

THE DEVOLVED UNITED KINGDOM¹

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SUMMARY: I. *The Constitutional History of the development of the United Kingdom.* II. *The consequences of the doctrine of Parliamentary sovereignty (or supremacy) regarding federalism, devolution and Regionalism.* III. *The United Kingdom's experience of devolution prior to the 1998 Acts of Parliament.* IV. *The 1997 labour Government, and its (devolution) constitutional reform agenda.* VI. *The english question. Why is regionalism the government's preferred answer?* VII. *The multi-layered United Kingdom Constitution.* VIII. *Select bibliography and Web-site addresses.*

I. THE CONSTITUTIONAL HISTORY OF THE DEVELOPMENT OF THE UNITED KINGDOM²

- a) '*United Kingdom*' refers to the United Kingdom of Great Britain and Northern Ireland.
- b) '*Great Britain*' refers to England, Wales and Scotland.
- c) '*British*' refers to Great Britain; it may also be used to refer to the United Kingdom. There are, however, many 'labels' of national identity which the people in Northern Ireland might use to describe themselves: Irish, Northern Irish and Ulster are three other such adjectives in addition to British.
- d) The current population (2001 Census) figures are:

England	49.0 m
Scotland	5.0 m

¹ The financing of devolution is not considered here. It is regulated by the Barnett Formula. For details on this, see House of Commons Research Paper 98/8, 1998.

² Current terminology, background facts, etc.

Wales	2.9 m
N. Ireland	<u>1.6 m</u>
United Kingdom	<u>58.5 m</u>

e) The United Kingdom developed as follows:

England and Wales: Acts of Union 1536 (broad principles) and 1542 (the details).³

England and Scotland: the Acts and Treaty of Union 1706/7. (This was a union of the Parliaments. The union of the Crowns had taken place in 1603.) The Scots almost invariably refer to the Treaty of Union and the English to the Act.⁴

Great Britain and Ireland: Acts of Union 1800, effective from 1 January, 1801.

The history summarised in the next sentence is a long one but in essence 26 of the Irish counties which are now the (Republic of) Ireland ceased to be a part of the United Kingdom in 1922. The remaining 6 (north-eastern counties) (*now Northern Ireland*) remained in the United Kingdom.⁵

The history of the formation of the United Kingdom, although it can only be dealt with very briefly here, is necessary to an understanding of the devolved United Kingdom for four reasons.

First, it highlights the significance of the doctrine which has been described as the keystone of the British constitution, namely, the sovereignty of the Westminster Parliament. Secondly, we need to consider whether or not that doctrine is solely an English doctrine —*cf.* Scotland— or whether it is a British constitutional doctrine. Thirdly, did the various Acts of Union create a ‘*union state*’ (that is, one in which the component nations retained at least some of their prior national/civic identity and the means of their expression) or a ‘*unitary state*’ (that is, one in which all major political power is centralised in the one sovereign Parliament in London). This issue, especially recently, is sometimes phrased in these terms, particularly with regard to the union between England and Scotland: was the union an ‘incorporating’ union or a ‘federating’ union? On this issue too, there may

³ From 1746, until its repeal by the Welsh Language Act 1967, the Wales and Berwick Act provided that statutory references to England included Wales.

⁴ Each Parliament passed an Act, so the plural is necessary.

⁵ See Hadfield, *The Constitution of Northern Ireland* (1989), chapters 1 and 2.

be distinctive English and Scottish answers. Fourthly, therefore, it should be noted that the present system of devolution in some ways builds on the history of the UK.

Seventeenth century English constitutional history was marked by a series of highly significant constitutional clashes between Parliament, especially the House of Commons, the King and the Courts. The Courts sometimes decided for the King, sometimes for the Parliament. Besides certain (historically) key cases there were other manifestations of these ‘power-struggles’ too: a civil war (between Royalists and Parliamentarians), the execution of the King (Charles I), the existence of a republican form of government, the “Commonwealth and Protectorate” during which England had the nearest it has ever had to a ‘written’ constitution (the Instrument of Government 1653), the restoration of the monarchy (1660, Charles II), and, with an increasingly strong element of conflict between Anglicans/Protestants, on one hand, and Roman Catholics, on the other, the abdication of James II (also known as James VII of Scotland).

The *Bill of Rights* 1688/9 resolved the many issues in favour of the *centrality* or overall *dominance* of Parliament, both by curbing royal power (especially with regard to Parliamentary legislation) and by making succession to the throne dependent on Parliamentary will.

(The *Act of Settlement* 1700 secured the independence [of tenure] of the [higher] judiciary.)

The Bill of Rights secured the centrality/dominance of Parliament in the constitution; this doctrine (imperceptibly) over time became the doctrine of the supremacy (or sovereignty) of Parliament. The doctrine was, clearly, ‘boosted’ politically by (19th reforms to electoral law enhancing the democratic legitimacy of the House of Commons.

The classic exposition of the doctrine was made by Professor A.V. Dicey in his *Law of the Constitution* 1885:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament... has, under the English constitution, the right to make or unmake any law whatever, and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

This doctrine is not a moral doctrine, or a doctrine about the political power of Parliament. The essence of the doctrine is that there are *no legal*

limits on the powers of Parliament. That is, the courts will not, cannot, entertain or uphold any challenge to the validity of an Act of Parliament. They owe such Acts their full and dutiful obedience; their duty is to interpret and apply them but *not* to rule on their validity.

This doctrine is so deeply rooted in judicial thinking that there is only a handful of cases over the last 300 years which in any way involve a challenge to the validity of an Act of the Westminster Parliament.⁶

For a Scottish opinion that the doctrine of Parliamentary Sovereignty is an English one and not Scottish: see *MacCormick v. Lord Advocate* [1953] S.C. 396, per Lord President Cooper (*obiter*):

The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law... Considering that the Union legislation [of 1706/7] extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done.

When this *dictum* is combined with the existence of certain ‘fundamental’ provisions in the Treaty of Union (primarily related to distinctive elements of Scottish religious and civic society) then it can be seen why the concept of a federating union is stronger in Scotland than it is in England.

Since the Bill of Rights, Act of Settlement and Acts of Union, change in Great Britain has been evolutionary or incremental. Specifically the doctrine of Parliamentary sovereignty (not universally but almost so) has been accepted as the keystone of the UK constitution. This doctrine prevents (without fundamental ‘revolution’) the emergence of a written constitution which would allocate powers to Westminster and prevent it from legislating on certain topics. If Parliament were to legislate for such a constitution, Parliament, under the doctrine of sovereignty, could equally legislate to re-

⁶ I am not addressing here the impact of the UK’s membership of the EC/EU on the doctrine. There is a clashing of competing sovereignties in this regard and the issue has engendered considerable political debate and judicial dicta. They are not, however, relevant here and, as will be seen below, the language of the devolution Acts 1998, both statutory and political, is the language of Parliamentary sovereignty.

peal it. A sovereign Parliament must remain sovereign, it is not bound by its predecessors and cannot limit its successors (This last point is not a restriction on sovereignty but a necessary element in its definition).

This argument can, however, become too removed from real debate. What matters here is the impact of the doctrine on the *non-emergence* of the United Kingdom as a federal state or to put it another way: it explains why a decentralised United Kingdom is devolved and/or regional rather than federal.

II. THE CONSEQUENCES OF THE DOCTRINE OF PARLIAMENTARY SOVEREIGNTY (OR SUPREMACY) REGARDING FEDERALISM, DEVOLUTION AND REGIONALISM

For as long as the doctrine of Parliamentary Sovereignty exists, the UK cannot ever be a federal state. Federalism (usually) requires these elements: a written constitution (fundamental law); allocating exclusive powers between the centre (federal authorities) and the states/provinces/regions; an amending power which involves both the central and at least some of the provincial authorities (that is, a unilateral power of amendment is regarded as hostile to the federal principle). Usually too a federal constitution involves courts who act as “boundary riders”, adjudicating on the extent of *both* federal and provincial powers. In many if not all respects the federal and regional authorities are regarded as of co-ordinate status. As can be seen from that brief and general summary, sovereignty of Parliament as a doctrine is incompatible with the key aspects of federalism: all legislative power in the UK stems from the Westminster Parliament and is limited by it, and if necessary by the courts. Devolved/regional authorities, thus, derive their powers from Parliament and are limited by Parliament not by an over-arching or fundamental constitution. The courts, through judicial review and related procedures, will consider the validity of devolved/regional authorities but not (*pace* EC law) the validity of an Act of the Westminster Parliament.

Devolution, therefore, contains features which reflect the doctrine of Parliamentary sovereignty, such as locating the power to amend the devolution Act in Westminster alone and retaining the power of Westminster to

legislate in the devolved areas. These principles will be referred to in Section 5 below.⁷

Of greater difficulty are the ways in which devolution and regionalism are to be distinguished. Devolution is unusual in the UK; regionalism is not. It is easy to make distinctions in terms of what may be termed ‘political’ criteria. Almost invariably in the UK, “devolution” is used to refer to the establishment of executive and legislative power in one of the four component national elements *in their entirety*. That is, there is devolution to Scotland, or to Wales or to Northern Ireland; a lesser/smaller geographical unit could receive ‘local government’ or regional powers but this would not (usually) be called devolution. The political status, therefore, of devolved authorities in the UK’s ‘nations’ is considerably greater than that of local authorities/regional assemblies because of the nature of the area they represent and the social, cultural and historic associations of each ‘nation’. The word ‘nation’ is not, in international law terms, correct for England, Scotland, Wales and Northern Ireland. The UK is the nation for those purposes; it is increasingly common, however, in the UK devolved context to use ‘nation’ to refer to the component parts of the UK and this usage will be followed here. ‘Local/regional government’ will be used to refer to sub-national areas, *e. g.* the north-west of England, Belfast City Council, West Lothian Council, etc. (The word ‘regional’ is used for the larger sub-national areas, and ‘local’ for the smaller sub-national areas.)

It is harder *legally* to distinguish devolved government from local/regional government, although clearly the ‘national’ dimensions to devolution will influence the type of institutions elected (powers, composition, etc.) and the possible responses of the courts to *vires* challenges.

These general points will be considered in the context of UK devolution and English regionalism below. For the moment, it is sufficient to note:

1. the strength and pervasiveness of the doctrine of Parliamentary sovereignty; and
2. the potential for a complex multi-layered UK constitution —the European Union; the Westminster Parliament; the devolved institutions; regional and local government.

⁷ It is possible for constitutional convention, political behaviour, judicial rulings to blur ‘clear’ distinctions.

III. THE UK'S EXPERIENCE OF DEVOLUTION PRIOR TO THE 1998 ACTS OF PARLIAMENT

The history of Northern Ireland is a complex and difficult one. (See, for a constitutional law analysis prior to 1990: B. Hadfield, *The Constitution of Northern Ireland*, 1989)

The over-riding factors which influence all else are:

1. The debate about the constitutional status of Northern Ireland—should it be a continuing part of the United Kingdom (which includes the question— should Ireland have ever been divided in the 1920's?) or should it become a part of a (sovereign, independent) united Ireland?
2. The fact that in Northern Ireland there are two communities (which are increasingly moving towards but not yet of co-equal size). They are usually identified by religious labels (Protestant/Roman Catholic) but what is of key concern is the convergence of religious identity and political preference (Protestants, who prefer the *UNION* between Great Britain and Northern Ireland; and Roman Catholics, who prefer the Nationalist/Nation-Hood of all Ireland).⁸

The incidence and the human cost of 'the Troubles' throughout the history of Northern Ireland constitute a backdrop which should never be forgotten.

Northern Ireland experienced two systems of devolution, very different from each other prior to the Northern Ireland Act 1998. The first lasted for 50 years; the second for 5 months. The two Acts of the Westminster Parliament which set up the two systems are respectively:

- the Government of Ireland Act 1920; and
- the Northern Ireland Constitution Act 1973 (and related legislation).

These Acts cannot be dealt with at any great length, but here are some of the key elements/issues of these two devolved systems to Northern Ireland.

⁸ These two communities do also divide —loyalist/unionist— nationalist/republican—often but not always over the attitudes taken to the use of violence to pursue political preferences).

- Provisions on the Constitutional status of Northern Ireland;
- All-Ireland dimensions;
- Nomenclature – this is very important both constitutionally and politically: Parliament or Assembly; Prime Minister or Chief Executive; Cabinet or Executive Committee; Acts (legislative) or Measures; etc.;
- The nature of the links between Great Britain and Northern Ireland;
- The types of power to be devolved — *i. e.* should those most likely to cause division (*e. g.* policing, justice, law and order, electoral systems) be devolved at all?;
- Power-sharing —single-party *vs.* multi-party;
- The principle of proportionality between the two communities and how it should be reflected in the legislature/executive;
- Human rights, including anti-discrimination laws, policing and justice issues, and fair employment laws
- Links between Britain and Ireland, etc.

These factors were not all addressed in both the above systems, but they were and still are of key concern in any devolved system for Northern Ireland as are new factors connected with the decommissioning of all paramilitary weapons, etc. and the demilitarisation of Northern Ireland.

In addition to Northern Ireland's experience of devolution (when it alone of all the component nations of the UK possessed devolution) an attempt was made during the 1970's to introduce devolution to Scotland and to Wales. This in part stemmed from the electoral manifestations/successes of the nationalist parties in both Scotland and Wales; a certain renewed interest in constitutional matters (see the Kilbrandon Report on the Constitution, which was set up in 1969 and reported in 1973 Cmnd 5460, 5460-I); and the 'pact' between the (minority) Labour Government with Liberal MP's during 1977-1979.

The two Acts are:

- a) The Scotland Act 1978; and
- b) The Wales Act 1978.

Both Acts were enacted before being put to popular referendum in both Scotland and Wales, in March 1979. (Because of the doctrine of sover-

eighty of Parliament, a referendum can only be advisory. Parliament cannot be tied by the outcome legally (*cf.* politically?). Also, although there has recently been in the UK increasing use of the referendum as a way of ascertaining public opinion, they still remain unusual.⁹

In the terms of the statutory formula (see Scotland Act s. 85; sched. 17; Wales Act s.80; sched. 12) there was not the requisite popular support for devolution to be introduced. The Acts were *never* brought into force. They, therefore, remain of historical/comparative interest only.

Excursus

Before considering the (new) Labour Government's proposals for constitutional reform introduced since 1997, what has been called 'the animating principle' of the UK constitution should be considered. This is the principle of Strong (Central) Government. The doctrine of Parliamentary sovereignty is still regarded as the keystone of the constitution but what is the political reality which underpins it?

1. The electoral system is 'first-past-the post'. This is not a proportionate system at all. So, for example, in the 2001 General Election, on a turn-out of just below 60%:

Labour received	40.7% of the vote	(10.7 m)
Conservative	31.7%	(8.4 m)
Liberal Democrats	18.3%	(4.8 m)

The percentage of seats won, however, was quite different:

Labour	412 seats (62.0%)
Conservative	166 seats (25.0%)
Liberal Democrats	52 seats (7.8%)

(There are some minority parties)

⁹ In the UK, a 'Bill' (pre-legislation) may be enacted —“an Act of Parliament”— but does not need to come into force immediately. It may be several months or years —(if at all)— before an Act comes into (legal) force after its enactment.

- Given the turnout, only 1 in 4 people actually voted for the present Government which possesses a vast majority in the House of Commons.
2. Parliament consists of 2 Houses; the (dominant, elected) House of Commons and the (unelected) House of Lords. The House of Lords has limited powers over legislation, essentially now only a delaying power (subject to some exceptions).
 3. The Queen, as constitutional monarch, acts on the advice of her Government.
 4. The Government is chosen from the majority party in the House of Commons. It has no ‘independent’ or ‘separate’ mandate.
 5. There are no special majorities in the House of Commons; there are no pieces of entrenched legislation.
 6. The Government controls the majority vote in the House of Commons (by a tight system of ‘whipped votes’); it controls the amount of time given to (most) legislation. It retains its majority (proportionately) on (virtually) all Committees of the House of Commons.

Therefore: there are very few checks/balances in Parliament (and re an Act of Parliament in the courts) on the wishes of a UK Government. If, *e. g.*, it wants to introduce legislation, it will control all the aspects/stages of that legislation (including the amending stages) and once enacted/brought into force, the courts must, under the doctrine of sovereignty, give that Act ‘their full and dutiful obedience’. Thus there are very few checks and balances upon the UK Government through Parliament. The ‘animating principle’ of strong government is coupled with a (relatively) weak Parliament (politically). Hence the doctrine of sovereignty is a powerful tool in the hands of/at the disposal of the Government.

One of the interesting questions stemming from the Labour Government’s programme of constitutional reform is this:

To what extent have these reforms in any way weakened the fact of strong government at the very heart of the Westminster system?

To reword this – how does the introduction of devolution and the development of a multi-layered constitution impact upon a central strong government?¹⁰

¹⁰ See John Morrison, *Reforming Britain: New Labour, New Constitution?* (2001) p. 5

The unique quality of Blair, identified early on... has been his combination of pluralism and control freakery, his apparent willingness to share power and his simultaneous desire to hang on to it. The contradiction can best be understood by the transition from policy making in opposition to policy making in government... Constitutions tend to limit the power of government and proposals for reform inevitably lose their attractiveness when opposition politicians move within sight of power... The deepest and most far-reaching of the reforms carried out since 1997 were rooted in commitments inherited by Blair from his predecessors Neil Kinnock and John Smith. Since Blair succeeded John Smith in 1994, party policy has gradually moved from *democratization* to the more ambiguous concept of *modernization*, a shift of the tiller which has set the Labour constitutional project on a very different course.

IV. THE 1997 LABOUR GOVERNMENT AND ITS (DEVOLUTION) CONSTITUTIONAL REFORM AGENDA

The question to be asked in this context is why did a new Labour Government (out of power since 1979) legislate for devolution as one of its major policy initiatives at the outset of its term of office? There are, of course, some specific answers. Both Labour and Conservative Governments had sought for a new constitutional settlement for Northern Ireland since the collapse of the short-lived system in 1974. In Scotland (which had returned no Conservative MPs at the 1997 General Election), a ‘Constitutional Convention’ had been sitting (involving civic, religious and [some] political representatives) and had produced a blueprint for devolution to Scotland. (Conservative representation at Westminster has been virtually non-existent for the past few elections).

More generally, the new Labour Government sought to address what it saw as the over-centralizing tendencies of the previous Conservative Governments and the dominance of the Executive. The principles which flowed from that stance included: “a revitalized democracy which protects the fundamental rights of the citizen from the abuse of power, which proposes the substantial devolution of central government authority, and which insists that the legitimacy of government rests on it being both open and accountable to the people it serves”.¹¹

¹¹ Quoted in Morrison, *op. cit.*, p. 36.

The reforms introduced, therefore, included: the Human Rights Act 1998 (in force in its entirety from October 2000), the Referendums (Scotland and Wales) Act 1997, the Scotland Act 1998, the Northern Ireland Act 1998, the Government of Wales Act 1998 and the Greater London Authority (Referendum) Act 1998.

Electoral reform (to the system used for Westminster elections) seems to have faded from the scene. The Home Secretary in December 1997 set up an Independent Commission on the Voting System. It reported in October 1998 but the issue has gone from the political/Government agenda.

The Freedom of Information Act was enacted in 2000, but the right of access to information under the Act will not come into force until January 2005. In November 2002, the Government Departments and non-Departmental Public Bodies will be required to have their 'Publication Schemes' in place.

Other reforms have either taken place more recently or have been proposed since the 2001 General Election.

In June 2003, a new Department for Constitutional Affairs has been established. It is also proposed to abolish the Office of Lord Chancellor and to create a new Top or Supreme Court and a new system of judicial appointments. Also, the Regional Assemblies (Preparation Act) 2003 has been enacted. Some of these measures are explained more fully below.

V. SCOTLAND, WALES AND NORTHERN IRELAND

1. *Introduction*

The key Acts of (the Westminster) Parliament are:

- the Scotland Act 1998,
- the Northern Ireland Act 1998, and
- the Government of Wales Act 1998.

Also relevant for understanding the background to the Acts.

For Scotland:

Scotland's Parliament (Cm 3658, July 1997) and
Scotland's Parliament, Scotland's Right (Report of the Scottish Constitutional Convention to "the people of Scotland", November 1995).¹²

¹² The Convention was 'self-generated' in 1988 by supporters from within Scotland for a Scottish [devolved] Parliament. It was not set up by Government or elected.

For Wales:

A Voice for Wales: the Government's Proposals for a Welsh Assembly (Cm 3718, July 1997)

For Northern Ireland:

e. g. The Belfast Agreement (Cm 3883, April 1998)

It is important.¹³ Consequently, elections to the Northern Ireland Assembly (first elected in 1998) which became due in 2003 were deferred first for a brief period and then indefinitely. They may now be scheduled for 26 November 2003. The power to suspend the Assembly (vested in a Westminster Government Secretary of State for Northern Ireland by Westminster Act of Parliament) and to defer the holding of the elections (again done by Westminster Act) are excellent illustrations of the Sovereignty of Parliament. It is also, of course, an important issue to consider whether or not, given the peculiar issues in Northern Ireland (N.I.) when compared with Scotland (S) and Wales (W), Westminster would (or, politically could) exercise its sovereign powers as (politically) easily with regard to such fundamental issues in S. and W. The legislation with regard to N.I. is:

- the Northern Ireland Act 2000 (on suspension of devolution)
- the Northern Ireland Assembly Elections Act 2003
- the Northern Ireland Assembly (Elections and Periods of Suspension) Act 2003

For legislation for Northern Ireland on matters relating to issues of human rights, policing, judges, decommissioning etc. see, *e. g.*

- the Police (Northern Ireland) Act 2000
- the Justice (Northern Ireland) Act 2002 (not yet in force)
- the Northern Ireland Arms Decommissioning (Amendment) Act 2002 (and the legislation of 1997 which it amends)
- the Northern Ireland (Monitoring Commission, etc.) Act 2003
- the Police (Northern Ireland) Act 2003

¹³ That devolution in Northern Ireland has since 1998 had an on-off history. It has been suspended on a number of occasions (see B. Hadfield, "The Suspension of Devolution in Northern Ireland: New Story or Old Story", *European Public Law* 2003, pp 49-57).

Work has also been ongoing for the future enactment of a Bill of Rights for Northern Ireland (additional to the UK-wide Human Rights Act 1998). For one of the latest reports on this of the Northern Ireland Human Rights Commission, see its *Summary of Submissions on a Bill of Rights*, NIHRC, July 2003.

(For relevant background agreement, see the Belfast Agreement, *Rights, Safeguards and Equality of Opportunity*, para. 4 and the Northern Ireland Act 1998, sections 68-71, especially section 69(7)-(9)).

As devolution involves inter-governmental relationships throughout the UK, regulation of such relationships needs to be provided for, additional to the bilateral Ministerial and (frequent) informal contacts, between the different devolved Governments and the Westminster Government. The informal contacts have so far tended to be the main means of communication especially given the presence of a central/Westminster Labour Government, and either Labour dominated coalition Governments or a single-party Labour Government in S. and W.

For the framework of formal relationships, see *The Memorandum of Understanding (MoU) and Supplementary Agreements between the UK Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*.

It was first published in October 1999 as Cm 4444 and has been replaced with minor amendments in July 2000 (Cm 4806) and (the most recent version) Cm 5240 (December 2001). The formal channel for resolving disputes/reaching agreement, policy, liaison, etc. is the *Joint Ministerial Committee (JMC)*. The MoU has to be supplemented by a series of Devolution Guidance.¹⁴

The House of Lords Select Committee on the Constitution has looked at the operation of inter-governmental relations in the devolved United Kingdom. Its report is worth considering:

Devolution: Inter-Institutional Relations in the UK, HL 28, 2002-03, December 2002 and the Government's response: Cm 5780, March 2003.

These references have been provided because clearly in a paper as short as this only (most) key issues can be considered in outline.

¹⁴ (DGN 1 to 14), available on [www.odpm.gov.uk].

2. Key Issues

- It must be remembered that there are considerable differences between S, NI and W:- differences in legal system (the Scots [private] law is quite distinct), in political history, in religion, in culture, for example, and these differences are (in part) reflected in the 3 devolution Acts. That is, the asymmetrical devolved systems of the UK have built on an asymmetrical UK. There is limited space here to explore the differences between the 3 systems but this will be attempted in 5(c) below. This section simply highlights the key issues which were *addressed* (even if sometimes different answers were given) in the formulation of devolution principles in the UK.
- The legal source of devolution is an Act of the Westminster Parliament. Power to amend the Act rests (almost totally) with Westminster *alone*. Power to repeal the Act can be effected by Westminster only.

Query: What about politically? To what extent would devolved consent be necessary to effect fundamental amendment to a devolution Act? The answer may differ, *e. g.* between S. and N.I. Also pertinent here is the referendum point immediately below.

- Devolution in all 3 jurisdictions was preceded by a favourable referendum within that jurisdiction.¹⁵ That is, in many ways, devolution was perceived/presented as affecting the devolved jurisdiction only, not the UK Constitution as a whole. To what extent does this popular support for devolution ‘entrench’ or make (legally/politically) “special” the devolution Acts. This does impinge on the doctrine of Parliamentary sovereignty. In a recent White Paper, the Westminster Government wrote about Sovereignty in the context of EC, human rights and devolution...

[In the UK] there is no separate body of constitutional law which takes precedence over all other law. The constitution is made up of the whole body of the laws and settled practice and convention, all of which can be amended or repealed by Parliament. Neither membership of the Eu-

¹⁵ Note: there was no overall UK referendum; no referendum asking the other jurisdictions about devolution elsewhere.

ropean Union nor devolution nor the Human Rights Act has changed the fundamental position. Such amendment or repeal would certainly be very difficult in practice, and Parliament and the executive regard themselves as bound by the obligations they have taken on through that legislation, but *the principle* [of Sovereignty] *remains intact*.¹⁶

- What principles should guide the division of powers between Westminster and the devolved legislature? For S. and N.I., certain national/international matters were withheld from their legislative competence, all the rest being devolved. So, for example, matters within the competence of the Scottish Parliament (the list is similar but not identical in Northern Ireland) include health and community care, education, the environment, aspects of the economy, business and industry, home affairs, agriculture, fisheries and forestry, rural development, transport, tourism, culture, the arts and sport. This is all subject to the provision that it is outside the competence of the devolved legislatures to legislate extra-territorially or incompatibility with EC/EU Law and the European Convention on Human Rights.
- Questions will, therefore, arise (see further below) about the validity of the Acts of the devolved legislature. Because of the doctrine of the Sovereignty of the Westminster Parliament (a doctrine which manifestly does *not* in any way apply to the devolved legislatures) the UK courts prior to devolution were not involved in the consideration of challenges to the validity of legislation. (The exception was with regard to N.I. during 1920-1972, but there were very few such cases indeed.) Post-devolution and with regard to the devolved legislatures, the courts now have to engage in the scrutiny of the *vires* of such Acts. A new relationship, therefore, has come about between the courts and elected political power.
- The devolution Act preserves (out of abundance of caution) the power of the Westminster Parliament to legislate in the devolved areas; conversely, the devolved legislatures *cannot* legislate on matters withheld from their competence and retained by Westminster. Clearly questions will arise concerning the categorisation of a par-

¹⁶ July 2003, *Constitutional Reform: A Supreme Court for the UK*, para. 23. [www.lcd.gov.uk].

ticular power. If the environment is devolved, but nuclear power is not and the devolved legislature passes an Environment Act which impacts on a nuclear power station located in its jurisdiction —is the Act *ultra vires* or *intra vires*? What tests do the devolution Acts provide? In N. I., the test is ‘deals with’— if a N. I. Act *deals with* a retained matter it is *ultra vires*. ‘Deals with’ is defined as meaning “affecting otherwise than incidentally” (s. 98(2) of the N. I. Act 1998). The S. Parliament is given wider reach. The S. Act 1998 s.29 uses the ‘relation’ test. If a provision of a Sc.Act relates to a retained/reserved matter it is *ultra vires*. In order to determine the ‘relation’ test consideration must be given to “the purpose of the provision, having regard (among other things) to its effect in all the circumstances. (s.29 (3)).

These questions are ultimately determined by the courts but the Joint Ministerial Committee (see above) seeks to deal with any inter-governmental clash of opinions on the *vires* of proposed legislation.

- Also, although Westminster in law remains free to legislate in a devolved area, by convention (called the *Sewel Convention*) Westminster “would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.” Somewhat unexpectedly there has been a considerable number of ‘Sewel motions’ since devolution.¹⁷

An answer to a Parliamentary Question in the House of Commons given by the Secretary of Scotland for Scotland on 3rd July 2003 listed 42 Sewel motions to June 2003.

- Provision is made in the devolution legislation for the *vires* of *proposed* devolved legislation to be referred to a court by one of the *Law Officers* (not by either Government), of either Westminster or the devolved governments. The court concerned is called the Judicial Committee of the Privy Council (JCPC). At the time of writing,

¹⁷ See e. g. A. Page and A. Batey, “Scotland’s Other Parliament: Westminster Legislation about Devolution matters in Scotland since Devolution” 2002 Public Law, pp. 501-523. (There were, e. g. some 30 Sewel motions between June 1999 and April 2002.)

there are proposals to create a new ‘Supreme Court’ for the United Kingdom and the JCPC may become a part of this ‘top’ court. All devolved governments are also under a statutory duty to scrutinise their devolved legislation with a view to its *vires*, as is the devolved Presiding Officer/Speaker of the devolved legislature. (He or she is politically ‘neutral’/impartial).

- The possibility of pre-enactment judicial scrutiny is to be linked with post-enactment scrutiny by the courts. The devolution Acts provide for such matters to be resolved ultimately by the JCPC whose decisions on these matters are binding on all other courts.¹⁸

This case concerned the compatibility of an Act passed by the Sc. Parliament with a provision of the European Convention on Human Rights. The Act was the Mental Health (Public Safety and Appeals) (Scotland) Act 1999. This was actually the first Act passed by the Scottish Parliament.¹⁹

- There is representation in the UK Cabinet of (Labour) Ministers representing the ‘link’ between the UK Government and the devolved authorities: Secretary of State for Northern Ireland; the Secretary of State for Scotland (also Secretary of State for Transport) and the Secretary of State for Wales (also Leader of the HC).²⁰
- The details of the devolved Acts concerning key issues also show the Labour Government including into the Acts principles which differ markedly from those on which they insist for Westminster:

1. all devolved legislatures are unicameral.
2. the electoral system for the devolved legislatures. There is no separate election for the devolved executives. The more proportionate the representation in the devolved legislature, therefore, the more likely it is that the devolved executive will be a coalition/power-sharing one.

¹⁸ See, e. g. *Anderson, Reid and Doherty v. The Scottish Ministers and the Advocate General for Scotland* JCPC, October 2001.

¹⁹ See also *In re Trevor Adams*, Outer House of the Scottish Court of Session, July 2002 which concerned the *vires* of the Protection of Wild Mammals (Scotland) Act 2002.

²⁰ See also the responsibilities of the Secretary of State for Constitutional Affairs: [www.dca.gov.uk].

For S. and W. the electoral system is often referred to as the Additional Member System, with voters having two votes, one for a constituency member and one for a party. The second votes are organised on a regional basis. The regional seats are allocated in such a way as to compensate for disproportionate deficiencies in the constituency returns. In S, the two elections (1999 and 2003) have led to the formation of Labour-Liberal Democrat Coalition (with Labour the clearly larger party in it). In Wales, the 1999 Election led to a Labour-LD coalition (again with Labour the larger party); in 2003 it led to a single party Labour Cabinet.

The Northern Ireland system is more proportionate. It is called “STV”-single transferable vote. It is highly proportionate and under the relevant sections of the NI Act 1998 (see, e. g. s.18) 4 parties on the unionist/nationalist/republican spectrum have been represented in the devolved Executive (when it has been operative). In addition, NI has a First and Deputy First Minister of *co-equal powers*, each chosen in such a way as to reflect cross-community consensus. The First Ministers of S. and W. have been Labour at all times, their deputies *not* possessing in any way co-equal powers under the legislation.

It should further be noted that the same party, Labour, is at the present time ‘in power’ either absolutely or in a significant way at Westminster and in S. and W. By contrast, the major Westminster parties, and especially the Labour Party, either do not involve themselves at all in Northern Ireland (i. e they do not organise or seek election to any body at any level including Local Government, the NI Assembly or Westminster) or they do so only half-heartedly.²¹

3. Differences?

Full or ‘legislative’ devolution has been introduced for S. and (potentially/actually) for N.I. The system of devolution for Wales is often called executive devolution. What this means is that in essence the Westminster Parliament continues to legislate for W. That Act of Parliament (which

²¹ The Westminster Parliament continues to represent the whole of the UK. Prior to devolution, S and W had been over-represented there, compared with England. There are plans afoot to reduce the number of MPs representing Sc. Constituencies at Westminster to parity representation sometime over the next few years. Given the more limited nature (see below) of Welsh devolution, there are no similar plans for Wales.

may also apply to England also or to all GB: there have been only a very small number of Wales only Westminster Acts) lays down the general principles, leaving the Welsh Assembly to fill in (*by delegated legislation*) the requisite details. Clearly, therefore, the amount of (delegated) legislative power vested on the Welsh Assembly depends almost completely on how widely or narrowly the Westminster Act is drafted. This has caused an amount of concern as has the fact that W. has a more limited system of devolution than S. and NI. The reasons for the more limited nature of devolution for Wales include the closeness of the England and Wales legal systems and the weaker support from within Wales for devolution (or indeed independence) at all.²²

As far as the extent of Welsh devolution is concerned, see, *e. g.* the decision of the National Assembly for Wales to adopt the *RAWLINGS principles* which include the ‘requirement’ that provisions giving the Assembly “new functions... be drafted to allow the body flexibility to develop its own policies, including where appropriate, provision for *secondary legislative powers different from those given to a Minister* for separate exercise in England...”.

The Westminster Select Committee on Welsh Affairs in its Fourth Report, March 2003, recommended that the Westminster Government too should set out its position on these principles, especially that quoted above, over which there had been some debate/disagreement from within the UK Government. Their stance has been to refer to the tension between the necessary flexibility for the Welsh Assembly and the need of Westminster “to understand how legislation will be applied when it approves that legislation”. In its response to the Select Committee Report (see HC 989, July 2003), the UK Government stated that “each case is decided on its merits. However, in giving the Assembly such powers, [the UK] Parliament will be expected to be informed how the Assembly Government *proposes to exercise them...*”.

In addition the Welsh Assembly Government has set up the *Richard Commission* [www.richardcommission.gov.uk] to investigate, *inter alia*, the sufficiency of the Assembly’s current powers (including both their

²² *Plaid Cymru* in Wales and the *Scottish National Party* in Scotland have as their favoured political option the independence of Wales and Scotland from the UK/England—independent Wales/Scotland “in Europe”—. There is quite clearly a long debate about the tension between devolution as “better” government (closer to, more representative of the people, etc.) and devolution as a path/half-way house to independence.

breadth and depth), and specifically whether its powers are sufficiently clear to allow optimum efficiency in policy-making. The Report is expected early in 2004.

It is highly unlikely that the UK Labour Government will revisit the nature of devolution to Wales. Widening the powers of the Welsh Assembly would inevitably heighten the English Question (see below).

The differences with regard to NI have been touched on above, but they all stem from/relate to the need:

1. to address the question of the constitutional status of NI;
2. to ensure cross-community representation in all legislative/executive decision-making;
3. to provide for all-Ireland dimensions; and
4. to address issues which have been divisive from many generations and to pave the way for, it is hoped, a peaceful society in which the human rights and civil liberties of all can be respected.²³

VI. THE ENGLISH QUESTION. WHY IS REGIONALISM THE GOVERNMENT'S PREFERRED ANSWER?

There has been no devolution to England *qua* England at all. To put it simply, there is no English Parliament. The (present) Parliament at Westminster is the Parliament of the UK. In its House of Commons (the main House) sit MPs representing constituencies in England (529), Wales (40), Scotland (72) and Northern Ireland (18). The UK Parliament can and does legislate for the whole UK, for GB, for England, for England and Wales (and rarely for Wales only). That is, all policy and legislative decisions applying to England will be decided by MPs representing all parts of the UK. Conversely on a devolved matter, *e. g.* in Scotland, the decision by the Scottish Parliament or the Scottish Executive will be reached by Scottish representatives (MSPs) only. This means that matters of, *e. g.* Scottish (devolved) concern —say housing, hospitals, University students fees, etc.—, will be decided by Scottish MSPs etc.; the equivalent matters in England will be decided by the votes of UK MPs. In July a decision was reached in the House of Commons to introduce ‘foundation hospitals’ in England (a con-

²³ *The Scottish Parliament alone possesses but has not exercised a plus or minus 3% tax varying power.*

troversial part of the present Government's National Health Service policy). That vote was carried because of the votes of (Labour) MPs representing Scottish constituencies (many English Labour MPs abstained/voted against). The Scottish Parliament and Executive had already decided not to introduce foundation hospitals in Scotland.

On top of asymmetrical devolution for S, W and NI, therefore, there is the absence of any devolution for England as a whole. This is often called the English Question.

By and large, the arguments concerning England and devolution are often not addressed at all. A leading member (until recently) of the Labour Cabinet has said, for example, that the only way to answer the English Question is to stop asking it.

Others refer to the difficulties which would stem from the creation of an English Parliament; given the size of England, it is argued, the English Parliament would be too much of a 'rival' to Westminster, which would then represent only the whole of the UK (subject to resolution of the Wales question-see above). (It is also possible/probable that an English Parliament /Government, [unlike S, W and NI] would often have a Conservative not Labour majority.) The size of England compared with the other 3 UK jurisdictions is also given as a reason why the UK could not, as presently formed, become federal.

Others have suggested that laws for England should be passed at Westminster but decided *only* by the votes of MPs representing English constituencies. This too has its difficulties because the UK Government is drawn from the majority party in the House of Commons. The size of that party majority is determined, of course, by counting all MPs, including MPs representing S. and W. The majority of English MPs may be Conservative. The majority of UK MPs could be Labour leading to the formation of a Labour Government. If such a Government were to introduce legislation to be decided by English MPs only, it could, therefore, be constantly voted down. Who then is the Government/Parliament for England?

A previous Labour Government (1974 to 1979) when pursuing a devolution policy for S. and W. (see the reference to the Scotland Act 1978 and the Wales Act 1978 above) produced a White Paper explaining why it did not intend to introduce devolution for England: *Devolution: The English Dimension* (1976); the present Labour Government has at no time addressed that question. What it intends to do —and for London has already

done—is to introduce into those English regions which desire it an elected Regional Assembly of very limited powers.²⁴

The Regional Development Agencies Act 1998 divides England into 8 regions which have no ‘identity’/allegiance basis at all. They are simply administrative units. The 8 English regions are East Midlands, West Midlands, Eastern, North East, North West, South East, South West and Yorkshire and Humber. English identity is (to phrase the matter generally) often locally based; a person will often proclaim a county allegiance: Lancastrian, Cornish, Devonian, etc. The regions are conglomerate groupings of several counties.

The Government White Paper: *Your Region, Your Choice: Revitalising the English Regions* (Cm 5511, May 2002) swings between the language of devolution (not appropriate) and regionalism. The Regional Assemblies will not have legislative powers but will be primarily concerned with, *e. g.* economic regeneration, the regional environment, planning, transport, housing and public health in the region.

At the moment it is hard to be more precise because no substantive legislation additional to the White Paper has been enacted. The Regional Assemblies (Preparations) Act 2003 is a facilitative Act empowering the Secretary of State to hold a referendum on the desirability of such an Assembly within any of those regions where he believes there is a sufficient level of support in the region for holding such a referendum. In June 2003, he announced that in October 2004 such referendums could take place in the North West, North East and Yorkshire and Humberside regions. In addition, therefore, to overall asymmetric devolution, there could develop in England asymmetric regionalism for there are currently no plans even to hold preliminary referendums in any of the other 5 regions.

London already has an elected Mayor (elected in 2000 by a supplementary vote system; two votes being cast expressing first and second preferences. If a candidate wins over 50% of the first choice votes s/he is elected; if not, all but the top two candidates are eliminated and their second preferences votes distributed. The next elections for Mayor and the GLA will take place in 2004).

²⁴ This will not address the English Question above. Laws for England as a whole (and Wales) will continue to be made by the UK Parliament. All that regionalism will do is introduce into different parts of England a new level of local government.

The GLA —Greater London Assembly— (elected in a similar way to the Sc Parliament and National Assembly for Wales) comprises 25 Members (14 constituency Members and 11 List Members) is a scrutinizing body, examining the decisions of the Mayor and questioning him about his policies and activities. The Major essentially has the general power and responsibility of promoting the economic, social and environmental well-being of London and sets the annual budget for the Metropolitan Police Authority, the London Fire and Emergency Planning Authority, the London Development Agency and Transport for London. One of the best known recent decisions is the introduction of Road Congestion Charging for traffic into much of Central London.²⁵

There are clear arguments in favour of such regionalism but this is not the prime concern of this paper. In the context of *devolution* to S, W and NI, regionalism for (parts of) England points to its weaknesses not its strengths.²⁶

VII. THE MULTI-LAYERED UNITED KINGDOM CONSTITUTION

- The UK is a member state of the European Union/Community which has a wide range of powers in the areas of, *e. g.* agriculture, freedom of movement of workers, goods and services and increasingly, immigration, foreign affairs, defence and the economy.
- The UK is a signatory party to the European Convention on Human Rights, which requires it to respect for all within its jurisdiction certain civil and political rights. See also the Human Rights Act 1998.

That is, at the European levels (the ECHR being distinct from the EC/EU) the UK is required to act compatibly, in conformity with a wide range of substantive laws. (The devolved legislatures *Cannot* legislate incompatibly; under the doctrine of Parliamentary sovereignty, the UK Parliament may.)

²⁵ See [www.london.gov.uk] (the Mayor) and [www.london.gov.uk/assembly] (GLA) and the Greater London Authority Act 1999.

²⁶ For further reading, see B. Hadfield, "Towards an English Constitution" (2002) *Current Legal problems*, vol. 55, pp. 151-189; and (pending) B. Hadfield, "Devolution in the UK and the English Question" in J. Jowell and D. Oliver, *The Changing Constitution*, 5th ed. 2004, *The English Question*, edited by S. Chen and T. Wright for the Fabian Society 2000.

- The Westminster Parliament is the legislature for the whole of the UK/GB as well as England's only legislature. S. W and NI have their devolved legislatures, combining, in different ways, with laws made by Westminster.
- London has an elected Mayor and an elected Greater London Assembly with proposals for other regional assemblies in England. These are not or will not be legislative bodies.
- There is a wide system of local government throughout the UK. Local Government (presently in England the only elected tier beneath the UK Parliament) only possesses those powers granted by statute and relies mainly on grants made by central government. The values identified for local government include: political pluralism/avoidance of over-concentration of power; enhancing democratic accountability, responsiveness in service delivery to local opinion; the promotion of local community development and 'citizenship'/citizen involvement.

(The area of local government *per se* and of grass roots constitutional growth are outside the remit of this paper—but see, *e. g.* Dawn Oliver, *Constitutional Reform in the UK* (2003), chapter 16 [from which the above summary reasons for local government is taken]. Indeed the whole book is well worth reading.)

VIII. SELECT BIBLIOGRAPHY AND WEB-SITE ADDRESSES

Several references have been given in the text above.

Acts of Parliament may be obtained from: [www.hmso.gov.uk].

(Also available from this web-site are the Acts, etc. of Scotland, Wales and Northern Ireland).

The most relevant UK Government Department web-sites are: [www.dca.gov.uk] and [www.odpm.gov.uk].

Scotland

[www.scottish.parliament.uk]

[www.scotland.gov.uk]

[www.scottishsecretary.gov.uk].

Wales

[www.wales.gov.uk]

[www.oss.w.gov.uk].

Northern Ireland]

[www.ni-assembly.gov.uk]

[www.nics.gov.uk]

[www.nio.gov.uk].

Court decisions may be found, *e. g.*, on

[www.bailii.org]

[www.publications.parliament.uk (HL judgments)]

[www.privycouncil.org.uk].

The web-site of the pressure group Campaign for an English Parliament gives some arguments concerning the establishment of an English Parliament

[www.englishpm.demon.co.uk].

See also the web-site of the pressure group Campaign for the English regions

[www.cfer.org.uk].

For *illustrations* of local government web-sites see

[www.essexcc.gov.uk]

[www.lancashire.gov.uk]

(for England)

[www.westlothian.gov.uk]

(for Scotland)

[www.outwood.com/localgov/wales/htm]

[www.wlga.gov.uk]

(for Wales)

[www.belfastcity.gov.uk]

[www.colerainebc.gov.uk or]

[www.nics.gov.uk/councils.htm]

See also

[www.spani.gov.uk]

(for Northern Ireland)

In addition to books and articles cited above:

See

V. Bogdanor, *Devolution in the U. K.* (1999);

N. Burrows, *Devolution* (2000); and

V. Bogdanor (ed.) *The British Constitution in the Twentieth Century* (2003), especially

- M. Loughlin, *The Demise of Local Government*, chap. 13, pp. 521-556; and
 - B. Hadfield, *The UK as a Territorial State*, chapter 15, pp. 585-630 and the bibliographies to both chapters.
- A. Aughey, *Nationalism, Devolution and the Challenge to the UK State* (2001); and S. Henig (ed.) *Modernising Britain: Central, Devolved, Federal?* (2002).