live in some particular part of the UK than is paid out per head to people in the UK as a whole, this is not necessarily unfair or unjust.

More public money is spent in Scotland than is raised by taxation in Scotland (Scottish Executive, 2005). The latest Treasury figures also indicate that identifiable expenditure on services is £1503 more per head in Scotland than in England (HM Treasury, 2006). In some quarters there is much resentment caused by this inequality. We would argue that it might or might not be unfair but that it is not necessarily unjust.



For various practical reasons, many public services are provided at a regional level rather than on an individual basis. For instance, we could not all have, even if we wanted to have one, a hospital, a university, a golf course or an international airport of our own on our own doorsteps. Since the 1960s, there has been a widely accepted notion that public services should be standardised across space (See Davies, 1968). The idea is that although the costs of providing public services will be territorially variable, the quality of the services provided should not consequently be adversely affected. Whatever region one lives within, one should have the same range and quality of public services. Although this ideal is not likely to be an obtainable goal, the political decision has been made to pursue it. Part of what membership of a state involves is the obligation to make sacrifices, including financial ones, in order to meet what are decided to be collective aims.

Devolution makes this notion of standardisation across regions much more problematical. The United Kingdom has long had devolution to local government, but central government has sought, in those areas where local authorities have competency, to intervene to limit the choices permitted by devolution (See O'Higgins, 1987). Scotland, Wales and Northern Ireland had administrative devolution through their respective Secretaries of State prior to the 1998 devolution proposals.<sup>1</sup> The existence of these figures reflected central government's acknowledgement that some standard policies were better

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<sup>1</sup> Northern Ireland had a devolved legislature in Belfast from 1920 until devolution was suspended in 1972 and direct rule, through a Secretary of State, imposed.

implemented at a sub-central level and that some areas were better covered by non-standardised policies. In such instances, to permit Northern Ireland, Scotland and Wales to be different, was an appropriate way for the Government to treat such regions equally and impartially.

However, the acceptance of policy variation by the Labour government as a part of policy devolution to Scotland, Wales and Northern Ireland changed the relationship between central and sub-central government. Whereas before devolution central government was able to enforce its will on local government and permit slight variation within a standard policy through the territorial secretaries of state, the greater perceived legitimacy of the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly have made that much more difficult. The nature of devolution in the UK maintained the sovereignty of Westminster, but gave the devolved assemblies the right to make their own decisions by stating that Westminster would not intervene unless these decisions were prejudicial to the interests of the whole UK. Policies in some parts of the UK are now very different due to devolution, consider for instance: university tuition fees in Scotland, prescription charges in Wales, hospital and school management systems in England.

An issue of some importance, and one more visible under devolution than before, is the leeway permitted in policy choices and formations by the different budgets available to the governments and executives within the United Kingdom. Before

devolution it was readily admitted that standard policies, or near standard policies, were more costly to implement in some parts of the United Kingdom than others. Scotland, Northern Ireland and Wales often required greater funds due to issues of costs associated with, amongst other factors, relative rurality and sparsity of population. Devolution has not altered the funding system that passes resources to Belfast, Cardiff and Edinburgh, but the elected parliament and assemblies in these cities are responsible for setting policy and determining resource allocation. Identifiable spending per head is greater in Scotland than in England. It is not at all clear, however, whether this sum is greater merely by the amount required to employ standard policies across the whole of the United Kingdom. If so and devolution permits mere rearranging of resources – the cake to be cut in different ways – then individuals are not being treated differently in terms of resources by where they live, government is taking a given resource and matching it most closely to the policy preferences of its citizens.

A quite different point is when Scotland, Wales and Northern Ireland receive different levels of funding per head as between themselves and England and these funds are more than required to fund a standardised, most likely English, level of expenditure. There are good economic reasons why this might be the case. Alesina and Spolaore (2005) have argued that peripheral areas receive greater levels of funding from the centre in recognition of their geographical and social distance from the centre. The benefit in return to the centre is in developing economies of scale in the provision of national public goods.

## **Devolution and Justice**

It is not always inappropriate that people are disadvantaged or advantaged by where they live. Devolution, in its various forms and senses illustrates this. The outcome of the application of the rules and principles of devolution will, in all likelihood, be geographical variability. That does not mean that the rules or their application are necessarily unjust. It is what one should expect. It is inherent to devolution.

Suppose that some particular person is born in and spends his life in a country or section of a country which is controlled by elected members of the Labour party and that some other particular person is born in and spends his life in a country or section of a country which is in one which is controlled by elected members of the Conservative party. It might well be the case that one of the people is disadvantaged relative to the other one as an indirect consequence of where he lives. Otherwise, one might wonder what the point in having opposing political parties is. This might be bad luck but it is not, in our view, an injustice. He has no right that is breached by this electoral outcome.

When people who live in different places are treated differently, it does not follow that they are treated differently because they live in different places. The reason and possible justification for the difference might be some other than geographical and other mere physical sorts of disparity. It is not always morally

objectionable when people are said to be disadvantaged by where they live. In this regard, the use of the term 'post-code-lottery' in relation to NHS health care provision is instructive (See Puttick, 2005). The term is an extremely misleading one in this context. It confuses the separate issues of the principles used in the allocation of medical treatment and the outcome of the application of such principles.

If people who requested treatment for, say, cancer were given or denied treatment by health boards or other official agencies and agents on the basis of their post-codes, this would be a ghastly injustice. However, if people who request such treatment are treated impartially by the health boards and other official agencies and agents concerned and given or denied treatment on the basis of relevant criteria, the outcome might be that people who happen to live in different post-codes are more likely to receive particular treatment or to receive it more promptly. This would not necessarily be either ghastly or unjust. Often, and sometimes with good reason, the authority of the state and its organs and institutions is devolved. There can be benefits in allowing a devolved authority to make its own decisions and manage its own affairs in certain spheres. One of the effects of such devolution will be that devolved bodies will sometimes have different priorities and sometimes make different decisions. Were this not so, devolution of authority would be pointless.

There is a distinction between direct and indirect disadvantage. It is inevitable that, since they can be directly affected by devolution, people will be, quite properly, indirectly advantaged and disadvantaged by where they live. For instance, those who live in London and who drive motor cars are, unlike residents of, say, Edinburgh who drive cars, required to pay a congestion charge. However, this unequal treatment is not an injustice. It is not an infringement of the rights of residents of London or of Edinburgh. The difference in treatment and in experience is not the result of a post-code-lottery, it is the result of devolution. This is what devolution means. It might, for instance, happen at some stage that those who live in Scotland will pay a higher rate of income tax than those who live in the rest of the UK. It is not an injustice that people living within different devolved jurisdictions have different experiences and, sometimes, different rights and duties. How fundamental such different rights and duties are and how fundamentally they can differ within the one polity is a matter of interpretation and debate.

## **Conclusion**

Questions about the justification of regional, territorial and national variations and inequalities are more complex and more interesting than they often first appear. It is clear that not all such inequalities and divergences are necessarily unjust although some of them might be. Devolution would seem to be in conflict with or, at least, not in harmony with 'social justice' insofar as it leads to and is associated with a variety of inequalities and differences. Of course to say this is

not to condemn devolution or regional variations and inequalities. 'Social justice' might not be a meaningful or laudable goal (See McLachlan, 2005a).

Consider, for instance, the observation that at present, economic growth and the absolute level of GVA *per capita* in the North East region of England are below those levels in Scotland, while public expenditure in Scotland is considerably higher than that in the North East region. Is it contrary to social justice? Is it unjust?

Because, for instance, the chances of earning high salaries are different in the North East of England from other places in the UK, the situation as we have described it seems to be contrary to 'social justice' as Miller outlines it. However, this seems a hollow observation. To say that the divergences and inequalities between the North East and the UK as a whole are instances of 'social injustice' if one defines 'social injustice' in terms of divergences and inequalities is to say something that must be true by definition. What is wrong with inequalities and divergences? One needs arguments rather than mere definitions of terms in order to grapple with such a question.

Paxton and Gamble argue that there are circumstances where devolution (and other regional variations) might not be incompatible with what they think of as 'social justice'. However, it seems clear that the circumstances they have in mind will not invariably come about. They say that, in terms of a consideration of

'social justice' the differences at issue are desirable or acceptable if five questions can be answered in the affirmative. The questions are these:

'Is this policy area central to the definition of national citizenship?....Is this policy area central to a sense of regional or local identity?....Is the demand for the service different across the country?....Does justice demand a uniform social minimum or is a 'floor' below which provision will not fall acceptable?....To what extent can improved overall outcomes result from experimentation.... Will devolution make it harder to achieve distributional objectives?' (Paxton and Gamble, pp230-231)

Is the situation as described concerning the North East of England unjust? One would need to distinguish in the situation that has been sketched between what has been done and what has merely happened. It is not clear that the inhabitants of the North East of England have been treated unjustly as citizens. Membership of a state is not like membership of a bank where individual depositors are entitled to reclaim what they have given into its safe-keeping. The same goes for categories of citizens, however such categories are formed. For instance, some people choose to get married and some people choose to have children and some people choose to smoke. It is not the job of the state to try to ensure that married people as a category are not in effect subsidised by unmarried people or that smokers as a group do not subsidise non-smokers or that people without children do not subsidise those with children (or *vice versa*). Similarly, it is not a



principle of justice that all and only the money raised in taxation within a particular geographical area or political region should be spent within that geographical area or region.

If, for instance, the state were treating the citizens of Scotland and the North East of England differently where there were no relevant reasons for such different treatment, the treatment would be unjust: but it is not like that. It is not as if, say, people in the North East of England paid a higher rate of income tax than comparable people in Scotland. The treatment seems to be appropriately impartial. There is too no existing agency or body in the North East of England that is denied the enjoyment of rights that are accorded to a comparable existing Scottish agency

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