Devolution and the United Kingdom constitution: Causes, contents and consequences.

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Devolution and the United Kingdom Constitution

Causes, contents and consequences

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To my parents,
Ursula and
the memory of my grandmother

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Declarations and statements

1. This work has not been previously accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.
2. This thesis is the result of my own independent investigation, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.
3. I hereby give consent for my thesis, if accepted, to be available for photocopying and for inter-library loan, and for the title and summary to be made available to outside organisations.

Summary

The thesis addresses devolution under three broad headings. Initially, it surveys the historic background of the United Kingdom as a coming together of different nations. The Union-state, although making different arrangements for its component nations, has developed alongside the doctrine of parliamentary sovereignty, a doctrine which is completely unfamiliar with any sharing of power. However, the experiences of Home-Rule for Northern Ireland and the nationalist movements leading to a first devolution legislation in the 1970s have influenced the development of Britain's constitutional future.

The contents of devolution are summarised as a second step. The three assemblies in Belfast, Cardiff and Edinburgh have different, asymmetrical powers. Two main issues arise, however, in the context of their creation. First, the integration of England in the devolution model is not achieved. Secondly, the inter-governmental arrangements between these bodies and their relationship with central government are addressed.

Devolution affects especially the centre, where the new bodies and their underlying principles are to be inserted into the structure of the British state. This leads to the consideration, how far reaching these arrangements at the centre are to become. Do they represent some form of quasi-federalism or is it more appropriate to define the current legislation as a form of muddling through, whilst the initiation of a clear federal structure could resolve the main problems of an "asymmetrical structure"? It is argued that asymmetrical devolution is the right start to the development of a more powerful sub-national governance. However, the regionalisation may not stop there as it was the experience of other European states in the 1980s. Obviously, the nations want their powers entrenched in a written Constitution, which may lead to the complete abandonment of parliamentary sovereignty. Thus, the United Kingdom may evolve to federalism.

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I. Introduction

Devolution has potentially significant implications for the United Kingdom. It was not only the most significant measure on the political agenda of the Labour government elected in 1997, but "arguably [one part of] the most radical programme of constitutional change"[1] ever undertaken in the United Kingdom since the Great Reform Act 1832. After the 1997 General Election, the Referendums Bill[2] was the first constitutional proposal introduced in the House of Commons and the referendums themselves were rapidly held. The government's proposals have been endorsed by a comfortable yes vote in that referendums. Devolution represents an important change in government. This is because it attempts to combine two conflicting principles[3]: the sovereignty of the Westminster Parliament on the one hand, and on the other hand, the granting of self-government in a restricted realm for three geographic units. The devolved bodies in Cardiff, Edinburgh, and Belfast are able to exercise a wide range of powers and competences, which previously were wielded by Westminster. Scotland enjoys the strongest model, whilst Northern Ireland's devolution is dependent on the future peace process. Wales got a particular type of devolution – a unique administrative model of devolved competences. As "devolution is a process, not an event"[4], these developments may not fail to influence England in the mid-term.

Hence, the United Kingdom clearly cannot be seen as a unitary state anymore, but how are we to characterise the purpose and nature of the new constitutional arrangements? Britain might be seen to be on the way to a written and (de facto) federal constitution with all implications this may have. At the time being, however, this scenario was not yet to happen, as there are only the Acts legislating for devolution. Thus, this thesis considers first the historical background to devolution and outlines its main constitutional challenges. Secondly, it analyses the initial implementation of devolution in Scotland, Wales, Northern Ireland and, England. Thirdly, it considers the problems of devolution from a comparative standpoint: How do they fit with the conditions of federalism? By all meanings, devolution changes the

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[1] Lord Irvine of Lairg, *Keynote Address,* presented at the inaugural conference of the Cambridge Centre for Public Law, 17 January 1998, see: Cambridge University, Centre for Public Law, Constitutional Reform in the United Kingdom: Practice and Principles, Hart, Oxford 1998, p 1

[2] Referendums (Scotland and Wales) Bill, published on 15 May 1997

[3] Bogdanor, Vernon: Devolution: the constitutional aspects, in: Cambridge University, Centre for Public Law, Constitutional Reform in the United Kingdom: Practice and Principles, op cit, p 9

[4] Davies, Ron: *Devolution: A process not an event,* in: The Gregynog Papers, Vol 2 (2), Institute of Welsh Affairs, Cardiff 1997

United Kingdom considerably, but does it relinquish all features of a unitary state? Does it make quasi-federal arrangements for a Union-state? The thesis seeks to summarise the precise type of constitutional settlement devolution represents and the essential questions that arise. It will be argued that devolution raises various questions, which could be better handled by a really federal structure.

The constitutional identification of devolution needs to be addressed on the basis of the different constitutional schemes of territorial organisation. For the precise definition of the United Kingdom's territorial structure, the competing models of state organisation need to be approached and determined. A first point to be made is that all observations are principally based on the fact that the nation-state is at least in Europe the appropriate form of territorial organisation[5]. However, the organisation of the state underlies a variety of factors, which differ from one state to another. Thus, the centre-periphery polarity can be observed historically and politically. This is because the main characteristics of every territorial structure can be related to a more or less clear development of unification[6]. One form of classification for territorial structures is offered by Rokkan and Urwin[7]. There, a unitary state is "built up around one unambiguous political centre which is economically dominant and pursues a policy of administrative standardisation". All areas are to be treated equally under the direct control of the centre. This model might be best exemplified by the III and IV French Republic. In contrast to the model of a unitary state, the union state is not the "result of straightforward dynastic request, but the incorporation of at least parts of its territory by way of personal dynastic union". Integration is, hence, less than perfect. The consequences of personal union entail the survival in some areas of pre-union rights and institutional infrastructures, which preserve some degree of regional autonomy. Thus, Belgium could be taken as an example for a union state. That model can finally be opposed to federalism. Federalism means a pattern of territorially diversified structures, with more or less centralised control mechanisms[8]. Germany is an examples of a federal state[9].

Conversely, the relationship between centre and periphery can be distinguished referring to a

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[5] Rokkan, Stein; Urwin, Derek: *Introduction: Centres and Peripheries in Western Europe,* in: The politics of territorial identity: Studies in European Regionalism, Sage, London 1982, p 1; Recently, the "nation-state" UK has even been questioned, see: Davies, Norman: The Isles, Macmillan, London 1999, pp 1039

[6] So Davies, Norman: The Isles, op cit; also Bulpitt, Jim: Territory and power in the United Kingdom, MUP, Manchester 1981

[7] For the following see: Rokkan, Stein; Urwin, Derek: *Introduction,* op cit, p 11

[8] Rokkan, Stein; Urwin, Derek: *Introduction,* op cit, p 11

[9] Rokkan, Stein; Urwin, Derek: *Figure 2,* op cit, p 12

constitutional approach. Thus, one can identify the organisation as a unitary state, a federation or a confederation according to the structures and connections within the organisation of the state. Under these conditions, the unitary state concentrates sovereignty with the central institutions[10]. Its structures are administrative sub-units or local authorities, but these structures are not sovereign. There is only one sovereign body, even if differences between a centralised unitary state and a decentralised unitary state may exist. Federalism, as a constitutional principle, means in contrast to the unitary model an autonomous unification of distinguished equal states[11]. In a federation both levels have "sovereign" powers: the federation itself and the component parts also. Power is clearly defined and distributed between these two levels of government[12] and this division of powers is only possible to amend by a common decision. Whilst the European federal states developed to a form of co-operative federalism between the different levels of government, the American model of federalism is based on a strict division of powers[13]. Federalism can appear in different colours and its meaning may develop in time despite the clear theoretical definition[14]. The function and idea of a federal scheme can be the creation or the maintenance of political unity without abolishing the diversity of its components. Conversely, it can be introduced to diversify a previous unitary structure, which is thus to be preserved from its break-up[15]. A confederation is oppositely an association of states, which transfer a part of their business to common institutions[16]. Whilst the confederation appears as a unity, it is constitutionally not a state, as it does not touch upon the sovereignty of its members. Switzerland is organised as a confederation, for example.

In defining powers of different levels of government a key principle is subsidiarity. Subsidiarity implies that functions should be performed at the lowest level of community structures as far as they can be performed "more effectively" than at any other level. The appropriate level is, however, not defined, but has to be found for each issue. The principle of subsidiarity has long tradition in cultural history. It dates back to the old Greek philosophy of

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[10] Maunz, Theodor; Zippelius, Reinhold: Staatsrecht, op cit, p 106
[11] Hesse, Konrad: Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland, C.F. Müller, Heidelberg 1993, p 90
[12] Maunz, Theodor; Zippelius, Reinhold: Staatsrecht, op cit, p 106
[13] See for example Watts, Ronald L.: Comparing federal systems, 2nd edition, McGill- Queen's University Press, Montreal 1999, pp 35
[14] Hesse, Konrad, op cit, p 91; also: Barnett, Eric, op cit, p 64; Brazier, Rodney: *The Constitution of the United Kingdom*, in: C.L.J., Vol 58(1), Cambridge 1999, p 125
[15] Hesse, Konrad, op cit, p 91; also Wheare, K.C.: Federal Government, op cit, p 244
[16] Maunz, Theodor; Zippelius, Reinhold: Staatsrecht, C.H. Beck, München 1998, p 106

Platon and Aristotle[17]. The catholic encyclical "Quadragesimo Anno" (1931) of Pope Pius VI has most commonly featured it by referring partly to the bible. It is true that the principle can best be understood within the context of a federal state, as there are different levels, which are necessary for the definition of the most "effective" layer. The German *Grundgesetz* (Basic Law), for example, is based on the general concept of federalism that means that the written constitution attributes powers to different levels of government[18]. However, whether a federal constitution implies that subsidiarity applies between the different levels is a divisive question in Germany[19]. At least, there is no general definition of the principle, which is precisely enough to give it a specific significance. More recently, subsidiarity has been introduced in the European Treaty. There, it has been sought to define the principle. Article 5 stipulates that, in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore [...] be better achieved by the Community[20]. However, this definition was not able to give a clear legal concept to the principle of subsidiarity[21].

Devolution – as a specific British expression in the context of constitutional structures– involves the transfer of powers from a superior to an inferior political authority[22]. It is the delegation of central government powers without the relinquishment of sovereignty[23]. Or, less vaguely, devolution includes the transfer of functions at present exercised by ministers and Parliament to a subordinate elected geographically based body, whilst leaving Westminster as the only sovereign Parliament[24]. Though such a transfer of power encountered thorny critics in the 1990s[25], the United Kingdom is not unfamiliar with this idea as we will see in the example of Northern Ireland.

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[17] Höffe, in: Riklin, Alois: Subsidiarität, Nomos, Baden-Baden 1994, pp 21
[18] Barnett, Eric, op cit, p 59
[19] In favour: Würtenberger, Thomas: *Das Subsidiaritätsprinzip als Verfassungsprinzip*, in: Staatswissenschaft und Staatsrecht, 1993, p 622; Isensee, Josef: Subsidiaritätsprinzip und Verfassungsrecht, C.H. Beck, München 1968, S. 143; against: Herzog, Roman: *Subsidiaritätsprinzip und Staatsverfassung*, in: Der Staat, 1963, pp 401; Oppermann, Thomas: *Subsidiarität als Bestandteil des Grundgesetzes*, in: Juristische Schulung, 1996, p 569
[20] Treaty of European Community, Article 5
[21] Craig, Paul; de Bùrca, Grainne: EU Law, 2nd edition, OUP, Oxford 1998, pp 128
[22] Bogdanor, Vernon: Devolution in the UK, op cit, p 2
[23] Report of the Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, HMSO, London 1973, p. 165
[24] Bogdanor, Vernon: Devolution in the UK, op cit, p 2
[25] In the words of John Major: "One of the most dangerous proposals ever put to the British Nation" cited in: Bradbury, Jonathan: British Regionalism, op cit, p 4

II. The British Constitution and the historical experience of devolution

A. The constitutional background

The constitutional reform in territorial organisation of the United Kingdom might be seen as a very recent and innovative development. This view was notably stressed by way of the overwhelming comments for the recent political decisions "having no precedent since 1688"[1]. However, the United Kingdom has already had some experience with devolution and the discussion about the best governance of the United Kingdom is not really new. Therefore, devolution must be seen in the historical context of a highly centralised state, whose constitutional basements might have obstructed to devolve power to sub-national governments for different reasons.

It is hard to define the terms "British Constitution"[2] or "British Constitutional Law" as there is no written document, which could represent it[3]. A Constitution – whether written or not[4] - is the "systems of law, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen"[5]. Separately, the United Kingdom came into existence, not through the growth of a single national or linguistic consciousness, but as the outcome of a series of historical contingencies. It was created by ordinary acts of Parliament and not by a constitutional document[6]. Its "Constitution" has traditionally been characterised by the unity of its several parts: Wales became united with England through being conquered in 1262, while the acts of Union 1706 and 1707 marked the end of the separation between Scotland and England under two sovereign parliaments. Therefore, the United Kingdom did not appear as a state by a Nation-based movement like other European States, but was formed through the coming-together of different nations, England, Wales and Scotland with one supreme

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[1] See for example Dewar, Donald quoted in: Hassan, Gerry: A guide to the Scottish Parliament, HMSO, Edinburgh 1999, p 143
[2] Walter Bagehot entitled his book even "English Constitution"
[3] Yardley, David: Introduction to British Constitutional Law, 7th edition, London, Butterworths 1990, p 3
[4] Barnett, Antony: This Time, Our constitutional revolution, London, Vintage 1997, p 149; Barnett, Hilaire, op cit, pp 219
[5] Philips, Hood: Constitutional and Administrative Law, 7th edition, London 1987, p 5; Yardley, D., op cit, p 4
[6] Bogdanor, Vernon: Devolution in the United Kingdom, OUP, Oxford 1999, pp 3

parliament[7]. This parliament enjoyed a long dominance throughout the centuries. Ireland was initially integrated through the Acts of Union 1800, but only the Northern part of the Isle remained under the control of the Union Parliament. The Westminster parliament has therefore always been the "centre" of the state. Under these conditions, the Parliament developed to an institution whose main characteristics is to be the supreme institution of the state. This is the fundamental rule of British Constitutional Law[8].

In the United Kingdom the concept of parliamentary sovereignty has regularly been taken to mean, that there can be no substantive legal limitations on the capacity of Parliament[9]. Thus, it has been said that it is the fundamental – perhaps the only – constitutional principle of the United Kingdom[10]. John Austin systematically advanced the theory of parliamentary sovereignty[11]. In his view it appears that a sovereign lawmaker cannot be subject to any legal restriction. Austin presumes, that "the position that sovereign power is incapable of legal limitation will hold universally and without exception. The immediate author of a law of the kind, or any of the sovereign successors to that immediate author, may abrogate the law at pleasure"[12]. However, the "classical" view of parliamentary sovereignty is generally associated with the academic work of another famous English lawyer, A. V. Dicey. He was critical of Austin's proposal because of the lack of difference between political and legal sovereignty[13]. In his view, "a sovereign power cannot, whilst retaining its sovereign character, restrict its own powers by any particular enactment. 'Limited sovereignty', in short, is in the case of a Parliament, as of every other sovereign, a contradiction in terms"[14]. For Dicey the Queen in Parliament has "the right to make or unmake any law whatever" and nobody outside Parliament was "recognised by the law of England as having a right to override or set aside the legislation of parliament"[15], which is therefore legally sovereign[16]. Consequently, Parliament is firstly, the supreme law making body and may enact laws on any subject matter. Secondly, no Parliament may be bound by a predecessor or bind a successor. And thirdly, no person or body –including a court of law – may question the validity of Parliament's

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[7] Bogdanor, Vernon: Devolution in the UK, op cit, p 2
[8] Yardley, D., op cit, p 33; Bogdanor, Vernon: Devolution in the UK, op cit, p 1; Barnett, Hilaire, op cit, p 222
[9] Barnett, Hilaire, op cit, pp 208
[10] Bogdanor, Vernon: *Devolution,* in: Halpern, David (ed.): Options for Britain, Dartmouth 1996, p 298
[11] Marshall, Geoffrey: Parliamentary Sovereignty and the Commonwealth, Clarendon, Oxford 1957, p 4
[12] Austin, John: The Province of Jurisprudence Determined, Weidenfeld, London 1954, p 254
[13] Dicey, A.: Introduction to the Study of the Law of the Constitution, 10th edition, London, Macmillan 1959, p 39
[14] Dicey, A., op cit, p 68
[15] Dicey, A., op cit, p 40
[16] Wade, H.: *The Basis of Legal Sovereignty,* in: Cambridge Law Journal, Cambridge 1955, pp 172

enactments[17]. However, even Dicey was obliged to classify the *Treaties of Union* as they were expressively concluded "for ever" and "in all time". Dicey argued, albeit these stipulations could not bind, that they had a special purpose, and that

> "the enactment of laws which are described as unchangeable, immutable, or the like, is not necessarily futile. ... A sovereign Parliament ... although it cannot be logically bound to abstain from changing any given law, may, by the fact that an Act when it was passed had been declared to be unchangeable, receive a warning that it cannot be changed without grave danger to the Constitution of the country"[18].

Since these views have been put forward at the end of the 19th century, some empirical and normative assumptions which underlie this constitutional vision were questioned[19]. In this perspective, Lord Jennings admits that "the legal sovereign may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself"[20].

This current interpretation of the doctrine has been affected by various constitutional changes, which have occurred more recently. The first change arose from Britain's Membership in the European Union[21]. Initially, the courts of the United Kingdom have time after time attempted to avoid any conflict with Community law[22]. This was made by the use of principles and juridical constructions, which should oblige the courts to read the law of the United Kingdom as to be compatible with European law requirements[23]. However, such an interpretation of the law was not always possible as the Case *Duke v. GEC Reliance*[24] proves. The crucial case might have been the famous "*Factortame*"[25], where an unequivocal decision about sovereignty was to be made. On the substance of this case, there was a clash between the EC-Treaty itself and the Merchant Shipping Act 1988, which was enacted later. Especially one

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[17] Barnett, Hilaire, op cit, p 224
[18] Dicey, A.V.; Rait, S.: Thoughts on the Union between England and Scotland, Macmillan, London 1920, p 253
[19] Jennings, Ivor: The Law and the Constitution, 5th edition, Hodder, London 1959, p 152; Marshall, Geoffrey: Constitutional Theory, Clarendon, Oxford 1972; Craig, Paul: *Constitutionalism, Regulation and Review,* in: Hazell, Robert: Constitutional Futures, op cit, p 68
[20] Jennings, Ivor, op cit, p 152
[21] See Bradley, Anthony W.: *The Sovereignty of Parliament,* in: Jowell, Jeffery; Oliver, Dawn: The Changing Constitution, Clardendon, Oxford 1995, pp 90
[22] Craig, P.: *Constitutionalism, Regulation and Review,* in: Hazell, Robert: Constitutional Futures, op cit, p 68
[23] Barnett, Hilaire, op cit, p 253; Craig, Paul: *Constitutionalism, Regulation and Review,* in: Hazell, Robert: Constitutional Futures, op cit, p 68
[24] *Duke v. GEC Reliance* [1988] A.C. 618 and in: Craig, Paul; de Bùrca, Grainne: op cit, pp 285
[25] *R. v. Secretary of State for Transport, ex p. Factortame Ltd.* [1990] 2 A.C. 85 and later R. v. *Secretary of State for Transport, ex p. Factortame Ltd.* [1991] 1 A.C. 603.

feature of the concept of sovereignty was put in question, which entailed that if there is a clash between a later statutory norm and an earlier legal provision the former takes precedence[26] (implied repeal). Naturally, the application of this rule was very problematic, as the European Court of Justice held that Community law as far as there is a conflict with national provision must take precedence. Therefore, the dictum of the House of Lords in this case (*Factortame II)* is important as it stipulated, that

> "if the supremacy within the European Community of Community law over the national law of member states was not always inherent in the European Economic Community Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. ... the protection of rights under Community law, national courts must not be prohibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy."[27]

The consequence of this decision was that the concept of implied repeal has no longer been applicable to clashes of Community and national law[28] and that judges have had to disapply legislation which contravened European Community Law[29].

A second change to the doctrine of sovereignty was introduced by the implementation of the Human Rights Act[30] in 1998[31]. Its main approach to solving clashes between national (primary or secondary) legislation and the European Convention of Human Rights is also applied to European Community Law: the courts must interpret the national legislation in a way which is compatible with the Convention[32]. As far as such an interpretation is not available, the courts are allowed to make a declaration of incompatibility[33], albeit such

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[26] Bradley, Anthony W.: *The Sovereignty of Parliament,* op cit, p 95
[27] [1991] 1 A.C. 603, 658
[28] Craig, P., *Constitutionalism, Regulation and Review,* op cit, p 69
[29] Bogdanor, Vernon: *Devolution and the British Constitution,* op cit, p 63
[30] Craig, Paul: *Constitutionalism, Regulation and Review,* op cit, p 69
[31] See for example Leigh, Ian; Lustgarten, Laurence: *Making rights real: The courts, remedies, and the Human Rights Act,* in: C.L.J., Vol 58 (3), November 1999, pp 509
[32] Jacobs, F.: *Public Law - The impact of Europe,* in: Public Law, Sweet & Maxwell, London, Spring 1999, pp 232
[33] Human Rights Act 1998, section 4

declarations do not affect the validity of the national legislation[34]. It empowers the responsible Secretary of State to start a procedure in order to amend the offending legislation[35]. However, what the Parliament will do if the Secretary of State proposes such an amendment is not clear. In this way its sovereignty is not limited.

Devolution questions the constitutional doctrine of Parliamentary sovereignty anew. In the traditional conception of sovereignty power devolved is power retained, as it could be taken back by the Westminster Parliament, which remains "the sun, around which the planets revolve"[36]. The practical political reality, however, renders it a very unlikely eventuality[37]. First, there is the creation of new elected bodies in the Nations as "Parliaments" with a democratic mandate. This may lead to a form of "reasoned separatism", based on the doctrine of sovereignty: they may have at least political sovereignty. Second, the devolution of power to the Nations raises questions concerning the boundary lines of competence between Westminster and the other bodies which are provided with legislative power[38]. Until recently there was no functional boundary in the allocation of responsibilities. This lack of assignment of competence produced sometimes confusion[39]. On the other hand, there was a need to make special "constitutional" arrangements for the acts, which should empower the devolved institutions. The implementation Bills concerning devolution for Scotland and Wales were therefore introduced as "first class"[40] constitutional measures, i.e. the Committee stage in the House of Commons was taken on the floor of the house[41]. However, as outlined before, in traditional terms this cannot bind Parliament for the future. It is therefore unclear, whether the acts represent a real and lasting "constitutional" settlement.

The principle of parliamentary sovereignty has therefore ensured that historically the United Kingdom incorporated both a high degree of centralisation and integration. It could therefore even be regarded as an extreme case of a unitary state[42] in that there is no entrenched legal

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[34] Reed, Robert: *Devolution and the Judiciary*, in: Cambridge University, Centre for public law, Constitutional Reform in the United Kingdom: Practice and Principles, op cit, p. 27; Craig, Paul: *Constitutionalism, Regulation and Review,* in: Hazell, Robert: Constitutional Futures, op cit, p 70

[35] Craig, P: *Constitutionalism, Regulation and Review,* in: Hazell, Robert: Constitutional Futures, op cit, p 70

[36] Barnett, Eric, op cit, p 51; Bogdanor, Vernon: *Devolution and the British Constitution*, op cit, p 55

[37] Craig, Paul: *Constitutionalism, Regulation and Review,* in: Hazell, Robert: Constitutional Futures, op cit, p 70; see further below

[38] Reed, Robert, op cit, p 22; see further below

[39] Loveland, Ian: *Local Authorities,* in: Blackburn/ Plant: Constitutional Reform, op cit, p 313

[40] Expression provided by May, Erskine: Parliamentary Practice, 21st ed., Butterworths, London 1989, p 479

[41] Hazell, Robert: *Introduction*, in: Hazell, Robert: Constitutional Futures, op cit, p 2

[42] McQuail, Paul; Donelly, Katy: *English Regional Government,* in: Blackburn, Robert; Plant, Raymond: Constitutional Reform, London, Longman 1999, p 264; Hopkins, John: *Regional Government in the EU,* in: Tindale, Stephen (ed): The state and the nations, The politics of devolution, London, Institute for Public Policy

status for any public body other than Parliament[43]. It sought to integrate the whole Welsh, Scottish and Northern Irish elites[44]. Despite the fact that different administrative processes existed in the Celtic fringe there are no significant variations in policy implementation[45]. In practice, the United Kingdom is not as simple and easy to understand as a unitary state, but something blurred and the product of typical British compromise and incremental reform[46]. Despite this non-perfect form of a unitary state, the United Kingdom was a highly centralised state[47].

It is difficult to distinguish other bodies outside central government which enjoyed general democratic powers in the last few decades. The only institutions enjoying such competence were local authorities including their power to make by-laws. These authorities, covering geographic areas of established boundaries[48], are elected, and may raise revenue. Moreover, they have a certain degree of discretion in allocating priorities and determining financial allocations[49]. In view of the lack of any other democratic institution outside Westminster, these authorities represented the only balance[50] to the power of the Centre. However, even this role has been increasingly limited by central government due to their constitutionally unfixed structure. The legal basis of these authorities is provided by the Local Government Act 1972, which established a uniform two-tier system of county and district councils. But this structure was changed in 1985 when the Conservative Government of Mrs Margaret Thatcher abolished[51] the Greater London Council (GLC) and six other metropolitan county councils outside London, seemingly because it disliked the focus which they provided for opposition to its policies[52]. Later, in 1994, this two-tier system was replaced in Wales[53] and Scotland[54] by unitary authorities, with respectively 22 and 32 unitary councils being established. This rapid and constant change in the structure and organisation of local government has been outpaced by the increasing central control over its expenditure and

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Research, 1995, pp 13

[43] Bulpitt, Jim: Territory and power in the United Kingdom, op cit, p 236; John, Peter, op cit, p 132; also Keating, Michael: Nations against the State: the new politics of nationalism in Quebec, Catalonia and Scotland, Macmillan, London 1995,

[44] Birch, A.: Nationalism and National Integration, Unwin, London 1989

[45] Goldsmith, M.: *Managing the periphery in a period of fiscal stress,* in: Goldsmith, M.: New Research in Central- Local Relations, Dartmouth, Aldershot 1986

[46] Hassan, Gerry: The new Scotland, Fabian Society Pamphlet, N° 586, London, May 1998

[47] Bradbury, Jonathan, *Introduction,* in: Bradbury/ Mawson: British Regionalism and Devolution, op cit, p 19

[48] Barnett, Hilaire: Constitutional and administrative Law, Cavendish, London 1998, p 459

[49] Barnett, Eric, op cit, p 64

[50] Barnett, Eric, op cit, p 64

[51] Local Government (interim provisions) Act 1984; Local Government Act 1985

[52] Barnett, Eric, op cit, p 64

[53] Local Government (Wales) Act 1994

revenue-raising powers[55]. Local councils are statutory bodies and are only allowed to incur expenditure for those purposes, which have been authorised by parliamentary legislation[56]. As far as these authorised areas are exceeded, the action is "*ultra vires*" and the expenditure can be stopped by the courts[57]; councillors responsible for unauthorised expenditure may be even personally liable[58]. The local councils as the only democratic elected bodies in the United Kingdom outside Westminster are entirely creatures of statute[59]. Local government does not have any entrenched remit of independent action. All powers that they can exercise have been conferred by statute.

From a comparative perspective, it is obvious that the United Kingdom did not introduce any form of elected regional government. Whilst Britain remained a highly centralised state, there were a certain number of States in Western Europe which have moved towards a more decentralised structure[60]. The first example for a regionalised state was the German Republic after 1945 (Austria followed shortly later) as the new State emerged as a federal state, with a constitutional form agreeing a certain range of governmental power to the *Länder*, the institutional units[61] below the federal level. Later, other European States, such as Belgium (in 1994), France (in 1982), Spain (in 1978) and Italy (in 1972) followed[62] suit. In these states, there is a deep-rooted sub-national or regional tier of government with a wide range of powers concerning local and regional matters. The German Federal Model might be the most salient case for such regional bodies[63]: The *Länder* as the regional units of the federation enjoy an important role in the whole decision-making process of the German State except in some areas of reserved matters[64] to the federation. Another example for a strong regional layer of government is Spain. The Spanish *communidades autónomas* are provided by the

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[54] Scotland (Local Government) Act 1994
[55] Barnett, Hilaire, op cit, p 462, pp 466
[56] Barnett, Eric, op cit, p 65
[57] Barnett, Hilaire, op cit, p 462
[58] Barnett, Eric, op cit, p 65; Barnett, Hilaire, op cit, p 462-4
[59] Barnett, Hilaire, op cit, p 458
[60] Roht-Arriaza, Naomi: *The CoR and the Role of Regional Governments in the EU*, in: Hastings International & Comparative Law Review, Vol 20, University of Hastings, Winter 1997, pp 417
[61] Jones, Barry, in: Jones, Barry; Keating, Michael: Regions in the European Communities, Clarendon, Oxford 1985, p 238
[62] Wiedmann, Thomas: Idee und Gestalt der Region in Europa, Nomos, Baden-Baden 1996, pp 254; Hopkins, John: *Devolution from a comparative perspective*, in: European Public Law, Vol 4 (3), Kluwer Law International, Amsterdam 1998; Keating, Michael : *Europeanism and Regionalism*, in: Keating, Michael; Jones, Barry: The European Union and the Regions, Clarendon, Oxford 1995
[63] Jeffery, Charlie: *The decentralisation debate in the UK: Role-Modell Deutschland?,* in: Scottish Affairs, N° 19, spring 1997, pp 42; Hopkins, John, op cit, pp 13
[64] Art. 73-75 GG

Constitution[65] with a wide range of powers. Similar provisions are made in France, Italy, and Belgium[66]. In these countries, all sub-national tiers of government, either the regional or the local bodies, have entrenched legal status and they are not in the same way limited as the British authorities by the legal doctrine of "*ultra vires*". This doctrine means that local government is entirely dependent upon the national legislature to carry out an activity[67]. In Germany, for example, both the *Länder* and the local authorities have a constitutional status, which is provided by the *Grundgesetz,* the German Constitution[68]. This means that these authorities have a restricted realm of responsibility, which cannot be limited by the national Parliament[69]. Any interference of national legislation with this realm can be challenged at the Constitutional Court[70]. In the same manner, the Spanish *communidades autónomes* are constitutionally empowered to ensure the exercise of their constitutional rights[71].

The United Kingdom has been a centralised state, but there were at all times discussions about the best territorial organisation. Hence, devolution has long been an issue in UK politics for consideration in constitutional law. It was raised in respect of treatment of separate nations in the United Kingdom. It has thus been connected to the movement based on national identity[72]. However, the question of the relation between British Centre and the other Nations cannot be addressed except within the context of the former British Empire. The transformation of the British Empire into a "Commonwealth of independent nations" is meaningful in this context, as it was undoubtedly a successfully managed challenge for the United Kingdom[73]. Following the shock of the American war of independence in 1776, when the most important colonies of the first British Empire dissolved, the United Kingdom was able to find new solutions for other colonies with similar problems. The political elite of the United Kingdom was apparently capable to take lessons from this secession. At the same time, the British political system itself was under enormous pressure of social change due to the industrial revolution. It has been argued that this internal success was due to the fact that the British Constitution was never limited by a written document[74]. The successful transformation of the former British

[65] Art. 148 of the Spanish Constitution
[66] See Wiedmann, Thomas, op cit, or Hopkins, John, *Devolution from a comparative perspective,* op cit
[67] John, Peter, op cit, p 132
[68] Art. 30 GG and Art. 28 GG respectively
[69] Barnett, Eric, op cit, pp 66 (concerning local government)
[70] Art. 93 GG
[71] Hazell, Robert; O'Leary, Brendan: *A rolling programme of devolution,* in: Hazell, Robert: Constitutional Futures, OUP, Oxford 1999, pp 24; Wiedmann, Thomas, op cit, p 187
[72] Drucker, Henry; Brown, Gordon: The politics of nationalism and devolution, Longman, London 1980
[73] Davies, Norman: The Isles, op cit, p 911; Ansprenger, Franz: *Erbe des Empire – Bedeutungswandel des Commonwealth,* in: Kastendiek, Hans: Länderbericht Grossbritannien, Bundeszentrale, Bonn 1998, p 406
[74] Ansprenger, Franz, op cit, p 407; see also Thomson, David: England in the nineteenth century, Penguin,

colonies was based on the policy of progressing autonomy: the developing nations achieved gradually more autonomy and self-government, however, before the question of self-determination was tabled[75].

B. Home Rule, Devolution and Ireland

The issue of devolution of power raised within the United Kingdom first in respect of Ireland. Ireland had always a special relationship with the United Kingdom. The Irish country itself was originally catholic. However, after a period of implantation of Ulster by Protestants in the seventeenth century the indigenous, that means catholic, population became gradually treated as second-class citizens[76]. They were finally excluded from the Irish Parliament in 1692 and also disfranchised in 1727. Thus the Irish Parliament represented on the one hand the centre of the Nations political life, but the "political" nation at this moment was only the Protestant nation[77]. In 1782 the Irish Parliament was given back a co-ordinate power with the Westminster Parliament – leaving the Catholic majority aside, which had no right to vote[78]. With respect to the fear of an invasion of Napoleon Bonaparte, England proposed in 1800 a union under one parliament in Westminster. The Irish catholic majority supporting the union expected its emancipation[79]. However, the then King George III refused with reference to his oath requiring the maintenance of the Protestant religion[80]. In the middle of the nineteenth century after a gradually degrading economic and social situation and a famine[81], the catholic majority was finally led to believe that only a separation from Britain could bring an improvement despite the different efforts to appease catholic opinion[82]. Consequently, when the Irish males could vote for the first time in 1885 the nationalists won most of the seats[83].

When the Liberal British Prime Minister W. E. Gladstone had to deal with the "Irish question", he wanted to give Ireland political rights instead of making efforts of kindness. He sought a constitutionally balanced solution for Ireland on the one hand, and the safeguard of British interests on the other hand. He accepted that Britain could only survive by recognising

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London 1978, p 28
[75] Ansprenger, Franz, op cit, p 407
[76] Kearney, Hugh: The British Isles, A History of four Nations, CUP, Cambridge 1989, p 1489
[77] Bogdanor, Vernon: Devolution in the UK, op cit, p 16, p 56
[78] Kearney, Hugh, op cit, pp 211
[79] Kearney, Hugh, op cit, pp 213
[80] Bogdanor, Vernon: Devolution in the UK, op cit, p 17
[81] Kearney, Hugh, op cit, p 241-3
[82] Kearney, Hugh, op cit, p 214
[83] Bogdanor, Vernon: Devolution in the UK, op cit, p 17

the multinational character of its union[84]. Gladstone proposed a "home rule" model for Ireland to provide a certain degree of autonomy. Actually, "home rule" had the same guiding principles as devolution[85]: it should involve the transfer of certain powers from the superior to an inferior political authority, i.e. an Irish body avoiding the term, parliament[86]. The Irish Nationalist leader, John Redmond defined it as "the idea ... [of] the desirability of finding some middle course between separation on the one hand and over-centralisation on the other"[87]. From the standpoint of Gladstone, Irish "home rule" should secure the "main ends of civilised life"[88] by allowing Ireland to govern itself in its domestic affairs whilst remaining part of the United Kingdom. As a result, Irish "home rule" was the most divisive question of British politics between 1886 and 1914[89]. In this period three "home rule" bills were introduced into the Westminster Parliament[90]. Gladstone's proposals for Irish home rule were essentially based on fundamental values, which had already been successfully applied in imperial relations[91], i.e. in Canada[92]. In his view, home rule was an idea, which was especially founded on history and traditions, while aiming to restore, not to alter the Empire[93]. "The creation of such legislatures had in certain cases been an instrument, not of dismembering, but of consolidating Empire"[94], he thought.

This belief rested crucially on the assumption that home rule would cater to a "local patriotism" that could be made compatible with remaining in the United Kingdom[95]. However, his proposals for home rule had three main deficiencies: Firstly, there was no clear solution to the question of how Ireland should be represented at Westminster after home rule[96]. Should Irish MPs after the implementation of "home rule" continue to vote on the domestic affairs for England or Scotland, when English MPs would be no longer able to vote on domestic affairs of Ireland? Another problem was the financial arrangements of the "home

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[84] Bogdanor, Vernon: Devolution in the UK, op cit, p 18
[85] Brand, Jack; Mitchell, James: *Home Rule in Scotland,* in: Bradbury/ Mawson: British Regionalism, op cit, p 36
[86] Bogdanor, Vernon: Devolution in the UK, op cit, p 19
[87] Redmond, John: *Historical and Political Adresses, 1883-1897,* cited in Bogdanor, Vernon: Devolution in the UK, op cit, p 20
[88] Gladstone Papers, May 1886, BL Add. MS 44772, cited in Bogdanor, Vernon: Devolution in the UK, op cit, p 19
[89] Kearney, Hugh, op cit, p 234; Bogdanor, Vernon: Devolution in the UK, op cit, p 19
[90] Bogdanor, Vernon: Devolution in the UK, op cit, p 19
[91] See above
[92] Hadfield, Brigid: The Constitution of Northern Ireland, Belfast, SLS 1989, p 6
[93] Gladstone, William: Special Aspects of the Irish Question, John Murray, London 1892, p 47
[94] Memorandum to the Queen, March 1886: Gladstone Papers, BL Add. MS 40469, f. 20 cited in Bogdanor, Vernon: Devolution in the UK, op cit, p 300
[95] Bogdanor, Vernon: Devolution, op cit, p 13
[96] Hadfield, Brigid, op cit, p 13

rule" scheme. Taxation-powers could not be divided in a way which combined equity between the different parts of the country and financial autonomy for Ireland[97]. Finally, Gladstone was not able to prove that the sovereignty of the Westminster Parliament would remain more than a symbolic one[98]. His proposals were based on the colonial self-government in Canada. There, however, a really federal division of powers has been applied[99]. Nonetheless, home rule failed[100] not only for its constitutional deficiencies. It was also refused from the right and the left for social and economic reasons[101]. The following refusal of home rule did, however, not solve the Irish question[102]. Nonetheless, all the arguments of the "home rule" debate in the 1880s were to come back in later periods as the key problems of devolution.

These constitutionally insuperable deficiencies of any form of Irish "home rule" led some politicians to discover an easier model, which could reconcile the Irish wish for more autonomy and the requirements of sovereignty of parliament[103]. It was the proposal of a "federal solution". However, the proposition was thereby not intended to divide powers and sovereignty constitutionally like the American Constitution does[104]. Here might have been the start of the continuing[105] misleading understanding of federalism in the United Kingdom. In Britain, federalism is seen as a very centralist form of government. It has then been said, that "Federalism was a misnomer. But devolution has noisome associations. Home rule all around worse. Federalism has been a success everywhere and people will therefore not be inclined to fight shy of the word"[106]. In fact, the supporters of federalism meant a policy of general devolution or "Home- Rule- All- Round"[107]. Ireland, and Scotland, Wales and England should get some form of legislatures whilst retaining the Westminster sovereignty and solving the deficiencies of the Gladstonian "home rule" proposals by avoiding the problems of a lob-sided constitution[108]. As a result of such a form of "federalism", the different parts of the United Kingdom would be treated equally. On the one hand, "federalism" would therefore

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[97] Bogdanor, Vernon: Devolution in the UK, op cit, p 29; Hadfield, Brigid, op cit, p 15
[98] Bogdanor, Vernon: Devolution in the UK, op cit, p 29
[99] Bogdanor, Vernon: Devolution in the UK, op cit, p 27
[100] Hennessey, Thomas: A history of Northern Ireland, Macmillan, London 1997, pp 1
[101] Bogdanor, Vernon: Devolution in the UK, op cit, p 52
[102] Hadfield, Brigid, op cit, pp 15
[103] Bogdanor, Vernon: Devolution in the UK, op cit, p 44
[104] Bogdanor, Vernon: Devolution in the UK, op cit, p 44
[105] Burrows, Bernhard; Denton, Goeffrey: Devolution or Federalism, Macmillan, London 1980, p 5; Sturm, Roland: *Kein totes Gleis britischer Politik,* in: Frankfurter Allgemeine Zeitung, 6 May 1999, p 14
[106] Kerr, Philip, quoted in: Kendle, J.E.: *The round table movement and „Home- Rule- All- Round",* in: Historical Journal, Vol 11, London 1968, p 338
[107] Burrows/ Denton, op cit, p 7; Bogdanor, Vernon: Devolution in the UK, op cit, p 44
[108] Bogdanor, Vernon: Devolution in the UK, op cit, p 44

safeguard the unity of the kingdom and protect against separatism. "Federalism" would, on the other hand, involve a massive constitutional upheaval. However, the federalist solution remained an almost unrealised idea. The most obvious objection to this constitutional system was that it gave to England a constitution that it did not want only to retain Ireland within the United Kingdom. Lord Curzon explained to the War Cabinet in July 1918 that "he was not prepared to pull up the British Constitution by the roots in order to get Ireland out of her difficulties"[109]. Apart from that, federalism was put forward in the context of constitutional arrangements for the Commonwealth as an imperial federation[110].

Whilst Irish home rule failed before 1914, it was to re-emerge after the First World War. As the war drew to a close in 1918, the British government once more tried to settle the Irish question by legislating for "home rule" for the fourth time. Then, "devolution" was also seen in the context of an overloaded Westminster Parliament[111], which sought to reduce its work schedule. The Government of Ireland Act 1914 was scheduled to be enacted automatically on the ratification of peace between the Great powers[112]. Albeit the Act was supposed to be politically impossible to amend, neither the nationalists nor the unionists found it now suitable. The government therefore set up a Committee under the leadership of Walter Long, the former leader of the Irish Unionist Party to elaborate a new scheme of self-government for the Isle. Long himself found that Ulster Unionists would accept "home rule" only if at least six of the nine Ulster counties remained outside the juridical responsibility of the Irish "parliament"[113]. Thus, the Committee conceived its proposals in the general context of devolution for the United Kingdom as a whole[114]. As the Bill passed the House of Commons, the position of the Nationalists was troubled by discussions between Sinn Fein and the Irish Party. These discussions were finished by a broad majority of Sinn Fein at the general election in 1918, but Sinn Fein's MPs rejected their seats at Westminster[115] and constituted themselves in Dublin as the Parliament of Ireland, Dáil Éirann. There, it issued a declaration of independence, in which they announced an Irish Republic in January 1919[116]. Consequently, the Nationalists did not influence the elaboration of the "home rule" bill

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[109] Cited in Fair, John: British Interparty Conferences, OUP, Oxford 1980, p 229
[110] Wheare, K.C.: Federal Government, 4th edition, OUP, Oxford 1963, p 9
[111] Bradbury, Jonathan: British Regionalism and Devolution, op cit, p 12; Bogdanor, Vernon: Devolution, OUP, Oxford 1979, p 36
[112] Hennessey, Thomas, op cit, p 4
[113] Kendle, John: Ireland and the federal solution: The debate over the United Kingdom Constitution, Kingston 1989, p 188
[114] Hennessey, Thomas, op cit, p 5
[115] Bogdanor, Vernon: Devolution in the UK, op cit, p 64
[116] Hennessey, Thomas, op cit, p 9

(including the boundaries), that became the Government of Ireland Act 1920. It created two new jurisdictions with their own Parliaments[117]: one in Dublin and one in Belfast. Thus, the partition of the Isle was institutionalised[118]. The establishment of a separate Parliament for Northern Ireland was defended on the grounds that a later reunification of Ireland would be easier[119].

The Government of Ireland Act was supposed to apply for Ireland as a whole. However, it came only into effect in the northern part of the Isle[120]. In the Southern part, Sinn Fein did not claim "home rule" but independence[121]. The Anglo-Irish Treaty of 1921 finally assured the independence of the South. (Southern) Ireland was to become a self-governing dominion within the British Empire[122], the so-called "Irish Free State"[123]. The Irish Free State Act amended the Act of Union by excluding the Southern counties from its jurisdiction[124]. Northern Ireland was given the choice to secede[125] from the Free State, whilst retaining its own "home rule" scheme[126]. The six northern counties naturally did not hesitate to accept this offer. Therefore, "home rule" for Northern Ireland remained the relic of a political failure: The solution of the Irish question. Consequently, the case study of Northern Ireland in relation of devolution is limited by two factors[127]. The underlying weakness of its exemplarity is at first, that its parliament was not established to meet a nationalist or separatist threat. However, this is in general the reason for devolved parliaments[128]. The new Ulster parliament at Belfast, called "Stormont", was not demanded by the Unionist, but enforced by the British government to provide the end of direct rule from Westminster. The second argument for the unique character of the Northern Ireland example is that the situation in Ireland with its deep historical roots was (and is) exceptional. On the one hand the primarily protestant Unionists, who sought to remain entirely under central control, and on the other hand the catholic group of Nationalists, who wanted one Irish State[129]. Apart from that, the claim[130] of the Irish Free State and the Irish Republic respectively on Northern Ireland justified the work of all

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[117] Hennessey, Thomas, op cit, p 9
[118] Bogdanor, Vernon: Devolution in the UK, op cit, p 64; Hadfield, Brigid, op cit, p 31
[119] Kendle, John: Walter Long, Ireland and the Union, Queen's University, Montreal 1992, p 183
[120] Bogdanor, Vernon: Devolution in the UK, op cit, p 66
[121] Bogdanor, Vernon: Devolution in the UK, op cit, p 66
[122] Irish Free State (Agreement) Act 1922
[123] Hennessey, Thomas, op cit, p 21
[124] Bogdanor, Vernon: Devolution in the UK, op cit, p 69
[125] Article 12 of the Irish Free State (Agreement) Act 1922
[126] Hadfield, Brigid, op cit, p 34
[127] Bogdanor, Vernon: Devolution in the UK, op cit, p 55
[128] Barnett, Eric, op cit, p 59
[129] Hadfield, Brigid, op cit, pp 5
[130] Article 2 of the Irish Constitution, see below

nationalist groups in Ulster. In this context, the North-South Council set up in the Act was never able to serve as a bridge for the later re-unification of Ireland and was destroyed by protestant opposition.

Despite these limitations, different lessons can be drawn from the Northern Ireland devolution scheme, which lasted for over fifty years. Northern Ireland had its status as part of the United Kingdom through the Act of Union 1800, but the Government of Ireland Act 1920 became finally the Constitution of Northern Ireland[131]. The Act divided legislative and financial powers[132] between the two Parliaments and provided for machinery by which the Constitution could be safeguarded from any breach by the Northern Ireland Parliament. The 1920 Act established a bicameral Parliament[133] and provided for reduced representation of Northern Ireland at Westminster. It was stipulated that there should be a Lower House[134] (modelled alongside the House of Commons) and a Senate[135] (The House of Lords). The Members of the Lower House should be elected by proportional representation in General Elections. The 26[136] Members of the Senate were to be elected by the Members of the Lower House according to a system of proportional representation[137]. The Act transferred[138] to Belfast the general power to make laws for "the peace, order and good government" of the Province. This devolution of power was residual, as there were several enumerated restrictions[139]. At the outset, there was a realm of excepted matters, which remained within the exclusive competence of Westminster[140]. These matters dealt with national or imperial concerns, such as foreign affairs or defence. Secondly, the area of reserved matters was equated with the excepted matters and was to remain at Westminster. The reserved matters should originally be devolved to a Irish Parliament for the whole Isle[141]. They included a Supreme Court, certain taxes, postal services and savings banks. Following the general grant of power, the Stormont Parliament was responsible for all matters except the reserved and excepted ones ("transferred matters"). The Act provided[142] also that the Belfast Parliament was prohibited from enacting laws interfering with religious equality and to take property without compensation.

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[131] Hadfield, Brigid, op cit, pp 45
[132] Hadfield, Brigid, op cit, p 48-9
[133] Section 14 (4)
[134] Section 14
[135] Section 13
[136] Excluding the Mayors of Belfast and Londonderry
[137] Hadfield, Brigid, op cit, p 55
[138] Section 4 (1)
[139] Hadfield, Brigid, op cit, p 48
[140] Section 4 (7)
[141] Hadfield, Brigid, op cit, p 77
[142] Section 5

The Act stipulated that the validity of Northern Ireland's legislation could be challenged and in doing so it enforced the sovereignty of Westminster[143]. It allowed for appeal to the Northern Irish Courts. Special provision was made for constitutional matters. They were to be raised at the Judicial Committee of the Privy Council of the House of Lords[144]. Consequently, statutes made by the Northern Ireland Parliament, albeit a subordinate parliament, could be declared void for being "*ultra vires*"[145]. Therefore, the courts were allowed to invalidate acts of parliament[146]. It is also noteworthy, that Northern Ireland was represented at Westminster, but in a reduced number of thirteen members[147].

The Westminster Parliament maintained, in the Act, that its sovereignty remained unaffected and that the new Parliament at Belfast was sub-ordinate[148]. Therefore, it might have been possible that Westminster legislates even in areas of devolved matters. However, such attempts would have been "unconstitutional"[149]. In theory, however, the general diceyan[150] conception was followed by several sections[151] of the Act 1920. In practice, on the contrary, the relationship between Stormont and Westminster became rather federal, as the province enjoyed a rather large degree of autonomy[152]. This was due to the fact that the provisions of the Act were unpractical and inconsistent with the general idea of devolution. Having legislated for this form of Northern Irish self-government, Westminster was never intended to enact interfering bills, i.e. to overrule Stormont. It could be argued that this was omitted by convention[153] or as being unconstitutional[154]. Thus, Westminster did intervene by direct legislation on no occasion until 1969[155]. However, the provisions were unpractical, that means ineffective. This can be best showed by the way in which the United Kingdom could uphold the respect of the constitution, i.e. in constitutional practice of Northern Ireland. The Government of Ireland Act 1920 provided that the Belfast Parliament was prohibited from making laws interfering with religious equality[156]. However, Westminster had no right[157] to

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[143] Section 49 and 50
[144] Section 51
[145] See further below
[146] Bogdanor, Vernon: Devolution in the UK, op cit, p 72
[147] Hadfield, Brigid: The constitution of Northern Ireland, op cit, p 59
[148] Section 75
[149] Jennings, Ivor, op cit, p 157
[150] See above
[151] Section 6, 12 and 75
[152] Bogdanor, Vernon: Devolution in the UK, op cit, p 72
[153] Hadfield, Brigid, op cit, p 80
[154] See above
[155] Bogdanor, Vernon: Devolution in the UK, op cit, p 73
[156] See above

keep up equal treatment of the catholic population in Ulster. In practice, it became obvious that this was an Achilles' heel, because the catholic minority has been consequently discriminated. First, it has been excluded from the nomination of judges[158]. Thus, "the only area of the United Kingdom where there were constitutionally entrenched safeguards against religious discrimination was also the only area in which discrimination was prevalent and unchecked"[159]. This led the protestant majority later to attempt that their political power was enforced: Stormont abolished the system of proportional representation in local government elections[160]. Westminster was aware of the problem, however, it hesitated to overrule the Stormont Parliament. The British government wanted to stop this measure as a breach of the Anglo-Irish Treaty of 1921 by withhold of the Royal assent. Belfast, in contrast, argued that the bill was clearly within its powers and was willing to resign, if Westminster overruled it. Thus, the British Government receded[161]. The consequence of this retreat was that Stormont went further and rearranged[162] the boundaries in the interest of the Protestants. And finally, even the proportional representation for the elections of the Stormont Parliament were abolished in 1929. Under the previous system of proportional representation, the Catholic minority had a fair status in the province. With other discriminating measures added over the years, the situation exploded finally in violent protest in 1968[163].

The Constitution of Northern Ireland did not provide for these acts, but Westminster was apparently unwilling to assert its sovereignty[164]. There was a lack of information. For example, the Parliament of the United Kingdom spent only two hours a year on average to Northern Irish questions between 1921 and 1968[165]. The inattention of Westminster was combined with a general ignorance[166] in Britain. Thus, one part of the conflicting and violent development in the province was based on the failure of the British government to control effectively civil rights in Northern Ireland. Practically, however, the province enjoyed a quasi-federal status[167] in this time.

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[157] Section 5 (1), 8(6)
[158] Bogdanor, Vernon: Devolution in the UK, op cit, p 74 citing more examples
[159] Bogdanor, Vernon: Devolution in the UK, op cit, p 74
[160] See further below
[161] Bogdanor, Vernon: Devolution in the UK, op cit, p 76
[162] Hadfield, Brigid, op cit, p 80; Hennessey, Thomas, op cit, p 46
[163] Hennessey, Thomas, op cit, pp 171
[164] Bogdanor, Vernon: Devolution in the UK, op cit, p 79
[165] Coulter, Colin: *Direct Rule and the Ulster Middle Classes,* in: English, Richard; Walker, Graham: Unionism in Modern Ireland, Macmillan, London 1996, pp 169
[166] Bogdanor, Vernon: Devolution in the UK, op cit, p 79
[167] Bogdanor, Vernon: Devolution in the UK, op cit, p 80

In the early 1960s Northern Ireland's new prime minister, Terence O'Neill, offered a new and modernist image of Ulster Unionism[168]. He intended to stress the economic problems of the province rather than the religious conflict and tried to integrate the catholic minority by this way. That "new spirit"[169], however, could not prevent the minority pushing for more reforms. Like all his successors in reformist Unionism, O'Neill was in a peculiar situation. On the one hand, Unionism was offered a new chance by his political overture but, on the other hand, it was increasingly difficult for the British government to depend upon O'Neill. For the catholics, the pace of reforms was not fast enough. The British government, however, could force reforms on a Unionist prime minister, but only at the expense of compromising his position both in Ulster and within its own party[170]. The violent development in Ulster in 1968 made it necessary that central government was involved in Northern Ireland's politics directly. However, the "explication of British policy" to the Belfast government was belated and Westminster was gradually convinced that only a direct rule scheme could bring the control of the province[171].

A new constitutional structure was covered by the Northern Ireland Act 1973, which contained like its predecessor of 1920 three categories of power, excepted, minimum reserved and transferred matters[172]. The Act provided for a power-sharing executive whose powers should be determined after its initial establishment. These questions were addressed in December 1973 at Sunningdale, where the British, Irish and Northern Irish governments met. At the conclusion of the conference agreement on the establishment of a "Council of Ireland" was reached, but that agreement could not be realised. The Unionists repudiated the agreement, leaving the power-sharing executive isolated[173]. The agreement was also challenged in the Irish Republic as a breach of the constitution", because it claimed to accept the will of the Northern Irish population over their future. Even if the 1973 Act might have been a "bold and hopeful experiment"[174], it once more gave the responsibility for the province to the Ulstermen themselves. The provisions lacked the necessary political and public support – it was alleged that Whitehall had "betrayed Ulster"[175] – and the experiment was finished in 1974.

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[168] Boyce, David G.: The Irish question and British politics, 1868-1996, 2nd edition, Macmillan, London 1996, p 107
[169] Boyce, David G., op cit, p 108
[170] Boyce, David G., op cit, p 112
[171] Bogdanor, Vernon: Devolution in the UK, op cit, p 98
[172] Hadfield, Brigid: The constitution of Northern Ireland, op cit, p 108
[173] Hadfield, Brigid: The constitution of Northern Ireland, op cit, p 114
[174] Boyce, David G., op cit, p 118

Following the break out of disorder in Ulster, there was no immediate attempt to look for a new solution[176]. Temporary arrangements for the province were sought for the orderly government of Northern Ireland[177]. Under the scheme of "direct rule", the laws, which were made by primary legislation in other parts of the United Kingdom, were made largely by Orders in Council for Northern Ireland[178]. The province was constitutionally not re-integrated in the British State, but Westminster wanted to retain the control over the province applied by a Secretary of State[179]. Consequently, the parliamentary control over Ulster was less open than for the rest of the United Kingdom[180]. The most serious defects of these systems were that they gave the political parties, which are completely different[181] from the British parties, "all the advantages of political activity with none of the disadvantages of responsibility"[182]. There was thus a clear experience how devolution may not work successfully.

C. Nationalism and Devolution in Scotland, Wales and England

Even if the British state had a high degree of centralisation, the British government made special arrangements for the government in Scotland, Wales and England. From a general standpoint, it has been obvious that Scotland gained a lot from its membership in the United Kingdom since the beginning of the century, especially with respect to its 'good deal' in welfare. In the Acts of Union 1707 Scotland could preserve its own Church, special arrangements in education and its own legal system. It was also allowed to send a relative higher number of MPs to Westminster. In 1885 a Secretary of State for Scotland was re-established and became Member of the Cabinet in 1892[183]. He presides over the Scottish Office, which has become central government's executive arm in Scotland. Thus, Scotland has always been in a privileged position to demand more from the centre. Wales though being conquered at early times received similar treatment in 1960s. A Welsh Office was established

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[175] Boyce, David G., op cit, p 119
[176] Hadfield, Brigid: *Devolution: Some key issues and a Northern Ireland searchlight,* in: Cambridge Centre for Public Law: Constitutional Reform in the United Kingdom, Hart, Oxford 1998, pp 51
[177] Hadfield, Brigid: The constitution of Northern Ireland, op cit, p 125
[178] Hadfield, Brigid: The constitution of Northern Ireland, op cit, pp 104
[179] Hadfield, Brigid: *Devolution: Some key issues and a Northern Ireland searchlight,* op cit, p 52
[180] Bogdanor, Vernon: Devolution in the UK, op cit, p 99
[181] Bogdanor, Vernon: Devolution in the UK, op cit, pp 100
[182] Prior, James, in: House of Commons Debates, Vol 23, col 479, 10 May 1982
[183] Brown/McCrone/Paterson, op cit, pp 98

in 1964 and like Scotland special arrangements were made in the House of Commons. England itself, however, always being dominant within the British state was only for administrative reasons split into eight regions (with Regional Economic Planning Councils) in 1964. Later Government Offices have been established in these regions. These special treatments for the different territorial units have been described as "executive regionalism" within the British state[184].

However, these arrangements proved unsatisfactory. New devolution debates arose in the 1960s which were not due to the problems in Northern Ireland. Their main impulse came especially from Scotland and to a lesser extent from Wales[185]. The first modern political movement leading Scottish nationalism had been founded in 1886[186]. The Scottish Home Rule Association was set up in order to change the "legislative neglect of Scotland"[187]. A distinct political nationalist party was not created before 1934, when John MacCormick founded the Scottish Nationalist Party (SNP). MacCormick himself has sought to fight for a Scottish "home rule" scheme, but he was rather quickly ousted from the leadership and the SNP became a explicitly separatist party[188]. Since the general elections hold in 1955 the SNP has been able to increase its support steadily[189]. In 1966, the SNP gained 5 per cent[190] and won soon after a by-election in Hamilton – a stronghold of the Labour Party[191]. After a time of economic growth, political participation became an increasingly important issue at this time. Apart from the Scot's political participation, the SNP stressed the national character of the recently discovered oil resources in the North Sea. The slogan "It's Scotland's oil!" was put forward. In Wales, the nationalist party Plaid Cymru never reached the same role as the SNP, but it was also able to win its initial constituencies in the 1960s. The nationalist ascent has developed[192] further and its threat enforced the political centre in London to react[193]. The then Labour Prime Minister, Harold Wilson proposed in 1968 a Royal Commission on the Constitution to investigate the situation. He remarked, however, that Royal Commissions "take minutes and spend years"[194] implying that the Commission would "kill devolution"[195]

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[184] See Bradbury, Jonathan, in: British Regionalism, op cit, pp 11
[185] Jones, Barry: *Welsh Politics and changing British and European Context,* in: British Regionalism, op cit, p 56
[186] Bogdanor, Vernon: Devolution in the UK, op cit, p 119
[187] Scottish Home Rule Association, Statement of Scotland's Claim for Home Rule, Edinburgh 1888, p 5
[188] *Brown, McCrone, Paterson*: op cit, p 17; Nairn, Tom: The Break-up of Britain, op cit, pp 180
[189] Paterson, Lindsay: The autonomy of modern Scotland, EUP, Edinburgh 1994, p 168
[190] Bogdanor, Vernon: Devolution in the UK, op cit, p 121
[191] Drucker/ Brown, op cit, p 80
[192] Drucker/ Brown, op cit, p 41
[193] Sturm, Roland: *Das Vereinigte Königreich von Grossbritannien und Nordirland – Historische Grundlagen und zeitgeschichtlicher Problemaufriss*, in: Länderbericht Grossbritannien, op cit, p 82
[194] Cited in Drucker/ Brown, op cit, p 54

when it was appointed in 1969. Officially, the Commission was charged to

> "examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom; to consider, having regard to developments in local government organisation and in the administrative and other relationships between the various parts of the United Kingdom, ... whether any changes are desirable in those functions or otherwise in present constitutional and economic relationship; to consider, also, whether any changes are desirable in the constitutional and economic relationship..."[196].

Meanwhile, the general election of 1970 returned a new Conservative government with Edward Heath as Prime Minister. He was not insensitive to the argument for devolution to Scotland, as this would allow contrasting Conservative sensitivities with the centralising tendencies of the Labour Party[197]. Thus, the Conservatives became apparently the first of the two major parties to support devolution. In the "declaration of Perth[198]" in 1968, Heath favoured a directly elected Scottish assembly[199]. To prove his commitment to devolution, he established a Scottish Constitutional Committee[200]. In contrast to the Royal Commission, this Committee had to consider whether "it was possible to meet the desire of the majority of the people of Scotland to have a greater say in the conduct of their own affairs"[201] – quite an opportunistic instruction. The Committee reported in March 1970 by proposing Scottish assembly within the Westminster machinery[202]. This part of the proposal was evidently seen as weakness, but it had the advantage of being a "natural evolution ... of parliamentary practice[203]". However, the Heath government made no move to establish that Assembly[204]. The reason for this hesitation[205] might have been that the government did not want to anticipate the report of the Royal Commission of the Constitution[206]. Additionally, the Heath

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[195] Cited in Drucker/ Brown, op cit, p 54 and p 82
[196] Report of the Royal Commission on the Constitution (Kilbrandon Commission), Cmnd. 5460-I, HMSO 1973, p iii, iv
[197] Bogdanor, Vernon: Devolution in the UK, op cit, p 132
[198] Drucker/ Brown, op cit, p 84
[199] Bogdanor, Vernon: Devolution in the UK, op cit, p 133
[200] The "Home Commission", Drucker/ Brown, op cit, p 84
[201] Scottish Constitutional Committee: Scotland's Government, The Report of the Scottish Constitutional Committee, Edinburgh 1970, p 62
[202] Bogdanor, Vernon: Devolution in the UK, op cit, p 134
[203] Scottish Constitutional Committee, op cit, p 5
[204] Bogdanor, Vernon: Devolution in the UK, op cit, p 135
[205] Drucker/ Brown, op cit, pp 85-6
[206] Bogdanor, Vernon: Devolution in the UK, op cit, p 135

government proceeded with the local government reform[207] in Scotland, which was incompatible with the establishment of an Scottish Assembly at the same time. However, this was the end of the Conservative move in favour of devolution, because in 1975 when the anti-devolutionist Margaret Thatcher became the successor to Edward Heath in the leadership of the party the proposals fell short[208].

In October 1973 the report of the Royal Commission on the Constitution was finally published. Its members were united in the commitment that something had to change in the system of government, but they were divided on the kind of reforms that were desirable[209]. Moreover, their report was a rather unusual proposition[210] of a Royal Constitution, because it contained a lot of individual opinions and different objections. Thus, the report was divided in two parts: the report of the majority and a memorandum of dissent[211]. Lord Crowther-Hunt and Professor Alan Peacock, who supported a scheme of federal[212] devolution to Scotland, Wales, Northern Ireland and the English regions, issued the latter. The report of the majority proposed a form of devolution for Scotland and Wales, whilst beginning to distinguish thoroughly between separatism, federalism and devolution. This was made because the main line of division within the Commission was between a minority opting for a completely reformed federal state and a majority preferring only minor changes within the current system[213].

The majority rejected "federalism" as a solution for the United Kingdom in favour of devolution. First, questionably, they issued in their statement that "it is widely accepted that even at its best federalism is an awkward system to operate"[214]. Canadian federalism would have evidenced desirable change being avoided and proved as an inflexible system of government[215]. Secondly, for the majority of the Commission the application of federalism to the United Kingdom was seen as "particularly unsuitable". That view was based, on the one hand, on the fact that no "unitary state comparable to the United Kingdom has ever changed to federalism, with the exception of Western Germany after the Second World War". The circumstances of that case were, however, unique and, federalism was designed and is

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[207] Bradbury, Jonathan, in: British Regionalism, op cit, p 15
[208] Bradbury, Jonathan, in: British Regionalism, op cit, p 16
[209] Drucker/ Brown, op cit, p 59
[210] Drucker/ Brown, op cit, p 59; Bogdanor, Vernon: Devolution in the UK, op cit, p 173
[211] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit
[212] Bogdanor, Vernon: Devolution in the UK, op cit, p 172
[213] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit, Parts IV-V
[214] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit, para 520

appropriate for states coming together to form a single unit, and not far a state breaking up into smaller units[216]. Federalism was also rejected, because it would require a written constitution placing the elected bodies in a position subordinate to the judiciary. That situation, probably unavoidable in a federal system, is "foreign to our own tradition"[217]. Additionally, the majority of the Commission saw no solution to the dominant position of England in federation. Even if England was split up into several provinces, the south-east might dominate the federation according to its huge population[218]. Finally, the Commissioners feared the undermining tendency of federalism for the political and economic unity of the country[219]. Hence, the majority of the Commission favoured devolution, as they took into account the centralisation, the increasing weakening of democracy and the national feelings in Scotland and Wales[220]. Devolution, for them, thus "could go a great deal to cure the particular faults which we have been mainly concerned, those which are essentially regional in character[221]".

Conversely, the Memorandum of dissent interpreted its task more widely and its authors thought, "only if we recommend the abolition of the Monarchy would we be in conflict with our terms of reference"[222]. Both interpreted the "terms of reference as meaning that we should consider what changes might be necessary in our system of government as a whole if it is not to meet the needs and aspirations of the people[223]. Our colleagues do not give an analytical assessment of the validity or otherwise of the particular complaints about our system of government [...] and summarise these complaints under such headings as "centralisation" and "the weakening of democracy", but nowhere do they say whether [...] the complaints [...] are justified"[224]. Therefore, Crowther-Hunt and Peacock envisaged a reform of the entire system of government and recommended the adoption of a federal model like it is practised in Germany whilst including different adjustments referring to the British tradition and practice[225]. This comprised a devolution scheme for England, where five regional assemblies were to be established, and different models of devolution with legislative, executive, advisory powers and tax raising powers. This proposition had two weaknesses: First, it did

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[215] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit, paras 521-523
[216] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit, para 526
[217] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit, para 529
[218] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit, para 533
[219] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit, para 535
[220] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit, paras 1096-1101
[221] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit, para 1224
[222] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-II, Chapter 1, para 1
[223] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-II, Preface, para 2
[224] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-II, Preface, para 2

devolve power to the English regions, albeit there was no popular demand for such bodies and, secondly, it made no special provision for the Scottish legal system, which was to remain in the area of Westminster responsibility[226].

The majority's report proposed[227] in contrast a devolution scheme only for Scotland and Wales based on the argument that these two Nations wanted to have devolution according to opinion polls[228]. However, if there should be devolution to Scotland and Wales it should go along with the abolition of the Secretary of States and the equalisation of their Westminster representation. Apart from that, the whole Commission recommended that the new assemblies should enjoy the greatest financial scope consistent with the political and economic unity of the United Kingdom[229]. The question, what role would be attributed to Scottish and Welsh MPs after devolution did not raise any problem in the report[230], although this problem worried Gladstone eighty years before[231]. The report's legacy might be, however, that devolution to Scotland and Wales would not have an impact on England[232] and that the recent Membership of the United Kingdom in the European Community would not affect devolution. The main report declared, that "momentous as entry to Europe is, it does not have any major specific consequences for the questions remitted to us. In particular, it does not rule out devolution"[233]. The contradictory parts of the report did not give a clear direction for possible devolution debates and the report passed briefly the House of Commons. Apart from that, the report of the Kilbrandon Commission represented the most comprehensive investigation of the constitutional issues of devolution in the United Kingdom.

Irrespective of the Kilbrandon report, however, devolution returned to the political agenda after the election of the Labour MP Harold Wilson as Prime Minister in 1974. Labour was under electoral pressure in Scotland confronted with the threat of the growing support for the SNP[234]. The Scottish Labour Party had rejected devolution in 1968 declaring "We think that legislative devolution would damage Scotland's economic development"[235]. The Labour national election manifesto in March 1974 was silent about devolution, albeit the Welsh

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[225] Bogdanor, Vernon: Devolution in the UK, op cit, p 172
[226] Bogdanor, Vernon: Devolution in the UK, op cit, p 174
[227] Kilbrandon Commission, Cmnd. 5460-I, op cit, para 1123
[228] Drucker/ Brown, op cit, p 63
[229] Kilbrandon Commission, Cmnd. 5460-II, paras 270-276, also: Cmnd. 5460-I, para 694
[230] Kilbrandon Commission, Cmnd. 5460-I, op cit, para 1111
[231] See above
[232] Bogdanor, Vernon: Devolution in the UK, op cit, p 177
[233] Kilbrandon Commission, Cmnd. 5460-I, op cit, para 404
[234] See above

Labour group proposed a directly elected council for Wales[236]. However, for the general election of October 1974, Labour presented itself as committed to devolution[237], and published for the first time a separate Scottish manifesto[238]. This was not really demanded from the Scottish Party[239], but was introduced by the centre for tactical and strategic reasons[240]. Just before the election, Wilson presented in September 1974 a White Paper[241] laying down its "decisions of principles" for devolution. The White Paper broadly furthered the general ideas of the Kilbrandon Commission's main report, but differed on certain points of principle[242]. The Labour government wanted to create directly elected assemblies in Scotland and Wales, whereby the Scottish one would have legislative powers, whilst it attributed to the Welsh only executive powers. There was no difference with the Kilbrandon proposals. In contrast to the Royal Commission, however, these bodies should be financed by block-grant allocated by Parliament and they would not have tax rising powers. Furthermore the White Paper saw no need to reduce the number of Scottish or Welsh MPs at Westminster. Nor were the Secretaries of State for Scotland and Wales to be abolished. In addition, the new bodies should be elected by the first-past-the-post system, whilst devolution in England would be postponed for further consideration.

However, these "principles" were formulated in the context of Labour's electoral campaign and were dominated by fear of electoral gains of the SNP. They lacked "any particular conviction of the merits of devolution"[243]. This included an important opposition of some senior ministers of Wilson's Cabinet[244]. In preparation of the Government of Scotland and Wales Act 1978 these "principles" were detailed more preciously in another White Paper[245]. Therein, the government endeavoured to show a minimalist approach to devolution. The new bodies should follow different types – proposing an executive model for Wales and a legislative model for Scotland – but they should be established by one act. The White Paper

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[235] Royal Commission on the Constitution, Minutes of evidence, Edinburgh, HMSO 1971, iv, para 70
[236] Bogdanor, Vernon: Devolution in the UK, op cit, p 141
[237] White Paper, Devolution within the United Kingdom – Some alternatives for discussion, (without Command number) cited in: Drucker/ Brown, op cit, p 91 and p 96
[238] Bogdanor, Vernon: Devolution in the UK, op cit, p 142
[239] see Dalyell, Tam: Devolution: The end of Britain, Cape, London 1977, p 99; Bradbury, Jonathan, in: British Regionalism, op cit, p 16
[240] Bogdanor, Vernon: Devolution in the UK, op cit, p 142
[241] Democracy and Devolution: Proposals for Scotland and Wales, HMSO 1974, Cmnd. 5732
[242] Drucker/ Brown, op cit, p 91
[243] Bogdanor, Vernon: Devolution in the UK, op cit, p 178
[244] As Roy Jenkins, who is cited in Dell, Edmund: A Hard Pounding: Politics and Economic Crisis, 1974-1976, OUP, Oxford 1991, p 51
[245] Our changing democracy: Devolution to Scotland and Wales, HMSO 1975, Cmnd. 6348

included restraints to prevent the assemblies from undermining the British government[246]. With these stipulations the Government of Scotland and Wales Bill was introduced in the Commons, whilst the new Labour Prime Minister James Callaghan declared that "a new settlement among the nations ...[of] the United Kingdom[247]" would be promoted with the Bill. However, the Bill encountered several difficulties. Initially, it was obvious that the devolution- commitment of a wide range of Labour back-benchers was only lukewarm[248] and that the Bill in its original form would have complications to get a majority in the Commons[249]. The cold reaction of some Labour MPs to devolution had historical reasons[250], because the Party was opposed to devolution in Scotland until recently[251]. There were three different types of reasons. First, from an ideological standpoint, the Labour party still supported democratic socialism which has been seen as dependent on centralisation. Secondly, territorial aspects were put forward from Labour's English MPs from the North-East, to whom devolution did not offer any advantage. Thirdly, another group of MPs stressed the constitutional problems of devolution[252]. The Callaghan government proposed therefore, that the Bill might be supplemented with a referendum clause[253]. Thus, the substantial popular support which had been put forward by the government could be tested. Another obstacle for the Bill was its apparent inadequacy[254]. Even passionate advocates of devolution wanted to repeal the bill, as it included "appalling difficulties" which could endanger the unity of the country"[255]. Therefore, a new attempt was undertaken in March after the parliamentary defeat of the first devolution bill in February[256]. Then, Labour agreed to a pact with the Liberals[257] who wanted to see the creation of a better legislation, but they failed to include in the agreement the aim of proportional representation and tax-raising powers for the devolved bodies. The new bill was now divided into one for Scotland and one for Wales – including referendums. The majority of Labour and Liberals was large enough to secure its approval, although two major amendments were made at the end. The first one, the so-called "Ferrers

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[246] Bogdanor, Vernon: Devolution in the UK, op cit, p 179
[247] House of Commons Debates, Vol 922, col 992, 13 December 1976
[248] Mitchell, James: *The creation of the Scottish Parliament: Journey without end,* in: Parliamentary Affairs, Vol 52, autumn 1999, OUP, Oxford 1999, p 649
[249] Drucker/ Brown, op cit, p 110
[250] Mitchell, James; Brand, Jack: *Home Rule in Scotland: The politics and bases of a movement,* in: British Regionalism, op cit, pp 35, 52
[251] See above
[252] See Bradbury, Jonathan, in: British Reigonalism, op cit, p 16
[253] Drucker/ Brown, op cit, p 112
[254] Mitchell, James, in: Parliamentary Affairs, op cit, p 651
[255] John Mackintosh, MP, cited in: House of Commons Debates, Vol 925, cols 1715-16, 10 February 1977
[256] Drucker/ Brown, op cit, p 113
[257] Mitchell, James, in: Parliamentary Affairs, op cit, p 650

amendment", tabled in the House of Lords concerned a constitutionally and politically[258] important matter. It provided that if any vote in the House of Commons on a devolved matter of Scottish legislation was secured with the Scottish MPs, it could be demanded that this vote has to be repeated two weeks later. The concern of this amendment corresponded[259] to one deficiency of Gladstone's "home rule" proposals in 1886[260]. However, the possibility of a convention, which could answer the issue of equal representation, was raised. Then, Scottish MPs would not be able to vote on English-Welsh matters[261]. The consequence of such a convention would be, of course, that a government relying on Scottish MPs, could lose its parliamentary majority for English-Welsh matters. The consequence of such a convention would have been that the parliamentary majority of the government was in question for devolved matters in relation to England and Wales. That would obviously have led to a "bifurcated executive"[262]. The second salient[263] amendment was made by George Cunningham, therefore leading it to be called the "Cunningham Amendment". It required that at least 40 per cent of the registered electorate had to be in favour of devolution in a referendum for to be enacted[264]. This allowed sceptical Labour MPs to vote for the Bills, as they were convinced that it would not achieve a 40 percent majority. However, the amended Act did not mention a definite percentage. It stipulated that " having regard to the answers given in a referendum", the Secretary of State may lay an Order for its repeal[265]. Thus, he was left with an extensive power of discretion for the interpretation of the results. Cunningham justified the amendment with the irreversible constitutional change that devolution was likely to introduce. In his view the constitutional change required to have the evidence of the people for the devolution legislation. However, the amendment opened the way to campaign against the legislation[266].

The results of the Referendums held on 1 March 1979 were a clear defeat in Wales and a defeat in Scotland under the terms of the Act. In Scotland[267] 51.6 per cent voted yes whilst

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[258] Bradbury, Jonathan, in: British Regionalism, op cit, p 17
[259] Bogdanor, Vernon: Devolution in the UK, op cit, p 185
[260] See above
[261] Bradbury, Jonathan: *Introduction,* in: British Regionalism and devolution, op cit, p 17
[262] Bradbury, Jonathan: *Introduction,* in: British Regionalism and devolution, op cit, p 17; Bogdanor, Vernon: Devolution in the UK, op cit, p 186
[263] Following Bogdanor the most important back-bencher initiative in British Politics since 1945, see: Devolution in the UK, op cit, p 186 or the same *The 40 per cent rule,* in: Parliamentary Affairs, Vol 33, OUP, Oxford 1980, p 249
[264] Drucker/ Brown, op cit, p 117
[265] Clause 82 (2) of the Bill
[266] Bradbury, Jonathan, in: British Regionalism, op cit, p 17
[267] Scotland turnout: 62.9%; Vote: Yes 51.6% (cor. 32.85% of the electorate), No 48.5% (cor. 30.78% of the electorate)

48.4 voted No. The "yes-vote" thus represented only 32.8 per cent of the electorate. The 40 per cent ruling thus defeated devolution in the Scottish vote. In Wales, only 20.2 per cent voted yes corresponding to a minority of some 15 per cent of the electorate[268]. During the long debates in the Commons the government stated repeatedly the considerable support for devolution whilst the outcome did not satisfy the expectations[269]. With respect to the Cunningham amendment, and the closeness of the popular vote it was impossible for the Callaghan government to implement the Acts[270]. The new government of Margaret Thatcher returned in 1979 put the issue of devolution off the constitutional agenda[271].

It has been outlined that the constitutional background of the United Kingdom is principally based on the view that there is no other sovereign power than the central parliament at Westminster. However, even if the constitutional justification may have been difficult or lacking, devolution to Northern Ireland proved de facto to be a certain form of federalism. Also, even if the United Kingdom is from a constitutional viewpoint clearly a unitary state, the special treatment for Scotland and Wales proves that there remained some sort of pre-union privileges for the historical nations. Thus, it became evident that the British traditions are not as strong as they might appear at first sight, but that they must be seen in their historical context. For these reasons, it has been said that the British Constitution is a "splendidly versatile and flexible instrument"[272]. Nevertheless, the flexibility has not been offered to the different parts of the country; the solutions proved to be non-concluding, as they were not strong enough to stop the nationalist parties. That flexibility was not used neither for a view on devolution beyond the traditional concept of a unitary state. Devolution followed the slogan that "power devolved is power retained". This was also the case for Northern Ireland, even if there were other problems added. Thus, devolution failed in Northern Ireland because it could not secure a cross community majority, which would have been the key-stone for any solution. It failed in Scotland and Wales, as it could not be understood as a coherent, clear concept of how the nations should be related to the centre. What lessons from the past could thus be drawn? First, the Northern Irish problem needs to be based on an "all Isles" and inclusive approach. The open-up of the Irish question had been refused by the British government until the 1980s. This was an important condition for new

[268] Wales turnout: 58.5%; Vote: Yes 20.2%, No 79.8%
[269] Drucker/ Brown, op cit, pp 120
[270] Bradbury, Jonathan, in: British Regionalism, op cit, p 17
[271] Bogdanor, Vernon: Devolution in the UK, op cit, p 191
[272] Bradley, Anthony: *Constitutional Reform, the Sovereignty of Parliament and devolution,* in: Cambridge Centre for Public Law: Constitutional Reform in the UK, op cit, p 33

and serious solutions. Devolution alone would not be a "new" idea. Secondly, the British state itself needed the reform of its territorial structure, which devolution could bring. However, devolution as a constitutional structure needed to be more coherent, as it does not represent just another concession to Scotland and Wales, but implies a fundamental change. Only if it entails legitimacy for the new institutions both within the nations and vis-à-vis the Westminster Parliament and, if it produces also gains of democracy, devolution could secure a parliamentary majority and popular support[273].

[273] See Bradbury, Jonathan: *The Blair government's White Papers on British devolution*, in: Regional and Federal Studies, Vol 7 (3), pp 130; Bradley, Anthony: *Constitutional Reform, the Sovereignty of Parliament and devolution,* op cit, p 35; Constitution Unit: Scotland's Parliament, op cit, p 31

III. Devolution in Scotland, Wales and Northern Ireland

Devolution came back to the political agenda in the mid-1990s, when the Labour party showed its commitment to legislate for a Welsh assembly and a Scottish parliament and for regional chambers in England[1], provided that the party should win a majority at the general elections. The Labour "Manifesto[2]" and the Labour leader, Tony Blair, argued that the abuse of central power would undermine democracy and governmental effectiveness and it would even lead to damage to the country's economic interests. In contrast, devolution would preserve the British State from a break-up[3]. Devolution has also been advocated as a tool for a more effective government. The project of "bringing government closer to the people"[4] was most of all about constitutional reform but also about creating a newly textured democratic culture[5].

However, there are more reasons for democratically elected sub-national units and the Labour Party had further thoughts when it made these proposals. First, there was the need for new acceptance of the constitutional framework in the United Kingdom. This need was based on the fact that the expression of the politics of identity in Scotland and Wales have increased since the 1980s, when there was "a questionable mandate" for Conservative governments in areas where the Conservatives had little support[6]. Responsibility for a wide range of areas in Scotland and Wales had been transferred to non-accountable quangos or the Secretaries of State[7] being judged as "excessive centralism"[8]. Secondly, the state reforms (as for example the Government's Offices in the Regions[9]) of subsequent governments in the 1990s left a certain policy and planning vacuum[10]. Faced with a double challenge of a shortage of land for housing and the Conservative bias to avoid new constructions in their backyard, they supported local authority activity in the questions, albeit being generally hostile to their

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[1] Bradbury, Jonathan, *Introduction,* in: British Regionalism and devolution, op cit, p 3
[2] New Labour, Because Britain deserves better, London 1997, op cit, p 33 (see http://www.labour.org.uk/lp/new/labour/docs/MANIFESTO/97MANIFESTOPART1.PDF)
[3] Bradbury, Jonathan, in: British Regionalism and devolution, op cit, p 4
[4] New Labour, Because Britain deserves better, London 1997, op cit, p 33
[5] Rawlings, Richard: *The new model Wales,* in: Journal of Law and Society, Vol 25 (4), Oxford, Blackwells December 1998, p 469
[6] Bradbury/ Mawson: British Regionalism and devolution, op cit, p 276
[7] Brazier, Rodney: *The Constitution of the United Kingdom,* in: C.L.J., op cit, p 109
[8] Olowofoyeku, Abimbola A: *Decentralising the UK: The federal argument,* in: Edinburgh Law Review, Edinburgh, January 1999, p 57 or already noted by the Royal Commission on the Constitution (Kilbrandon), op cit, part I, para 6
[9] See below
[10] Bradbury/ Mawson: British Regionalism and devolution, op cit, p 278, see also further below

influence[11]. Thirdly, there have been functional pressures for a more regional orientated governance due to the impact of state reform and European integration in the context of the political economy of regionalisation[12]. The democratic deficit in the United Kingdom with the lack of any representative or elected structure of regions made it difficult to access European Funds and to integrate in the European Union, who had the will to develop towards a special regional policy[13]. Furthermore, Britain's economic deficit relied upon the dependence of the regional level from the centre in a context of a more global economy and the Single European Market. Following these pressures, another support for devolution occurred, when the political elites in the periphery moved to champion devolution for positive regionalist, but not nationalist reasons[14]. Finally, as we have seen, it would not be the first time that devolution has been used for party political reasons[15]. This observation is surprising as the question of devolution is of central concern and has an important constitutional impact for the United Kingdom as a whole[16]. In respect of the devolution proposals in 1977 it was said that the fear of the SNP was more serious than "any particular conviction of the merits of devolution"[17]. Later, during the 1990s, Labour wanted to legislate for devolution to protect Scotland against right-wing London rule and to reorganise the "quangoland" in Wales[18]. The Labour party's proposals were officially based on the idea of a more democratic and more accountable government, but behind this idea the issue was the party's electoral future[19]. Since the arrival of John Smith and later of Tony Blair there has been a clear insight, that the Labour strongholds in Scotland and Wales would be at mid-term able to create a balance of power to the England dominated Conservative Party. Labour had constantly a majority of the electorate in these "Nations", but this did not give any power to the party within the territorial administrations ("quangos")[20]. Therefore, tactical and strategic reasons were most obvious. In the 1990s thus there was a remarkable growth in commitment to devolution within the Party. First, "New Labour" sought to distance from "Old Labour" as a party of state intervention[21].

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[11] Bradbury/ Mawson: British Regionalism and devolution, op cit, p 278
[12] See Murphy, Phil; Caborn, Richard: *Regional government – an economic imperative,* in: Tindale, Stephen: The state and the nations, op cit, p 184
[13] Roberts, Peter: *Whitehall et la désert anglais: Managing and representing the UK Regions in Europe,* in: Bradbury/ Mawson: British Regionalism and devolution, op cit, p 256
[14] Mitchell, James: *The Evolution of Devolution: Labour's Home Rule Strategy in Opposition,* in: Government and Opposition, Vol 33(4), London 1998, pp 479
[15] See above
[16] See further below
[17] Bogdanor, Vernon: Devolution in the UK, op cit, p 178
[18] Mitchell, James, in: Parliamentary Affairs, op cit, p 653
[19] Bradbury/ Mawson: British Regionalism and devolution, op cit, p 275
[20] Morgan, Kevin; Roberts, Ellis: The democratic deficit, A Guide to Quangoland, University Papers in Planning Research N° 144, Cardiff 1993
[21] Bradbury/Mawson: British Regionalism and devolution, op cit, p 297

New Labour, in seeking to find an ideological identity which was anti-statist but also one which was not identified with the market individualism of the Conservative Party, tried to stress its role as the party of the community[22]. In the view of the leaders, social and economic problems could thus be best addressed by devolving power not to the individuals but to a unit of the community: the nations. However, such a regional reform was also seen as positive in terms of management of the party and its approach to the state[23]. As parts of traditional Labour were worried about the anti-statist approach, devolution could create a new party "occupation" and so maintain the unity of the party. The Labour Party has furthermore always been more pro-European than the Conservatives. Hence, devolution was likely to establish closer links with its European Socialist parties and would so add influence to the British Labour party in Europe. Apart from the Party's strategic reasons, there was, however, in 1997 a shift from electoral expediency to more instrumental policy-making and an increasing commitment[24]. What Labour proposed in 1978 was so limited that it would have created an Assembly without meaningful devolution. According to Mitchell, that has been a direct consequence of legislating without conviction[25]. In 1997, however, Labour developed a more innovative policy for Scotland. This can be best shown by the nature of the scheme, which was proposed. In many respects, the 1998 legislation can be seen as a more professionally designed version of the 1978 Act[26]. When the devolution legislation was successfully put in the statutes, the new Prime Minister put forward a more "global" view of devolution as follows:

> "The demand for more democratic self-governance is fed by better educated citizens and the free-flow of information provided by new technology and media. We must meet this demand by devolving power and making government more open and responsive. Devolution and local governance are not just important in themselves: open, vibrant, diverse democratic debate is a laboratory for ideas about how we should meet social needs. We must equip government with new capacity and skills"[27].

Devolution as a constitutional expression has quite a vague meaning, because it only needs the transfer of certain powers. However, which powers it precisely encompasses is not

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[22] Bradbury/Mawson: British Regionalism and devolution, op cit, p 297
[23] Bradbury/Mawson: British Regionalism and devolution, op cit, p 298
[24] Bradbury/Mawson: British Regionalism and devolution, op cit, p 296
[25] Mitchell, James, in: Parliamentary Affairs, op cit, p 663
[26] Mitchell, James, in: Parliamentary Affairs, op cit, p 663
[27] Blair, Tony: The third way, New politics for the new century, in: Fabian Society, Pamphlet N° 588, London

provided with this definition. Hence, it is important to analyse in detail the different devolution schemes which have been implemented since 1998 in Britain. Thus, first it is the Scottish model, which is to be scrutinised as it represents the clearest example of devolved powers. The policy of devolution to Scotland was based on an already existent "asymmetry" in different parts of the political life: the administration, but most of all the church and the legal system. The devolved territorial structure of the United Kingdom does not follow a strict model rather than create a special devolution scheme for each part of the country. Scotland has got responsibility for a much larger part of powers compared with the other nations of Wales and Northern Ireland. Thus, there are important differences between the implemented devolution models, which are to be scrutinised.

A. Legislative devolution for Scotland

One year after the referendum of 1979, an all-party Campaign for a Scottish Assembly (CSA) has been established[28] which, however, did not launch its first declaration before 1988. In "The Claim of Right for Scotland[29]" the CSA expressed its conviction that sovereignty rests with the Scottish people and claimed that Scotland should be accountable to its people[30]. In the event, the sense that the Conservative governments were ruling Scotland against the wishes of a majority of its people was common ground[31]. This impression had been enforced by a special political measure of the Thatcher government in 1988. Although the Conservatives under Margaret Thatcher were opposed to any distinctive treatment of Scotland and Wales, the "poll tax" was launched in Scotland one year earlier than in the residual part of the country. That tax was strongly criticised and the Scots felt like the guinea pigs for the unpopular tax.[32]

This popular backdrop to "the Claim of Right" led the CSA to set up a Scottish Constitutional Convention (SCC), which met first in 1989 under the joint chairmanship of a Labour and a Liberal MP[33] and comprised a large slice of Scottish opinion, that means apart from Labour

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September 1998
[28] Bogdanor, Vernon: Devolution in the UK, op cit, p 196
[29] Edwards, O.: A Claim of Rights for Scotland, Edinburgh 1989
[30] Millar, David: *Scottish Home Rule: Entering the Second Century*, in: The Edinburgh Law Review, Vol 1, Edinburgh 1997, p 264
[31] Mitchell, James, in: Parliamentary Affairs, op cit, p 655
[32] Kellas, James: *The Scottish political system revisited*, in: Taylor, Bridget; Thomson, Katarina: Scotland and Wales, Nations again?, op cit, p 223
[33] Millar, David, in: The Edinburgh Law Review, op cit, p 264

and Liberals there were the trade unions, the church and others[34]. The majority of the SNP preferred to campaign[35] for "independence in Europe" and did not participate. The Conservatives were opposed to a Scottish Parliament in any form[36]. The Constitutional Convention adopted in its inaugural meeting a declaration which started with the following phrase: "We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government best suited to their needs, and do hereby declare and pledge that in all our actions and deliberations their interest shall be paramount...."[37]. The Constitutional Convention went on to publish several proposals for devolution, becoming ever more detailed and complete[38]. The first document "Towards Scotland's Parliament[39]", published in 1990, set out the principal elements for a devolution scheme in accordance with Scottish needs[40]. In the aftermath of the 1992 election with a returning Conservative majority, more substantive agreements could be reached about the electoral system. After the European Council meeting in Edinburgh in 1992 faced with 30000 demonstrating Scots further breath was given to the work of the SCC[41]. This resulted finally in the declaration "Scotland's Parliament. Scotland's Right"[42] published on St. Andrew's Day 1995. In contrast to the 1978 Bill[43], the Convention's proposals included a single-chamber Scottish Parliament without any legislative role for the House of Lords[44]. The most important feature was the recommendation of the election of the future Members of the Scottish Parliament (MSPs) by proportional representation[45]. On the whole, the Convention concentrated on a limited range of issues leaving crucial questions apart like the future relation between Edinburgh and Westminster and Whitehall respectively[46].

In the lead up to the 1997 general British election, Labour stuck to its devolution pledge. Nonetheless, the Party decided suddenly that a referendum about the future role of the

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[34] Bogdanor, Vernon: Devolution in the UK, op cit, p 197
[35] Brand/ Mitchell, in: British Regionalism and devolution, op cit, p 45
[36] Millar, David, in: The Edinburgh Law Review, op cit, p 264
[37] Mitchell, James, in: Parliamentary Affairs, op cit, p 657
[38] Millar, David, in: The Edinburgh Law Review, op cit, p 265
[39] Scottish Constitutional Association, Towards Scotland's Parliament, Edinburgh 1990
[40] Initially, the Rights of a Scottish Parliament should be entrenched formally, see: McFadden, Jean; Bain, William: *Strategies for the Future: A lasting parliament for Scotland?,* in: Bates, T. St. J.: Devolution to Scotland, T&T Clark, Edinburgh 1997, pp 10
[41] Brown, Alice; McCrone, David; Paterson, Lindsay: Politics and Society in Scotland, 2nd edition, Macmillan, London 1998, p 24
[42] Scottish Constitutional Convention, Scotland's Parliament. Scotland's Right, Scottish Constitutional Association, Edinburgh 1995
[43] The Bill proposed an „Assembly", see Brand/ Mitchell, in: British Regionalism and devolution, op cit, p 47
[44] Millar, David, in: The Edinburgh Law Review, op cit, p 265
[45] Brand/ Mitchell, in: British Regionalism and devolution, op cit, pp 47-8
[46] Bogdanor, Vernon: Devolution in the UK, op cit, p 200

Parliament should be held before its creation. However, neither the SCC nor the Labour party were ever in favour of a referendum, as it existed a widespread fear that a referendum could endanger devolution a second time[47]. This change of view was due to the context of the campaign[48]. The decision to hold a referendum with two questions concerning the establishment of the parliament and its tax raising powers was a bid to take a thorny issue off the campaign. Then, the general elections returned Labour successfully, as all Scottish MP's were Labour. Thus, the realisation of devolution was possible. In July 1997, a White Paper[49] outlining New Labour government's proposals was issued. Important settings were made comprising some details, which differed from the 1978 Bill and the Convention proposals. Scotland should "no longer be the only democratic country with its own legal system but no legislature of its own"[50]. The legislation would define matters to retain at Westminster rather than devolved powers[51] and a reduction of Scottish MP's at Westminster was to "be reviewed"[52]. The Scotland Act 1998, which was based on the White Paper, passed the House of Commons without any problem as the Conservatives were in a weak position having not one Scottish MP[53]. The contrast with the 1978 Bill was most apparent. The Act, however, did not resolve all questions, which were raised by the White Paper. The precise operation of the devolved bodies, the resolution of conflicts between London and Edinburgh, its financial responsibility etc. were left to be clarified in the implementation of devolution[54].

The Referendums Scotland and Wales Bill 1997 was the first Bills introduced in the House of Commons after the general elections. As the Labour Party itself pledged to devolution in its manifesto, the Bill passed the Parliament rapidly. The decision to hold the referendums was made, not in government, but in opposition. On the one hand, there was the concern that the devolution legislation might have a difficult passage through the Houses of Parliaments[55]. On the other hand, New Labour wanted to leave the "tax and spend" image[56]. The government had not forgotten the situation of 1978, when the referendum took place after the legislation and was finally rejected by the people[57]. Another remarkable change occurred in comparison

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[47] Mitchell, James, in: Parliamentary Affairs, op cit, p 661
[48] Brown/ McCrone/ Paterson, op cit, p 25
[49] Scotland's Parliament, HMSO, London, Cmnd. 3658, July 1997
[50] Scotland's Parliament, op cit, p vii
[51] Scotland's Parliament, op cit, para 2.4, p 3
[52] Scotland's Parliament, op cit, para 4.5, p 13
[53] Brown/ McCrone/ Paterson, op cit, p 25
[54] Mitchell, James, in: Parliamentary Affairs, op cit, pp 662
[55] Taylor, Bridget; Curtice, John; Thomson, Katarina, in: Scotland and Wales: Nations again?, University of Wales Press, Cardiff 1999, p xxv
[56] See above
[57] Munro, Colin: *Power to the people,* in: Public Law, Sweet & Maxwell, London, Winter 1997, p 581

to 1979. The preparation of the referendum was organised in one single campaigning strategy, led jointly by Labour, Liberals and the SNP[58], even if the latter wanted an independent Scotland in the mid term. Therefore, the campaign against was difficult to carry out[59]. In the referendum[60] held on 11 September 1997 two questions were asked on separate ballot papers[61]. One concerned the creation of a Scottish Parliament, another the tax varying powers of the Parliament. The result was an overwhelming majority in favour of the establishment of a parliament with 74.3 per cent (1979: 51.2) on a turnout of 60.2 per cent (1979: 62.9). The victory was completed by a Yes-vote of 63.5 per cent for its tax varying powers[62]. The "Cunningham Amendment[63]", however, applying in 1978 would have permitted merely a non-revenue raising Parliament, as only 38.1 per cent of the Scottish electorate were in favour of this competence[64].

A referendum may raise the question of its constitutional context[65]. Devolution has a very deep impact on the constitutional settlement in the United Kingdom[66]. In several states constitutional change requires mandatory[67] or advisory[68] referendums. In the United Kingdom, however, with its doctrine of parliamentary sovereignty there is no need for referendums[69]. Prior to the Referendum (Scotland and Wales) Act 1997 there were two referendums held: one on EC membership in 1975 and the other one on devolution in 1979[70]. The arguments put forward for and against referendums are well known[71], raising the question as to whether they are furthermore necessary for constitutional changes. The constitutional practice of the United Kingdom has been described as "elastic"[72], as there is neither any legal provision nor any agreed criteria as to when referendums should be called. This has been

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[58] Brown/ McCrone/ Paterson, op cit, p 25
[59] Brown/ McCrone/ Paterson, op cit, p 25: "amateurish"
[60] Referendum (Scotland and Wales) Act 1997
[61] Bogdanor, Vernon: Devolution in the UK, op cit, p 199
[62] Brown/ McCrone/ Paterson, op cit, p 25
[63] See above
[64] Munro, Colin, op cit, p 581
[65] See Heath, Anthony; Taylor, Bridget: *Were the Scottish and Welsh referendums second-order elections?,* in: Taylor, Bridget; Thomson, Katarina: Scotland and Wales: Nations again?, University of Wales Press, Cardiff 1999, pp 149
[66] See above
[67] E.g. the German Constitution provides for a mandatory consultation of the people as far as they are concerned by a change of boundaries of the *Länder*, but only for that question (Art. 29 GG)
[68] E.g. the French Constitution attributes to the President of the Republic the power to hold a referendum, which has an advisory function, article 11 French Constitution
[69] Munro, Colin, op cit, p 579
[70] Donnelly, Kathy; Smith, Nicole: *Implementing Constitutional Reform,* in: Blackburn/ Plant: Constitutional Reform, op cit, pp 216; see also Constitution Unit: Scotland's Parliament, London 1996, p 51-2
[71] Donnelly/ Smith, in: Blackburn, Plant: Constitutional Reform, op cit, pp 216
[72] Bogdanor, Vernon: *Western Europe,* in: Butler, David; Ranney, Austin: Referendums around the world, 1994, p 46

proved with the Referendums Act 1997, as notably a "yes" vote was not a guarantee of the establishment of the body[73]. However, there are certain questions about the increasing use of referendums. It has been argued that once the genie is out of the bottle[74], it is not difficult to imagine that there will be demands for the voice of the people in other areas like capital punishment. The problem has been shown[75] at the example of the Scottish vote in 1997. In that referendum there was a obvious logic for the vote. The outcome of the referendum, however, did not correspond to this logic[76].

The Scottish model of devolution has been described with the term of "legislative devolution". The Kilbrandon Commission issued the opinion that in a scheme of legislative devolution, "powers would be transferred to the regions to determine policy on a selected range of subjects, to enact legislation to give effect to that policy and to provide the administrative machinery for its execution, while reserving to Parliament the ultimate power to legislate on all matters"[77]. Whether this definition in theory is supposed to reflect the devolution process at work is to be seen[78]. However, the Scotland Act 1998[79] establishes a Scottish Parliament[80], which has been based in Edinburgh. The first general election to the Parliament took place on 6 May 1999. This date was set by the Secretary of State for Scotland[81]. Voters left Labour 9 seats short of an overall majority, with 56 MSPs corresponding to 43.4%. The SNP added one constituency to the six it holds at Westminster and emerged with a total of 35 MSPs. The Conservatives secured 18 seats, all from the regional lists, while the Liberal Democrats finished with 17 members. The Scottish Socialist and Green parties are represented in a British Parliament for the first time ever[82]. For the election of the First Minister at 13 May 1999, Labour reached an agreement with the Liberals and a coalition government was set up with the former Labour Secretary of State, Donald Dewar, as First Minister[83]. The new Parliament assumed its full powers on 1 July 1999[84],

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[73] Tierney, Stephen: *Constitutional Reform under the new Labour Government,* in: European Public Law, Vol 3 (4), Kluwer, London 1997, p 468
[74] Munro, Colin, op cit, p 580
[75] Heald, David; Geaughan, Neal; Robb, Colin: *Financial Arrangements for UK devolution,* in: Keating, Michael (ed.): Remaking the Union, London, Cass 1998, p 26
[76] Heald/ Geaughan/ Robb, op cit, p 26
[77] Royal Commission on the Constitution (Kilbrandon), op cit, para 734
[78] See below
[79] London, HMSO 1998 (http://www.hmso.gov.uk/scotland/)
[80] Scotland Act 1998, section 1 (1)
[81] Scotland Act 1998, section 2 (1)
[82] The turnout was 58%; for results see Appendix 1
[83] *Dewar wins his place in history,* in: Daily Telegraph, 14 May 1999, p 1
[84] Hazell, Robert (et al.): *The British Constitution in 1998-99,* in: Parliamentary Affairs, Vol 53 (2), London, Hansard 2000, p 245

when the Queen came to Edinburgh for the Official opening[85]. A Liberal Peer, Sir David Steel, was elected Presiding Officer. The Scotland Act 1998 stipulates that the elections must be held by an additional-member system[86] which is a special form of proportional representation and is quite similar to the system used in Germany[87]. The electoral law for Scotland, however, will remain in the remit of Westminster[88]. This perhaps reflects the lessons of the history in Northern Ireland[89]. The main advantage of this form of vote[90] is a more proportional representation and it is likely to increase the number of female MPs[91]. The proportion of women elected to the Parliament was unprecedentedly high at 37 per cent. The major reason for that was the "twinning" policy of the Labour party to achieve gender equality.

The Scottish Parliament is –unlike Westminster – unicameral and its term of office has been fixed for four years[92]. Subsequently, ordinary general elections in Scotland will be held on the first Thursday in May in the fourth year after that in which the last ordinary general election was held. It is, however, possible for an ordinary general election to be held no more than one month earlier or later than the first Thursday in May[93]. It is possible that the Scottish Parliament is dissolved before the four years are expired. This may happen if at least two-thirds of the MSPs vote for the dissolution[94] or if the Parliament fails to agree on the appointment of a First Minister[95]. In this case an extraordinary election must be held. The Presiding Officer who corresponds to the Leader in the House of Commons proposes to the Queen a day for the holding of the extraordinary general election and her Majesty dissolves the Parliament[96]. However, if the date proposed is within six month of the regular date for the ordinary elections, the latter will not be held[97]. This does not affect the date of the next

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[85] Hazell, Robert (et al.): *The British Constitution in 1998-99,* in: Parliamentary Affairs, op cit, p 246
[86] section 7, 8
[87] Gay, Oonagh: *British Elections – additional members and the „Neill" effect*, in: Public Law, London, Sweet & Maxwell 1999, p 187
[88] Scotland Act 1998, Schedule 5 (g), see further below
[89] Haggerty, Charles: *Scotland's Parliament – The devolution white paper,* in: SCOLAG, Scottish Legal Action Group, Edinburgh August 1997, p 130
[90] Seyd, Ben; Michell, Jeremy: *Fragmentation in the Party and Political System,* in: Hazell, Robert: Constitutional Futures, op cit, p 99
[91] Plant, Raymond: *Proportional Representation,* in: Blackburn/ Plant: Constitutional Reform, op cit., p 66; see also: Report of the Independent Commission on the Voting System, (Jenkins Commission) London, HMSO 1998
[92] Scotland Act 1998, section 2 (2)
[93] Scotland Act 1998, section 2 (5)
[94] Scotland Act 1998, section 3 (1,a)
[95] Scotland Act 1998, section 3 (1,b)
[96] Scotland Act 1998, section 3
[97] Scotland Act 1998, section 3 (3)

subsequent ordinary election[98]. Therefore, the Scottish Parliament is in contrast to the Westminster Parliament not a maximum-term parliament but a fixed-term parliament[99]. The proceedings in the Scottish Parliament are in some ways different with respect to the latter: in Scotland, members of the Parliament are called by their name, parliamentary questions are possible throughout the summer recess and, there is no annuality for the legislative programme[100].

For the election to the Scottish Parliament, Scotland has been divided into 73 constituencies. This division differs from the Westminster constituency system as Orkney and Shetland have been given two MSPs[101]. For these two islands special provision was made, as they are not permitted to be combined or associated at the next general review of the boundary commission either for general elections for Westminster or the Scottish Parliament[102]. The other 56 MSPs, which are regional members, are returned from the eight regions used for elections to the European parliament[103]. Every region[104] returns seven additional members to Edinburgh. The number of MSPs, however, is likely to change because the boundary commission for Scotland will take place between 2002 and 2006[105]. The number of constituency-elected MSPs could therefore be approximately 57 after their decision[106]. As the relation between the constituency-elected Members and the regional Members of the Scottish Parliament must be respected, this will probably decrease the regional-based Members to five or six per region[107]. The right to vote for the Scottish Parliament is different to the Westminster Parliament because of the inclusion of European Union nationals and Peers who are resident in Scotland[108].

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[98] Scotland Act 1998, section 3 (4)
[99] Bogdanor, Vernon: Devolution in the UK, op cit, p 216
[100] Hazell, Robert (et al.): *The British Constitution in 1998-99,* in: Parliamentary Affairs, op cit, p 247; for the procedure at Westminster see Barnett, Hilaire, op cit, pp 515
[101] Scotland Act 1998, Schedule 1, para 1
[102] Scotland Act 1998, section 86 (3,4)
[103] SI 1996/1926
[104] European Parliamentary Constituencies (Scotland) Order 1996, SI 1996/1926
[105] McFadden, Jean: *Elections to the Scottish Parliament: A guide to the law,* in: Scottish Law & Practice Quarterly, Vol 4 (2), Edinburgh 1999, p 125
[106] O'Leary, Brendan; Hazell, Robert: *A Rolling Programme of devolution,* in: Hazell, Robert: Constitutional Futures, op cit, p 22
[107] The number of 129 MSPs are likely to remain, even if the Boundary Commission may recommend a reduction of Scottish Westminster constituencies, on which the current division is mostly based. See Hadfield, Brigid: *The nature of devolution in Scotland and Northern Ireland: Key Issues of Responsibility and control,* in: Edinburgh Law Review, Vol 3, Edinburgh, January 1999, p 8
[108] Scotland Act 1998, section 11 (1)

1. The Scottish Parliament

The Scottish Parliament is a real "parliament"[109], albeit not being sovereign. It is responsible for drawing up and adopting its Standing Orders[110]. Schedule 3 of the Scotland Act 1998 provides a detailed module in which the statutorily required part of the Standing Orders is prearranged. In the White Paper the government intended that the Standing Orders were designed to ensure openness, responsiveness and accountability[111]. An all party-Consultative Steering Group (CSG) on the Scottish Parliament was established by the Secretary of State for Scotland to take forward consideration of how the Scottish Parliament might operate. The CSG issued a report[112], which drew up "proposals on how the Scottish Parliament should operate"[113]. The detailed decisions on how the Scottish Parliament works were left to the Parliament itself. Therefore, the Standing Orders were made by resolution of the Parliament on 9 December 1999 and came into force on 17 December 1999[114]. Therein the proceedings for the different sections of the Scotland Act 1998 are described. The Scotland Act 1998 does not mention any scrutiny of the Executive other than provision in section 91 requiring an Ombudsman-style procedure for complaints of maladministration against a Scottish Minister or any other official in the Scottish Executive[115]. Besides, the Parliament is empowered to call for witnesses and documents concerning the devolved matters[116]. Furthermore, the Act provides for a motion of no confidence to be moved in the Scottish Executive as a body[117]. At the beginning, it was thought that this would not be possible for one minister individually[118]. However, the Standing Orders provided later for "a motion that the Scottish Executive or a member of the Scottish Executive or a junior Scottish Minister no longer enjoys the confidence of the Parliament[119].

To the Scottish Parliament is given the power to approve the appointment of the whole Executive[120] including the Law Officers[121]. The Parliament has to vote on (junior) Minister

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[109] Scotland Act 1998, section 1 (1)
[110] Scotland Act 1998, section 22 (1); Constitution Unit, Scotland's Parliament, op cit, p 148
[111] Government's White Paper, Scotland's Parliament, op cit, p 30
[112] Report of the Consultative Steering Group "Shaping the Scottish Parliament", Scottish Office, Edinburgh 1998 (see: http://www.scotland.gov.uk/library/documents-w5/recsg-00.htm)
[113] McLeish, Henry, *Foreword,* in: Report of the Consultative Steering Group, op cit, p 1
[114] From the official Website of the Scottish Parliament (http://www.scotland.parliament.gov.uk/)
[115] Hadfield, Brigid, in: Edinburgh Law Review, Vol 3, January 1999, op cit, p 11
[116] Scotland Act 1998, sections 23
[117] Scotland Act 1998, section 45 (2), 47 (3,c), 48 (2), 49 (4,c)
[118] Brazier, Rodney: *The Scottish Government*, in: Public Law, Sweet & Maxwell, London 1998, p 213
[119] Standing Orders, Rule 8.12 (1)
[120] Scotland Act 1998, section 47 (2), 49 (3)
[121] Scotland Act 1998, section 48 (1)

nominations before the names are submitted to the Queen[122]. The requirement for parliamentary approbation is a novel check and an extension of parliamentary rights, which have never existed at Westminster[123]. The White Paper stated that the relationship between the Scottish Parliament and the Executive would be similar to the relationship between Westminster and Whitehall[124]. This is only true for the drawing of the Executive from the Parliament and for its general parliamentary responsibility. However, there are several differences. Due to its fixed four-year term and the application of proportional representation, it is likely that there are less clear cut political alignments than in the Westminster parliament[125]. In further contrast to London, there are statutory rules for the choice of the First Minister[126]. As no party is likely to enjoy a majority in the Scottish Parliament[127], the decision about an appropriate candidate for the office of the First Minister is to be provided by the parliamentary groups. Therefore, the appointment of the First Minister by the Queen[128] is only formal[129]. The Presiding Officer has to transmit to her the parliament's recommendation[130]. There is a clear statutory framework which –unlike Westminster – places the responsibility of a viable First Minister nomination on the Scottish Parliament[131]. So, it is very unlikely that the Queen would do other than comply with the Officers transmission[132]. However, the fact that the Queen is given a role to nominate the First Minister proves that the devolved power is vested in his or her office.

This is also shown by the procedures of nomination for the judiciary. The Scottish judiciary continues to be responsible for adjudicating on reserved matters and on devolved matters, and in disputes between institutions of the United Kingdom and Scottish institutions[133]. Also, the judges of the supreme Scottish courts are one component of the common base from which appointments are made to the House of Lords and the Privy Council. Generally, the responsibility for judicial appointments in Scotland has been devolved to the Scottish

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[122] Brazier, Rodney: *The Scottish Government*, in: Public Law, op cit, p 214
[123] Brazier, Rodney: *The Scottish Government*, in: Public Law, op cit, p 214
[124] Scotland's Parliament, op cit, p 7
[125] Bogdanor, Vernon: Devolution in the UK, op cit, p 216
[126] Scotland Act 1998, section 46
[127] See e.g. Hassan, Gerry: The new Scotland, Fabian Society Pamphlets, N° 586, London, May 1998, pp 13; (The last majority for Westminster was wont by the Conservatives in 1955)
[128] Scotland Act 1998, section 45 (1)
[129] Himsworth/ Munro: The Scotland Act 1998, op cit, p 60; Bogdanor, Vernon: Devolution in the UK, op cit, p 216
[130] Scotland Act 1998, section 46 (4) and Rule 4.1 of the Standing Orders
[131] Scotland Act 1998, section 46
[132] Brazier, Rodney: *The Scottish Government*, op cit, p 216; Hadfield, Brigid, in: Edinburgh Law Review, op cit, Vol. 3, January 1999, p 10
[133] Reed, Robert: *Devolution and the judiciary*, in: Constitutional Reform in the United Kingdom, op cit, p 28

Parliament[134]. This was criticised when the Bill passed the House of Lords[135] because the Scottish Parliament is not bound by the many unwritten arrangements and conventions that operate in Westminster for these offices at present[136]. This concerns most of all the independence of the Lord Advocate's office[137]. Under the blurred heading[138] "Miscellaneous and General" section 95[139] provides that "a judge of the Court of Session and the Chairman of the Scottish Land Court may be removed from office only by Her Majesty; and any recommendation to Her Majesty for such removal shall be made by the Scottish First Minister". Additionally, the appointment of the Lord President and the Lord Justice Clerk will be made by Her Majesty on the advice of the Prime Minister[140]. However, the Prime Minister will be unable to recommend the appointment of any person who has not been nominated by the First Minister[141]. This reflects clearly the duality of devolved decision-making alongside the symbolic retention of roles for central government with respect to the Scottish Law Officers[142]. Other appointments to the Court of Session or the Sheriff Court are to be made by the Queen on the recommendation of the First Minister[143]. Therefore, all juridical appointments in Scotland need the consent of the First Minister[144]. The Scottish Parliament can only be involved if a motion is made by the First Minister resolving that the Parliament should make a recommendation[145]. There have been criticisms that arguments in favour of more important role of the Parliament have not been respected[146]. This would have supported a more open and independent system of the judiciary's high offices. However, it will depend upon the Scottish Executive to determine the selection procedures[147]. It is thus up to the First Minister to act and up to the Scottish Parliament to scrutinise the Executive's work. The Scottish devolution model clearly divides between a managing First Minister and controlling Parliament. This view is supported by the organisation of the Parliament itself. The Scottish

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[134] Scotland Act 1998, section 95
[135] Lord Roger of Earlsferry, in: House of Lords Debates, Vol 582, col 197, 30 July 1997
[136] Himsworth, Chris: *Securing the tenure of Scottish Judges,* in: Public Law, Spring 1999, pp 15
[137] Reed, Robert: *Devolution and the judiciary,* op cit, p 29
[138] Brazier, Rodney: *The Scotland Bill as Constitutional Legislation*, in: Statute Law Review, Vol 19 (1), p 13
[139] Scotland Act 1998, section 95 (6) and Rule 4.4 of the Standing Orders
[140] Scotland Act 1998, section 95 (1)
[141] This has been a change to the initial version of the Bill. Himsworth/ Munro: The Scotland Act 1998, op cit, p 120; Reed, Robert: *Devolution and the judiciary,* op cit, p 29
[142] Himsworth/ Munro: The Scotland Act 1998, op cit, p 120
[143] Scotland Act 1998, section 95 (4) see also for further procedures
[144] Reed, Robert: *Devolution and the judiciary,* op cit, p 29
[145] Scotland Act 1998, section 95 (7)
[146] Bradley, Anthony: *Constitutional Reform, the sovereignty of Parliament and devolution,* in: Constitutional Reform in the UK, op cit, p 37; for the "legislative story" see Himsworth, Chris: *Securing the tenure of Scottish Judges,* in: Public Law, Spring 1999, p 15
[147] See further below

Parliament's Committees were established by way of its Standing Orders[148]. There is a Procedures Committee; a Standards Committee; a Finance Committee; an Audit Committee; a European Committee; an Equal Opportunities Committee; a Public Petitions Committee and a Subordinate Legislation Committee. Generally, these Committees have been drawn alongside the lines of the Executive's departments. Hence, they are expected to assume the role of scrutiny committees and they do not have, as at Westminster, an advisory role in the form of Standing Committees. Generally, the shape of the Scottish Parliament's Committees provides thus for holding the Scottish Ministers into account[149]. The Parliament's main office is the position of the Presiding Officer, which is of significant constitutional importance as it is supposed to be the main channel of communication between the Scottish Parliament and the Queen[150].

The Scottish Parliament is given the power to make primary laws, which are to be known as Acts of the Scottish Parliament[151]. However, the power of Westminster to legislate for Scotland is not affected by Scotland's power to make laws[152]. Following Section 29 of the Act, the competence of the Scottish Parliament is bound[153]. Before a Bill is introduced into the Scottish Parliament, it must be stated that it is within the Parliament's competence[154]. Furthermore, if the Secretary of State has "reasonable grounds" to believe that a Bill is incompatible with international obligations or the interests of defence or national security or modifying the reserved matters, he or she can make an order prohibiting the Presiding Officer to submit a Bill for Royal assent[155]. The Act[156] does not list the devolved, but only the reserved matters. That is in sharp contrast to the Scotland Act 1978, which specified in detail the legislative competences devolved from Westminster[157]. This system of enumerated competences for the devolved parliament was too detailed, and the schedules were open to different interpretation. Judicial challenges would then have been a very probable consequence[158]. Therefore, the Scotland Act 1998 provides thus a more comprehensible document. Westminster is responsible for the reserved matters[159], whilst the Scottish

[148] Rule 6.1.5 of the Standing Orders
[149] Scotland's Parliament, op cit, p 7
[150] Brazier, Rodney: *The Scottish Government*, op cit, pp 216
[151] Scotland Act 1998, section 28
[152] Scotland Act 1998, section 28 (7)
[153] See further below
[154] Scotland Act 1998, section 31 (1and 2)
[155] Scotland Act 1998, section 35, see also further below
[156] Scotland Act 1998, Schedule 5
[157] Constitution Unit: Scotland's Parliament, op cit, p 35
[158] For further detail see, Constitution Unit: Scotland's Parliament, op cit, pp 35
[159] See further below

Parliament has responsibility for all matters, which are not in the realm of the Westminster Parliament. These include[160] a large range of Scottish domestic affairs like health, school education, further and higher education, science and research funding, training policy and lifelong learning, vocational qualifications, careers and advice guidance, local government, social work, voluntary sector issues, housing, area regeneration, land-use planning and building control, economic development, financial assistance to industry, inward investment, trade and export promotion, tourism, passenger and road transport, air and sea transport, inland waterways, criminal law, criminal justice and prosecution, civil law, civil and criminal courts, local government elections, judicial appointments, tribunals, legal aid, parole, prisons, police and fire services, civil defence and emergency planning, international legal agreements, liquor licensing, protection of animals, environment, natural heritage, built heritage, flood prevention, coast protection and reservoir safety, for the European linked matters as agriculture, fisheries, forestry, food standards, and sport, the arts, statistics, public registers and records[161].

The Scottish Parliament's powers include a large responsibility over other public bodies. First, this concerns the Parliament's devolved power over local government. While little in practical terms is to change at the beginning, it has been hold the opinion that the creation of the new parliament "represents a unique opportunity to redefine the nature of central-local government relation"[162]: the new powers should not be centralised at the parliament solely, but its division should be organised following the principle of subsidiarity[163]. Local government is currently highly dependent on the total expenditure, which is part of the Scottish block distributed at the Scottish Parliament[164]. Therefore, the Scottish Parliament has a considerable influence over local government policy. Also, its powers over other public bodies such as health authorities and quangos are inherited from the Scottish Office[165]. The most important functions in this context are the appointment of Executives, the scrutiny and accountability of the Scottish and cross-border bodies and their funding[166]. However, these functions have been transferred from the Parliament to the Scottish Ministers. It remains to be

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[160] Government's White Paper, Scotland's Parliament, op cit, p 3
[161] Government's White Paper, Scotland's Parliament, op cit, pp 4; also Gay, Oonagh: Devolution and Concordats, House of Commons Research Paper 99/84, London, October 1999, p 8
[162] McAteer, Mark; Bennett, Michael: *The role of local government,* in: Hassan, Gerry: A guide to the Scottish parliament, op cit, p 110
[163] McAteer, Mark; Bennett, Michael: *The role of local government,* op cit, p 110; Constitution Unit: Scotland's Parliament, op cit, p 126
[164] This encompasses nearly 40 per cent of the global expenditure of the parliament
[165] Hogwood, Brian: *Relations with other public bodies,* in: Hassan, Gerry: A guide to the Scottish parliament, op cit, p 103

seen in which way the Parliament will be involved in vetting individual appointments. There are no legal requirements for it. Thus, the function of the Parliament in exercising its responsibilities over these bodies, is probably also a scrutinising one. Apart form that, it is noteworthy that new matters may arise which fall directly into the realm of Holyrood. On all these non-reserved matters, the Scottish Parliament is allowed to legislate.

Another important task concerns the subordinate legislation of the Scottish Parliament. Section 117 of the Scotland Act 1998 provides that any pre-commencement enactment or prerogative instrument, and any other instrument or document for the exercise of a function by a member of the Scottish Executive within devolved competence[167] is to be read as including references to the Scottish Ministers[168]. In the continuity of the British practice[169] the Scotland Act provides also for extensive powers to make subordinate legislation. Initially, functions that includes subordinate legislation, which were heretofore exercised by a Minister of the Crown, can now be transferred to Scottish Ministers[170]. After the official Opening of the Parliament, most of the responsibilities and functions formerly effected by the Secretary of State were thus transferred[171]. Additionally, Sections 104 and 105 provide for subordinate legislation for two concerns: On the one hand, subordinate legislation can make such provision as the person making considers it necessary or expedient in consequence of a provision made by or under any act of the Scottish parliament[172]. On the other hand, subordinate legislation can modify any pre-commencement enactment[173], prerogative instrument as appears necessary or expedient to the person making the legislation in consequence of the Scotland Act[174]. This includes a "Henry VIII" clause allowing earlier primary legislation to be modified by subordinate legislation being with the devolved area[175]. A similar power contains section 107 providing for subordinate legislation to cure defects in an act of the Scottish parliament or exercise of power by the Scottish Executive being "*ultra vires*". That type of secondary legislation is, however, subject to scrutiny by Parliament[176]. Following Section 112, the Scottish Ministers, provided that Scottish Ministers are regarded

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[166] See Hogwood, Brian: *Relations with other public bodies,* op cit, p 103
[167] Scotland Act 1998, section 118
[168] Craig, Paul: Administrative Law, 4th edition, Sweet & Maxwell, London 1999, p 206
[169] See Barnett, Hilaire, op cit, p 549
[170] Scotland Act 1998, sections 52-54
[171] Hazell, Robert (et al.): *The British Constitution in 1998-99,* in: Parliamentary Affairs, op cit, p 245
[172] Scotland Act 1998, section 104 (1,2)
[173] For the unclear meaning of "pre-commencement enactment" in the different meanings for Scottish and Westminster legislation, see: Craig, Paul: Administrative Law, op cit, p 207, fn 70
[174] Scotland Act 1998, section 105
[175] For more detail, see further below
[176] See Scotland Act 1998, Schedule 7

as Ministers of the Crown[177], have the power to exercise that power by Her Majesty by Order in Council or by a Minister of the Crown by order. The mode of approving such secondary legislation being transferred to a Scottish Minister is, principally, moved to the Scottish parliament[178]. Secondary legislation allowed by the Scotland Act itself is to follow detailed rules stipulated in Schedule 7[179]. The Scotland Act 1998 thus gives to the Scottish Parliament a wide scope of legislative responsibility, primary and secondary.

2. The Scottish Executive

The Scotland Act 1998 provides for a Scottish Executive[180], which is composed of the First Minister, such further Ministers as the First Minister appoints, and the Lord Advocate and the Solicitor General for Scotland[181]. Only Members of the Scottish Parliament can be appointed (junior) Scottish Ministers[182]. It is not possible to hold ministerial office at Westminster and to be member of the Scottish Executive[183] at the same time. However, membership of both Westminster and the Scottish Parliament is possible, a MSP can therefore be a Member of the Westminster or European Parliament or a local council[184]. The number of Scottish Ministers or their portfolios are not provided by statute. Therefore, the First Minister could theoretically appoint as many Ministers as he wishes from the 129 MSPs[185]. The present portfolios of the Ministers have been allocated as follows: Justice, Enterprise and life-long learning, Children and Education, Finance, Health and Community Care, Rural Affairs, Communities, Transport and Environment and Parliament. The requirement of being a Member of the Scottish Parliament is not imposed for the Scottish Law Officers, but being appointed they have the right to attend or speak in the Parliament[186]. Hence, the Lord Advocate and the Solicitor General for Scotland are part of the Executive[187]. Until recently, they have been part of the British government. As they exercise quasi-judicial functions[188], they have to take decisions

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[177] Craig, Paul: Administrative Law, op cit, p 208, see below
[178] Scotland Act 1998, section 118 (2)
[179] For more detail see: Craig, Paul: Administrative Law, op cit, p 209
[180] Scotland Act 1998, section 44
[181] Scotland Act 1998, section 45
[182] Scotland Act 1998, sections 46, 47, 49
[183] Scotland Act 1998, section 44 (3)
[184] Brazier, Rodney: *The Scottish Government*, op cit, p 213
[185] Brazier, Rodney: *The Scottish Government*, op cit, p 213
[186] Scotland Act 1998, section 27 (1)
[187] Scotland Act 1998, section 44 (1,c)
[188] Brazier, Rodney: *The Scottish Government*, op cit, p 213

independently of any other person[189]. In order to continue to grant British access to legal advice and information about Scotland, an Advocate General for Scotland can be appointed by the Prime Minister[190].The First Minister leads the Executive[191] even if this is not set by the Scotland Act 1998. It is inferred, however, because he or she can recommend the appointment of all other members of the Executive[192]. Provision is also made for Junior Scottish Ministers[193], but they are not members of the Executive[194]. The First Minister is the keeper of the Scottish Seal[195] and its delivery by the Queen (and the surrender back) marks the legal taking up of the office[196]. Its first delivery was at Edinburgh on 17 May 1999, when the First Minister was sworn in by the Queen who subsequently granted him an audience[197]. Audiences are normally held at Buckingham Palace, but this one took place at Holyrood and the Queen was making a special visit to Edinburgh for the occasion[198]. The Scotland Act 1998 stipulates[199] that each MSP and each (junior) Minister has to take the oath of allegiance. Section 80 (7) provides that this is the oath as provided for by the 1868 Act as follows: "I do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors, according to law. So help me God."[200] In addition, Scottish Ministers take the official oath[201] on appointment. There is an apparent difference to the oath procedure at Westminster. British junior Ministers are not supposed to take the oath on appointment: they assume their office as a matter of law as soon as the Queen has approved their names[202]. The very fact that all Members of the Scottish Executive have to take the oath of allegiance underlines that their duty is not only owed to the Scottish Parliament, but to the United Kingdom with the Queen as head of state[203]. Thus, the procedure of oath underlines that devolution "enhances the Union"[204] and it is "symbolic" of the relationship between the new Scottish institutions and the Queen[205]. Therefore, the Scottish Ministers hold office "at Her

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[189] Scotland Act 1998, section 48 (5)
[190] Scotland Act 1998, section 87
[191] Bogdanor, Vernon: Devolution in the UK, op cit, p 203
[192] Scotland Act 1998, section 44; see also above
[193] Scotland Act 1998, section 49
[194] Hadfield, Brigid, in: Edinburgh Law Review, op cit, p 9; Brazier, Rodney: *The Scottish Government*, op cit, p 212
[195] Scotland Act 1998, section 45 (7)
[196] Brazier, Rodney: *The Scottish Government*, op cit, p 214
[197] Hazell, Robert (et al.): *The British Constitution in 1998-99,* in: Parliamentary Affairs, op cit, p 246
[198] *Historic day as the Queen arrives in Scotland for first audience,* in: Daily Telegraph, 16 May 1999, p 2
[199] Scotland Act 1998, section 84
[200] Cited in Hadfield, Brigid, in: Edinburgh Law Review, op cit, p 9
[201] Scotland Act 1998, section 84 (4,a)
[202] Brazier, Rodney: Ministers of the Crown, Clarendon, Oxford 1996, p 86
[203] Brazier, Rodney: *The Scottish Government*, op cit, p 215
[204] Government's White Paper: Scotland's Parliament, op cit, p 10
[205] Scotland Bill, House of Commons Bill 104 (1997-98), clause 79 (notes)

Majesty's Pleasure"[206], but the oath is taken at the Scottish Parliament. This may make it easier for the First Minister to carry out reshuffles[207], as the Ministers are not directly responsible to the Parliament itself. Also, the Scottish First Minister became a Member of the Privy Council. Consequently, the Scottish Executive is, generally spoken, in a similar situation to Westminster as far as devolved competences are concerned. Specific statutory functions can be conferred on the Scottish Ministers by name through enactment[208]. Section 53 of the Act makes also a general transfer to the Scottish Ministers of functions which were hitherto exercised by a Minister of the Crown, i.e. of central government[209].

The Scotland Act 1998 stipulates that the Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to this Act[210]. By introducing the Act into the House of Commons the government was "firmly committed to strengthening the Union"[211]. Scotland will continue to form an integral part of the United Kingdom as the devolution proposals, by meeting the aspirations [of the people], will not only safeguard but also enhance the Union". Both the Scottish Parliament and the English Parliament passed the Scottish Acts of Union in 1707. The power of both bodies was transferred to Westminster except some reservations concerning the Scottish legal system and the position of the Church in the North. The Scottish view of these reservations was explained in the famous case of *MacCormick v Lord Advocate*[212] as follows: "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law". The then Lord President told having "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 at all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done[213]". The Scots saw the guarantees firmly entrenched and any attempt of Westminster to pass legislation, which infringed them, would be invalid[214]. The Scotland Act 1998 might be a new foundation of these rights, even if they have not been entrenched at all[215]. Devolution to Scotland could release political forces, which have been suppressed in the former system of

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[206] Scotland Act 1998, section 45 (1), 47 (3)
[207] Hadfield, Brigid, in: Edinburgh Law Review, op cit, p 10
[208] Scotland Act 1998, sections 52 (1, 7)
[209] See above
[210] Scotland Act 1998, section 37
[211] Scotland Bill, House of Commons Bill 104 (1997-98), clauses 5
[212] [1953] SC 296 concerning the legitimacy of the numeral "Elisabth II."
[213] [1953] SC 296, at p 411
[214] Boyle, Kevin; Hadden, Tom: *Northern Ireland,* in: Blackburn/ Plant: Constitutional Reform, op cit, p 304
[215] See proposals of the SCC, Further Steps towards a scheme for Scotland's Parliament, Edinburgh 1994, pp 29

centralisation. However, these forces must not be centripetal[216] as far as a spirit of trust and generosity accompanies the new constitutional settlement[217]. Nevertheless, as it was put by John Major in a White Paper[218] of the Conservative government in 1993, "no nation could be held irrevocably in a Union against its will". Expectations of the break-up of Britain are stronger than before, as nationalist attitudes and support for independence have spread throughout the population, and across all parties in recent decades[219]. Hence, much depends on *how* devolution works in Scotland.

B. Administrative devolution for Wales

Wales has always been different from the Scottish case. In the twelfth century, England began to acquire parts of the Welsh territory and in the Treaty of Aberconway 1277, Wales lost its independence[220]. In 1536 and 1543, two acts[221] were passed by the Westminster Parliament declaring that Wales was a part of England. English became the official language, but in 1563 Elizabeth I ordered the translation of the Bible and Prayer Book into Welsh to secure Welsh allegiance to the Protestant religion[222]. Thus, the roots of Welsh nationalism rested not on institutions but on language, non-conformism and culture[223]. The effects of Irish home rule or Scottish nationalism were never able to create a strong national Welsh movement. Nationalism in Wales has always been divisive and much less integrative than it was in Scotland[224]. The Welsh nationalist Party "Plaid Cymru" was established in 1925 and began as a movement to preserve the Welsh language. Its electoral success has always been less notable. The Labour party has traditionally dominated the party scene in Wales and it was the party which supported devolution at the end[225]. The issue was how united the party would be in recommending it, and as to whether the Labour voters would support it. Labour, therefore, did not renew its proposals for devolution until the late 1980s[226]. Plaid Cymru, similarly to the SNP in Scotland, followed a commitment to a policy of "Wales in Europe". Following the

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[216] Nairn, Tom, op cit, pp 22
[217] O'Leary/ Hazell: *A Rolling Programme of devolution*, op cit, p 45; see further below
[218] White Paper, Scotland and the Union, A Partnership for Good, HMSO, Edinburgh 1993, Cmnd. 2225
[219] Kellas, James: *The Scottish political system revisited,* in: Taylor/ Thomson: Scotland and Wales, Nations again?, op cit, p 232
[220] Bogdanor, Vernon: Devolution in the UK, op cit, p 6
[221] Also known as "Acts of Union"
[222] Bogdanor, Vernon: Devolution in the UK, op cit, p 7
[223] Bogdanor, Vernon: Devolution in the UK, op cit, p 144
[224] Bogdanor, Vernon: Devolution in the UK, op cit, p 148
[225] McAllister, Laura: *The Road to Cardiff Bay: The process of Establishing the National Assembly for Wales,* in: Parliamentary Affairs, autumn 1999, Oxford, OUP 1999, p 634, 636

Conservative victory in 1987, an official "Campaign for a Welsh Assembly" was set up. The movement that was led by representatives of the main opposition parties changed its name to "Parliament for Wales campaign" in 1993[227]. In the same time, an independent report about the Conservative's way of carrying out the governance of Wales was published[228]. It outlined the undemocratic character of the administration in the Principality[229]. However, the Campaign did not have the same public and party support as in Scotland[230]. The reasons were twofold. On the one hand, Labour had problems to convince its own members of the political need of devolution[231] and, on the other hand, the relationship between Liberals, Plaid Cymru and Labour was less perfect. Lastly, there was no broad popular demand for devolution within the Welsh opinion as, for example, the poll tax did not have the same impact as in Scotland. This might be one argument for the fact that the National Assembly for Wales has been only granted executive powers[232]. There was no strong political logic for the creation of a body without legislative powers[233]. Also, the announcement of the referendum has been seen as an attempt to convince the public opinion of the need for devolution in Wales, even if there were fears in 1997 that a referendum may defeat devolution Thus, the Wales devolution model is partly based on political compromises complying with the majority of the Welsh electorate.

After the success of Labour in Wales at the general election, the new government did not hesitate to publish a White Paper[234]. On 22 July 1997 it proposed in a bilingual[235] publication that an elected Assembly would "assume responsibility for policies and public services currently exercised by the Secretary of State for Wales"[236]. It outlined that there is a need for an Assembly to take over responsibility for the services run directly by the Secretary of State[237] because the Secretary's power over their "spendings and settings" represented a "democratic deficit"[238]. In contrast to the proposals for Scotland, the module for Welsh devolution did not differ from the general settings made in the devolution Bill 1978. It has

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[226] Bogdanor, Vernon: Devolution in the UK, op cit, p 196
[227] McAllister, Laura, op cit, p 638
[228] Morgan, Kevin; Roberts, Ellis, op cit
[229] See also Bradbury, Jonathan: *Conservative Governments, Scotland and Wales,* in: Bradbury/ Mawson: British Regionalism and devolution, op cit, p 90
[230] Rawlings, Richard, op cit, p 474
[231] Bradbury, Jonathan: *Conservative Governments, Scotland and Wales,* in: Bradbury/ Mawson: British Regionalism and devolution, op cit, p 87
[232] Bogdanor, Vernon: Devolution in the UK, op cit, p 165
[233] Osmond, John: Creative conflict: The politics of Welsh devolution, Cardiff, Routledge 1977, p 149; Rawlings, Richard, *The new model Wales,* op cit, p 473
[234] Government's White Paper, A Voice for Wales, London, HMSO 1997, Cmnd. 3718
[235] See further below
[236] A Voice for Wales, op cit, para 1.1
[237] A Voice for Wales, op cit, para 1.3

been argued that the 1978 devolution model had established a principle of a Welsh Assembly having only executive powers[239]. In contrast to this view, however, even the Kilbrandon Commission had favoured legislative devolution for Wales[240].

In the lead up to the referendum, the government launched a "Yes for Wales" campaign and sought to create a larger consensus for devolution in the proposed frame. However, Wales lacked something like the Scottish Constitutional Convention where the basis of a consensus in the leadership of Welsh opinion could have developed[241]. That deficit was also significant for the "Yes" campaign, because the support of Parties like Plaid Cymru and the Liberals was not enthusiastic[242], as they sought a "better" model of Welsh devolution. In consequence, the referendum, which took place on 18 September 1997, brought a very narrow result, although the Scottish result was intended to boost the Welsh public opinion. Only 50.3 per cent of the electorate voted "Yes" with a low turnout of 50.1 percent. The majority for devolution was secured by less than 7000 votes[243]. That outcome was due to the "No" coming from Cardiff and the Southeast, well industrialised areas where people speak mainly English. Conversely, the Welsh speaking North and the former Welsh coalfields in the Southwest voted "Yes". Thus, the opposition to devolution is easier to locate in Wales than in Scotland even if the Welsh identity might have been less divisive than it was in 1979[244]. Apart from the geographic and social class divisions, the analysis of the referendum stresses the generational difference: younger people were more favourably disposed to devolution[245].

1. The National Assembly

The National Assembly for Wales with its specific characteristics is a unique institution in Europe[246]. Devolution to Wales must be seen in a context of an asymmetrical redistribution of powers[247]. Compared with the French Regions, it has a considerable power in secondary legislation whilst the Spanish *Communidades autonomidas* enjoy a stronger position as they

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[238] A Voice for Wales, op cit, para 1.4
[239] McAllister, Laura, op cit, p 636
[240] See Williams, David: *Wales and legislative devolution,* in: Calvert, Harry: Devolution, London, Professional Books 1975, pp 63
[241] See above
[242] McAllister, Laura, op cit, p 639
[243] Results of the official Website of the National Assembly for Wales (http://www.assembly.wales.gov.uk/)
[244] Bogdanor, Vernon: Devolution in the UK, op cit, p 200
[245] See: Rawlings, Richard: *The new model Wales,* op cit, p 475
[246] Jones, Barry: *The Committees,* in: Osmond, John: The National Assembly Agenda, Cardiff, Institute for Welsh Affairs, 1999, p 59
[247] Rawlings, Richard: *The new model Wales,* op cit, pp 461

have a constitutional entrenched status[248]. In contrast to the Scottish Parliament, the National Assembly for Wales does not have legislative powers. The scheme for the Assembly can be defined as administrative or executive devolution[249]. The Kilbrandon Commission yielded the latter expression. Its report outlined, "that [the Westminster] Parliament and the central government would be responsible for the framework of legislation and major policy on all matters but would, wherever possible, transfer to directly elected regional assemblies the responsibility within that framework for division specific policies and for general administration"[250]. The Welsh model does not really differ from the 1976 one, which had been described as "a sort of Glamorgan County Council on stilts"[251]. The whole devolution scheme is more tightly controlled by central government. Thus, it reflects Labour's long standing ambivalence about Welsh devolution[252]. In 1997 however, the Secretary of State for Wales, Ron Davies, believed that the Government of Wales Act 1998[253] "is immeasurably stronger than [he] dared hope"[254]. This implied a certain unawareness of the public about the political power of the new body when the first elections to the National Assembly for Wales took place on 6 May 1999. The elections gave Labour 28 seats – three short of an overall majority. Plaid Cymru won 17 seats, the Tories nine and the Liberal Democrats six. Alun Michael, the succeeding Labour Secretary of State won the battle for the Labour leadership in the Assembly. Unlike Scotland, he decided to form a minority government rather than to attempt a coalition[255]. This did not mean, however, that deals did not have to be done. For example, the Presiding Officer of the new Assembly was a Nationalist, Lord Dafydd Elis Thomas.

The Government of Wales Act 1998 provides for a National Assembly for Wales[256]. The act is longer than its Scottish counterpart but despite its 159 sections it is not overly prescriptive[257]. The emphasis on "national" was chosen by the Secretary of State for Wales because of the divisive character of the former title of a "Welsh Assembly". That Assembly is composed of sixty[258] Members of the Assembly (AM). The AMs are to be elected by an

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[248] See above, also Wiedmann, Thomas, op cit, pp 156
[249] Constitution Unit: An Assembly for Wales, London 1996, pp 50
[250] Royal Commission on the Constitution (Kilbrandon), op cit, para 827
[251] Thorpe, Jeremy, MP, in: House of Commons Debates, Vol 254, col 903, 13 January 1976
[252] Hazell, Robert (et al.): *The British Constitution in 1998-99,* in: Parliamentary Affairs, op cit, p 247
[253] London, HMSO 1998 (http://www.hmso.gov.uk/)
[254] Davies, Ron, op cit, p 4
[255] *Blair faces coalition dealing in both Scotland and Wales,* in: Daily Telegraph, 8 May 1999
[256] Government of Wales Act 1998, section 1
[257] McAllister, Laura, op cit, p 640
[258] Government of Wales Act 1998, section 2 and Schedule 1

additional member system, the same system[259] of proportional representation as in Scotland. In forty constituencies[260] in Wales representatives are elected under the "first- past- the- post" system. The remaining 20 AMs are additional members. They are to be elected from the party lists in the five regions of Wales based on the European parliamentary constituencies[261]. This figure signalled a reduction from the first proposal of eighty members[262]. The ratio between different types of members differs from Scotland as it is in Wales 2:1 between constituency and additional members. This reduces considerably the proportionality of the vote in Wales. As in Scotland, however, the Members of the Assembly are elected for a fixed four-year term[263]. As the first election took place in May 1999, the next election is supposed to take place on the first Thursday in May of 2003. The Act does not provide for any possibility of the Assembly's earlier dissolution[264]. This may be a handicap for the Executive Committee and may prove difficult for strong leadership of the Assembly[265]. This was to be seen when the new First Secretary, Mr Alun Michael, had to resign after less than one year of office because of "his failure to deliver a secure promise of matched funding for 'Objective One' spending"[266]. The main problem was, however, that he did not have a party majority or a stable coalition in the Assembly[267]. He resigned finally according to the Standing Orders[268]. It is therefore to be seen if the blend of cabinet and local government system is a workable solution for the Assembly[269]. In Wales, there was a similar attempt of Labour as in Scotland to increase the female representation within its group of the Assembly through "twinning-lists". At the first elections, the proportion was at 37 per cent of female AMs. Also, the Assembly has installed a Committee on equal opportunities[270].

The Government of Wales Act 1998 provided for the preparation of the Assembly's Standing Orders[271]. However, Wales lacked on the one hand the preparatory work that was done in

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[259] See above
[260] Government of Wales Act 1998, Schedule 1
[261] Government of Wales Act 1998, section 2 (2), 6,7 and Schedule 1
[262] McAllister, Laura, op cit, p 641
[263] Government of Wales Act 1998, section 3 (2) with exceptions of section 3 (3)
[264] Rawlings, Richard, *The new Model Wales,* op cit, p 478; Bogdanor, Vernon: Devolution in the UK, op cit, p 218
[265] Bogdanor, Vernon: Devolution in the UK, op cit, p 219
[266] *Michael's Day of Destiny,* in: Western Mail, 10 February 2000
[267] Hazell, Robert (et al.): *The British Constitution in 1998-99,* in: Parliamentary Affairs, op cit, p 248
[268] Standing Orders of the National Assembly for Wales, Cardiff, Welsh Office 1999, (or http://www.assembly.wales.gov.uk/works/standingorders/standingorders_e.htm), para 2.9
[269] See below
[270] Standing Orders of the National Assembly for Wales, op cit, para 14
[271] Government of Wales Act 1998, section 50

Scotland at the SCC and on the other hand the act itself was not over-prescriptive either[272]. Therefore the Assembly's Standing Orders were to be geared up by the Secretary of State[273] before the Assembly would begin to function. The Secretary of State transferred this task to an all-party commission[274], which was charged to draft a report on the precise procedures for the Assembly[275]. That Commission proposed a scheme embodying the principle of open, accountable government, thus allowing the Assembly flexibility enough to decide the procedural details. These new Standing Order claim to offer a "contemporary interpretation of democratic governance within the context of accountability and inclusivity"[276] and were adopted at the first meeting of the new Assembly at the end of May 1999. The Standing Orders can only be changed with a majority of two-thirds within the Assembly. Moreover, they include a rigorous Code of Standards for Members and require the Assembly's members to act at all time exclusively in terms of the public interest[277]. Generally, AMs can also be MPs. The Labour party thought, however, that double membership should be avoided. Currently, about five AMs are Members of both bodies.

The National Assembly for Wales elects its First Secretary[278]. He or she is, however, not appointed by the Queen. The First Secretary appoints the Executive Committee composed of Assembly Secretaries with specific policy portfolios[279]. This corresponds in practice to a Cabinet-type system[280]. The Standing Orders allow the Assembly to delegate functions to the Executive Committee[281]. Generally, however, power over devolved areas is transferred to the Assembly as a whole, to whom powers are devolved[282]. The Assembly is a body corporate which may exercise both executive and legislative functions. That is a salient difference to the Scottish Parliament. The Assembly is empowered to delegate its functions to its committees or to the First Secretary. The Assembly elects the committee chairs, which have the duty to oversee the policy remit of each subject committee[283]. The statutory Committees are the "sub-

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[272] See above
[273] Government of Wales Act 1998, section 50 (1)
[274] National Assembly Advisory Group set up in 1997 and later the Standing Orders Commission
[275] Government of Wales Act 1998, section 50 (2)
[276] Michael, Alun: *Foreword,* in: Standing Orders of the National Assembly for Wales, op cit, p 1; see also Davies, Ron, in: House of Commons Debates, Vol. 298, col. 757, 22 July 1997
[277] Government of Wales Act 1998, section 72 see also Standing Orders
[278] Government of Wales Act 1998, section 53 (1)
[279] Government of Wales Act 1998, section 56
[280] See Standing Orders, op cit, definitions, before para 1; also Bogdanor, Vernon: Devolution in the UK, op cit, p 211
[281] Government of Wales Act 1998, section 62
[282] Gay, Oonagh: Devolution and Concordats, op cit, p 15
[283] Government of Wales Act 1998, section 57 (5). Their chairpersons proved as potential power-breakers with Labour providing only two due to the lack of coalition. See Hazell, Robert (et al.): *The British Constitution 1998-99*, in: Parliamentary Affairs, op cit, p 248

ordinate legislation Committee"[284], and "Audit Committee"[285], "Regional Committees[286]" for North Wales, Mid Wales, South West Wales and South East Wales[287]. Beside these statutory settings the Standing Orders established a "Business Committee"[288], a "Standard of conduct Committee"[289], a "Committee on European Affairs"[290] and a "Committee on equal opportunities"[291]. Apart from that there are the subject Committees, which are established with reference to the Assembly Secretaries[292]. The "sub-ordinate legislation Committee" has a special position as it considers subordinate legislation for Acts passed by the Westminster Parliament[293]. It co-operates with the Joint Committee on Statutory Instruments, which has much experience with the delegation by statute. This implies a limited power to legislate that is regularly handed to the Executive[294]. Besides that, the subject committees' role extends well beyond the scrutiny of the executive on the Scottish scheme[295]. They assume a double or hybrid task as they do not only combine the roles of standing and select committees but also in the way in which they enable the minority parties to play a distinctive and influential role. Proceedings of the Assembly must be held in public; a Welsh Administration Ombudsman investigates complaints[296].

All Committees must reflect the party balance in the Assembly[297]. These Committees are at least composed of seven and not more than eleven members. Therefore, questions arose concerning the management of Committees. As the Assembly has only sixty Members it is difficult to staff and organise these structures with reference to its range of responsibilities[298]. The Presiding Officer[299] of the National Assembly for Wales has not the same weight as in the Scottish Parliament. Its responsibility lies only in its political position to control the proceedings of the Assembly[300]. He or she is not supposed to be an information channel to the crown as Whitehall manages all contacts between London and Cardiff. The First Secretary is

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[284] Government of Wales Act 1998, section 58, 59; Standing Orders, op cit, para 11
[285] Government of Wales Act 1998, section 60; Standing Orders, op cit, para 12
[286] Government of Wales Act 1998, section 61; Standing Orders, op cit, para 10
[287] An attempt to unite the historically diverse country; see McAllister, Laura, op cit, p 642
[288] Standing Orders of the National Assembly for Wales, op cit, para 13
[289] Standing Orders of the National Assembly for Wales, op cit, para 16
[290] Standing Orders of the National Assembly for Wales, op cit, para 15
[291] Standing Orders of the National Assembly for Wales, op cit, para 14
[292] Government of Wales Act 1998, section 57 (4)
[293] Jones, Barry: *The Committees,* in: Osmond, John: The National Assembly Agenda, op cit, p 60
[294] See further below
[295] Rawlings, Richard, *The new model Wales,* op cit, p 481
[296] Government of Wales Act 1998, section 70
[297] Government of Wales Act 1998, section 54 (2)
[298] Jones, Barry: *The Committees,* op cit, p 61; also Institute of Welsh Affairs Working Party: Making the Assembly work, Institute of Welsh Affairs, Cardiff 1997
[299] Government of Wales Act 1998, section 52

not to be nominated by the Queen neither.

Unlike Scotland, Wales has its own language which might be used as "the badge of the distinctive Welsh identity"[301]. The Welsh Language Act 1993 stipulates that Welsh and the English language are to be treated on a basis of equality in the conduct of public business and in the administration of justice in Wales. In keeping with the terms of that Act, the Government of Wales Act 1998 requires that the new body carries out its work in both languages "so far as it is both appropriate in the circumstances and reasonably practicable"[302]. All papers are available in both languages and the sessions of the Assembly are staffed with a simultaneous translation[303]. Particularly, Welsh as a language of law is to be "re-invented"[304]. Section 122 of the act attributes to the Assembly even a "dictionary power" as it can describe Welsh equivalents to established legal terminology.

The Government of Wales Act 1998 confers executive but not primary legislative functions on the Assembly. This means that the Assembly will have the powers transferred from Whitehall departments and especially the Secretary of State for Wales to make subordinate legislation in areas within its competence. This construction implies inevitably a legal and administrative complexity where a "horizontal division" of law-making functions is concerned but also a "vertical division" of primary law-making powers[305]. In contrast to the Scotland Act, the Government of Wales Act 1998[306] requires functions to be transferred to the Assembly and charges the Secretary of State to consider as to whether further parts of functions are to be "devolved"[307]. The strategy of the Government of Wales Act is to assign the Assembly competence field by field[308]. These areas are specified in Schedule 2 of the act[309] and include agriculture, forestry, fisheries and food, ancient monuments and historic buildings, culture (including museums, galleries and libraries), economic development, education and training, environment, health and health services, highways, housing, industry,

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[300] Standing Orders, para 1.9- 1.12
[301] J.R. Jones quoted in: Williams, Colin: *Operating through two languages,* in: The National Assembly Agenda, op cit, pp 101
[302] Government of Wales Act 1998, section 47 (1)
[303] McAllister, Laura, op cit, p 645
[304] Rawlings, Richard, *The new model Wales,* op cit, p 484
[305] Rawlings, Richard, *The new model Wales,* op cit, p 462
[306] Government of Wales Act 1998, section 22
[307] Sherlock, Ann: *The Establishment of the National Assembly for Wales,* in: European Public Law, Vol 5 (1), London, Kluwer 1999, p 44
[308] Craig, Paul; Walters, Mark: *The courts, devolution and judicial review,* in: Public Law, Sweet & Maxwell, London, Spring 1999, p 274
[309] Government of Wales Act 1998, Schedule 2

local government, social services, sport and recreation, tourism, town and country planning, transport, water and flood defence and the welsh language. The Assembly has also the power to transfer to itself the functions of other public authorities such as health[310] authorities or quangos[311]. This includes a large responsibility for the funding of the Welsh public bodies. Also, the National Assembly has to distribute the central government grants[312] to local government. This revenue constitutes the dominant proportion of local government finance[313]. The Assembly is required to set out a scheme to promote a sustainable relationship with local government[314]. In this context, a "Partnership Council" has been established which should enhance the consultation between both bodies.

The National Assembly for Wales (Transfer of Functions) Order[315] has defined the scope of the Assembly's work, which is, in principle, to take over the functions previously exercised by the Secretary of State[316]. The Transfer Order describe precisely each act or statutory instrument for which the responsibility is to be taken further by the Assembly (Schedule 1) and it (Schedule 2) enumerates the enactments subject to constraint on ministerial exercise. However, there is nothing to prevent future Acts of Parliament to transfer more powers[317]. The Assembly also takes over the former budget of the Welsh Office, which corresponded in 1999 to approximately £7bn[318]. Moreover, the Act provides for regulatory appraisal of subordinate legislation[319]. A draft lay before the Assembly needs generally to be analysed for cost-benefits[320]. This can be seen in the context of a consultative style of government as the National Assembly has also to establish a scheme for the promotion of the voluntary sector[321], its consultation with business[322] and a scheme for sustainable development[323].

Despite the fact that the Assembly has not got primary legislative power, it will exercise a

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[310] Government of Wales Act 1998, section 27
[311] Government of Wales Act 1998, section 28
[312] See further below
[313] McAllister, Laura, op cit, p 647
[314] Government of Wales Act 1998, section 113
[315] National Assembly of Wales (Transfer of Functions) Order, SI 1999/672 changed by SI 2000/253
[316] Corresponding to 150 Statutory Instruments made independently and around 400 with other Ministers, see: Rawlings, Richard: *The new model Wales,* op cit, p 488
[317] Silk, Paul: *The Assembly as a legislature,* in: Osmond, John: The National Assembly Agenda, op cit, p 71
[318] A Voice for Wales, op cit, para 1.3
[319] Craig, Paul; Walters, Mark: *The courts, devolution and judicial review,* op cit, p 276
[320] Government of Wales Act 1998, section 65
[321] Government of Wales Act 1998, section 114
[322] Government of Wales Act 1998, section 115
[323] Government of Wales Act 1998, section 121

considerable degree of power in view of "secondary" or more precisely "sub-ordinate[324]" legislation and scrutiny of primary legislation. This is only to understand in the context of the British system of legislation. Albeit the Parliament makes the law in Britain, it has delegated legislative powers to other institutions especially to Ministers, local authorities or other public bodies from the nineteenth century[325]. These "orders", "regulations" or "rules" are legally provided by the Statutory Instruments Act 1946, which stipulates the procedures and formalities of this type of legislation. The main political decisions are generally made by primary legislation. Ministers for example can only be empowered to make secondary legislation because of an act of primary legislation[326]. Nevertheless, secondary legislation can have the same effects. In Britain, unlike other European states as for example Germany, prison sentences can be based on breaches of secondary legislation[327]. The volume of delegated legislation reveals its importance, as in recent years a growing number of laws have been sub-ordinate legislation[328]. Statutory instruments govern largely the daily life in Wales[329]. However, these have not been all made by the Secretary of State for Wales, most of these instruments have been made by other Ministers[330]. Some of them are made concurrently, others jointly. In the first case, the instrument falls within the responsibility of the Secretary of State for Wales that for reasons of administrative convenience only one instrument is made. The second case may happen if the act confers powers to a group of Ministers. The jointly made statutory instruments are furthermore to be made between the Assembly and the appropriate Whitehall Ministers whilst the Assembly is solely responsible for the concurrent scheme even if it might be inclined to follow the Westminster made instruments[331]. In addition, the Assembly has the power to make sub-ordinate legislation where none has been made yet. In this the Assembly is supposed to be able to revoke or amend existing secondary legislation as it has the power to make sub-ordinate legislation in the devolved areas following the Interpretation Act 1978[332]. However, there is one special class of powers to make secondary legislation that is called "Henry VIII clauses". Their name is due to a King who was given sweeping powers under Statute of Proclamations 1539 to legislate without reference to parliament[333]. These clauses allow a Minister to amend or repeal

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[324] Interpretation Act 1978, section 21
[325] Silk, Paul: *The Assembly as a legislature,* in: The National Assembly Agenda, op cit, p 68
[326] Barnett, Hilaire, op cit, pp 549
[327] Silk, Paul: *The Assembly as a legislature,* in: The National Assembly Agenda, op cit, p 69
[328] See Barnett, Hilaire, op cit, p 550: In 1994 over 3.300 statutory instruments were made
[329] Rawlings, Richard: *The new model Wales,* op cit
[330] Silk, Paul: *The Assembly as a legislature,* in: The National Assembly Agenda, op cit, p 70
[331] Silk, Paul: *The Assembly as a legislature,* in: The National Assembly Agenda, op cit, p 71
[332] Government of Wales Act 1998, section 14
[333] Silk, Paul: *The Assembly as a legislature,* in: The National Assembly Agenda, op cit, p 73

primary legislation by secondary legislation. The width of their power has been described as "breath-taking"[334]. This has been the case concerning the School Standards and Framework Act[335] for example, which allows statutory instruments to make fundamental changes to major provisions of the Act concerning appeals against school exclusions or admissions[336]. This Act is included in the Government of Wales Act (Transfer of Functions) Order 1999[337]. Sub-section[338] 2(g) allows for regulations making "provision for amending, repealing or revoking any statutory provision passed or made before the appointed day, for applying any such provision and for making savings or additional savings from the effect of any amendment or repeal made by this Act". Section 5 stipulates furthermore that the "amendments that may be made under the previous subsection shall be in addition (and without prejudice) to those made by any other provision of this Act"[339]. Also Section 27 (5) and 28 (7) of the Government of Wales Act 1998 contain such clauses[340]. Ordinary "Welsh clauses[341]" in recent acts are more clear and understandable and do not give such autonomy to the Assembly. As an example could be taken the Local Government Act 1999 which stipulates in section 29[342] that the Act "in its application to Wales shall have effect with modifications". This means that "for each reference to the Secretary of State there shall be substituted a reference to the National Assembly for Wales". Some sections of the Act are omitted or excluded whilst the Secretary of State is in other cases prohibited to make any provision which has effect in relation to Wales unless he has consulted the National Assembly for Wales or to amend the application of legislation made by the National Assembly for Wales, unless the Assembly consents.

2. The Welsh Executive

The particularity of the Welsh devolution model can be best identified with its organisation of the political Executive. Originally it was intended that the Assembly is organised like a local government council carrying out the work in subject committees[343]. However, in order to enable the Executive to have a more effective leadership it was finally regulated a mixture

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[334] Bradley, Anthony: *Constitutional Reform, the sovereignty of Parliament and devolution,* in: Cambridge Centre for Public Law: Constitutional Reform in the United Kingdom, op cit, p 39
[335] Other examples are the Jobseekers Act 1995, Human Rights Act 1998 or the Deregulation and Contracting Out Act 1994 see Silk, Paul: *The Assembly as a legislature,* in: The National Assembly Agenda, op cit, p 73
[336] Silk, Paul: *The Assembly as a legislature,* in: The National Assembly Agenda, op cit, p 71
[337] SI 1999/253
[338] School Standards and Framework Act 1998, section 144
[339] School Standards and Framework Act 1998, section 144 (5)
[340] Craig, Paul; Walters, Mark: *The courts, devolution and judicial review,* in: Public Law, op cit, p 277
[341] Silk, Paul: *The Assembly as a legislature,* in: The National Assembly Agenda, op cit, p 77
[342] Local Government Act 1999, section 29 "Modification for Wales"
[343] Bogdanor, Vernon: Devolution in the UK, op cit, p 211

between the Westminster cabinet-model[344] and also that the subject committees should come in operation[345]. Thus, the Assembly is organised on a hybrid system, but the definition of the business of the Assembly follows a top-down logic. The First Secretary has therefore the task to create its own cabinet with Minister's portfolios of its choice. Thus, the following Assembly's Secretaries were established in 1999: Finance, Business, Agriculture and Rural Development, Health and Social Services, Environment and Local Government, Economic development, Education and children, Education and Training[346]. Indeed, this partition was the base for the correspondent subject committees of the Assembly. In the event, the National Assembly Advisory Group[347] had precisely recommended such an Assembly Cabinet to ensure efficient decision-making but with considerable involvement for subject committees to provide scrutiny[348] of the Cabinet[349]. This differs with the Scottish model. It can be argued that the position of the First Secretary is rather strong as far as the Executive is concerned. Nevertheless, he has a different position compared with the Scottish First Minister. Therefore, it was presumable that he was not granted an audience with the Queen following his election[350]. However, he also has been given the status of Member of the Privy Council.

C. The Northern Ireland Assembly

It has been pointed out that the Northern Irish case differs considerably from the Scottish and Welsh ones. Since 1920 Northern Ireland has been treated differently from Great Britain. Also, the issues in Northern Ireland have never been separatist, but "unionist" or "nationalist" and "protestant" or "catholic"[351]. The constitutional background and the context of "devolution" in Northern Ireland differ thus generally from Scotland and Wales. Hence, it is necessary to explain why a comparative approach is suitable[352]. First, the understanding of the devolved institutions in Northern Ireland is significantly enhanced in the context of

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[344] Standing Orders of the National Assembly for Wales, para 2.4 "Assembly Cabinet"
[345] McAllister, Laura, op cit, p 642
[346] See Official Website of the National Assembly for Wales (http://www.assembly.wales.gov.uk/)
[347] see above
[348] Concerning the role of the courts, see further below
[349] Sherlock, Ann: *The Establishment of the National Assembly for Wales,* op cit, p 45
[350] *Historic day as the Queen arrives in Scotland for first audience,* in: Daily Telegraph, 16 May 1999, p 2
[351] See above; for the religious implications in Scotland see: Walker, Graham: *Scotland and Northern Ireland: Constitutional Questions, Connections and Possibilities,* in: Government and Opposition, Vol 33 (1), London 1998, pp 21
[352] Also Hadfield, Brigid, *The nature of devolution in Scotland and Northern Ireland,* op cit, p 5 stating "a risk of a certain amount of distortion". Meehan, Elizabeth: *The Belfast Agreement – Its distinctiveness and point of cross-fertilization,* in: Parliamentary Affairs, Vol 52 (1), London 1999, pp 19 holds that Northern Ireland is central to this question.

devolution to Scotland and Wales. Special problems of Ulster are then easier to identify. Second, the constitutional questions of devolution in Northern Ireland are similar to those in Scotland and Wales and for a general overview of the devolution model it is important to see which powers are devolved to Northern Ireland. Thirdly, devolution to Northern Ireland affects also the residual part of the United Kingdom[353]. It introduces an inter-national aspect in the constitutional settlement of devolution of the United Kingdom[354].

As shown above, there was since the 1980s a common attempt of the British and Irish government to seize the problem. The British- Irish inter-governmental approach culminated 1985 in the Anglo-Irish Agreement[355]. This international treaty established a base for the both governments in the leading-up to the 1998 peace-talks[356]. It included four principal elements. On the one hand, it stipulated that "any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland". On the other hand, it established an inter-governmental conference, chaired by both British and Irish Ministers assisted by a permanent secretariat at Belfast. The general viewpoint of the agreement was that power should be devolved to a Northern Irish administration maintained by cross-community co-operation. The agreement was a sign to a real "open-up" of the Irish issue to the international public, whilst the British government had always taken the view that the Irish question is exclusively of national concern[357]. The whole agreement was embedded in the context of deeper cross-border co-operation between Ireland and the United Kingdom in security and socio-economic matters[358]. These principles established a common ground for further co-operation. For the first time, the Anglo-Irish Agreement gave a special role to the Republic of Ireland, which has been consequently able to moderate the nationalist option. The Downing Street Declaration in 1990, where the Irish Republic announced the abandon of its constitutional claim over Northern Ireland, was conversely able to appease the Unionist position. The logic which followed was that the British government has attempted to force the Unionists into a power-sharing co-operation, whilst the Irish government coerced the nationalists all conditioned that Northern Ireland is to remain a part of the United Kingdom as long as the majority does not express another will. However, the capability of the British government for an effective coercion was suspended when the Major government lost its

[353] O'Leary, Brendan, The British-Irish Agreement, London, Constitution Unit 1998, p 8
[354] See further below
[355] See Hadfield, Brigid: The Constitution of Northern Ireland, op cit, Appendix 8
[356] Boyle/ Hadden, in: Constitutional Reform, op cit, p 295
[357] In the Treaty of Versailles 1918, for example, the Irish question was completely excluded.
[358] Boyle, Kevin; Hadden, Tom: The Anglo-Irish Agreement, Sweet & Maxwell, London 1989, and in:

majority in the Commons and relied increasingly on the vote of the Northern Irish Unionists. The final breakthrough in the province of the United Kingdom was, indeed, not only due to the endeavour of the new Labour government, because the peace process started under the former governments However, an important difference was marked by the change of the new British government concerning the integration of the Northern Irish problem in a more substantial concept of devolution thereby avoiding any isolation of the Northern Irish case[359].

In 1994 the announcement of the Irish Republican Army (IRA) to hold a cease-fire boosted the all-party approach of the Anglo-Irish Agreement as it allowed its political wing Sinn Féin to take part in these talks[360]. In February 1995, the joint ministerial conference issued its Joint Framework documents. These documents[361] outlined in detail the possible status for Northern Ireland and were in the end followed by a final agreement[362]. That agreement has been prepared[363] since 1996 through multi-party talks under the chairmanship of the former United States Senator George Mitchell. A further Westminster Act provided[364] then for the elections of a "forum for political dialogue". This Forum had the task to discuss "issues relevant to promoting dialogue and understanding with Northern Ireland". Thus, its functions were deliberative only[365]. The talks within the forum led finally to the Good-Friday Agreement of 1998[366], which created a new political and constitutional construction for the province. The agreement, however, was discussed and developed by the representatives of the Northern Irish parties. It later became the basis for the Northern Ireland Act 1998 that enshrined the agreement in the form of legislation.

The agreement itself provides under Strand One for a cross-community Assembly to be elected by the single transferable vote system for a four-year term. The Assembly should "exercise full legislative and executive authority in respect of those matters currently within the responsibility of the six Northern Ireland Government Departments (Agriculture, Economic, Development, Education, Environment, Finance and Personnel, Health and Social Services), with the possibility of taking on responsibility for other matters as detailed

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Constitutional Reform, op cit, p 295
[359] Boyle/ Hadden, in: Constitutional Reform, op cit, p 283; Davies, Norman: The Isles, op cit, p 920
[360] Bogdanor, Vernon: Devolution in the UK, op cit, p 105
[361] See official Website of the Northern Ireland Office: http://www.nio.gov.uk/ptalks.htm#frwk
[362] Boyle/ Hadden, in: Constitutional Reform, op cit, p 297
[363] Northern Ireland (Entry to Negotiations etc.) Act 1996
[364] Section 3, Northern Ireland (Entry to Negotiations etc.) Act 1996
[365] Hadfield, Brigid: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 14
[366] London, HMSO 1998,Cmnd. 3883

elsewhere in [the] agreement"[367]. Further powers could also be devolved in due course. The Assembly would enjoy an "aliud" status between the Scottish Parliament with tax-raising powers and the Welsh Assembly with a restricted realm of competence. Apart from the cross-community institution, Stand Two of the Agreement provides for a North-South Ministerial Council, whilst Strand Three establishes the British-Irish Council[368].

The Good Friday Agreement[369] regulated that each government organises a referendum on 22 May 1998. Subject to Parliamentary approval, a consultative referendum in Northern Ireland[370] and the Irish Republic, should address the question: "Do you support the agreement reached in the multi-party talks on Northern Ireland ...?". Also, the Irish government was to introduce in the Irish Parliament a Bill to change the Irish Constitution by amending Articles 2, 3, and 29 to permit its government to ratify the new British-Irish Agreement[371]. As the public in the Irish Republic and all parties in Northern Ireland were broadly involved in the agreement, a "Yes" campaign for these referendums was not set up. The agreement was lastly approved on 22 may 1998 when, on a turnout of 81.1 per cent, 71.1 per cent of the Northern Irish electorate voted in favour[372]. The large majority of „yes" votes proved that the agreement enjoyed a majority support in both communities in Northern Ireland, the unionist and the nationalist. The referendum held in the Republic was endorsed by 94 per cent of the electorate on a turnout of 56 per cent.

1. The Northern-Ireland Assembly

Following the agreement and its approval by the population, general elections for the new Northern Ireland Assembly were held in June 1998. This was provided by the Northern Ireland (Elections) Act 1998. However, these general elections took place before a Northern Ireland Bill had been published[373]. This implied that Scotland and Wales had much more time to prepare the individual devolution scheme and a consultative committee of preparation was installed. In Northern Ireland, on the contrary, the Agreement provided for a complete

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[367] The Good-Friday-Agreement, London, HMSO 1998,Cmnd. 3883, strand one, 3 (See also http://www.niassembly.gov.uk)
[368] See further below
[369] Good-Friday-Agreement, para 11 (2)
[370] Organised under the terms of the Northern Ireland (Entry to Negotiations, etc.) Act 1996
[371] Para 2 of the section "Constitutional Issues", in Annex B, see also O'Donnell, Donal: *Constitutional Background to and aspects of the Good Friday Agreement – A Republic of Ireland perspective,* in: Northern Ireland Legal Quarterly, Vol 50 (1), Belfast, SLS Spring 1999, pp 76
[372] Bogdanor, Vernon: Devolution in the UK, op cit, p 108
[373] Hadfield, Brigid, in: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 12

"devolution" project. The electorate had therefore to vote without detailed legislation proposals concerning the future tasks of the Assembly[374]. The general elections for the new Assembly in Belfast were held in June 1998 and returned a majority of 28 seats for the protestant UUP, 24 seats for the catholic SDLP, 20 seats for the protestant Democratic Unionist Party, whilst Sinn Féin won 18 seats. Other parties including parties for cross-community support got 18 seats. The new Assembly met for the first time on 1 July 1998 in Castle Buildings and since then has met in Parliament Buildings. The AMs elected David Trimble as (shadow) First Minister and Seamus Mallon as (shadow) Deputy First Minister[375]. Lord Alderdice was appointed by the then Secretary of State as initial Presiding Officer of the New Northern Ireland Assembly. The timetable, which was imposed by the Agreement, provided that the First Minister and its colleagues had to take office by the 31 October 1999. After hectic activity to establish the devolution scheme for Northern Ireland, the devolution process became delayed first by the refusal on the Unionist side to enter a power sharing executive until there was evidence about the disarmament of the IRA. The unionist problem was to sit with Sinn Fein in Cabinet without being assured about disarmament. In 1999, Senator Mitchell came a second time to Belfast, and after some delicate negotiations the IRA agreed to appoint an interlocutor for decommissioning. The Unionist leader, David Trimble, then got a small 58 per cent majority of his party to establish the power-sharing executive provided that the IRA started decommissioning until February 2000. The UUP, although having two ministers, refused to sit in Cabinet with Sinn Fein. The decommissioning of IRA weapons became the deadlock during the initial months of the new Northern Ireland Assembly. The taking of office in October/November 1999 was already difficult, as the unionist did not see a progress in decommission of IRA. Whilst a real break-through was not possible at the beginning of 2000, the Northern Irish First Minister announced to resign if the decommissioning did not progress. Nevertheless, the general context of co-operation advanced as the Secretary of State announced in January 2000 the scrapping of the Royal Ulster Constabulary's name and the force's dismemberment, in what Unionists perceived to be an appeasement of the republicans. However, the British government feared finally the resignation of the Unionist leader. His withdrawal from the Executive could have lead to a new deadlock on the unionist side, it was thought. Therefore, Westminster overruled the new body on 11 February 2000[376]. The Northern Ireland Act 2000 provides for the complete

[374] Hadfield, Brigid, in: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 12
[375] Results from http://www.niassembly.gov.uk
[376] See *Mandelson imposes direct rule*, in: Daily Telegraph, 12 February 2000

suspension of the Northern Ireland Assembly and of all other related institutions[377]. In May 2000, however, the British and Irish government could break the deadlock on decommissioning . The IRA made an official statement being ready to put its weapons "beyond use". Thus, the power-sharing body could be reinstated at the end of May[378]. All theoretical questions about the future of parliamentary sovereignty are at present resolved at least in relation to Northern Ireland, where it was stipulated "that Northern Ireland in its entirety remains part of the United Kingdom"[379]. The future of the peace process remains, however, unclear.

The Northern Ireland Act has been adopted at Westminster in November 1998 and repealed the Northern Ireland Elections Act 1998. It is not evident which devolution scheme was followed in Northern Ireland. The Kilbrandon Commission's definition[380] of legislative devolution would be able to describe the present system. However, this system is supposed to be changed[381] in Northern Ireland and might end in a later unification of the Isle. Thus, the system has been described as "power-sharing plus"[382]. Bogdanor[383] avoids classifying the Northern Irish model of devolution. It is true, that the original Gladstonian conception of Home Rule has been followed. Thus, the devolution model of Northern Ireland may be a *limited* legislative devolution opened to an independent status at the end. An important feature are the "confederal" arrangements[384] both within the Irish Isle and between Britain and the Irish Republic. The confederal nature of the arrangements are shown by the different cross border bodies[385].

The Northern Ireland Act 1998 provides for a 108-member unicameral[386] –in contrast to the bicameral system of 1921[387] – Northern Ireland Assembly. The Assembly is elected for a fixed term of four years, although the Act[388] schedules the next elections not before 1 May 2003. That has been stipulated due to the lack of competences of the Assembly in the first

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[377] Northern Ireland Act 2000, section 1
[378] By way of a restauration order under Section 3 (1). See SI 1445/2000 and 1446/2000 of 27th May 2000
[379] Northern Ireland Act 1998, section 1 (1)
[380] See above
[381] Section 3 and 1 (2) respectively
[382] O'Leary, Brendan: The British-Irish Agreement, op cit, p 1
[383] Bogdanor, Vernon: Devolution in the UK, op cit, p 109
[384] O'Leary, Brendan: The British-Irish Agreement, op cit, p 6
[385] See below
[386] Section 33 (1) and Parliamentary Constituencies Act 1986, Schedule 2 also Good Friday Agreement 1998, Cmnd. 3883, para 5 (2)
[387] See above
[388] Northern Ireland Act 1998, section 31 (2)

nine month of its existence[389]. However, the suspension[390] of the Northern Ireland Assembly makes it unforeseeable as to whether this date will be maintained. Clause 24 of the Northern Ireland Bill[391] empowered originally the Queen i.e. the Secretary of State to dissolve the Assembly if the First Minister or other Ministers were not able to hold office or, if they should resign, that those who might succeed them should also be unable to do so or, lastly, if the public interest might be that the Assembly should be dissolved. Thus, the dissolution of the Assembly could have produced an earlier general election. However, this clause of the Bill was changed at the Lord's Committee stage. It was argued that the weight of criticism of such emergency power was considerable. Therefore, it was argued that these regulations "are planning for failure and as a result make failure more likely"[392]. Thus, section 32 is now equal[393] to the regulations of the Scotland Act 1998 and any prorogation power was deleted.

Each of the 18 Northern Irish Westminster constituencies returns six Members to the assembly[394]. The figure of 108 Members of the Assembly (AMs) is proportionally higher than that for Scotland and Wales. However, that number has been enshrined in the Good Friday Agreement[395] as it states that a "108-member Assembly will be elected by proportional representation from the existing Westminster constituencies" thus reflecting the understanding of six AMs per constituency[396]. Nevertheless, this provision faced unionist amendments when it was inserted in the Northern Ireland Act[397]. The then responsible Minister justified the proposal because of the agreement's regulation, which should provide for "greater inclusivity"[398]. Therefore, the boundary commission has to respect the agreement's provisions[399]. This does not include the current representation at Westminster, which is, however, likely to remain[400]. This "inclusivity" means in fact a high degree of proportionality that is more than in Scotland and Wales. The political reason for the proportionality of the agreement's provisions is that every part of the Northern Irish community is ensured of its representation according to its population. This is to provide for confidence in the newly established institutions from both sides, nationalist and unionist.

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[389] Hadfield, Brigid: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 18
[390] Northern Ireland Act 2000, section 1
[391] Sub-section 4, see Website of the Assembly http://www.niassembly.gov.uk
[392] Lord Dubs in: House of Lords Debates, Vol 593, col 1442, 21 October 1998
[393] Hadfield, Brigid: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 18
[394] Section 33 (2) and Parliamentary Constituencies Act 1986
[395] Para 5 (2)
[396] Hadfield, Brigid: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 18
[397] Sections 31-5
[398] Murphy, Paul, in: House of Commons Debates, Vol 310, col 892, 22 April 1998
[399] The UK government remains legally responsible for the elections to the Assembly
[400] Hadfield, Brigid: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 17

The elections were held under a system of proportional representation, the so-called "single transferable vote". The single transferable vote offers both proportionality between votes and seats and a constituency based, but multi-member, system of election[401]. The calculation is based on a quota of the votes cast that is reached either by first preference voting producing the required quota or the redistribution of votes cast for losing candidates. It requires that the total number of votes be divided by one more than the number of vacant seats, plus one[402]. In contrast to the systems of additional member lists like in Scotland and Wales, this system offers a greater proportionality and a better choice for the voter. However, it implies a greater influence of the parties too, even though more parties are represented at the Assembly[403]. Given the experiences of the Northern Ireland Parliament[404], the electoral system cannot be changed by the Assembly[405]. Apart from that, a higher female representation was not an issue in the Northern Ireland elections.

The Northern Ireland Act 1998 provides for the establishment of the Assembly's own Standing Orders[406]. It requires the creation and the repeal of the Standing Orders only by cross-community support[407]. The Standing Orders were prepared by the Committee on Standing Orders which was established by the Assembly at its first meeting on 1 July 1998 to assist it in its consideration of Standing Orders[408]. They were finally approved by the Assembly on 9 March 1999. According to section 31, the Standing Orders of the Assembly stipulate that the Presiding Officer is in Northern Ireland called the "Speaker"[409]. The Assembly has to elect the leaders of the Executive and to take key-decisions by way of a novel cross-community voting mechanism[410]. That means those elected must first secure a majority of members voting in the election. Secondly, however, they need also a majority of the designated nationalists and a majority of the designated unionists voting in the election[411]. Thus, it is ensured that both parts of the community support the candidates. However, for the very important decisions, like the Assembly's leaders a third provision is made. It requires

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[401] Barnett, Hilaire, op cit, p 508
[402] Barnett, Hilaire, op cit, p 508; Mitchell/ Seyd, in: Hazell, Robert: Constitutional Futures, op cit, p 99
[403] Hadfield, Brigid: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 15
[404] See above
[405] As it is included in the Good-Friday Agreement and as it would fall in the reserved competence of Westminster, see below
[406] Northern Ireland Act 1998, section 41
[407] Northern Ireland Act 1998, section 41 (2)
[408] See http://www.niassembly.gov.uk
[409] Standing Orders of the Northern Ireland Assembly, para I, see http://www.niassembly.gov.uk/
[410] O'Leary, Brendan: The British-Irish Agreement, op cit, p 6, 13
[411] Northern Ireland Act 1998, section 4 (3)

that the office can only be held by two persons of the different communities, but both must secure a majority within their own community and also within the other part of the community[412]. At the first meeting of the Assembly, all members were required to register a declaration of identity[413]. It is possible to be "unionist", "nationalist" or "other". This created, of course, some difficulty for the "others", as their votes are not counted[414] if cross-community support procedures take place. A party is not likely to lose seats, as vacancies are to be replaced by substitutes rather than through by-elections. The number of seats can only be changed by defections[415]. Conversely, the Assembly with majority vote can pass "normal laws", although a minority of 30 Members can claim special procedures[416]. Key-decisions[417], however, are the adoption of controversial laws like the budget or questions of equality are to be voted by cross-community support[418].

The Act requires that the Standing orders make provision for establishing committees of members of the Assembly ("statutory committees") to advise and assist each Northern Ireland Minister in the formulation of policy with respect to matters within his responsibilities as a Minister[419]. Therefore the following committees are provided[420]: Committee on Procedures, Business Committee, Special Committee on conformity with Equality Requirements, Public Accounts Committee, Committee on Standards and Privileges, Audit Committee and a Committee of the Centre. These committees have to scrutinise the work of the Executive Committee[421], which is established, following section 20 of the Act. The distribution of committee chairs follows the d'Hondt formula[422] that means a proportional scheme. Moreover, section 29 of the Act requires for the Committee chairs that the nominating party has to prefer a committee in which there is no "party interest". Party interests in a committee arise when the committee is established to advise or assist a Minister who is member of that party[423].

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[412] See further below
[413] Standing Orders, para 3 (7)
[414] Bogdanor, Vernon: Devolution in the UK, op cit, p 106
[415] Hadfield, Brigid: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 19
[416] O'Leary, Brendan: The British-Irish Agreement, op cit, p 13
[417] Good Friday Agreement, Strand 1 (5)
[418] Northern Ireland Act 1998, section 63 (3); Standing Orders, paras 33, 54
[419] Northern Ireland Act 1998, section 29 (1)
[420] Good Friday Agreement, paras 52-8
[421] See above
[422] The formula applies as follows: S/1+M, where S is equal the number of seats of the party in the Assembly, which were held by members of the party on the day on which the Assembly first met following its election; M has to be equal with the number of Ministerial offices (if any), which are held by members of the party.
[423] Northern Ireland Act 1998, section 29 (6)

The Northern Ireland Act 1998 provides for full legislative and executive authority in respect of the matters currently devolved administratively to the Northern Irish government departments. The power of the Northern Ireland's Assembly is thus closer to the role given to the Scottish Parliament than to that of the Assembly in Wales[424]. The Act classifies three different categories of legislative powers to the Assembly, which are described in section 2 as follows: transferred, reserved and excepted matters. However, the term "reserved" has a different meaning with reference to the Scotland Act 1998 where "reserved" matters are those "excepted" in Northern Ireland Act[425]. Following the Northern Ireland Act 1998[426] excepted matters remain in the realm of the Westminster Parliament as far as they are not ancillary to other provisions dealing with a reserved or transferred matter[427]. Excepted are the Crown, the Parliament and the elections, international relations except some areas of cross-border co-operation, defence, national security and weapons control, political parties and the appointment of judges and others[428]. The substance of that schedule is similar but not identical with the Scottish one, albeit the Northern Ireland Act makes no provision for moving a matter out of the excepted category[429]. In contrast to the excepted matters, reserved matters can be legislated by the Assembly but only with the consent of the Secretary of State[430]. Under section 15[431] parliamentary approval is needed unless the matter is ancillary only. Reserved matters are, as stipulated in Schedule 3, navigation, civil aviation, domicile, post office, public order, policing and the criminal law (including abortion[432]) and others[433]. Section 4[434] provides for reserved matters to become transferred matters and the other way round, but any further transfer needs a cross-community vote and the approval by the Westminster parliament. However, though these matters could be transferred to the Assembly in due course[435], not all are judged as being suitable for transfer[436]. Conversely, all other matters are, as in the Scottish case, transferred to the Assembly. The assembly enjoys, for example, powers devolved to finance, personnel, agriculture, education, health, social services, economic development and environment. The general structure of the devolved

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[424] Hazell, Robert (et al.): *The British Constitution 1998-99,* in: Parliamentary Affairs, op cit, p 249
[425] Hadfield, Brigid, *The nature of devolution to Scotland and Northern Ireland,* op cit, p 16
[426] Northern Ireland Act 1998, section 4 and Schedule 2
[427] Northern Ireland Act 1998, section 6 (2b)
[428] See Northern Ireland Act 1998, Schedule 2
[429] Hadfield, Brigid, *The nature of devolution to Scotland and Northern Ireland,* op cit, p 16
[430] Northern Ireland Act 1998, sections 4 and 7
[431] Northern Ireland Act 1998, sections 8 (5), 15 (2)
[432] See Hadfield, Brigid, *The nature of devolution to Scotland and Northern Ireland,* op cit, p 17, fn 63
[433] See Northern Ireland Act 1998, Schedule 3
[434] Northern Ireland Act 1998, section 4 (2,3)
[435] See Good Friday Agreement
[436] Lord Dubs, in: House of Lords Debates, Vol 593, cols 1195, 19 October 1998

matters is thus similar as in Scotland, even though the Northern Irish realm is less extensive, as it enjoys for example no tax raising powers.

2. The Northern Irish Executive

The Northern Ireland Act 1998 provides for a very special executive model, whose crucial feature is the idea of real power-sharing between the two communities in Northern Ireland[437]. The Assembly has to vote through cross-community majority for the First and Deputy First Minister[438]. Initially, section 16 (2) of the Act requires that a First Minister and a Deputy First Minister candidate jointly for both offices, because of the fact that if one ceases to hold office the other office falls also vacant[439]. All other ministerial offices are distributed following a scheme determined in accordance with the d'Hondt formula[440]. By contrast with 1973, the appointment of the executive is no longer to be made by the Secretary of State. Nor is the devolution model dependent on a 70 per cent vote in the Assembly as it was in 1982[441]. Both leaders of the Executive can only take office[442] after affirmation of the pledge of office[443] which reflects the same pledge that is included in the Good Friday Agreement. Both First Ministers – they enjoy actually equal status[444] – submit to the Assembly for its approval on a cross-community vote their determination as to the number of (junior[445]) Ministers and their portfolios. The number of executive offices was set up at ten ministers[446] and a number of junior ministers[447]. They form together the Executive Committee, which is similar to the Welsh model[448]. Each (junior) Ministers shall not take office until he or she has affirmed the pledge of office[449]. However, the oath of allegiance to the Queen is not required with contrast to Scotland and Wales. The Standing Orders provide[450] that a Minister cannot chair a statutory committee. This is not the only reason, for which it is likely that the opposition to

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[437] O'Leary, Brendan: The British-Irish Agreement, op cit, pp 1
[438] See above
[439] Northern Ireland Act 1998, section 16 (7)
[440] Northern Ireland Act 1998, section 18 (5)
[441] Bogdanor, Vernon: Devolution in the UK, op cit, p 106
[442] Northern Ireland Act 1998, section 16 (4)
[443] Northern Ireland Act 1998, Schedule 4
[444] Both offices have to co-operate following the Act (see e.g. section 16 (7)) and the agreement
[445] The Bill did not provide for junior Ministers. The Bill was there changed at the stage in the House of Lords. The d'Hondt formula does not apply for the Junior Ministers. See Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 20
[446] Northern Ireland Act 1998, section 17 (4)
[447] Northern Ireland Act 1998, section 19
[448] See above
[449] Northern Ireland Act 1998, sections 18 (8), 19 (3)
[450] Good Friday Agreement, para 45 (3), and Northern Ireland Act 1998, section 29 (5a)

individual ministers comes from the shadow committees[451], which have the task of scrutiny of the Executive. In contrast to Scotland, no Minister holds office at Her Majesty's pleasure and the Executive is therefore not dismissable by the Queen[452]. Another similarity in Northern Ireland occurs from a comparative standpoint as the initial First Minster, David Trimble, is a Member of the Privy Council. However, he was nominated before the time of his office. The question is therefore, as to whether all Northern Irish First Ministers are given a Membership in the Privy Council[453].

The Northern Ireland Act 1998 attributes[454] to the Executive Committee the task of agreeing and reviewing the Northern Ireland budget. The budget is linked to cross-community policies and programmes as included in the Good Friday Agreement. The agreement[455] stipulates that ministers "have full executive authority in their respective areas of responsibility, within any broad programme agreed by the Executive Committee and endorsed by the Assembly as a whole". In the context of the pledge of office, these regulations should ensure some collectivity within the Executive and avoid a fragmented decision-making[456]. Nevertheless, the agreement provides[457] for the removal of individual ministers too. Therefore, a minister may be "removed from office following a decision of the Assembly taken on a cross-community basis, if he or she loses the confidence of the Assembly". Before the suspension of the Northern Ireland Assembly the following ministerial offices were established: Agriculture and Rural Development, Culture, Arts and Leisure, Education, Enterprise, Trade and Investment, Environment, Finance and Personnel, Health, Social Services and Public Safety, Higher and Further Education, Training and Employment, Regional Development and Social Development[458]. For the support of the Executive, Section 68 provides for a Human Rights Commission. It has the task to "keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights"[459]. The commissions members are nominated by the Secretary of State ensuring that the Commission as a group is representative for the province[460]. The Commission advises the Secretary of

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[451] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 21
[452] See above
[453] See also Brazier, Rodney: *The Scottish Government,* op cit, p 215; for the historical background of Privy Councillors in Northern Ireland, see: Hadfield, Brigid: *Devolution: Some key issues and a Northern Ireland searchlight,* in: Cambridge Centre for Public Law: Constitutional Reform, Practice and Principles, op cit, p 51
[454] Northern Ireland Act 1998, section 20 (3), based on the Good Friday Agreement, paras 19, 20, and section 64
[455] Para 24
[456] Hadfield, Brigid: *The nature of devolution to Scotland and Wales,* op cit, p 20
[457] Para 25
[458] See http://www.niassembly.gov.uk
[459] Northern Ireland Act 1998, section 69 (1)
[460] Northern Ireland Act 1998, section 68 (3)

State and the Executive Committee of the Assembly of legislative and other measures, which ought to be taken to protect human rights in Northern Ireland.

3. The trans-national Councils

According to the Good Friday Agreement, the Northern Ireland Act 1998 stipulates[461] that the North-South Ministerial Council[462] (NSMC) brings together representatives of the Irish government and the Executive of Northern Ireland thus providing for a "con-federal" relationship between both parts of the Isle[463]. Visibly, that new body was not called "Council of Ireland[464]". This was the term of the 1920 Council, which has "unfortunate overtones" for unionists[465]. The NSMC is to be "established to bring together those with executive responsibilities in Northern Ireland and the Irish Government, to develop consultation, co-operation and action within the island of Ireland - including through implementation on an all-island and cross-border basis - on matters of mutual interest within the competence of the administrations, North and South"[466]. However, it is to be established after the Assembly has come into being and completed a work programme to establish this body[467]. The Assembly and the Council are therefore interdependent[468]. All Council decisions are to be agreed between the two sides. The Members of that body are the First Minister, Deputy First Minister and any relevant Ministers of the Northern Ireland government, and the Irish Government represented by the Taoiseach and relevant Ministers. All of its Members have to operate in accordance with the rules for democratic authority and accountability in force in the Northern Ireland Assembly and the Oireachtas respectively[469]. Participation in the Council should become one of the "essential responsibilities[470]" attaching to relevant posts in both administrations. It is, however, up to the leaders of the Executives to "make alternative arrangements", if a holder of a relevant post will not participate normally in the Council[471]. Firstly, the Council can meet in different formats that means in plenary format twice a year,

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[461] Northern Ireland Act 1998, section 52
[462] Good Friday Agreement, Strand Two. Established through the *Agreement between the government of the UK of Great Britain and Northern Ireland and the government of Ireland establishing a North/South ministerial Council*, Dublin 8 March 1999, see http://www.nioffice.gov.uk
[463] O'Leary, Brendan: The British-Irish Agreement: Power-sharing plus, op cit, p 6
[464] See above
[465] Bogdanor, Vernon: Devolution in the UK, op cit, p 108
[466] Good Friday Agreement, op cit, Strand Two, para 1
[467] Good Friday Agreement, op cit, Strand Two, para 8
[468] O'Leary, Brendan: The British-Irish Agreement: Power-sharing plus, op cit, p 6. Also p 7: "Unionists cannot destroy the Council while retaining the Assembly, and nationalists cannot destroy the Assembly while retaining the Council".
[469] Good Friday Agreement, op cit, Strand Two, para 2
[470] Thus, neither Unionist nor Nationalist Ministers can oppose this body

with Northern Ireland representation led by the First Minister and Deputy First Minister and the Irish Government led by the Taoiseach[472]. Secondly, specific sectoral formats are possible "on a regular and frequent basis with each side represented by the appropriate persons". Lastly, the NSMC can establish an appropriate format of Members to consider institutional or cross-sectoral matters (including in relation to the EU) and to resolve disagreement. However, by agreement between the two sides, experts from outside can be appointed to consider a particular matter and report[473]. Therefore, the NSMC will function much like the Council of Ministers model in the European Union[474]. The agendas for all meetings are to be settled by prior agreement between the two sides, but it will be open either to propose any matter for consideration or action[475]. The British-Irish Agreement states as its main functions to "exchange information, discuss and consult with a view to co-operating on matters of mutual interest within the competence of both Administrations, North and South. The NSMC has to use best endeavours to reach agreement on the adoption of common policies, in areas where there is a mutual cross-border and all-island benefit, and which are within the competence of both Administrations, North and South, making determined efforts to overcome any disagreements"[476]. Moreover, the Council considers the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements are to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings. Generally, decisions are taken by agreement on policies for implementation separately in each jurisdiction, in relevant meaningful areas within the competence of both Administrations. Consistent with the Good Friday Agreement, the Irish Parliament has changed the Constitution of the Republic to ensure that the NSMC is able to exercise island-wide jurisdiction in those functional activities where co-operation is possible[477]. The Council can take decisions by agreement on at least six[478] policy areas and action at an all-island and cross-border level to be implemented by the cross-border bodies[479]. These are, however, executive bodies[480]. Apart from the EU-subjects, the matters for that co-operation are not specified, but it is likely that the following matters are included: agriculture, transport,

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[471] Good Friday Agreement, op cit, Strand Two, para 2
[472] Good Friday Agreement, op cit, Strand Two, para 3
[473] Good Friday Agreement, op cit, Strand Two, para 14
[474] O'Leary, Brendan: The British-Irish Agreement: Power-sharing plus, op cit, p 7
[475] Good Friday Agreement, op cit, Strand Two, para 4
[476] Good Friday Agreement, op cit, Strand Two, para 5
[477] O'Leary, Brendan: The British-Irish Agreement: Power-sharing plus, op cit, p 7
[478] O'Leary, Brendan: The British-Irish Agreement: Power-sharing plus, op cit, p 8
[479] See above
[480] O'Leary, Brendan: The British-Irish Agreement: Power-sharing plus, op cit, p 7

tourism, and education[481]. Each side has to be in a position to take decisions in the Council within the defined authority of those attending, through the arrangements in place for co-ordination of executive functions within each jurisdiction[482]. Both sides remain, however, accountable to their respective parliamentary institutions, whose approval, through the arrangements in place on either side, is required for decisions beyond the defined authority of those attending. As far as disagreements within the Council occur[483], they are to be addressed in the plenary format or in the Council where the appropriate persons represent each side[484]. The NSMC is funded by the two Administrations supported by a standing joint Secretariat, staffed by members of the Northern Ireland Civil Service and the Irish Civil Service[485].

On 13 December 1999, all 15 members of the Irish Cabinet met 10 of the new Northern Ireland executive[486]. That was the first time that ministers from Dublin and Belfast had sat down for formal discussions. The gathering in the historic setting of Armagh City marked the inaugural meeting of the NSMC. The Irish team was led by the Prime Minister and the Ulster contingent by the First Minister. Both parties agreed to set up six cross-border implementation bodies to work together for the benefit of north and south[487]. These include waterways, food safety, special European Union programmes, language, lighthouses and trade and business. The headquarters of three will be north of the border and three in the Republic. The ministerial council also agreed that "matters for co-operation" should include transport, agriculture, education, health, environment and tourism[488]. However, the meeting was boycotted by two extreme unionist members of the executive cabinet (both of the Democratic Unionist Party), but their refusal of co-operation concerns the members of Sinn Fein and not the Members of the Irish Republic. The First Minister of Northern Ireland stated that "this council will allow north/south co-operation to be co-ordinated and managed in a way that threatens no one and benefits everyone. Central to its operation is the principle of consent. This interlocking principle binds the future of all sides to the implementation of the Belfast Agreement. It is the bedrock of justice and fairness in this process and it is the reason the Agreement will work"[489]. Paragraph 13 of this Agreement, however, outlines that it is understood that the North/South Ministerial Council and the Northern Ireland Assembly are

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[481] O'Leary, Brendan: The British-Irish Agreement: Power-sharing plus, op cit, p 8
[482] Good Friday Agreement, op cit, Strand Two, para 6
[483] Good Friday Agreement, op cit, Strand Two, para 14
[484] See above
[485] Good Friday Agreement, op cit, Strand Two, paras 15, 16
[486] *Trimble hails first formal links across the border,* in: Daily Telegraph, 14 December 1999
[487] As provided by the Good Friday Agreement, see above
[488] See: *Trimble hails first formal links across the border,* in: Daily Telegraph, 14 December 1999

mutually inter-dependent, and that one cannot successfully function without the other. Thus, the entire system has been interrupted by the suspension of the Northern Irish Assembly through the Northern Ireland Act 2000[490]. Section 1 (5) of that Act provides that the functions conferred by section 52 of the Northern Ireland Act 1998 referring to the Council are not to be exercised any more. Therefore, it remains to be seen as to whether the NSMC can re-take office.

Strand three of the Good Friday Agreement provides[491] for the establishment of a British-Irish Council[492] (BIC). Both governments agreed[493] on 8 March 1999 at Dublin about the establishment of that Council. It will bring together representatives of the British and Irish governments, and of the devolved bodies of Northern Ireland, Scotland, Wales, the Isle of Man and the Channel Isles (whilst England could follow suit[494]) to discuss matters of common interest[495]. Apart from its function for devolution as a whole, this council puts the Northern Irish conflict in a general context of self-government. This may facilitate the development in Northern Ireland in the future. Moreover, it may encourage further links between the devolved institutions and the both countries[496] as an "overarching tier"[497]. Furthermore, a British-Irish Intergovernmental Conference was established, bringing together the British and Irish governments, to promote bilateral co-operation at all levels[498]. According to the Good Friday Agreement[499], an Intergovernmental Conference (IGC) was established[500] on the same day. The agreement provided for a standing conference, which subsumes both the Anglo-Irish Intergovernmental Council and the Intergovernmental Conference established under the 1985 Agreement. The new Conference brings together the British and Irish Governments to promote bilateral co-operation at all levels on all matters of mutual interest within the competence of both governments. It can meet as required at Summit level (British

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[489] Cited in: *Trimble hails first formal links across the border,* in: Daily Telegraph, 14 December 1999
[490] See above
[491] Good Friday Agreement, Strand Three (5,1)
[492] See further below
[493] *Agreement between the government of the UK of Great Britain and Northern Ireland and the government of Ireland establishing a British-Irish Council*, 8 March 1999, see Official Website of the Northern Ireland Office http://www.nioffice.gov.uk
[494] See further below
[495] Bogdanor, Vernon: Devolution in the UK, op cit, p 108
[496] Good Friday Agreement, paras 14, 15
[497] Thus: Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 30
[498] See also: Qvortrup, Mads; Hazell, Robert: The British-Irish Council: Nordic Lessons for the Council of the Isles, London, Constitution Unit 1998, p 17
[499] Annex B (5)
[500] *Agreement between the government of the UK of Great Britain and Northern Ireland and the government of Ireland establishing a British-Irish Intergovernmental Conference*, Dublin 8 March 1999, see http://www.nioffice.gov.uk

Prime Minister and Taoiseach) or governments are represented by appropriate Ministers like at EU-level. Apart from these high-level institutions, the agreement provided for other cross-border implementation bodies. These bodies may take an important role for a general exchange between the North and the South of the Irish public, as their functions are rather non-political. An agreement[501] between the Irish and British governments adjusts the detailed mission of the bodies. They are responsible for the implementation of inland waterways ("Waterways Ireland"), for the implementation of food safety ("The Food Safety Promotion Board"), for trade and business development ("The Trade and Business Development Body") for the implementation of special EU programmes ("The Special EU Programmes Body"), for the language ("The North/South Language Body" or "An Foras Teanga or in Ullans as Tha Boord o Leid"), and for the implementation of aquaculture and marine matters ("The Foyle, Carlingford and Irish Lights Commission"). Lastly, both leaders of the Executive acting jointly have install a "Civic Forum"[502] which corresponds to the consultative Civic Forum established in pursuance of paragraph 34 of Strand One of the Belfast Agreement.

The Good Friday Agreement and its following agreements establishing different new bodies and institutions, are a very subtle construction[503]. It is in fact an inter-ethnic accord, which has been made by parties, which are not directly involved. Such inter-ethnic accords are, however, normally established within one state and they are not made under such cross-border conditions[504]. It has been shown that such accords mostly improve the position of only one part of the community[505]. However, the case of Northern Ireland is different. On the one hand, the agreement was not based on one single state, and it offers a unique model of power-sharing which might be able to triumph over the deep-seated conflict[506]. The agreement might therefore really not represent a "victory" for the unionists or of the nationalists[507]. O'Leary[508] argues that "no paramilitaries that abide by the Agreement have to engage in formal surrender to those they opposed in war". Unfortunately, this proved as untrue in the view of the extreme republicans. The extremists are, however, in a increasing minority position[509].

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[501] *Agreement between the government of the UK of Great Britain and Northern Ireland and the government of Ireland establishing implementation bodies*, Dublin 8 March 1999, see http://www.nioffice.gov.uk. The agreement refers to Article 2 of the Good Friday Agreement.
[502] Northern Ireland Act 1998, section 56
[503] O'Leary, Brendan: The British-Irish Agreement, op cit, p 11
[504] O'Leary, Brendan: The British-Irish Agreement, op cit, p 11
[505] O'Leary, Brendan: The British-Irish Agreement, op cit, p 11
[506] Bogdanor, Vernon: Devolution in the UK, op cit, p 109
[507] O'Leary, Brendan: The British-Irish Agreement, op cit, p 11
[508] O'Leary, Brendan: The British-Irish Agreement, op cit, p 11

What can we now conclude about the models of devolution in Scotland, Wales and, Northern Ireland? Firstly, it is obvious that there is no common model for these nations within the framework of the British Constitution. Each nation has special powers: Wales got only a "basic" model, which allows the Assembly to make the decisions formerly being made by the Secretary of State. Even if this seems to be minimalist, it must be seen as a large gain of democracy. "Quangoland" is therefore an expression of the past. However, the limited powers of the Assembly in Cardiff are difficult to handle and to adapt in a country which has been dominated for centuries by an omnipotent Parliament. The question "Just Who Is Running This Country?[510]" is currently not only unclear within the Assembly in Cardiff itself, but also in the eyes of the Welsh Public. Thus, it may take some time for the AMs to understand how to work within a confined scope. Conversely, the Scottish Parliament got a strong devolved powers. Initially, these powers were even so large that the Scottish parliament allowed Westminster to legislate on a devolved matter[511]. This is however, likely to change in the future when the experience of the MSPs has grown. From a European standpoint, however, the Scottish Parliament is becoming a "normal" regional institution, which will be able to overtake the bulk of devolved matters. Also the adopted form of government, a coalition enjoying a broad parliamentary majority, proved very stable, although the Scottish First Minister being leader of the main party within the coalition had to undertake medical treatment for several weeks. Northern Ireland, in contrast, the situation witnessed all the problems one had to expect. Therefore, devolution in this part may start with interruptions and work in another background than in Scotland and Wales. At the end of the day, however, Northern Ireland may have even more power than Scotland, because the transfer of powers is likely to increase. This sort of devolution has been described as "asymmetrical". That means nothing more than a completely different devolution for each nation. As to whether this asymmetry will prove to be stable and create strong institutions remains to be seen[512].

Secondly, the inside construction of the devolved bodies witnesses the same differences. The relationship between the First Minister or First Secretary and the Assembly is one pivotal point in this construction. In Scotland, it has been outlined that the Parliament has to concentrate on its functions of scrutiny. The devolved powers are vested in the Scottish First

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[509] See above
[510] See Western Mail, 12/05/00
[511] See Constitution Unit: Monitor, March 2000, p 3
[512] See further below

Minister. This is emphasised by the fact that he is sworn in by the Queen and holds office at Her Majesty's pleasure. The Scottish Executive functions thus on the same idea as Whitehall: a strong government, which is made accountable to the Parliament. In Wales, in contrast, the devolved powers are directly placed under the corporate body of the National Assembly. Hence, the office of the First Secretary and his or her Executive Committee are theoretically completely different: the Assembly follows the general idea of a County Council where all Members are able to make their contributions. The functions of the Assembly should therefore be hybrid: scrutiny and advisory work. However, in practice the Assembly decided quite soon for reasons of efficiency to transfer a large part of its power to the Executive Committee thus evolving to a real "government". In Northern Ireland efficiency reasoning is not possible. The main purpose of the Assembly in Belfast is to ensure that all decisions enjoy cross-community support. This takes more time, but if it appeases the political climate in Northern Ireland it may be the best solution for constructive politics. Also, the Committees in Northern Ireland work differently. They are not established to make decisions following the majority will, but to ensure consocial decision making. This implies the control of Ministers of "extreme" political parties. The Northern Irish Committee on Education thus is keen on overseeing all details of the Minister's work: Martin McGuiness, former member of the IRA. A handicap of Northern Ireland's devolution has been seen in the fast legal implementation. Only weeks were between the Agreement, the Northern Ireland Act, the Referendum and the establishment of the Assembly. However, the legislation for Northern Ireland was flexible and strict, when this was necessary. This was obviously due to the co-operation of the British and Irish governments. Thus, the life of the Northern Ireland's Assembly is likely to be a moved one followed by sudden "stops" and quick "go". The three devolved institutions have really equal powers as far as their control over local government and other public bodies is concerned. There are small differences, but generally, all devolved bodies have overtaken the former functions of the Secretary of State. Given the power over secondary legislation, the new institutions have an important constitutional but also political task.

IV. Devolution: The English question and Intergovernmental Relations

As a consequence of Scottish and Welsh devolution, two other issues have to be addressed: England and the intergovernmental relations. Devolution to Scotland, Wales and Northern Ireland does not include England, although it is the main part of the United Kingdom both economically and demographically. The developments in the "Celtic fringe" have significant implications on England. However, there are several solutions as to how England can be integrated in these arrangements. Hence, the implications of devolution for the United Kingdom as a whole are to be examined. From an internal viewpoint, there are currently no attempts to devolve power to "England", but maybe to the regions within England. Considered externally, on the contrary, devolution established a new form of co-ordination within the British government: the co-operation and exchange between central government and the devolved institutions. Such inter-governmental relations are "new" within the United Kingdom, but the country is already used to work under similar conditions in the context of the European Union councils. The British inter-governmental institutions have, of course, some different features compared with the European Union. Whilst the European co-operation is based on co-ordinated members, devolution in the United Kingdom is based on the principle of sub-ordination. Both issues, the English dimension and the inter-governmental structures, are thus part of the country-wide implications of devolution. Therefore, this chapter analyses the position of England after devolution and stresses the problems, which are due to the fact that there is no move towards regionalism in England. Also, the future co-operation of the devolved bodies is outlined.

A. England

England is, it has been argued, a "constitutional fiction"[1]. The English part of the United Kingdom has never been organised following a territorial model, but always administered by Westminster. Therefore, it might be thought that England is not concerned by devolution at all. However, England is, in many aspects, the key to the success of devolution[2]. This is because of the need for a large acceptance of the devolution settlement not just to the Scots and the Welsh but also to the English, who represent 85 per cent of the population in the

[1] Bogdanor, Vernon: *Devolution: Decentralisation or Desintegration,* in: Political Quarterly, Vol 70 (2), Oxford, Blackwells 1999, p 191
[2] Bogdanor, Vernon: Devolution in the UK, op cit, p 264

United Kingdom. England has not yet "spoken" as it does not exist as a constitutional term[3]. Since 1563 there has been no English Parliament and there was never an "English Office" in London[4]. Thus, it has been argued that England is rather a parliamentary Nation than a democracy[5]. However, debates about devolution and regionalism in England were present in the latter decades of the nineteenth century and in the time up to the First World War[6]. Later, the Kilbrandon Commission proved that England as a whole constitutes a complicated part in a devolved United Kingdom. Eight Members of the Commission favoured regional co-ordination and advisory councils, partly indirectly elected and partly nominated. One Member of the Commission advocated co-ordinating committees of local authorities. The Memorandum of dissent[7] promoted a detailed scheme for a regional level in England. These regional institutions were to have similar executive powers to those exercised by the Scottish and Welsh Office. This rather federalist scheme needed also elected regional assemblies with their own sources of taxation[8]. The report noted furthermore, that there was a general demand from people in England, "to win power back from London"[9]. A second point to be made is that England in relation to its size is unusual amongst European democracies, as it does not have a system of regional government[10]. However, England is divided into different regions for administrative purposes[11], but these regions follow a variety of boundaries and regional distinctions, which are quite artificial. Additionally, these boundaries have often been changed and there is no clear responsibility for the general "governmental" structure of England[12]. Therefore, England lacks a juridical concept of divided competences[13].

The requirement for a regional structure of government occurred at the beginning of the last century and culminated during the First World War in the creation of regional offices of government departments. These offices were to be in charge of food distribution and labour organisation[14]. Later, the discussion about a regional tier of administration focused on the

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[3] Bogdanor, Vernon: *Devolution: Decentralisation or Desintegration,* op cit, p 191
[4] Bogdanor, Vernon: *Devolution: Decentralisation or Desintegration,* op cit, p 191
[5] Osmond, John: Reforming the House of Lords and changing Britain, Fabian Society Pamphlet 587, London 1998, p 8
[6] Mawson, John: *English Regionalism and New Labour,* in: Keating, Michael; Elcock, Howard: Remaking the Union, Devolution and British Politics in the 1990s, London, Frank Cass 1998, p 158
[7] Issued by Lord Crowther-Hunt and Professor Alan Peacock, see above
[8] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit
[9] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, paras 1-7
[10] Constitution Unit: Regional Government in England, Constitution Unit, London 1996, p 16
[11] Hogwood, Brian: Mapping the Regions, Policy Press, Bristol 1996, p 10
[12] Wiedmann, Thomas, op cit, pp 74
[13] Wiedmann, Thomas, op cit, p 74
[14] Constitution Unit: Regional Government in England, op cit, p 16

need of local government to be organised more effectively[15]. The time of the Second World War was marked by the creation of ten civil defence regions. In the context with the economic crisis after the war, the Treasury established nine standard regions in 1946[16]. In the 1960s, the conviction emerged that a number of governmental tasks are best be carried out at a regional level[17]. The Labour government returned after the 1964 elections set up a framework for economic development thereby establishing eight "Regional Economic Planning Councils" (REPC)[18]. These councils were basically established on the French model of Economic planning being made by central government and implemented by regional bodies. Following the local government reorganisation in England in the mid-1970s, several of these regions were newly shaped[19]. Whilst many of these "Standard regions" were used by several departments, it has been shown that the pattern remained one of substantial variation in boundaries and regional administrative centres[20]. The Conservative government returned in 1979 abolished the REPCs and later the GLC, as it was hostile to every form of economic planning. It is the Department of Environment (DoE) that occupies a very important position in this context, as it is responsible for a wide range of issues including urban planning, housing, environment and so on[21]. However, even the DoE, which had inherited the regional co-ordinating role, used a scheme that was not adapted to the respective boundaries[22]. A recent research study identified nearly hundred regional structures of administration[23].

However, the regional agenda in England was inspired from the political developments in Scotland and Wales at the end of the 1970s and from the European trend of regionalisation[24]. Also rational arguments for reform like strategic planning and co-ordination were put forward[25]. Thus the Conservative government of John Major although being hostile to any form of constitutional change[26], announced in 1993 the creation of new Government Offices

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[15] Constitution Unit: Regional Government in England, op cit, p 16
[16] Hogwood, Brian, op cit , pp 10
[17] Keating, Michael; Rhodes, Malcolm: *The status of regional government,* in: Hogwood, Brian; Keating, Michael: Regional government in England, OUP, Oxford 1982, p 51
[18] Constitution Unit: Regional Government in England, op cit, p 17
[19] Hogwood, Brian: Mapping the regions, op cit , pp 11
[20] Hogwood, Brian; Lindely, P.: *Variations in regional boundaries,* in: Hogwood/ Keating: Regional government in England, op cit, pp 21
[21] Wiedmann, Thomas, op cit, p 75
[22] Hogwood, Brian: Mapping the regions, op cit, p 13
[23] Hogwood, Brian: Mapping the regions, op cit, p 25
[24] Mawson, John; Spencer, Ken: *The Origins and Operations of the Government Offices for the English Regions,* in: Bradbury/ Mawson: British Regionalism and Devolution, op cit, p 161
[25] See Constitution Unit: Regional government in England, op cit, p 28
[26] Bradbury, Jonathan: *Introduction,* in: British Regionalism and Devolution, op cit, pp 9

for the Regions (GoRs)[27]. The new network of ten integrated regional offices in the English regions was finally launched in 1994[28]. Under leadership of the DoE various departments integrated their regional work and made their civil servants accountable to one Senior Regional Director (SRD)[29]. Each SRD had to report to the different Secretary of States. The main idea of these structures has been to create a more adapted governance in England. On the one hand, business leaders became increasingly concerned about the weakness of business support structure as the economic impact on the regions had obviously been neglected[30]. On the other hand, the Conservative government sought to enhance its presence and thereby to forestall pressures for an elected regional level. Various national local authority and business representative bodies appreciated that system of governmental Offices[31]. However, the representatives were disappointed, as the GORs did not open up to a more active involvement of local institutions in their work[32]. The ten Government Offices are regional arms of central government and therefore democratically not accountable. The political responsibility remained centralised in the Whitehall Ministries[33]. The heads of the GORs had approximately the same position as the French *Prefets* before the re-organisation of the French regions by the *Deferre* Acts 1982[34]. The *Prefets* were the symbols of centralism in France. Their functions have been finally overtaken by the new *Conseils Regionaux*[35]. In the aftermath of the GORs development, local government discovered that one central office in their "region" was taking the decisions which have been largely scattered before[36]. Thus, subsequent regional associations have been created since the late 1980s. Their aim has been to face the main structural questions and the European Funding of the region. These regional associations, which focussed ironically on the GORs, initiated thus a certain pressure for regional governance in England. These offices underlined the democratic deficit in the English regions relative to Scotland and Wales[37]. In England, however, apart from the GORs, the overall dominance of quangos has also been criticised[38]. The quangos impose here the same problem

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[27] Mawson, John: *The English Regional Debate,* in: Bradbury/ Mawson: British Regionalism and Devolution, op cit, p 185
[28] Constitution Unit: Regional Government in England, op cit, p 40
[29] Mawson, John; Spencer, Ken: *The Origins and Operations of the Government Offices* op cit, p 163
[30] Mawson, John; Spencer, Ken: *The Origins and Operations of the Government Offices,* op cit, p 163
[31] Mawson, John; Spencer, Ken: *The Origins and Operations of the Government Offices,* op cit, p 175
[32] Economic Development Committee: Integrated Regional Offices, London, Association of District Councils, 5 May 1995
[33] Constitution Unit: Regional Government in England, op cit, p 47
[34] Also: Osmond, John: Reforming the House of Lords and changing Britain, op cit, p 11
[35] Wiedmann, Thomas, op cit, p 118
[36] For the regional structure of the GORs, see Appendix 2
[37] Bradbury, Jonathan; Mawson, John: *Devolution: It's England's turn,* in: New Statesman, 19 September 1997
[38] Constitution Unit: Regional Government in England, op cit, p 50

as in Wales[39]: they perform functions, which impact considerably on the community, they are funded with public money, but people who are neither elected nor appropriately accountable run them. The appointments to quangos are dominated by patronage and are generally made in secrecy[40]. That system of quangos represents therefore a further lack of democratic accountability.

It is to note, however, that the analysis of the administrative division of the English territory is independent of any political tier in England. "Wessex", "Mercia" and "Northumbria" may have a romantic appeal[41], but they are not associated with regional units. There have never been "nationalist" parties and the people do not feel "South Western". They may feel at least Cornish, but Cornwall is not a regional unit of England. "England", it has been said, "is a state of mind, not a consciously organised political institution"[42]. The essential difficulty of English regions is that there is not enough demand for it[43]. Some opinion polls have shown scores between 40 and 60 per cent against the increase of regional power in England[44]. These findings are difficult to interpret as far as there is no exact definition as to what a region is[45]. Regional levels need a certain sense of regional public awareness. However, at the moment English regions have been simply ghosts[46]. This may change due to the increase of the various regional movements.

Devolution, however, accentuates an imbalance in favour of Scotland and Wales, which exists already[47]. The fundamental impact of devolution upon England results, of course, not from the constitutional situation. Scotland and Wales had both their own Secretary of State and they have been over-represented in the Westminster Parliament. Now, they have their own elected bodies too. These are the constitutional imbalances between England and the Celtic fringe. However, the most important pressure for change is economic in nature. Scotland and Wales have been favoured in public spending[48] in recent years. Hence, the English regions

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[39] See above
[40] Constitution Unit: Regional Government in England, op cit, p 50
[41] Tindale, Stephen: *Devolution on demand: options for the English Regions and London,* in: Tindale, Stephen: The state and the nations, op cit, p 48
[42] Rose, Richard: Understanding the United Kingdom, Longman, London 1982, p 29
[43] Bogdanor, Vernon: Devolution in the UK, op cit, p 271
[44] MORI/Joseph Rowntree Reform Trust, State of the Nation Survey, London 1995; see also: Tindale, Stephen: *Devolution on demand: options for the English Regions and London,* in: Tindale, Stephen: The state and the nations, op cit, p 48
[45] Constitution Unit: Regional Government in England, op cit, p 26
[46] Bogdanor, Vernon: Devolution in the UK, op cit, p 271
[47] Bogdanor, Vernon: *Decentralisation or Desintegration,* op cit, p 190
[48] See further below

benefit less from public spending, although their Gross Domestic Product (GDP) per head is considerably higher[49]. Due to the flexibility of the devolved governments, it is not unlikely that the they are able to attract more easily investment to Scotland and Wales. This would increase their own economic power. Moreover, the devolved control over local government spending and services could contribute to a more focussed planning of economic investment[50]. The devolved institutions may also profit of their "direct access" to the British government and the European Union[51]. Hence, especially the people in those English regions, which are economically disfavoured, are likely to feel handicapped as they are not represented in the Cabinet and do not have their own assembly[52]. Therefore, devolution increases, on the one hand, the constitutional imbalance but, on the other hand, the economic disfavour of England in the Union is likely to grow.

1. Regional Chambers and Assemblies

When the Labour Party came into government, it had already developed a distinct model attempting to counter this unfavourable imbalance to England. The election manifesto proposed a two-stage approach[53] to developing a regional tier. At the beginning, indirectly elected Regional Chambers of local authority representatives should be established. These could later move on to directly elected Regional Assemblies[54]. This idea corresponded to a policy of "devolution on demand", developed by the present Labour Home Secretary Jack Straw[55]. It was based on the idea of indirectly elected regional chambers being voluntary groupings of local authorities. This policy should imply, however, the approval of their move towards a Regional Assembly by a referendum[56]. Regional development Agencies (RDAs), which had been established in Scotland and Wales already in the 1970s, were to be established and run by central government. Contrary to this model, the Secretary for Environment, Transport and the Regions, John Prescott, had proposed to move on by regional structures which are based on economic development. He argued that England has no

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[49] See Heald, David: Territorial Expenditure in the UK, in: Public Administration, Vol 72, Blackwells, Summer 1994, pp 147; Hazell, Robert; Cornes, Richard: *Financing Devolution: the Centre retains control,* in: Hazell, Robert: Constitutional Futures, op cit, p 202 (Fig. 11.2); Bogdanor, Vernon: Devolution in the UK, op cit, p 265

[50] Bogdanor, Vernon: Devolution in the UK, op cit, p 265

[51] See further below

[52] Bogdanor, Vernon: Devolution in the UK, op cit, p 265

[53] Hazell, Robert: *Three policies in search of a strategy,* in: Wright, Tony: The English Question, op cit, p 32

[54] Labour Party: A choice for England, London, July 1995

[55] Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* op cit, p 91

[56] Labour Party: A choice for England, London, July 1995; and A new Voice for England's Regions, London, September 1996

democratic deficit if it is compared with Scotland and Wales[57] He has rather taken the opinion that it lacks powerful development agencies of the kind of these nations[58]. His approach was to move to English RDAs, which should be made accountable to statutorily created and initially indirectly elected Regional Chambers. Both positions, however, were included in the Labour manifesto at different chapters and it was therefore not clear, which turn the new government would take[59].

Since the election, the government has appeared to backtrack[60]. After the Scottish and Welsh Referendums, the new government moved on to consider the future of the English regions[61]. A White Paper[62] was published in December 1997 which explained the decision to legislate first for a RDA model. However, the government's "proposals also build on the arrangements for Regional Chambers which are established by the regions themselves on a voluntary basis"[63]. Regional Chambers were not written out of the proposal and Regional Assemblies should remain possible. The White Paper notified in its introduction that the government is "committed to move to directly elected regional government in England, where there is demand for it, alongside devolution in Scotland and Wales and the creation of the Greater London Authority"[64]. The government, however, did not see the "business of imposing it". They believe that a lot can be done "within the present democratic structure to build up the voice of the regions"[65]. The Secretary of State put the English case in a context with Scotland and Wales: "Where there is popular demand, we are committed to further consultation on directly elected regional assemblies. This may take time, just as the developments in Scotland and Wales have come over time and with the growing support of the population"[66]. As noted in the White Paper the RDAs were to be nominated by Ministers and accountable through Ministers to Parliament what means that they should be new "quangos"[67]. However, the Members of the RDAs were supposed to be chosen from the Regions. Also, Regional Chambers were establised, but as non-statutory bodies and the accountability of the RDAs to

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[57] In contrast, especially from a European perspective: Roberts, Peter: *Whitehall et la désert anglais: Managing and representing the UK Regions in Europe,* in: Bradbury/ Mawson: British Regionalism and devolution, op cit, p 255, 269

[58] Regional Policy Commission: Renewing the Regions, Sheffield Hallam University, June 1996

[59] Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* op cit, p 90

[60] Bradbury, Jonathan; Mawson, John: *Devolution: it's England's turn,* in: New Statesman, 19 September 1997

[61] Hazell/O'Leary: *A rolling programme of devolution,* op cit, p 37

[62] Building Partnerships for prosperity – Sustainable Growth, Competitiveness, and Employment in the English Regions, HMSO, London 1997, Cmnd. 3814

[63] Building Partnerships for prosperity .., op cit, para 1.3

[64] Building Partnerships for prosperity..., Introduction

[65] Building Partnerships for prosperity..., Introduction

[66] Building Partnerships for prosperity..., Introduction

[67] Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* op cit, p 91

the Regional Chambers is secondary. Therefore, the Regional Chamber is one of a number of regional "stakeholders", but is not the body to which the RDAs are made accountable[68]. This means that the Regional Chambers have no statutory status.

In November 1998 the legislation was finished and adopted at Westminster. The Regional Developments Agencies Act 1998 followed consequently the proposals of the White Paper. It stipulates[69] that England is divided into nine regions (East Midlands, Eastern, London, North East, North West, South East, South West, West Midlands, Yorkshire and the Humber). All these regions have to have a corporate body, which is called by the name of the region with the addition of the words "Development Agency"[70]. The regions do, in fact, vary from the former Standard Planning Regions as for example, London represents furthermore an additional region[71]. However, they do not correspond to a previous scheme, but they are a "mix" of the GoRs and the former Standard Regions as it was favoured by a recent research study[72]. Thus, the Regional Development Agencies Act 1998 establishes a new scheme of territorial organisation, which might be confusing at the beginning both for the civil service and for the public in those areas being part of a "new" region. This might be the case in the South East especially[73]. It might be that a change of the region's name[74] is able to contribute to a regional understanding. However, the boundaries of the regions are anew not really legally entrenched as the Secretary of State is still allowed to change them[75].

The RDAs are composed of thirteen members who are nominated by the Secretary of State[76]. However, Section 2[77] attempts to introduce a general model of Membership, the Secretary of State has a large discretion in the nomination of these Members. This raises the question of "representation" in these bodies. It would have been favourable to stipulate statutorily that each part of the region is to be represented in the RDA[78]. At present, half of the members are from business and a third from local authorities[79]. Nevertheless, concerning the composition

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[68] Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* op cit, p 91
[69] Regional Developments Agencies Act, section 1(1) and Schedule 1
[70] Regional Developments Agencies Act, section 1(2)
[71] See Hogwood, Brian: Mapping the regions, op cit, p 13 and Schedule 1 of the Act
[72] Hogwood, Brian: Mapping the regions, op cit, pp 56; see also Constitution Unit: Regional Government in England, op cit, p 84
[73] Constitution Unit: Regional Government in England, op cit, pp 94
[74] Section 26
[75] Section 25
[76] Section 2 (1)
[77] Subsection 2, 3
[78] Constitution Unit: Regional Government in England, op cit, p 86 (concerning the Chambers)
[79] Hazell, Robert (et al.): *The British Constitution 1998-99,* in: Parliamentary Affairs, op cit, p 250

and proceedings of the Agencies the Act has a similar structure as the devolution Acts[80]. The chairman of the RDA is not elected, but the Agency can regulate its own procedures[81] and Schedule 3 allows the delegation of ministerial functions to the RDA. This is most apparent in Section 6, which provides for the delegation of any eligible function from the Secretary of State to a regional development agency. However, only such powers are allowed to delegate which do not consist of a power to make regulations or other instruments of a legislative character or a power to fix fees or charges[82]. Nonetheless, this does not mean that the RDAs are disallowed every financial activity. With reference to Section 9 the RDA has a general financial duty which is determined by the Secretary of State. Apart from its grant of central government the Agency is entitled to borrow according to its duties[83] and the Treasury can guarantee these borrowings[84]. The main activities of the RDAs as outlined in section 4 of the Act correspond exactly to the need of these bodies in the context of devolution. They have to promote the economic interests of the regions[85].

The powers of the RDAs are therefore very restricted as they can only give financial assistance, dispose of land and form or acquire a body corporate[86]. They have not got the powers of the GORs. Thus, public expenditure and inward investment remain with central government. Conversely, in the lead up to the Act it had been proposed that a regional agencies should have the functions of strategic land-use planning, transport, economic development including inward investment, the co-ordination of regional relations with the EU and its regions, including bids for funding and implementation and providing a "voice" for the region[87]. The Act itself does not provide for all these powers. This scattering of competences between the GORs, the RDAs and the Regional Chambers is not able to create a strong regional individuality. However, a further delegation of powers may increase the role of the RDAs. Thus, it is hard to judge as to whether the RDAs are able to "bring government closer to the people". The Act makes clear that the RDAs do not carry out functions on behalf of the Crown[88]. This follows from their status as agencies of central government[89]. Lastly, a very

[80] Schedule 2
[81] Schedule 2, Para 6
[82] Section 6 (2)
[83] Section 10, 11
[84] Section 12
[85] Section 4 (1)
[86] Section 5 (2)
[87] Constitution Unit: Regional Government in England, op cit, p 76
[88] Section 3
[89] Sections 16, 17

important feature[90] of the Act is that the Secretary of State can designate as far as there is a suitable body representative of those in a regional development agency's area with an interest in its work such a body as the regional chamber for the agency. The RDA would then be required "to have regard, in the exercise of its functions to any views expressed by the chamber" and to consult the latter in relation to the exercise of its functions. This provision of the Act may create a "devolution on demand", although it is likely that the local authorities need a certain time to find solutions and political compromises, which are necessary for the development of such bodies. Therefore, it has already been argued that the RDAs may prove as a disappointment, because of the lack of own budget and powers like the Welsh or Scottish Development Agencies[91]. The Agencies do not have a "clear and significant core group of function"[92]. As to whether the public and senior political figures may be attracted by the present scheme of RDAs remains to be seen. However, given the premise that England never had a clear territorial structure, these Agencies could be expected to create some sort of regional "identity" as far as their boundaries remained clear and durable. However, the tri-partite model is likely to blur regional power and thus discourage the regional movements. As to whether they are a first step[93] towards a regional structure in England remains to be seen.

The government's proposals for directly elected Regional Chambers are not closed, although there has not been any real attempt to provide for further legislation. Currently, they are voluntary, non-statutory bodies which, if designated by central government, are to be consulted by the RDA in the formulation of regional plans[94]. In 1999, for each RDA a Regional Chamber was designated by the Secretary of State. They vary from 40 to 100 members and not more than seventy per cent can be chosen from local government. Thus, the Chambers are not the political masters of the RDAs, but "mere appendages"[95]. However, several regions are more ambitious. In the aftermath of the Scottish Constitutional Convention's "Claim of Right"[96], the campaign for a Northern Assembly issued a declaration advocating for a "directly elected Assembly representing the people of the North"[97]. Later, a Regional Assembly for Yorkshire and Humberside was formally established[98]. The North-

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[90] Sections 8, also 18, 27
[91] Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* op cit, p 91
[92] Constitution Unit: Regional Government in England, op cit, p 76
[93] Bogdanor, Vernon: Devolution in the UK, op cit, p 269
[94] Hazell, Robert (et al.): *The British Constitution 1998-99,* in: Parliamentary Affairs, op cit, p 251
[95] Hazell, Robert (et al.): *The British Constitution 1998-99,* in: Parliamentary Affairs, op cit, p 251
[96] See above
[97] Hazell/O'Leary: *A Rolling programme of devolution,* in: Hazell: Constitutional Futures, op cit, p 38
[98] It corresponds to the former Regional Planning Forum in that region, see: Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* op cit, p 91

East is most likely to move fastest as it enjoys the strongest support for an elected Assembly[99]. The English Regional Association, which is composed of all these regional groupings[100] issued a first collective declaration in 1999. There, they affirm their commitment to the "development of democratically elected regional government in England"[101]. They were disappointed by the very weak Labour proposals for the English regions.

On the one hand, there are some arguments that the Regional Chambers will develop. They may gradually play an increasing part as partners in the business of regional development[102]. This is due to the fact that the RDAs do not have real power[103] and consequently, their role depends on the expansion of Regional Chambers[104]. Moreover, it is likely that devolution increases the political pressure for regional institutions in England. Therefore, they may even become statutorily entrenched with respective powers in the mid-term[105] that means after the next general elections[106]. Thus, the ERA proposed to make the RDAs rapidly accountable to Regional Chambers that are legally entrenched. Furthermore, the ERA requests the devolution to the regions of those functions of central government, which are more appropriately dealt with at a regional rather than a national level[107]. This is an apparent borrowing on the principle of subsidiarity[108]. The Association advocates furthermore to having similar competencies as Scotland, Wales and Northern Ireland. This can, however, only be achieved through the establishment of accountable regional institutions[109]. That proposal is likely to be supported by those Local Government Associations, which want to proceed towards directly elected assemblies[110]. However, the Labour party remains committed to hold referendums in the regions before Regional Assemblies are introduced. One might see therein a lack of political leadership or a constitutional insurance for the new bodies, but the referendums create an immense political challenge as the English public does not (yet) see the need for the

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[99] Following a MORI poll, cited in: Hazell, Robert (et al.): *The British Constitution 1998-99,* in: Parliamentary Affairs, op cit, p 251
[100] Osmond, John: Reforming the Lords and changing Britain, op cit, p 14
[101] English Regional Association: Regional Working in England: Policy Statement and Survey of the English Regional Associations, English Regional Association, London June 1999
[102] Hazell/O'Leary: *A Rolling programme of devolution,* in: Hazell, Robert: Constitutional Futures, op cit, p 39
[103] See above
[104] Hazell/O'Leary: *A Rolling programme of devolution,* in: Hazell, Robert: Constitutional Futures, op cit, p 39
[105] Hazell/O'Leary: *A Rolling programme of devolution,* in: Hazell, Robert: Constitutional Futures, op cit, p 39
[106] Caborn, Richard, in: Environment, Transport and Regional Affairs Committee, Regional Development Agencies, House of Commons Debates, Vol 415, qu 561, 1997-98
[107] English Regional Association: Regional Working in England, op cit
[108] See above
[109] English Regional Association: Regional Working in England, op cit
[110] Hazell/O'Leary: *A Rolling programme of devolution,* in: Hazell, Robert: Constitutional Futures, op cit, p 39

Assemblies[111].

On the other hand, a further development of English regions involves "almost certainly" the reorganisation of local government[112]. Apart from that, Labour's policy of "devolution on demand" requires difficult conditions[113] for directly elected Assemblies. They underlie a "triple lock". First, a single tier structure of local government must be introduced. This means that the shire and district counties are to be merged, because there should not be a extension of administrative tiers[114]. In 1979, the "no" campaigners in the devolution referendums raised this issue as it would be a waste of money to have two local governmental and a regional tier. However, this merger would impose the need for the abolition of one local government tier. This is a considerable obstacle, as local government has "no appetite" for a further round of reorganisation[115]. Also, all local authorities in the chamber need to agree to this process. Moreover, some Regional Chambers might be not willing to cede their power to an elected body, which is likely to be more difficult to control. Second, their establishment must be approved both by Parliament and –thirdly- in a region- wide referendum and they must have the auditor's confirmation that no additional public expenditure overall is involved[116]. These provisions appear as an attempt to block any regionalisation of England. Initially, however, a further threat to the regionalisation came from the directly elected Mayors[117]. The office of directly elected Mayors represent a threat because they might become political rivals to the Chambers within the regions. The big town's Mayors except from London might feel as the representative of the whole region and dislike a powerful Assembly[118]. Therefore, it would be necessary to begin with the establishment of Regional Assemblies and to hold the elections of the Mayors later[119]. However, the government decided not to wait with the introduction of directly elected Mayors. The re-introduction of a London Mayor was legislated[120] in 1999 and

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[111] Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* op cit, p 91
[112] Bogdanor, Vernon: Devolution in the UK, op cit, p 270; Hazell/O'Leary: *A Rolling programme of devolution,* in: Hazell, Robert: Constitutional Futures, op cit, p 38; Constitution Unit: Regional Government in England, op cit, p 109
[113] See for example *Uncertainties cast a cloud over future,* in: Financial Times, 11 May 2000
[114] Tindale, Stephen: *Devolution on demand,* in: Tindale, Stephen: The state and the nations, op cit, p 61; also Elcock, Howard: *Territorial debate about Local Government: Or don't reorganise – don't, don't, don't,* in: Elcock/Keating: Remaking the Union, op cit, pp 174
[115] Hazell/O'Leary: *A Rolling programme of devolution,* in: Hazell, Robert: Constitutional Futures, op cit, p 38; also Bogdanor, Vernon: Devolution in the UK, op cit, p 270
[116] Quoted in: Hazell/O'Leary: *A Rolling programme of devolution,* in: Hazell, Robert: Constitutional Futures, op cit, p 38
[117] Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* op cit, p 91
[118] Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* op cit, p 91
[119] Bogdanor, Vernon: Devolution in the UK, op cit, p 275; Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* op cit, p 92
[120] Greater London Authority Act 1999; see below

the Mayors of Birmingham and other major towns are likely to be elected in the period after 2002[121]. The political atmosphere of the campaign at London since mid 1999 has shown all the difficulties, which may occur in the regions[122]. As to whether that could be the hope for the English regions remains to be seen. One could argue that the Labour government will try to avoid further experiences like the London Mayor election[123].

2. London: Local government reform

London is the first English "region" where the RDA is accountable to a directly elected Regional Assembly. By way of the Regional Development Agencies Act 1998[124] London became a "region" and the Greater London Authority Act 1999 provided for the direct election of a Mayor and a city-wide local authority. One is inclined to see there an example how the future Regional Assemblies may be organised. This may be justified when the candidates are evaluated. The former Labour politician Ken Livingstone has been elected Mayor in May 2000. As he is a political "heavy weight", challenges of the government by his office are likely in different ways[125]. Conversely, the new London authority may be seen in the context of a general reform of local government as outlined in a White Paper[126] in July 1998. Moreover, there have been proposals to establishing English regions alongside the areas of the major towns[127]. At present, it is not obvious which direction the Greater London Authority (GLC) may take[128].

The proceeding for the introduction of the Authority and the Mayor fulfilled the important condition pledged by the Labour government. A referendum was held in the capital in May 1998 and results were a three-to-one vote in favour. 77.9 per cent voted "yes" whilst 22.03 per cent voted "no" on a low turnout of 30 per cent[129]. The concept of the huge 425 sections[130] Act itself, which was introduced into Parliament in 1999, is obviously based on equal with the Regional Development Agencies Act 1998, as the GLC will be a body

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[121] *Liverpool beats rest in race for elected city Mayor,* in: Daily Telegraph, 9 November 1999
[122] E.g.: *Livinstone tells Dobson: 'Step down honourably',* in: Daily Telegraph, 20 February 2000
[123] See further below
[124] Regional Development Agencies Act 1998, section 1, Schedule 1
[125] For further information about the candidate's selection, Hazell, Robert (et al.): *The British Constitution 1998-99,* op cit, p 252
[126] White Paper: Modern Local Government: In Touch with the People, HMSO, Cmnd. 4014, London June 1998
[127] Partridge, S.: Building a New Britain, London, City Region Campaign, March 1996
[128] Hazell/O'Leary: *A Rolling programme of devolution,* in: Hazell, Robert: Constitutional Futures, op cit, p 40
[129] *London votes for Mayor but England stays at home,* Daily Telegraph, 8 May 1998
[130] There are 34 schedules are to add

corporate[131] like the RDAs. The Mayor and the Greater London Authority (GLA) will sit for a fixed four-year term[132] and the general elections are to be held on the first Thursday in May. The GLA cannot be dissolved. In contrast to the RDAs, however, the GLC's members will be elected on a similar system as in Scotland and Wales, because fourteen members are to be elected on a constituency basis whilst eleven will be elected on the GLC area as a whole[133]. Unlike Scotland and Wales, that system allows each voter to express a preference through voting for two candidates[134]. The Mayor is directly elected on the basis of the alternative vote system[135]. No vote of the new GLA's Assembly is required. However, the Assembly is empowered like the devolved bodies and the RDAs to adopt its own rules of procedure[136]. The direct popular mandate gives the Mayor a powerful position[137], although he and the GLA respectively have only few powers. Section 30 (2) states the principal purposes of the Authority which are the promotion economic development and wealth creation in Greater London, the promotion of social development in Greater London, and the improvement of the environment in Greater London. It includes the running of the new London transport authority[138], a London development agency[139], a Metropolitan Police Agency[140] and the London Fire and Emergency Planning Authority[141]. These powers correspond to the powers of the RDAs[142]. Section 30 (7) makes clear that the GLA is dependent on central government, as the Secretary of State can issue guidance to the Authority concerning the exercise of its powers. Thus, the Act does not devolve any function of central government powers, nor is the GLA to have powers of secondary legislation[143]. Competences like health, training, further education, economic regeneration are to remain at Whitehall and as opposed to the Welsh Assembly land-use or development as other planning matters are to be exercised by the Secretary of State for Environment. The GLA is allowed to raise money[144], but unlike Wales does not have a block grant. Even this financial power is very restricted, as it has to be only in

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[131] Greater London Authority Act 1999, section 2 (1)
[132] Greater London Authority Act 1999, section 3 (2)
[133] Greater London Authority Act 1999, sections 2 (2), 4 (1)
[134] Barnett, Hilaire, op cit, p 507
[135] Greater London Authority Act 1999, sections 2 (7a), 4; also: Supperstone, Michael; Pitt-Payne, Timothy: *The Greater London Authority Bill,* in: Public Law, Sweet & Maxwell, London Spring 1999, p 581
[136] Greater London Authority Act 1999, section 36 (1)
[137] Supperstone, Michael; Pitt-Payne, Timothy: *The Greater London Authority Bill,* op cit, p 584; Bogdanor, Vernon: Devolution in the UK, op cit, p 274
[138] Greater London Authority Act 1999, sections 141 and 154
[139] Greater London Authority Act 1999, section 304
[140] Greater London Authority Act 1999, section 310
[141] Greater London Authority Act 1999, section 328
[142] Hazell/O'Leary, *A Rolling Programme of devolution,* in: Hazell, Robert: Constitutional Futures, op cit, p 40
[143] Bogdanor, Vernon: Devolution in the UK, op cit, p 274
[144] Greater London Authority Act 1999, section 34

relation to the functions described in the Act[145]. Most of the funds are furthermore channelled through the London boroughs[146]. Transport is therefore probably the key issue for the GLA, and there is a considerable dissatisfaction in London, which could improve the public perception of the new body[147]. Nevertheless, the GLA is a rather weak body whose main function is that of scrutiny[148]. It has to hold the Mayor to account and can adopt the Mayors budget and strategy priorities. The Mayor itself is empowered to prepare and review political strategies[149] in the areas of transport[150], economic development and regeneration[151], spatial development[152], biodiversity[153], municipal waste management[154], air quality[155], ambient noise[156] and culture[157]. These strategies, however, can only be adopted if different other bodies were consulted before[158]. Moreover, his strategies must be "consistent with national policies and with such international obligations as the Secretary of State may notify". Additionally, the Mayor lacks any power of creation or abolition of public bodies ("quangos"). He is only able to make appointments to them[159]. In further contrast to the devolved Welsh model, he presides only a dwarfs staff[160] and cannot create a powerful executive. It has been stated, that the GLA given its area "will have some, but not all, of the characteristics of a regional government"[161]. However, the fate of the Greater London Authority Act may hopefully not be the fate of Regional Assemblies in England. At present, the Regional Chambers may have the same status like the GLA, whilst the Chambers should only be the first step to a real regional governmental tier. It has also been said that a "basic decision [is] the extend to which central government is prepared to give up powers to a regional tier"[162]. In providing for such a dwarf model for the GLA, the government might have taken "a conscious decision against devolution" in England[163]. Therefore, the London

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[145] Greater London Authority Act 1999, section 30
[146] Bogdanor, Vernon: Devolution in the UK, op cit, p 274
[147] Supperstone, Michael; Pitt-Payne, Timothy: *The Greater London Authority Bill,* op cit, p 583
[148] Bogdanor, Vernon: Devolution in the UK, op cit, p 274
[149] Greater London Authority Act 1999, section 41
[150] Greater London Authority Act 1999, section 142
[151] Greater London Authority Act 1999, section 306
[152] Greater London Authority Act 1999, section 334
[153] Greater London Authority Act 1999, section 352 "biodiversity plan"
[154] Greater London Authority Act 1999, section 353
[155] Greater London Authority Act 1999, section 362
[156] Greater London Authority Act 1999, section 370
[157] Greater London Authority Act 1999, section 376
[158] Greater London Authority Act 1999, section 42
[159] Bogdanor, Vernon: Devolution in the UK, op cit, p 274
[160] Greater London Authority Act 1999, section 67 (1): Not more than 12 persons
[161] McQuail, Paul; Donnelly, Katy: *English Regional Government,* in: Blackburn/Plant: Constitutional Reform, op cit, p 273
[162] Constitution Unit: Regional Government in England, op cit, p 101
[163] Bogdanor, Vernon: Devolution in the UK, op cit, p 275

Mayor and the GLA are a "weak upper tier" of local government[164] enjoying only a few functional responsibilities[165]. They are not to be seen as a model of regional devolution in England. The legislation which provided for the direct election of a Mayor (first in London, later elsewhere) is nothing more than the re-democratisation of local government. Regardless of the government's political strategy, the powers of the London authority are too weak to represent the English part of "devolution".

Indeed, London may be a special case as the "basic decisions" for devolution to England were not prepared to be taken when the Bill was introduced in Parliament. London is perhaps special due to its role as the capital with an immense spending of central government, too. By all meanings, in the context of devolution to Scotland and Wales, Regional Assemblies need larger competencies and powers. Therefore, the GLA scheme is too "minimalist" as foundation of further Regional Assemblies. A reasonable featured Assembly requires at least some basic powers[166]. It has to have the strategic responsibilities[167] of the Regional Chambers that means land-use planning, transport, economic development and co-ordination of European funding bids[168]. Regional Assemblies need the power to guide the RDAs from the beginning because they are not able to establish a "voice of the regions" if strategic decisions can be taken against their consultative advice[169]. Moreover, the Assemblies must have the basic responsibilities for a budget (as considerable as it may be whereby a block grant would be preferable[170]) and a regional "structure" (relations between the Assembly and its leader) including the statutory right of consultation by central government on defined issues according to their other responsibilities[171]. Without these competencies the Regional Assemblies in England would lack the reasonable power to balance the devolved powers to Scotland and Wales. However, this balance is necessary because a model "consisting of four units –England, Wales, Scotland and Northern Ireland – would be so unbalanced as unworkable"[172]. England with four fifth of the population, would be too dominant. That conclusion remains essential[173] for the prospects of a more federal model for the United

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[164] Supperstone, Michael; Pitt-Payne, Timothy: *The Greater London Authority Bill,* op cit, p 581; Bogdanor, Vernon: Devolution in the UK, op cit, p 274
[165] Bogdanor, Vernon: Devolution in the UK, op cit, p 274
[166] McQuail/Donnelly, *English Regional Government,* in: Blackburn/Plant: Constitutional Reform, op cit, p 274
[167] Constitution Unit: Regional Government in England, op cit, p 102
[168] See further below
[169] Against: Constitution Unit: Regional Government in England, op cit, p 102
[170] Constitution Unit: Regional Government in England, op cit, p 103-4
[171] Constitution Unit: Regional Government in England, op cit, p 101; also McQuail/Donnelly, *English Regional Government,* in: Blackburn/Plant: Constitutional Reform, op cit, p 272
[172] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, op cit, para 531
[173] Also Bogdanor, Vernon: Devolution in the UK, op cit, p 268, see further below

Kingdom. An "English Parliament"[174], as proposed by the Bill of Theresa Gorman MP[175], would inevitably eclipse the "Union" even though the regional "division of England" may prove very difficult. In fact, there is no workable federation in the world where one of its parts is greater than one third of the entire state[176]. Therefore, from an English point of view, the most important part of the regional debate is, what may happen in England[177].

B. Intergovernmental Relations

Fundamental to devolution is the state of relations between the different tiers of government within the United Kingdom[178]. New political institutions and mechanisms for the discussion of inter-governmental issues have been introduced into the constitutional structure of the United Kingdom[179]. Generally, such interactions between component governments highlight a federal system[180]. However, the United Kingdom was defined as a unitary state[181]. Thus, it is likely that the existence of these new bodies indicates a new constitutional settlement as far as they are going to be entrenched either by convention[182] or by a constitutional document. However, the precise proceeding and the individual functions of most of the new institutions are not yet settled and therefore very difficult to judge. Also, only one part of the new institutional mechanisms, those with reference to Northern Ireland, were entrenched in a written document. In the constitutional context of the United Kingdom it represents an innovation, but the codification of this part was due to the international character of the Good Friday Agreement[183]. The institutional questions are dealt with in the attachment to this treaty[184]. Therefore, at least one part of the new institutions (The British-Irish Council, the North-South Ministerial Council and the joint ministerial Committee) are formally entrenched. That entrenchment, however, is relative as it depends upon the further

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[174] See further below
[175] Cited in Bogdanor, Vernon: Devolution in the UK, op cit, p 268
[176] See Hazell, Robert: *Three policies in search of a strategy,* in: Wright, Tony: The English Question, op cit, p 35
[177] Against McQuail/Donnelly, *English Regional Government,* in: Blackburn/Plant: Constitutional Reform, op cit, p 281
[178] Rawlings, Richard: *The new model Wales,* op cit, p 496
[179] Hadfield, Brigid: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 3
[180] Cornes, Richard: *Intergovernmental Relations in Devolved United Kingdom: Making Devolution Work,* in: Hazell, Robert: Constitutional Futures, op cit, p 156
[181] See above
[182] Barnett, Hilaire, op cit, pp 30
[183] See above
[184] Bogdanor, Vernon: *The British-Irish Council and Devolution,* in: Government and Opposition, Vol 34 (3), London 1999, p 287

development in Northern Ireland[185].

Taken together with the devolution Acts, the Good Friday Agreement establishes a new constitutional settlement both among the nations, which form the United Kingdom, and between the nations living in the Isles of Ireland and Great Britain[186]. However, it remains to be seen as to whether devolution builds in reality on the logic of a "union state" and accommodates constitutionally the nations with their powers and interests[187]. It might be possible that many political decisions, which are currently internalised in the consultative process at Whitehall, will be externalised in "intergovernmental" processes following the devolution legislation[188]. In contrast to the approach in a unitary state, intergovernmental relations may create outlandish mechanisms of governmental decisions and a new variety of agreements within the United Kingdom may arise. These could even lead to enforceable legal obligations[189]. This produces definitely a new political situation for the British public. After the experiences of the British EU-Membership, a new form of summits and ministerial meetings will arise.

1. The Joint Ministerial Committee

The Joint Ministerial Committee (JMC) is the first of these inter-governmental arrangements. It could prove as the main forum for negotiation of devolution issues merely within United Kingdom[190]. It was not proposed by any White Paper on devolution, but it had been announced during the Committee stage debates of the Scotland Bill in the House of Lords. Then, Baroness Ramsay of Cartvale stated for the government that "there should be standing arrangements for the devolved administrations to be involved by the UK government at ministerial level". It was outlined that "it is envisaged that this would be achieved through the establishment of a joint ministerial committee of which the UK government and the devolved administrations would be members"[191]. The Committee was to become a mere consultative body supported by a committee of officials and a joint secretariat[192]. The representation of the

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[185] See above
[186] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 287
[187] Cornes, Richard: *Intergovernmental Relations in Devolved United Kingdom: Making Devolution Work,* in: Hazell, Robert: Constitutional Futures, op cit, p 157
[188] Cornes, Richard: *Intergovernmental Relations in Devolved United Kingdom: Making Devolution Work,* in: Hazell, Robert: Constitutional Futures, op cit, p 157
[189] See further below
[190] Hazell, Robert; Morris, Bob: *Machinery of Government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 139
[191] House of Lords Debates, Vol 592, col. 1486-7, 28 July 1998
[192] House of Lords Debates, Vol 592, col. 1488-9, 28 July 1998

Committee was to vary according to specific issues under consideration. Fisheries Ministers would be involved on fisheries matters, for example[193]. The JMC has been established under the "Memorandum of Understanding"[194] agreed by the UK Government and the devolved bodies in Scotland and Wales on 1 October 1999. A supplementary agreement[195] sets out the basis on which the Committee operates, pursuant to the Memorandum of Understanding. The JMC does not hold regular meetings and did, in fact, not meet once to date. However, on the 7th of April 2000 the JMC's health committee was gathered in Cardiff for a first formal meeting. Summit meetings are to be held between the Prime Minister and the First Ministers (Secretaries) of the devolved bodies[196]. At that time, however, as matters of Health were in question, the Health secretaries of the devolved bodies and the Health minister of central government were included[197]. Present were thus the leaders of the UK, Wales, Scotland and Northern Ireland - Tony Blair, Rhodri Morgan, Donald Dewar and Peter Mandelson - plus Chancellor Gordon Brown and the health ministers. There is, therefore, no requirement for the JMC to meet in London.

The terms of reference of the JMC are[198] to consider non-devolved matters, which impinge on devolved responsibilities, and devolved matters, which impinge on non-devolved responsibilities. Secondly, where the UK Government and the devolved administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the United Kingdom. Finally, it is to keep the arrangements for liaison between the UK Government and the devolved administrations under review, and to consider disputes between the administrations. Plenary meetings of the JMC are to be held at least once a year[199]. According to the MoU, the plenary meetings consist of the Prime Minister (or his representative), who will take the chair, and the Deputy Prime Minister, the Scottish First Minister and one of his Ministerial colleagues, the Welsh First Secretary and another Assembly Secretary, [the Northern Ireland First Minister and Deputy First Minister], and the Secretaries of State for Scotland, Wales and Northern Ireland. Other Ministers and Assembly Secretaries can be invited to attend as appropriate when issues relevant to their areas of responsibility are to be discussed. The JMC can, however, also meet in "functional" formats

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[193] Baroness Ramsay of Cartvale, House of Lords Debates, Vol 592, col 1489, 28 July 1998
[194] See e.g. Official Website of the National Assembly for Wales (http://www.wales.gov.uk/works/moucover_e.htm), paras 3, 22
[195] Memorandum, Annex A 1
[196] Qvortrup, Mads; Hazell, Robert, op cit, p 18
[197] See *Blair to chair first formal meeting of Jmc,* in: Western Mail, 06/04/00
[198] Memorandum, paras 22 and Annex A 1.2
[199] Memorandum, Annex A 1.3

that mean for example in an "Agriculture Ministers format". The Secretaries of State for Scotland, Wales and Northern Ireland are invited to participate in these meetings as appropriate. Irrespective of their location, the responsible UK Minister will chair the meetings[200]. There are currently three of such sub-committees of the JMC, one on European affairs, one on poverty, and one on the knowledge economy (or "regional co-ordination committee"). Of these, only the last two have met so far[201]. The regional co-ordination committee was set up[202] on 1 December 1999 by the Chancellor and met on 9 December 1999 presided by the Chancellor, too[203]. The dominant role of Whitehall is enforced by the stipulation that meetings of the JMC, in the appropriate functional guise, are held at the request of the UK Government or any of the devolved administrations, but the responsibility for convening a meeting lies with the responsible Whitehall Minister[204]. The proceedings of each meeting are to be confidential[205]. The JMC is administered by a Joint Secretariat at the Cabinet Office and Committee of officials, normally civil servants, prepares its meetings[206]. The Committee has also a role in European affairs[207]. Then, it is chaired by the Foreign Secretary (or his representative) and will operate as one of the principal mechanisms for consultation on UK positions on EU issues, which affect devolved matters[208]. In the context of the EU, rapid decisions have to be taken to meet the timetable of negotiations in the Council of Ministers. However, the government's wishes to involve the devolved administrations as fully as possible in discussions on the formulation of UK policy position. Thus, a mechanism, which enables the lead UK Minister where necessary to consult other UK Government Ministers and their counterparts in the devolved administrations simultaneously, was needed. To establish that function is the task of the sub-committee on European Affairs. It is likely that the majority of its business will be conducted through correspondence, although meetings will also be convened where necessary[209]. Thus, the JMC is a consultative body rather than an executive body, and so will reach agreements rather than decisions[210]. It cannot bind any of the participating administrations, which will be free to determine their own policies while taking account of JMC discussions. Nonetheless, the expectation is that

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[200] Memorandum, Annex A 1.4
[201] Personal information (1 March 2000)
[202] *Brown is accused of 'devolution in reverse' by Tories,* in: Daily Telegraph, 2 December 1999
[203] The Times, 10 December 1999
[204] Memorandum, Annex A 1.8
[205] Memorandum, Annex A 1.11
[206] Mitchell, Michelle: *Relations with Westminster,* in: Hassan, Gerry: A guide to the Scottish Parliament, op cit, p 121; also Memorandum, Annex A 1.12-14
[207] See further below
[208] Memorandum, Annex A 1.9
[209] Also: Memorandum, Annex A 1.9
[210] Memorandum, Annex A 1.10

participating administrations are to support positions that the JMC has agreed[211].

Meetings of the JMC are to be held for two purposes. On the one hand, it has to take stock of relations generally and of the way in which the devolution arrangements are working in a particular area, and on the other hand, to address particular issues or problems[212]. In addition to shaping a joint policy on devolved issues, the JMC is also to act as arbiter in any cross-border wrangles and promote stronger links between the Scottish and British governments at a time when their relationship is under intense scrutiny[213]. Intended as a "peacemaker" at the beginning, the JMC was seen finally as a direct attempt to head off growing claims by the Scottish National Party that devolution was the first step to independence[214]. Thus, it was argued[215] that the JMC would prove as the mechanism for the devolved governments to negotiate with central government about reserved matters, which impinge on their functions, and to discuss also devolved matters in the different parts of the country. Thus, the JMC represents a significant constitutional reorganisation within the United Kingdom and could reach a considerable constitutional function[216]. Conversely, the JMC has been attacked by the Nationalist Parties stating that the Committee is an attempt to control policy in the devolved assemblies in Wales and Scotland by the centre[217]. Plaid Cymru argued that the nation's health problems should rather be addressed by the Assembly through its committees than by the JMC. However, the fact that the JMC comes together to discuss health problems in the whole United Kingdom is probably a strength of devolution as the JMC cannot bind the participants. Nevertheless, it is to note that "Health" is a devolved matter to Scotland[218]. Thus the Scottish parliament is to be responsible for the matter independently. At the moment the structures need to be put in place, but the centre of the United Kingdom polity is going to be enabled to move towards a more federalised settlement[219]. Then, there may well be "dynamics that London cannot dictate"[220]. If the JMC has been provided for "peacemaking", the conclusion is then that there will be some fights.

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[211] Memorandum, Annex A 1.10
[212] Memorandum, Annex A 1.6
[213] Memorandum, Annex A 1.5; see also: *Brown is accused of 'devolution in reverse' by Tories,* in: Daily Telegraph, 2 December 1999
[214] See: *Brown is accused of 'devolution in reverse' by Tories,* in: Daily Telegraph, 2 December 1999
[215] Hazell, Robert; Morris, Bob: *Machinery of Government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 139
[216] Hassan, Gerry: A new Union Politics, in: A guide to the Scottish Parliament, op cit, p 148; also Qvortrup, Mads; Hazell, Robert, op cit, p 18
[217] See *Labour rejects claims of interference on devolution,* in: Western Mail, 07/04/00
[218] See above
[219] Osmond, John: *The Joint ministerial committee and the British-Irish Council,* in: Osmond, John: The National Assembly Agenda, op cit, p 356
[220] Cited in Osmond, John: *The Joint ministerial committee and the British-Irish Council,* op cit, p 356

2. The British-Irish Council

The BIC represents the second form of these new summits. It brings together representatives of the British and Irish governments (in addition to the British-Irish Intergovernmental Conference[221]), and of the devolved bodies to discuss matters of common interest[222]. Its purpose is to institutionalise a new settlement between the different nations forming the United Kingdom and the Irish Republic[223]. It has to "promote the harmonious and mutually beneficial development of the totality of relationships among the people of these islands"[224]. The BIC indicates that due to the multiple links between the Republic of Ireland and the United Kingdom there must be a more intensive co-operation than during the last decades. The Membership of the BIC is not limited to the two States of Ireland and Britain and the devolved bodies, but also opened to the English regions "when established, and if appropriate"[225] and the Crown dependencies of the Isle of Man, Guernsey and Jersey. They are not part of the United Kingdom[226]. The BIC is to meet in different formats: at summit level, twice per year; in specific sectoral formats on a regular basis, with each side represented by the appropriate Minister; in an appropriate format to consider cross-sectoral matters[227]. The Council is primarily consultative and is allowed to consider a wide range of questions like transport, agriculture, and other approaches to the European Union. Moreover, it can conceive issues of environment, culture, and education[228]. It is open to the BIC to agree common policies or common actions. Individual members may opt ("opt out") not to participate in such common policies and common action[229]. The BIC normally operates by consensus. In relation to decisions on common policies or common actions, including their means of implementation, it will operate by agreement of all members participating in such policies or actions[230]. The BIC has a Secretariat provided by the British and Irish Governments. In addition to the structures of the British-Irish Agreement, it is open to two or more members to develop bilateral or multilateral arrangements. However, such arrangements could raise difficult questions, if nationalist parties in Scotland or Wales would be in power.

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[221] See above
[222] See above
[223] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 288
[224] British-Irish Agreement, op cit, Strand Three, para 1
[225] British-Irish Agreement, op cit, Strand Three, para 2
[226] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 289
[227] British-Irish Agreement, op cit, Strand Three, para 3
[228] British-Irish Agreement, op cit, Strand Three, para 5
[229] British-Irish Agreement, op cit, Strand Three, para 6
[230] British-Irish Agreement, op cit, Strand Three, para 7

Finally, the elected institutions of the members are encouraged to develop inter-parliamentary links, perhaps building on the British-Irish Interparliamentary Body[231]. A similar inter-parliamentary institution was proposed at the Committee stage of the Scotland Bill in the House of Lords to formalise the liaison machinery between Westminster and Edinburgh[232]. The suggestion from the debates on the Scotland Bill was not pursued in statutory terms. At present, there is an informal grouping of members of the National Assembly for Wales and of the Scottish Parliament entitled the "Scottish-Welsh Inter-Parliamentary Group". However, it has no legal basis and is not a body with which the civil servants have any regular dealings[233].

The BIC itself met, in fact, for the first and, to date, the only time on 17 December 1999 at Lancaster House in London[234]. There, interestingly, England has been represented by Hilary Armstrong, a junior Minister of the DETR. This BIC sought to take forward cross-border co-operation on issues such as environment, transport, progress on drugs and social exclusion. Those present cited improving transport links between Belfast and Scotland as an example of what might be achieved[235]. The Council afterwards issued a communiqué, which stated that the Council agreed a Memorandum on its working procedures. It adopted an initial list of issues for early discussion in the BIC and also decided which administrations would take the lead in each sectoral area. Therefore, the Irish Government is the leading administration on drugs, the Scottish Executive together with the Cabinet of National Assembly for Wales for Social Inclusion, the British Government for Environment, the Northern Ireland Executive Committee for Transport, and the administration of Jersey for the knowledge Economy. In addition, the Council agreed an indicative list of other issues suitable for the Council's work, including areas which members are already taking forward bilaterally. This concerns agricultural issues such as plant quarantine, rural development and rural depopulation, the development of renewable raw materials and energy crops, salmon fisheries; sea fisheries and aquaculture, health issues, regional issues including links between cities, towns and local districts, the consideration of interparliamentary links, energy issues, cultural issues, tourism, sporting activity, education issues, approaches to EU issues, minority and lesser-used languages, and prison and probation issues. Moreover, the Council agreed to hold its next summit in Dublin in June 2000, which shall focus on the issue of drugs. However, this meeting only takes place if the suspension of the Northern Ireland Assembly is abandoned.

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[231] British-Irish Agreement, op cit, Strand Three, para 10
[232] Lord Selkirk of Douglas, in: House of Lords Debates, Vol 592, col 1487, 28 July 1998
[233] Personal Information of the Cabinet of the National Assembly for Wales
[234] *Blair accused of turning blind eye to terrorists,* in: Daily Telegraph, 18 December 1999
[235] *Blair accused of turning blind eye to terrorists,* in: Daily Telegraph, 18 December 1999

The BIC is modelled in part on the Nordic Council[236]. This Council in the North of Europe has, in contrast to the European Union, never impinged upon the sovereignty of its member states[237]. The unique feature[238] of the BIC and the Nordic Council is that they are composed not only of sovereign states but also by other political units, which are not "states". In contrast to the Nordic Council, the BIC may not operate on an annual rotation of the presidency among all members, but rather be controlled by the two independent nation-states, Ireland and Britain[239]. Only two of the eight BIC's members are independent states whilst five of eight members are independent states within the Nordic Council[240]. However, the problem of English representation might have more significance. The Good Friday Agreement[241] provided for membership of devolved institutions in England "when established, and if appropriate"[242]. If there ever were to be devolution in England, it could complicate the work of the BIC[243]. This is due to the fact that England is much bigger than all the other members of the BIC together[244]. It was therefore proposed[245] to dissociate completely the question as to whether there should be devolution in England from the question of the representation at the BIC. An excellent solution might actually be that England is represented by a special Secretary of State[246]. When the Department of Environment was first established in 1970 it was initially contemplated as Department for England[247]. Thus, that Secretary of State may be the convenient representative for England within the BIC. However, the BIC offers to the smaller nations within this institution to counterbalance the tutelage of their larger neighbour. This is in contrast to the Nordic Council whose members share a fundamental constitutional consensus. The BIC is needed exactly because there is no consensus either on how the Irish problem can be resolved or on how the relationship between the non-English nations of the United Kingdom should be organised[248]. On the one hand, the BIC then establishes the paradoxical situation that whilst it was created to assure the Unionists of Northern Ireland of

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[236] Those Members are: Denmark, Finland, Iceland, Norway and Sweden with three other autonomous areas
[237] Qvortrup, Mads; Hazell, Robert: The British-Irish Council: Nordic Lessons for the Council of the Isles, op cit; Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, pp 289
[238] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 289
[239] Qvortrup, Mads; Hazell, Robert, op cit, p 17 stating that the BIC "was imposed upon the dependent territories"
[240] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 290
[241] See above
[242] British-Irish Agreement, op cit, Strand Three, para 2
[243] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 295
[244] Populations: England (49m), Scotland (5.1m), Ireland (3.6m), Wales (2.9m) and Northern Ireland (1.6m)
[245] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 295
[246] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 295
[247] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 295
[248] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 297

their membership of the United Kingdom the Council may prove to yield greater importance to Scotland and Wales at the expense of England[249]. On the other hand, the BIC may not be so important[250] in the context of devolution and is likely only to discuss issues with an Irish dimension which have not yet been discussed in other institutions like the Joint Ministerial Committee[251].

Before devolution, the Secretaries of State were entitled to represent the interests of Scotland, Wales and Northern Ireland on EU-matters. Especially the Scottish Secretary was ensuring that Scottish interests were taken into account in the context of European Union policy[252]. Obviously, the legislation for devolution has changed the situation. In future, particularly the Scottish Parliament and Executive are responsible for different parts of European politics[253]. However, the ways in which the devolved institutions are to participate in European Union matters are different. Scotland is to have the strongest position, Wales quite a limited one whilst Northern Ireland's position depends on the outcome of the peace process. According to the Scotland Act 1998, the Scottish Executive has full responsibility for EU dominated matters such as agriculture and fisheries, with contrast to Wales where the Assembly is only partly responsible[254]. Apart from that, the devolved bodies are represented at the Committee of the Regions (CoR), where they are able to propose their own representatives following the MoU[255]. The CoR is, however, at the time being, rather a weak institution[256]. Therefore, the devolved bodies may search for other ways of influence on European Union matters.

According to EU-law, a lot of decisions in the area of agriculture and fisheries are made at Brussels, and any Minister attending the Council has the power to agree to decisions for his country[257]. The devolved bodies are able to exert a degree of influence on the Commission during the pre-legislative period by different non-official ways (By way of their representation in Brussels – Scotland Europa, for example, or by way of the MEP's, or via

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[249] Bogdanor, Vernon: *The British-Irish Council and Devolution,* op cit, p 297
[250] Hazell, Robert; Morris, Bob: *Machinery of Government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 140
[251] Qvortrup, Mads; Hazell, Robert, op cit, p 18
[252] Bogdanor, Vernon: Devolution in the UK, op cit, p 279
[253] See Bates, T. St. J.: *Devolution and the European Union,* in: Bates, T. St. J.: Devolution to Scotland, op cit, pp 63
[254] Bogdanor, Vernon: Devolution in the UK, op cit, p 279
[255] MoU, part II, B 3.29
[256] Burrows, Noreen: *Relations with the European Union,* in: Hassan, Gerry: A guide to the Scottish Parliament, op cit, p 129
[257] Constitution Unit: Scotland's Parliament, op cit, p 89

central government[258], of course). However, as the United Kingdom is the Member State of the European Union, the Council negotiations bind the whole country[259]. Thus, a Scottish Minister does not have the power to negotiate since he operates in a purely Scottish context and cannot represent England or Wales[260]. However, it has been admitted[261] that Ministers of devolved institutions may participate and be involved, as part of the British negotiating team, when matters of Scottish and Welsh concern arise at the Council[262]. That proposal was not translated into any formal consultation mechanism in the devolution acts. Nevertheless, Scotland, Wales and Northern Ireland would then become the only "regions" in the European Union with individual access to the Council of Ministers[263]. Since the insertion of art 146 in the European Union Treaty, the German, Belgian or Austrian regions have been conversely able to be represented at the Council, but they cannot put forward their interests in that council individually. They are obliged to look for a "common" representative[264]. Nevertheless, the Scottish position must be agreed by Whitehall, whilst the German *Länder* are constitutionally entitled to nominate their own representative. The Scottish White Paper[265] stated that "provided the Scottish Executive is willing to work in that spirit of collaboration and trust, there will be an integrated process which builds upon the benefits of the current role of the Scottish Office within government". Bogdanor therefore argues, that the contrast between the constitutional status of the devolved institutions and their actual powers are likely to cause disillusionment in Edinburgh and Cardiff when it comes to be appreciated that there is a countervailing force to devolution in the form of the European Union[266]. In a situation of different parties at government in London and the devolved bodies, there is a risk of tensions about European matters. Constitutionally, the centre will dominate in such conflicts. Nevertheless, the devolved bodies are likely to gain influence in the context of their contribution to European policy matters[267].

It has been shown that devolution raises the question as to how England fits in the modified constitution. England is the largest part of the United Kingdom and its economic motor.

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[258] See also MoU, part II, B 3.31-33
[259] See also MoU, part II, B 1.3
[260] Burrows, Noreen: *Relations with the European Union,* op cit, p 129
[261] See White Paper, Scotland's Parliament, op cit, para 5.6
[262] Bogdanor, Vernon: Devolution in the UK, op cit, p 279
[263] Bogdanor, Vernon: Devolution in the UK, op cit, p 279
[264] Weston, Alison: Devolution and Europe, House of Commons Research Paper, N° 97/126, December 1997
[265] Scotland's Parliament, op cit, para 5.12
[266] Bogdanor, Vernon: Devolution in the UK, op cit, p 279
[267] Jeffery, Charlie: *Regionalisierung im Vereinigten Königreich und in Europa,* in: Forum franco-allemand,

Hence, it would disastrous to avoid a solution to the "English question". Devolution also demands a clear structure for co-operation of the different governments and institutions within the United Kingdom, and according to the Good-Friday-Agreement within and between the states of Britain and Ireland. On the one hand, these intergovernmental arrangements establish the forums where political conflicts can be discussed. There is a need in the post-devolution for a tighter co-ordination and for an organised co-operation. This can be achieved by the JMC. The BIC, on the contrary, is likely to be an institution, which is only made to ensure that Northern Ireland is integrated in a larger political background with different actors. The main contribution for the peace process will continue to be done between London and Dublin. On the other hand, the British-Irish Agreement established some sort of con-federal and federal arrangements[268] within the United Kingdom. This mixture of con-federal and federal features between two independent states marks the agreement out as novel in the international environment. The British-Irish Agreement and its implications for the United Kingdom Constitution could become a model for other areas of conflict. However, the underlying principle of "power sharing" is also an idea on which the European Union is partly based. The main aims of the British-Irish co-operation and the general framework of the European Communities are thus quite similar. The British-Irish arrangements currently do not impinge on the sovereignty of the member states. It was, however, the same at the setting up of the European Communities: Its point of departure has been the economic co-operation. Nobody could preview its fast development towards a supra-national organisation. Hence, it is not excluded that the British-Irish arrangements develop a dynamics, which leads finally to a similar structure. It could then also impinge on the sovereignty of its members. If the arrangements of the BIC reflect, however, a "new reality that we are all Regions of Europe" and if the BIC becomes a balance to the core to the European Union in the Benelux area, as the British Irish Council is likely to be dominated by its "peripheral member-regions[269]", remains to be seen. The British-Irish arrangements may develop a system of concurrent, but co-operative regions within the British Isles. Especially for Northern Ireland, the Membership of the European Union continues to integrate and to put pressure for both parts of Ireland to co-operate. This could prove an economic success given their shared peripheral geographical position, and similar interests in functional activities such as agriculture and tourism[270]. It was argued that Northern Ireland could even join the European Monetary Union with the

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I/2000, Deutsch-Französisches Forum, Freiburg/Paris 2000, pp 44

[268] O'Leary, Brendan: The British-Irish Agreement: Power-sharing plus, op cit, p 6

[269] Cited in Bogdanor, Vernon: *The British Irish Council and devolution,* op cit, p 295

[270] O'Leary, Brendan: The British-Irish Agreement: Power-sharing plus, op cit, p 7

Republic, if Britain itself remained outside[271]. It is, however, not the same for Scotland and Wales.

[271] O'Leary, Brendan: The British-Irish Agreement: Power-sharing plus, op cit, p 8, fn 9. It would be necessary that the Assembly agreed and the Secretary of State and the Westminster Parliament consented.

V. The "devolved" bodies and the new constitutional framework

Devolution does not only establish new institutions outside central government. Devolution does especially affect the centre. Thus, it is likely that it changes the shape of the whole constitutional structure of the United Kingdom. This chapter analyses the influences of devolution for the centre in the context of a general division of powers. Such a division of powers is normally associated with federal systems. The analysis may help to identify the constitutional nature of devolution. Also, the following chapter points out where it is most likely that problems within the new constitutional settlement may occur. Therefore, the different areas of power are scrutinised separately. Firstly, we shed light on the legislative powers and their division between the centre and the nations. Secondly, the administrative organisation is scrutinised. As a third point, it is questioned as to whether there is a clear financial settlement for the United Kingdom. Fourthly, this chapter examines the judicial review of devolution. By way of this investigation, various issues are outlined which arise with devolution, but which are avoided by a clear federal structure.

A. Legislative powers

For a United Kingdom-wide analysis of legislative competences it is necessary to take into account the different devolution schemes. The Scottish case provides the best example to scrutinise the realm of competences, which will remain at Westminster even if devolution would be strengthened in Wales or extended to England. The Scotland Act 1998 lists[1] not the devolved, but rather the reserved matters, which is in contrast to the abortive Scotland Act 1978[2]. Reserved matters are those, which are to be carried out at central level that means at a United Kingdom level. These reserved functions are outlined in Part I[3] as follows: first, the constitution, including the Crown[4], along with the succession to the Crown and a regency, the Union of the Kingdoms of Scotland and England, the Parliament of the United Kingdom, the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal, the continued existence of the Court of Session as a civil court of first instance and of appeal. The high judiciary remains in the realm of Westminster. Thus, the appointments to the Appellate Committee of the House of Lords and to the Judicial Committee of the Privy

[1] Scotland Act 1998, schedule 5
[2] See above, also Bogdanor, Vernon: Devolution, op cit, p 169
[3] Scotland Act 1998, schedule 5
[4] Legislation on private-law subjects fall outside the restriction

Council continue to be made by central government[5]. This is to be inferred from the reservation of the "constitution, including the Crown... and the Parliament of the United Kingdom"[6] and from the absence of any reference to those bodies in other provisions dealing with devolved matters[7]. A likely change may be that the Lord Chancellor consults further the First Minister instead of the Secretary of State before making his recommendations for the high judiciary to the Prime Minister[8]. The question is as to whether the Scottish parliament could abolish the appeal to the House of Lords and create a Scottish Supreme Court. If it is argued that the right to appeal is part of the civil procedure, which is not a reserved matter, the Scottish parliament would be able to do so[9]. However, if the right of appeal is seen as an aspect of the "constitution, including ... the Parliament of the United Kingdom"[10], it might be prohibited to do so, as the jurisdiction of the House of Lords in Scottish cases is an aspect of parliament, which substituted the former right of appeal to the Scots Parliament[11]. Apart from that it could be "beyond the scope of the Scottish parliament"[12] to abolish the right of appeal, as far as the Scotland Act[13] implies that the Judicial Committee of the Privy Council (as part of the House of Lords) is part of the Act which creates the Scottish parliament itself and is the ultimate institution of decision for devolution issues. However, this argument implies the fact that the Privy Council's function of ultimate decisions for devolution issues cannot exist without the residual role of the House of Lords. This conclusion is, however, not inevitable.

Secondly, the reserved matters include the registration and funding of political parties. Thirdly, foreign affairs, the European Union and the defence of the realm. Fourthly, the civil service and treason. Part II[14] states specific reserved matters as fiscal, economic, and monetary policy (excluding local taxes funding local government expenditure), the currency, financial services and markets, in the area of home affairs: the elections and the franchise for local government elections (except of the organisation of local government elections), immigration and nationality, the misuse of drugs and scientific procedures on living animals, the national security and emergency powers, extradition, firearms, betting, gaming and lotteries, in the area of trade and industry: Business associations, insolvency, competition and

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[5] Reed, Robert: *Devolution and the Judiciary,* op cit, p 30
[6] Scotland Act 1998, schedule 5, para 1
[7] Reed, Robert: *Devolution and the Judiciary,* op cit, p 30
[8] Reed, Robert: *Devolution and the Judiciary,* op cit, p 30
[9] Reed, Robert: *Devolution and the Judiciary,* op cit, p 30
[10] Schedule 5, para 1
[11] Lord Fraser of Tullybelton: Stair Encyclopedia of the Laws of Scotland, Vol 5, para 638
[12] Reed, Robert: *Devolution and the Judiciary,* op cit, p 30, fn 68
[13] Sections 33, 103; schedule 6
[14] Scotland Act 1998, schedule 5

intellectual property, import and export control, sea fishing, consumer protection, product standards, telecommunications and postal offices and services, the designation of assisted areas, the industrial development advisory board, in the whole area of energy policy, further the road, rail and marine transport. Part III of the Schedule concerns finally social security policy, employment and industrial relations, health and safety, the law of abortion and broadcasting. However, these matters can be changed[15] by Order in Council.

The Northern Ireland Act 1998 reserves a similar area of matters to the Westminster parliament[16]. The outline of the excepted – which correspond to the expression "reserved" of the Scotland Act – matters[17] includes the Crown, but does not limit the exceptions to "aspects of the constitution"[18]. Thus, the Northern Ireland Assembly has the power to affect the Crown's interests to a significant extent[19]. This Schedule covers the international relations and European affairs, too, but excludes some cross-border matters for the Irish Isle. Moreover, Northern Ireland is subject to certain restrictions in view of its judiciary[20]. The Northern Ireland Act 1998 distinguishes, however, between excepted and reserved matters, as the latter can be legislated by the Northern Ireland Assembly –and are therefore "devolved"– if they are ancillary, but the assent of the Secretary of State and Westminster is needed[21]. These matters include for example the establishment of the Royal Ulster Constabulary (RUC). Whilst in the Scottish case matters referring to police and security are reserved at present, the Northern Ireland Act 1998 empowers to "devolve" such competences. However, this might be due to the special situation of Northern Ireland. General conclusions are not to be drawn on the differences between the reserved matters in the Northern Ireland Act and the reserved matters of the Scotland Act 1998. Only a comparison between Northern Ireland's excepted and Scotland's reserved matters makes sense.

The distinction between the legislative powers of the Assembly in Wales and the bodies in Scotland and Northern Ireland is that both of the latter have primary and secondary legislative competences, whilst Wales enjoys only the devolution of secondary legislation[22]. However,

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[15] Scotland Act 1998, section 30 (2)
[16] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 16
[17] Northern Ireland Act 1998, schedule 2
[18] Schedule 2, para 1c (Other liberations are less important as the foreshore or the sea bed or subsoil or their natural resources so far as vested in Her Majesty in right of the Crown)
[19] Taylor, Greg: *Devolution and the applicability of statutes to the Crown in the inter-governmental context,* in: Public Law, Sweet & Maxwell, London 2000, p 10
[20] Schedule 2, para 11
[21] See above
[22] Silk, Paul: *The Assembly as a legislature,* op cit, p 70

the power of the Assembly to make secondary legislation in the context of "Henry VIII clauses" gives to the Assembly such powers, which are in other states only attributed to "real" parliaments. One could therefore argue that even the Assembly is a real legislator as the powers conferred by these clauses is very important[23]. Thus, secondary legislative power is real power[24]. Therefore, it can be concluded that devolution implies the transfer of legislative power to the newly created institutions, even though this legislative power includes "only" the power to make secondary legislation under the scheme of "Henry VIII clauses".

1. Reserved and devolved legislation

At present, it might be difficult to imagine that there is to be an "entrenched" relation between Westminster and the devolved parliaments, as Westminster was until currently the ultimate institution in the United Kingdom. The question is as to whether problems can arise concerning issues that both bodies are allowed to deal with. The relationship between the legislatures can be broken down in two component parts: the power of Westminster with regard to devolved matters on the one hand and, on the other hand, the power of the devolved legislature to debate or scrutinise non-devolved matters[25]. Initially, it might be helpful to bear in mind the situation when the Northern Irish Parliament at Stormont enjoyed devolved powers. In the 1920s, the two legislatures organised their relationship alongside the doctrine of ministerial responsibility[26]. The speaker of the Westminster parliament ruled then that "with regard to those subjects which have been delegated to the government of Northern Ireland, questions must be asked of ministers in Northern Ireland and not in this [the Commons] house. In the case of those subjects which were reserved to [Westminster] questions can be addressed to the appropriate ministers"[27]. In return, the speaker of the Stormont parliament ruled that "since... we have no power to make laws on any of these reserved matters, they are not ... subjects for discussion here"[28]. However, the general nature of the relationship between Westminster and the devolved bodies is most clearly expressed in the Scotland Act[29], where it is stipulated that the provisions of the Act "do not affect the power of the Parliament of the United Kingdom to make laws for Scotland". This general position has been maintained in the MoU where it is stipulated that "the United Kingdom

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[23] See Bogdanor, Vernon: Devolution in the UK, op cit, p 210
[24] Silk, Paul: *The Assembly as a legislature,* op cit, p 75
[25] Also: Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 22
[26] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 23
[27] House of Commons Debates, col 1623-25, 3 May 1923
[28] Northern Irelands Debates, col 490-2, 29 March 1927
[29] Section 28 (7), see also Northern Ireland Act 1998, section 5 (6)

Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power"[30].

The Scottish Office's notes on the Act[31] confirm the sovereignty of the United Kingdom parliament by providing that section 27 which empowers the Scottish Parliament to make legislation does not affect the power of Westminster to make laws for Scotland[32]. This means that Westminster is in theory allowed to legislate on all matters – including the right to block intra-vires legislation[33]. However, devolved matters should –in theory – be legislated at the devolved parliaments and assemblies, and –in practice – they are to be dealt with at that level. Why else introduce devolution[34]? There could only be an exception if the devolved bodies would agree and consent formally that Westminster should legislate for the United Kingdom as a whole[35]. Such procedures may be developed by convention[36]. However, conventions are partially based on a durable application. A practice is seen to have become a convention at the point at which failure to act in accordance with it gives rise to legitimate criticism[37]. At present, no practice has developed. This was shown most apparently in the (perhaps special) case of Northern Ireland. The Northern Ireland Act 2000 overruled the devolved body without great attempts to avoid such direct rule by way of other political measures. "Constitutional" thoughts were not made at that time. Therefore, the development of conventions in favour of the devolved bodies might be doubtful or, by all meanings, the rights that they give are not "entrenched" "for ever"[38]. That point of view is supported by the arguments of Hadfield[39], who quotes two meaningful examples. In the House of Lords' second reading of the Scotland Bill, it was said that the Lords "would expect a convention to be established that Westminster would not *normally* legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament"[40]. That quotation of "normal" is contrasted with Calvert's[41] observation of the operation of the then Northern Ireland convention. He put forward that the United Kingdom parliament "has frequently during the forty six years since the establishment

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[30] Memorandum of Understanding, part I, para 13, available at the official Website of the Assembly: http://www.assembly.wales.gov.uk/works/mouestats_e.html
[31] Scotland Act 1998, section 27 (7)
[32] Quted in Hadfield, Brigid: *The Belfast Agreeement, Sovereignty and the State of the Union,* in: Public Law, London, Sweet & Maxwell Winter 1998, pp 599, p 603
[33] See further below
[34] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 23
[35] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 23
[36] Lord Sewel, in: House of Lords Debates, Vol 592, col 791, 21 July 1998
[37] Barnett, Hilaire, op cit, p 36
[38] See above (The problem of the diceyan theory concerning the Scotland Act which was concluded "for ever")
[39] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 24
[40] Lord Sewel, in: House of Lords Debates, Vol 592, col 791, 21 July 1998
[41] Calvert, Harry: Constitutional Law in Northern Ireland, Belfast, SLS 1968, pp 87

of the Northern Ireland parliament, legislated with respect to transferred matters, but almost invariably only with the consent of the Northern Ireland government, even though that consent may not always have been readily forthcoming". The issue of Westminster's power to legislate is, however, independent of the question of its desirability[42]. Thus, the point of desirability could be handled by formal, but not statutory mechanisms, as for example through a Speaker's Ruling or by Standing Orders, that Westminster will not legislate on devolved matters[43]. However, it remains to be seen if Westminster may take that experience to be more reluctant or if the devolved legislatures of this century are more readily forthcoming.

Another question is as to whether the Westminster parliament could or should debate and scrutinise devolved matters. The MoU is clear about that as it cites that "the United Kingdom Parliament retains the absolute right to debate, enquire into or make representations about devolved matters. It is ultimately for Parliament to decide what use to make of that power, but the UK Government will encourage the UK Parliament to bear in mind the primary responsibility of devolved legislatures and administrations in these fields and to recognise that it is a consequence of Parliament's decision to devolve certain matters that Parliament itself will in future be more restricted in its field of operation"[44]. However, one could see Westminster's role, in fact, limited to the reserved matters. Then, Westminster's Standing Orders might exclude Private Member's Bills on devolved matters. It is likely that opposition MPs of Scotland, Wales or Northern Ireland try to challenge the devolved government by that way at Westminster. Private Members' Bills are promoted by an individual Member of Parliament, as opposed to the government or in order to propose a matter, which the government has been unable to fit in its government programme[45]. However, that possibility raised questions at the Northern Ireland's Bill in the House of Lords. There, the government referred to the future law of Northern Ireland and outlined that "if there is to be a change, the preferable way for it to happen is in a devolved administration in Northern Ireland, or, alternatively by way of a Private Member's Bill from a Northern Ireland Member"[46]. The then Secretary of State Paul Murphy supported the statement by proving a Diceyan character of constitutional approach: "I cannot simply rule out that parliamentary time may at some stage

[42] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 25
[43] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 25
[44] Memorandum of Understanding, part I, para 14, available at the official Website of the Assembly: http://www.assembly.wales.gov.uk/works/mouestats_e.html
[45] Barnett, Hilaire, op cit, p 534
[46] Worthington, Tony, in: House of Lords Debates, Vol. 593, col 209-210, 5 October 1998

be made available for a Private Member's Bill"[47]. However, it is true that the arguing for a preclusion of Westminster legislation on devolved matters underlies a federalist approach to the devolution model[48]. Devolution does not establish exclusive legislative powers and the "national interest" can still be defined at Westminster. That may be the meaning of the general legislative power at Westminster ruled in Section 28 (7) of the Scotland Act[49]. That can also be taken from Sections 35 and 58 giving the Secretary of State certain limited intervention powers[50]. Nevertheless, there are unsolved questions referring to the relationship between Westminster and the devolved bodies. The Westminster parliament considered recently the question "whether it is possible to lay down clear principles as to the relationship with the new bodies, even if only in outline, or whether changes should be evolutionary and limited to particular responses to particular problems. If it is possible to define clear principles, should the United Kingdom exercise a 'self-denying ordinance' on matters within the competence of the Scottish parliament or the Welsh or Northern Ireland Assembly and if so, what should it cover, and how should it be placed?"[51] That is, in fact, first a question at Westminster and not at the devolved bodies. It might be true that in the context of a devolved structure of government the airing of as a wide range of opinions on any given matter can be beneficial rather than threatening. However, the experience of the Stormont parliament showed that the devolved bodies must be made responsible for a clear political realm. This is not in contrast to the general legislative power of Westminster, but it may help to establish a definite political responsibility.

It is the same with the devolved bodies themselves. They may claim the right to discuss reserved matters, too[52]. For the Scottish case, the White Paper stated that the parliament in Edinburgh will be able to "debate a wide range of issues of interest and concern in Scotland, whether devolved or reserved"[53]. That could be the case if Westminster legislates against the majority of MPs stemming of one devolved nation[54], with reference to an international treaty for example. In such cases the devolved bodies may express through its general debates their opposition to what was being done. This position is supported in the MoU wherein "the devolved legislatures will be entitled to debate non-devolved matters, but the devolved

[47] House of Lords, Written Answers, WA 132-33, 19 October 1998
[48] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 24
[49] See Section 5 (6) of the Northern Ireland Act 1998
[50] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 25
[51] Select Committee on Procedures, Press Notice N°9 of Session 1997-98, 30 July 1998
[52] Hadfield, Brigid: *Scotland's Parliament: A Northern Ireland perspective on the White Paper,* in: Public Law, London, Sweet & Maxwell Winter 1997, p 668
[53] White Paper: Scotland's Parliament, op cit, para 2.5

executives will encourage each devolved legislature to bear in mind the responsibility of the UK Parliament in these matters"[55]. The Speaker of the Stormont parliament saw no reason for the discussion of matters outside the devolved issues, too. It was argued[56] that this ruling was unacceptable as resolutions of the devolved legislature on reserved matters "would be destitute of legal effect, but of considerable moral significance". In addition, it was stated that "if you give your politician a restricted field he may well lose a sense of proportion". However, devolution is the transfer of distinct not general power and it is based on the principle of the continuing general power of the Westminster parliament[57]. In contrast to federalism where a general power relies upon the assemblies, devolution implies that the devolved assemblies have only a restricted realm of power. Thus, it is impossible to reproach the assemblies with that restriction. A system of devolution, where the assemblies are allowed to issue their opinions on matters for which they have no political responsibility may function with two or three devolved bodies and in a political situation of friendly terms. However, if there is more than a handful of devolved institutions (following future devolution to England) and if the devolved assemblies want to challenge the Whitehall government for party reasons, it is foreseeable that the tensions may increase considerably. Then, it is not necessary to outline the probable cacophony in the United Kingdom. However, it was objected that there is paramount importance for the acquisition of as a wide range of views from within the United Kingdom as possible[58]. That was explained with the diction of the philosopher Karl Popper who wrote as following: "It is easy to centralise power but impossible to centralise all that knowledge which is distributed over many individual minds, and whose centralisation would be necessary for the wise yielding of centralised power"[59]. It is, however, questionable if the airing of as wide a range of opinions on any given matter seems to be beneficial rather than threatening in the public perception as far as the constitutional structure is a devolved one[60]. Even in federal systems like Germany for example, the federal states, although not prohibited, do not discuss reserved matters. Therefore, the issue of debating powers could be best solved by the doctrine of ministerial responsibility. Thus, the devolved bodies are to discuss the devolved matters, whilst Westminster has a certain degree of choice as the Secretary of States

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[54] Silk, Paul: *The Assembly as a legislature,* op cit, p 77

[55] Memorandum of Understanding, part I, para 15, available at the official Website of the Assembly: http://www.assembly.wales.gov.uk/works/mouestats_e.html

[56] Newark, Francis: *The Constitution of Northern Ireland,* in: Neill, Desmond: Devolution of Government: The Experiment in Northern Ireland, Unwin, London 1953, p 12

[57] See above

[58] Bogdanor, Vernon: Power and the people, OUP, Oxford 1997, p 22; Hadfield, Brigid: *Scotland's Parliament: A Northern Ireland perspective on the White Paper,* in: Public Law, Sweet & Maxwell, London Winter 1997, p 668; and in: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 28

[59] See Bogdanor, Vernon: Power and the People, op cit, p 22

are to remain at the beginning[61]. In future, the interparliamentary body[62] proposed both at the Committee stage of the Scotland Bill and in the British-Irish Agreement might become an appropriate institution to debate issues, which are not in the realm of the respective institutions.

Whilst the issue of debating powers can thus be resolved, a different group of arguments may apply to preclude the scrutiny of devolved matters through the Select Committees at Westminster. The Scotland Act attributes to the Scottish parliament the power to send for persons, witnesses, papers and records[63]. That power is confined to the scrutiny of devolved matters and may be delegated to the appropriate Committees[64]. This implies that the devolved institutions are the appropriate forum to scrutinise such matters. Even if that devolved responsibility may only be virtually exclusive[65], the overloaded Westminster parliament may well concentrate on the non-devolved matters. Westminster is to have an overarching responsibility, which might reveal itself in the future by way of the institution of a Select Committee on Devolved Affairs as a whole[66]. This Committee may be in charge of scrutiny for general devolution issues, for the work of the JMC (together with the devolved bodies), and for the intergovernmental concordats[67], for the crucial non-statutory aspects of devolution should not be allowed to float free of parliamentary supervision[68]. There, the Westminster Select Committee on Procedure may well play an important role to develop appropriate proceedings.

The scheme of devolution, which applies to Wales is different and leaves the Assembly in a weaker position compared with Northern Ireland and Scotland. There are a larger number of cases where problems may arise. On the one hand, the Westminster Parliament could pass primary legislation which applies only to Wales, and which is unacceptable to the majority of Welsh MPs, but acceptable to Westminster as a whole. On the other hand, the Assembly may tend to influence the primary legislation, which is made at Westminster or may even try to promote its own proposals. Whilst the first issue concerns the debating powers, the second

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[60] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 26
[61] Also Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 26
[62] See above
[63] Sections 23-25, see also Northern Ireland Act 1998, sections 44-45, and in more limited terms Government of Wales Act 1998, sections 74-75
[64] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 26
[65] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 26
[66] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 27
[67] See below
[68] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 27

issue is dependent on the power to make primary legislation. It is hard to formulate any substantial argument for different or larger debating powers of the Assembly. Its task is to deal with devolved matters, and as far as Wales is treated inappropriately by Westminster legislation, the Welsh MPs may well criticise it there. The ministerial responsibility and the legislative power lie at London. However, the difference of the Welsh devolution model concerns primary legislation. In the past, there has been very little specifically Welsh primary legislation at Westminster[69]. In the pre-publication stages of legislation affecting Wales, the Welsh Office used to be consulted[70]. The concordats[71] arrange, however, only for relations between the Executives. Thus, further consultation is limited to the Assembly Secretaries. At the beginning of a parliamentary session, at a moment when the legislative proposals come into the public domain, the Secretary of State for Wales has the duty to consult the Assembly about the government's proposals, and the Assembly can then make representations about any matter affecting Wales[72]. However, the question is as to whether the Welsh Assembly has there an effective role. Generally, Westminster could amend existing legislation so that the Assembly does not have any freedom of action in secondary legislation[73], and Assembly orders could even be repealed[74]. The entitlement in the Act is not very clear neither. The initial consultation of the Assembly is to take place "as soon as reasonably practicable after the beginning of the session". Much depend also on the relationship between the two Executives[75]. It is up to the devolved institution to monitor bills and when necessary to propose amendments which may be introduced by the Secretary of State or the Welsh MPs[76]. Future Acts could also confer to the Assembly the power to make specific provisions for Wales or the Speaker of the House could designate any bill affecting only a devolved Welsh function, and such a Bill could be exempt from the procedures under the Parliament Acts, or subject to the consent of the Assembly[77]. However, these devices are not yet developed and it depends upon the "generosity" of the Westminster parliament if they will evolve. Nevertheless, the Assembly has one way of being heard at Westminster. Section 37 (1) of the Government of Wales Act 1998 provides for the promotion and opposition of private bills in Parliament. Generally, one might think that the Assembly is the most appropriate place for the

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[69] Silk, Paul: *The Assembly as a legislature,* op cit, p 75
[70] Silk, Paul: *The Assembly as a legislature,* op cit, p 75
[71] See further below
[72] Government of Wales Act 1998, section 31
[73] See above
[74] Silk, Paul: *The Assembly as a legislature,* op cit, p 76
[75] Patchett, Keith: *Dealing with primary legislation,* in: The National Assembly Agenda, Institute of Welsh Affairs, Cardiff 1999, p 86
[76] Patchett, Keith: *Dealing with primary legislation,* op cit, p 91
[77] Silk, Paul: *The Assembly as a legislature,* op cit, p 77

regulation of matters of the kind normally dealt with by private legislation as far as only Welsh interests are concerned. Such bills are usually promoted outside central government and are handled by special parliamentary procedures[78]. A private bill is, in contrast to a public bill, one which affects only an individual or bodies as for example local authorities[79]. However, as part of primary legislation, these powers remain principally at Westminster. Nevertheless, even if that section was added late in the day[80], the Act confers the power to the Assembly to promote such bills but only as far as two-third of the Assembly have authorised the bill[81]. Such bills are not very likely to arise, as the powers of private bills have become less important in recent times. Westminster expects that if primary objectives can be fulfilled by other ways than by private bills these other ways are to be followed[82]. An important part for private bills is, however, excluded through section 37 (3) of the Act.

2. Representation in the Commons

Since earliest times, devolution has raised the question of popular "representation" in the United Kingdom[83]. Nowadays this issue is commonly associated with the "West-Lothian-Question"[84] and refers to the representation of the people from devolved areas at the Westminster parliament. The question got its name[85] with reference to the constituency of the Labour MP Tam Dalyell, who was sitting at Westminster in the 1970s when devolution to Scotland was debated for the first time[86]. The "author" of the West-Lothian question set out his argument in some detail in 1977, when he asserted that

> "if the United Kingdom is to remain in being, there can be no question but that the Scottish constituencies must continue to be represented at Westminster. [...] Yet once the Assembly had come into being, and was legislating for those areas that had not been reserved to the United Kingdom government, the position of the seventy-one Scottish Westminster MPs would become awkward and invidious. Their credibility – like those of their counterparts of the Assembly – would be deeply suspect, simply

[78] Patchett, Keith: *Dealing with primary legislation,* op cit, p 92
[79] Barnett, Hilaire, op cit, p 534
[80] House of Commons Debates, Vol 309, cols 594
[81] section 37 (2)
[82] Patchett, Keith: *Dealing with primary legislation,* op cit, p 93
[83] Concerning Irish Home Rule, see above
[84] See above
[85] Himsworth, C.; Munro, Colin: Devolution and the Scotland Bill, Green, Edinburgh 1998, p 32: "Its naming has been attributed to Enoch Powell"
[86] Bogdanor, Vernon: Devolution in the UK, op cit, p 227

because there would be so many areas of concern to their electors on which they could not pronounce"[87].

Dalyell, however, was not the first to raise that question[88]. The question asks as to whether it is justifiable for Scottish MPs, after devolution, to continue to be able to vote for English domestic affairs whilst non-Scottish MPs are no longer able to vote on Scottish domestic affairs[89]. However, each scheme of asymmetrical devolution must raise issues about equal parliamentary representation, about fairness[90]. However, a reasonable approach to that question is required because questions of this type of unequal representation are not stressed in the same way in other European states, where they exist, too[91]. To some the issue has been seen to be a way of undermining their opponents' arguments by exposing their inherent illogicality and their potential danger for the United Kingdom as a whole[92]. In return, generally to the people on the other side of the argument, the issue seems to be as irrelevant or as a serious challenge to their devolution plans[93]. The "West Lothian" question might be the crucial question for the constitutional structure of the United Kingdom. The Kilbrandon Commission summarised the problem as follows: "if devolution were to be to selected regions only, a problem would arise over the extent and level of representation of those regions in the House of Commons compared with that of regions which did not have legislative assemblies of their own"[94]. In essence, this question concerns the over- or under-representation in the Westminster Parliament once legislative power is devolved to a regional Parliament[95].

The only completely logical answer to the "West-Lothian" question would be the implementation of devolution all round. This implies, however, that Britain becomes a federal state[96]. Hence, this solution is quite unlikely to come into being. It was outlined[97] that the problem with the "West Lothian" question would not be that it has no answer but that none is remotely feasible. So, it might not really be a "question" only because "Tam [Dalyell] simply

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[87] Dalyell, Tom: Devolution -The end of Britain?, op cit, p 245
[88] Hadfield, Brigid: The constitution of Northern Ireland, op cit, p 89, "those with short memories called this the 'West Lothian Question'".
[89] Bogdanor, Vernon: Devolution in the UK, op cit, p 227
[90] Hazell, Robert: *Westminster,* in: Hazell, Robert: Constitutional Futures, op cit, p 121
[91] Winetrobe, Barry: The Scotland Bill: Some constitutional and representational aspects, House of Commons, Research Paper 98/3, 7 January 1998, p 16
[92] Winetrobe, Barry, op cit, p 16
[93] Winetrobe, Barry, op cit, p 16
[94] Royal Commission on the Constitution, op cit, paras 810-15
[95] Barnett, Hilaire, op cit, p 437
[96] Bogdanor, Vernon: Devolution in the UK, op cit, p 228; Winetrobe, Barry, op cit, p 31
[97] Constitution Unit: Scotland's Parliament, op cit, p 109

waits a while and then asks again"[98]. As far as the English regions do not have legislative powers or even administrative devolution –and this seems to be unlikely at present[99]- devolution remains asymmetrically. In consequence, the representation problem can be directed by different ways. First, the MPs representing the devolved region could be excluded from being at Westminster. Secondly, it would be possible to reduce the strength of the regional representation at Westminster. Thirdly, Westminster could legislate to ensure that the regional representatives only have a legislative role in relation to legislation concerning their own region, and not in relation to legislation which has purely English dimension, the so called „in and out" approach[100].

The exclusion of these devolved parts of the country, in which a devolution scheme of legislative powers was established, is difficult to justify[101]. That solution was already put forward by Gladstone in the "Irish Home-rule" debate hundred years before, but it was at that time as absurd as today given the premise that Westminster remains responsible for the reserved matters. The exclusion of Scottish representation at Westminster would in fact require independence for Scotland. That, however, is not provided by the Scotland Act 1998 and the large majority of the people do not want it. Thus, it would be unjust for Scotland to be legislated by Westminster on reserved matters without being represented at Westminster[102].

As the main issue of the "West Lothian" question is that Members in the Westminster Parliament representing seats in areas enjoying devolution are able to vote on English matters, the obvious solution would be to divide the matters in devolved and reserved and to prevent the Members of the devolved parliaments from voting on devolved i.e. domestic English matters at Westminster[103]. Moreover, it would be possible to divide that non-participation in different grades, from being absolutely out of process, including all forms of parliamentary business such as questions, motions and debates, or only a non-participation in relevant select committees. Thus, a self-denying ordinance[104] of Scottish and Welsh MPs could be thinkable, but it would be even possible to prevent those MPs only from voting on relevant bills. This solution is commonly known as the "in and out" solution, which was already discussed in the

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[98] Miller, Bill, in: The Scotsman, 23 January 1995
[99] See above
[100] Bogdanor, Vernon: Devolution in the UK, op cit, pp 227
[101] Bogdanor, Vernon: Devolution in the UK, op cit, p 229; Winetrobe, Barry, op cit, pp 24
[102] Constitution Unit: Scotland's Parliament, op cit, p 108; Bogdanor, Vernon: Devolution in the UK, op cit, p 229
[103] Wintrobe, Barry, op cit, p 24; Bogdanor, Vernon: Devolution in the UK, op cit, p 229
[104] Hazell, Robert: *Westminster,* in: Hazell, Robert: Constitutional Futures, op cit, p 121

context of Irish "home rule". In addition, the Ferrers amendment[105] in 1978 was an example of how the solution could be implemented. However, the "in and out" solution raises difficult problems. Firstly, a crucial question concerns the way in which legislative projects are classified. Gladstone's "home rule" proposal included that the Speaker of the House had to decide as to whether a matter is purely domestic and if the Irish MPs are entitled to vote for it or not[106]. Section 66[107] of the Scotland Act 1978 provided for a parliamentary procedure to decide if a second vote must be taken when the bill fell within a domestic matter and only secured in order to the Scottish vote. Generally, one might be inclined to think that the classification of legislative proposals in domestic and reserved matters must be possible, but the "cumbersome procedure which would be unlikely to affect the outcome except when the House is very closely divided, but would keep on drawing attention to the anomalous position of Scottish members. [Thus, the] trouble-making provision... would be better ignored"[108]. Apart from the difficulties[109] for the Speaker's position, however, the implication of the financial arrangements is to create further problems. Under the Barnett formula[110], which is in action at present, every increase of expenditure on a domestic English service has effects on the block grant and therefore on the total Scottish expenditure[111]. The Kilbrandon Commission stressed this fact by noting that the "ability to vote could not depend simply on whether the matter at issue related to reserved or transferred subject. Any issue in Westminster involving expenditure ... is of concern to all parts of the United Kingdom since it may directly affect the level of taxation and indirectly influence the level of a region's own expenditure"[112].

Apart from the general question of the "equality" of representation, often, the interrogation about two different classes of MPs at Westminster is put forward as an argument against this idea. When political majorities in Scotland and the United Kingdom were different, as in 1964, the "in and out" solution is likely to paralyse the government[113]. A Labour government at Whitehall could easily "lose" its parliamentary majority if the Scottish MPs withdraw. That

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[105] See above
[106] Bogdanor, Vernon: Devolution in the UK, op cit, p 230
[107] I.e. the Ferrers amendment, see above
[108] Smith, Geoffrey: *Westminster and the Assembly,* in: Mackay, D.: Scotland: the framework of change, Edinburgh 1979, p 121
[109] Bogdanor, Vernon: Devolution in the UK, op cit, p 230
[110] See further below
[111] Bogdanor, Vernon: Devolution in the UK, op cit, p 230
[112] Report of the Royal Commission on the Constitution, op cit, para 813
[113] Bogdanor, Vernon: Devolution in the UK, op cit, p 231

would have grave consequences for the government's position[114]. In addition, the equality of all MPs was stressed during the debates of the Scotland Act 1978 since "the nature of this House is that it is a body corporate. What concerns any part of it concerns us all. We are, in the best sense of the word, peers in every respect and sit on the basis of equality of responsibility and rights"[115]. The "in and out" solution would, on the contrary, create a situation of MPs of different status and therefore question the basis of equality. However, that view has been partly disputed as no parliament since the war has over-ruled a majority of English MPs[116]. So, the main problems of that "solution" remain in being[117].

Finally, a reduction of Scottish and Welsh representation is possible. Scotland is hugely over-represented at the House of Commons[118]. The average constituency in the United Kingdom is at present at 67,261 heads of population whilst the figure of Scotland is at 54,822, in Wales it is at 58,476, in Northern Ireland at 68,373 and in England at 69,571[119]. That over-representation of Scotland (and Wales) has been defended on the basis of "reasonable assurance for minority countries"[120]. In the same way, the Kilbrandon Commission argued that "the maintenance of the representation of Scotland and Wales at their present levels would be justified by their national status. England already has a preponderance if representation in Parliament compared with the smaller nations. To base representation only on the basis of counting heads is to ignore the important nationality factor"[121]. However, the legislation for a Scottish parliament and the National Assembly for Wales make sure that the "minority countries" have now a certain degree of autonomy. Thus, the over-representation might be decreased. However, even the cutting of the number of Scottish and Welsh MPs does not exclude the possibility of a vote for a domestic English bill secured by those MPs, but the likelihood of such an event might be lessened[122].

In relation of Wales, no changes are to likely, as the limited realm of the National Assembly for Wales would not justify such measures[123]. The only statement concerning the role of the Welsh MPs was made in the White Paper "A voice for Wales", where the government puts

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[114] Constitution Unit: Scotland's Parliament, op cit, p 109
[115] Powell, Enoch, in: House of Commons Debates, Vol. , col 296, 31 January 1978
[116] Miller, Bill, op cit, in: The Scotsman, 23 January 1995
[117] Bogdanor, Vernon: Devolution in the UK, op cit, p 231; Winetrobe, Barry, op cit, pp 27
[118] Constitution Unit: Scotland's Parliament, op cit, p 110
[119] Constitution Unit: Scotland's Parliament, op cit, p 110
[120] MacCormick, Neil: *The English Constitution, the British State and the Scottish Anomaly,* in: Scottish Affairs, Understanding Constitutional Change, 1998, p 131
[121] Report of the Royal Commission on the Constitution, op cit, para 815
[122] Bogdanor, Vernon: Devolution in the UK, op cit, p 231

forward that the "Members of Parliament representing Welsh constituencies will have a continuing role, but one which will be based upon a new partnership with the Assembly"[124]. The Welsh over-representation, it was argued, may be seen as compensation for the absence of legislative devolution[125]. In view of Scotland, the respective White Paper noted that "Scotland's Members of Parliament will continue to play a full and constructive part in the proceedings of the House of Commons. This is right both for Scotland and the United Kingdom because devolution is about strengthening the United Kingdom. The Parliamentary Boundary Commission will review the distribution of seats in the House of Commons, which follow criteria defined in statute. At present, special statutory provisions stipulate a minimum number of Scottish seats. The Government have decided that in the next review this requirement will no longer apply"[126]. This has been confirmed by the Scotland Act 1998[127] that repeals the protected minimum of Scottish MPs. Thus, the Scottish Representation at Westminster is likely to decrease in 2005 to around 57 MPs[128]. However, that reduction is not an answer to the "West-Lothian" question; it may be a political response, at least[129]. The only way out of this "insoluble constitutional conundrum" would be greater regionalism in the United Kingdom, which requires the devolution of legislative power to regional assemblies[130].

If the "West-Lothian" question cannot be completely solved, then the reverse question arises whether English issues cannot be discussed otherwise[131]. It has already been outlined[132] that the proposal of an English Parliament is not workable. It might be justified to say this was intended as a centralist alternative to the devolution of power within England[133]. Another possible way to counterbalance the implication of Scottish MPs especially could be the creation of an English Grand Committee[134], as it was proposed by the Conservative leader William Hague in February 1998. Such a Committee could carry out some of the functions attributed to an English Parliament[135], but it would be a less drastic measure. The English Grand Committee would create a forum for domestic English issues and it would be merely

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[123] Against: Hazell, Robert: *Westminster,* in: Hazell, Robert: Constitutional Futures, op cit, p 118
[124] A voice for Wales, op cit, p 20
[125] Bogdanor, Vernon: Devolution in the UK, op cit, p 232
[126] White Paper, Scotland's Parliament, op cit, pp 12-13
[127] Section 81
[128] Hazell, Robert: *Westminster,* in: Hazell, Robert: Constitutional Futures, op cit, p 117
[129] Constitution Unit, Scotland's Parliament, op cit, p 110
[130] Barnett, Hilaire, op cit, p 441
[131] Hazell, Robert: *Westminster,* in: Hazell, Robert: Constitutional Futures, op cit, p 121
[132] See above
[133] See Wright, Tony: The English Quesiton, op cit, p 16. Thess proposals have, however, no significant support.
[134] See *English MPs only to sit in revived regional committee*, in: Financial Times, 18 May 1998
[135] See above

composed of English MPs[136]. This Committee may demand, however, much more powers than have been hitherto been ceded to the Welsh and Scottish Grand Committees. There is already a Standing Committee on Regional Affairs, a kind of English Grand Committee[137], but that Committee has not met since 1978 as it might prove to be a "cumbrous talking-shop"[138]. However, in April 2000 the Labour government sought to revive the Standing Committee for Regional Affairs as a forum for discussion of English issues. Obviously, that proposal does not meet the proposals for regional assemblies in England – and it is not a solution to the West Lothian Question. The regional standing committee for England could, however, balance out the fact that Wales, Scotland and Northern Ireland already have their own Grand Committees at Westminster. In a recognition that the English regions have been "somewhat disadvantaged", the government envisages that the Regional Committee provides for a forum in which MPs could debate matters affecting specific English regions or touching on regional affairs generally[139].

3. Representation in the Lords

Devolution and constitutional reform were put together when the Labour government started its legislative activity. Generally, devolution as a mere transfer of power does not imply that the devolved bodies elect the upper House of Parliament or are represented in it. However, there are good reasons that it should be so. The function most often proposed for a reformed House of Lords –regardless of its powers[140] – could be the representation of the nations (or regions) of the United Kingdom. That would realise a quasi-federal structure for the United Kingdom[141]. A powerful argument for such a regionally based Second Chamber is that it would encourage the growing development of regional and national identity in providing an all-British representation-body[142]. Hence, the reform of the House would strengthen the Union and help to counterbalance the centrifugal forces released by devolution[143]. Also, it would balance the asymmetrical nature of devolution, because all nations would be represented in the House of Lords. Moreover, a regionally based House of Lords would give

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[136] Hazell, Robert: *Westminster,* in: Hazell, Robert: Constitutional Futures, op cit, p 121
[137] Bogdanor, Vernon: Devolution in the UK, op cit, p 267
[138] Bogdanor, Vernon: Devolution in the UK, op cit, p 267
[139] See *Move to cure devolution anomaly,* in: Western Mail, 12/04/00
[140] The powers are not addressed here. See therefore Russell, Meg: Reforming the House of Lords, Oxford, OUP 2000, p 251
[141] See Hazell, Robert: *Westminster,* in: Hazell, Robert: Constitutional Futures, op cit, p 242
[142] Osmond, John: Reforming the Lords and changing Britain, op cit, p 5, 26
[143] Hazell, Robert: *The new constitutional settlement,* op cit, p 242

to the regions a stake at the centre[144]. This could be expected to prove as an anchor of regions, which do not dispose of constitutionally entrenched powers. Different possibilities for its composition are thinkable[145]. The members of the chamber could be directly elected. However, direct election has some disadvantages. It would create no difference to the House of Commons[146] and, it would not create a common approach of the regions of their functions at the centre[147]. Indirect election or nomination would give the devolved institutions a direct power at the centre. In Germany, the *Länder* governments are represented in the "second chamber"[148]. This has to do with the co-operative nature of German federalism. However, there is nothing that could prevent to provide for a representation of the devolved assemblies at the House of Lords.

The government faced this issue by a two-step approach. The first step should be the removal of the hereditary peers. The House of Lords Bill 1999 Act provided effectively for the removal of the hereditary peers of the House of Lords. This was a popular measure of reform, which should set in train a power to entail a general review of the Second Chamber's role. However, some horse-trading was necessary to pass the Bill smoothly through both Houses. Different changes were made to the Bill including the remaining of 92 hereditary peers in the house[149]. The public may find it, in fact, difficult to focus only on the composition of the House[150]. The Labour manifesto, however, announced that removing the hereditary peers would be "an initial, self-contained reform, not dependent on further reform in the future"[151]. Therefore, doubts were put forward if there would ever be step two[152]. These doubts were, initially, alleviated by the nomination of a Royal Commission on Reform of the House of Lords under the chairmanship of Lord Wakeham. This commission published its report[153] in January 2000 and its recommendations are, however, rather minimalist. Concerning the composition of the future House of Lords, the Commission conclude that "we cannot recommend a wholly or largely directly elected second chamber; [or] indirect election from the devolved institutions (or local government electoral colleges) or from among British

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[144] Hazell, Robert: *The new constitutional settlement,* op cit, p 242
[145] See: Constitution Unit: Reform of the House of Lords, London 1996 and Reforming the Lords: A step by step guide, London 1998
[146] Russell, Meg: Reforming the House of Lords, op cit, p 250
[147] Hazell, Robert: *The new constitutional settlement,* op cit, p 242
[148] Osmond, John: Reforming the Lords and changing Britain, op cit, p 22
[149] Hazell, Robert: *The British Constitution in 1998-99,* op cit, p 243
[150] See Hazell, Robert: *Westminster,* in: Hazell, Robert: Constitutional Futures, op cit, pp 113
[151] See http://www.labour.org.uk/lp/new/labour/docs/MANIFESTO/97MANIFESTOPART1.PDF
[152] Hazell, Robert: *The British Constitution in 1998-99,* op cit, p 242
[153] A house for the future, report of the Royal Commission on the Reform of the House of Lords (Wakeham), London 2000, see http://www.official-documents.co.uk/document/cm45/4534

MEPs"[154]. However, a largely appointed chamber is proposed. The report outlines that "an independent appointments system should be supplemented by an arrangement which would give the regional electorate a voice in the selection of regional members and that the political balance in the reformed second chamber should match that of the country as expressed in votes cast at the most recent general election"[155]. The commission could not find an agreement about a single composition model and proposed three options with 65, 87 and 195 elected of around 550 members. The rest is to be proposed by an independent commission[156]. The small elected part of the House is supposed to represent the nations and regions. These members are to serve twelve to fifteen years. The proposals were, obviously, not well received by the press[157].

Generally, a Second Chamber with hereditary peers being removed and a large part of appointed members is not a big progression: it is still an undemocratic and unrepresentative chamber[158]. The House of Lords should be reduced in size and built around the British nations and regions. This would considerably add to its role and improve the overall aim of devolution for two further reasons[159]. First, there could also be a counterbalance of different population sizes. Scotland, Wales and Northern Ireland could be given a certain form of over-representation, whilst their relative strength in the House of Commons is to cease. Thus, their distinctive national status could be recognised without any conflict of democratic representation principles. Secondly, there is a good reason for giving each English region the same representation regardless of their population size. This would well contribute to a increasing regionalisation of England[160]. This "weighting representation" could also improve the public perception of the House of Lords. Thus, further reform could complete the constitutional context of devolution.

The legislative powers are likely to be settled down quickly. The choice to define only the reserved rather than the devolved powers cuts a clear and logical division. Also, the precedents from the Stormont time give Westminster a certain experience to deal with legislative devolution. The "West-Lothian" question is likely to be avoided by a certain

[154] Report (Wakeham), op cit, p 113
[155] Report (Wakeham), op cit, p 113 Recommendation 69
[156] Report (Wakeham), op cit, p 114
[157] Constitution Unit: Monitor, March 2000, op cit, p 4
[158] Also Osmond, John: Reforming the House of Lords, op cit, p 29
[159] Russell, Meg: Reforming the House of Lords, op cit, p 254; Osmond, John: Reforming the Lords, op cit, p 25

reduction of Scottish and Welsh over-representation. The government may, therefore, well prefer to "muddle along" as the concerned MPs are nearly all of the Labour party. It is the same with the House of Lords. There is a great chance to establish a regionalist or even federalist scheme within the United Kingdom with the House of Lords as the central actor. However, the Wakeham report seems to have the support of the government. Hence, a "minimalist" reform is to likely. Thus, devolution faces no real problems with reference to legislative powers, but this hesitating policy does not boost devolution and regionalism in England.

B. Executive powers

It has been argued that devolution presents "the largest, the most significant and the least certain of the changes" to the machinery of government[161]. This is true if one looks at the challenges that are created by devolution. Firstly, the organisation of ministerial offices is to change as the Secretaries of State for Scotland, Wales and Northern Ireland are muting their tasks even if they are likely to remain in the mid-term. Secondly, the unitary civil service has to adapt with its new role as an exclusive supporter for the government at London, but now also for the devolved executives at Belfast, Cardiff and Edinburgh and later perhaps in the English regions. Thirdly, the intergovernmental co-operation within the United Kingdom creates a challenge for the development of the administrations. The JMC and the conclusion of concordats most apparently show this. Additionally, the machinery of government faces the consequences[162] of the proportional electoral systems in the devolved areas, what is likely to lead to a more frequent change of government as coalitions have to be concluded. There may be even other challenges for Whitehall but they are not due to the devolution legislation like for example the Freedom of Information Act and the Human Rights Act 1998[163]. Consequently, they are not considered here.

1. Whitehall

The famous "West-Lothian" question concerns directly only the representation of MPs of the

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[160] Russell, Meg: Reforming the House of Lords, op cit, p 254; Osmond, John: Reforming the Lords, op cit, p 25
[161] Hazell/ Morris: *Machinery of government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 137
[162] Hazell/ Morris: *Machinery of government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 136
[163] Hazell/ Morris: *Machinery of government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 136

devolved areas at the Westminster parliament[164]. The importance of this question was increased when it became likely that general elections could return a Labour government with a Scottish Shadow Secretary of State for health, although the party wanted to devolve the matter of "health" to a Scottish parliament. The then Shadow Secretary denied the possibility for a Scot to become Minister in an area of devolved responsibility. He said, "once we have a Scottish parliament handling health affairs, it would not be possible for me to continue as Minister of Health, administering health in England"[165]. Apart from this "national" capacity for certain offices, the question is as to whether the devolved areas should enjoy having a continuos special treatment at Whitehall[166]. When Northern Ireland enjoyed "Home Rule" from 1921, it did not have its own Secretary of State[167]. There was a Governor, who had certain statutory powers including the power[168] to reserve the royal assent from a bill. This was, however, attempted only once when the Northern Ireland parliament envisaged altering the system of voting from proportional representation in local government elections to first-past-the-post[169]. The Governor's position, therefore, lacked real meaning[170]. Thus, one might be asked today, if the offices of the Secretaries of State are to remain after devolution. It is to question what functions a remaining Secretary of State in the present devolution scheme may have. In the 1978 Devolution Act the post of the Secretary of State was to remain with significant powers, although the Kilbrandon Commission agreed on the dropping of that office[171]. Six functions for the Office of the Secretary of State have been identified under the then devolution proposal[172]. First he or she has the function of a Cabinet Minister. Secondly, there is the function of a "wet nurse" at the beginning of the parliament or the assembly. Thirdly, he or she accomplishes "viceregal" or "continuity" functions inviting someone to form a government after the elections. Fourthly, "veto" functions are characteristic for that office as it can adjudicate on whether legislation is "*ultra vires*" and asking for the removal of offending sections. Fifthly, the Secretary may be the channel for all communications with Europe and finally, he or she has the function of a chief advisor to the Whitehall government on all aspects of the respective territory's affairs. Generally, these functions are to continue[173].

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[164] See above
[165] Cook, Robin in BBC 'On the record', 16 February 1992 quoted in Bogdanor, Vernon: Devolution in the UK, op cit, p 228
[166] Bogdanor, Vernon: Devolution in the UK, op cit, p 265
[167] Hadfield, Brigid: *A Northern Irelands perspective on the White Paper,* in: Public Law, op cit, p 669
[168] Government of Ireland Act 1920, section 12
[169] See above
[170] See Hadfield, Brigid: The Constitution of Northern Ireland, op cit, p 49
[171] Constitution Unit: Scotland's Parliament, op cit, p 100
[172] Mackintosh, John: *The power of the Secretary of State,* in: New Edinburgh Review, No 31, Edinburgh, February 1976
[173] See also Constitution Unit: Scotland's Parliament, op cit, pp 102 and Constitution Unit: An Assembly for

The government's White Papers on Scotland and Wales, however, were quite clear about the further role for these offices. They are not only to secure the passage and implementation of the legislation to establish the Scottish parliament and then to support its initial development, but also to establish the liaison between Whitehall and the devolved administrations[174]. The White Paper stated that once the Scottish parliament is in being, and the Scottish Executive established, the responsibilities of the Secretary of State will change. His focus will then be on promoting communication between the Scottish parliament and Executive and between the UK Parliament and Government on matters of mutual interest, and on representing Scottish interests in reserved areas[175]. Representatives of the UK government (usually the Secretary of State) and the Scottish Executive will meet from time to time, to discuss particular issues or simply to take stock of relations. These arrangements will be updated regularly to reflect the evolution of administrative conventions of co-operation and joint working"[176]. And "A voice for Wales" outlined[177] that "Wales's voice must be felt in cabinet and parliament". Thus, there is "a continuing role for a separate Secretary of State for Wales, with a seat in the cabinet, to safeguard Welsh interests". Therefore, there are current functions of the territorial Secretaries of State which are justified, but when devolution is working successfully their roles must be transformed. However, these positions could remain for other "non-devolution" reasons as political balance, patronage or symbolic aims[178]. More generally, indeed, the territories need a continuous voice at Whitehall. This could be achieved in the long-term by replacing the three offices by a single minister responsible for the generality of territorial affairs[179]. Its principal business would be the management of intergovernmental relations in broadest terms, what was put forward in the MoU as follows: "The UK Government and the devolved administrations commit themselves, wherever possible, to conduct business through normal administrative channels, either at official or Ministerial level. The Secretaries of State for Scotland, Wales and Northern Ireland, whose functions include the promotion of good relations between the UK Government and the respective devolved administrations, should be consulted in any significant case of disagreement"[180]. For all non-devolved matters, it is central government at Whitehall, which represents the United Kingdom interest. This cannot

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Wales, op cit, p 80 with slightly different meanings
[174] White Paper, Scotland's Parliament, op cit, p 14
[175] White Paper, Scotland's Parliament, op cit, p 14, para 4.12
[176] White Paper, Scotland's Parliament, op cit, p 14, para 4.14
[177] White Paper, A voice for Wales, op cit, p 8
[178] Hazell/ Morris: *Machinery of government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 137
[179] Hazell/ Morris: *Machinery of government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 137
[180] Memorandum of Understanding, part I, para 24, available at the official Website of the Assembly:

only be concluded by the different devolution Acts, but it is also stated in the MoE[181]. Policy responsibility for the non-devolved matters lies with the relevant United Kingdom Ministers and departments. Within the government, the Secretaries of State for Scotland, Wales and Northern Ireland continue to ensure that the interests of those parts of the UK in non-devolved matters are properly represented and considered. In the MoU the devolved administrations agreed to provide Whitehall with any factual information and expert opinion available to them relevant to such non-devolved matters[182].

However, the Secretaries of State will be confronted by different problems. First, the situation may arise, where the political majorities in Scotland, Wales or Northern Ireland differ from London. That constellation might be similar to the French *"cohabitation"*[183]. Then, the role for the Secretary of State may prove very difficult[184]. On the one hand, the Secretary is constitutionally charged to represent the Scottish interests at the central government and, on the other hand, he or she is member of the majority party at Westminster and has to follow the discipline of the cabinet. Tensions may therefore arise due to the claims of Scotland about drafted legislation on reserved matters or about the implementation of reserved matter legislation in Scotland by Whitehall. Especially European matters may put the Secretary in difficulties as for example when the French government stated during the French "beef ban" at the end of 1999 that it offered to Whitehall to import Scottish beef whilst the newly established Scottish parliament has not been informed about that proposal[185]. Such situations are likely to cause disturbances at the Secretary's office, as it is impossible for him or her to fulfil both the will of the Scottish and the British parliament. The Scotland Act 1998 itself does not give much information about the relationship between Edinburgh and Whitehall, albeit it gives the Secretary of State express and limited overruling powers[186]. Similar powers are provided by the Northern Ireland Act 1998[187]. Whilst these two devolution schemes attribute a more controlling role to the Secretary of State, the Welsh scheme needs a more supporting role of this Minister. That special relationship with the Secretary of State is due to the fact that the Assembly itself does not have legislative power. Thus, it is up to the Secretary of State to advocate for Wales at Westminster and at Whitehall concerning primary

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http://www.assembly.wales.gov.uk/works/mouestats_e.html

[181] Memorandum of Understanding, op cit, part I, para 21

[182] Memorandum of Understanding, op cit, part I, para 21

[183] Rawlings, Richard: *The new model Wales,* in: Journal of Law and Society, op cit, p 488

[184] Himsworth/ Munro, op cit, p 35

[185] See *Bulldog gegen Marianne,* in: Die Welt, 17 December 1999

[186] Sections 35 and 58

[187] Sections 14 and 25

legislation. On the one hand, the Act[188] sees it as a responsibility of the Secretary of State to consult the Assembly concerning the legislative proposals of the British government, but only as far as parliamentary legislation is concerned[189]. The Assembly may be able to press for the inclusion of a bill in the legislative programme, and the Secretary will probably remain entitled to request a place for a legislative proposal in the programme[190]. On the other hand, he might, however, have more information than his colleagues at the Assembly or the Welsh MPs. That may create further questions about the freedom of information[191], but most of all it is likely to create tensions when the Secretary of State takes part at the sessions of the Assembly. The Government of Wales Act 1998[192] provides for the Secretary of State to attend and to participate in any proceedings of the Assembly. This does, indeed, not include the right to vote. The Assembly needs complete autonomy from any Whitehall office, although the fact that there was a close relationship with the Secretary of State during the first months of the Assembly supported the general work of the devolved body[193]. When the Wales Bill 1998 was introduced in the Commons, there were some fears that a role combining the office Secretary of State and of the First Secretary may give the wrong "message to the Welsh people about the position of the Assembly"[194]. Conversely, the Membership of two different persons being the Secretary of State and the First Secretary would be likely to cause troubles at the JMC with two different voices for Wales[195]. However, that situation did not arise until recently. Thus, a convention may develop that the Secretary of State is a different person from the First Secretary and that only the latter is entitled to take part at the JMC meetings. The nature of the intergovernmental relations is of crucial importance as much depends on whether the Secretary of State is envisaged as having a defensive or proactive role[196], although the Acts do not provide for clear proceedings[197]. These are provided by non statutory concordats[198]. Nevertheless, much is thus left to the vicissitudes of political bonhomie – or the lack of it[199]. The territories are furthermore represented[200] in the Privy Council, which takes important decisions although not being part of Whitehall. There the Scottish First Minister,

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[188] Government of Wales Act 1998, section 31
[189] Patchett, Keith: *Dealing with primary legislation,* in: The National Assembly Agenda, op cit, p 84
[190] Patchett, Keith: *Dealing with primary legislation,* in: The National Assembly Agenda, op cit, p 84
[191] See below
[192] Section 76 (1)
[193] Lightman, Ivor: *The Assembly and Whitehall,* in: The National Assembly Agenda, op cit, p 348
[194] Lightman, Ivor: *The Assembly and Whitehall,* in: The National Assembly Agenda, op cit, p 348
[195] Lightman, Ivor: *The Assembly and Whitehall,* in: The National Assembly Agenda, op cit, p 348
[196] Constitution Unit: Scotland's Parliament, op cit, p 101
[197] Hadfield, Brigid: *The nature of devolution in Scotland and Northern Ireland,* op cit, p 27
[198] See below
[199] Hadfield, Brigid: *A Northern Irelands perspective on the White Paper,* in: Public Law, op cit, p 670; also Patchett, Keith: *Dealing with primary legislation,* in: The National Assembly Agenda, op cit, p 84
[200] See above

the Welsh and Northern Irish First Secretaries are represented. It could be possible that Privy Counsellorships are conferred to the Leader of the Opposition in the devolved Parliaments as it is the invariable practice in London[201]. Thus, the influence of the territories at Whitehall machinery would be even stronger.

As already outlined, the nature of the relations between the devolved and central government are of crucial importance. The Scottish Office's Guide to the Scotland Bill stated[202] that "for the most part, relations will be conducted on the basis of formal, non-statutory understandings between departments and so no provision is required or made in the Scotland Bill". These non-statutory "mutual understandings" have been called concordats and in response to a written question at the House of Commons, the then Secretary of State for Scotland, Mr Donald Dewar, has described their nature as the aim "to ensure that the business of government in Scotland and at the UK level is conducted smoothly, by setting the ground rules for administrative co-operation and exchange of information. Their purpose is not to create legal obligations or restrictions on any party, or to constrain the discretion of the Scottish Executive, or Parliament or that of any UK department"[203]. Additionally, the White Paper[204] outlined that

> "the Scottish Executive will need to keep in close touch with departments of the UK government. Good communication will be vital. Departments in both administrations will develop mutual understandings covering the appropriate exchange of information, advance notification and joint working. The principles will be as follows: the vast majority of matters should be capable of being handled routinely among officials of the departments in question; if further discussion is needed on any issue, the Cabinet Office and its Scottish Executive counterpart will mediate, again at official level; on some issues there will need to be discussion between the Scottish Executive and Ministers in the UK government"[205].

Similar provision was included in the Welsh White Paper.

Questions have however arisen about the organisation of the relationship between Whitehall

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[201] Brazier, Rodney: *The Scottish Parliament,* in: Public Law, op cit, p 215
[202] Scottish Office: Guide to the Scotland Bill, Edinburgh 1997, para 23
[203] Hansards Written Answers, 23 February 1998, Question of Rosemary McKenna
[204] Scotland's Parliament, op cit, p 14
[205] White Paper, Scotland's Parliament, op cit, p 14, para 4.13

and the Northern Irish Executive[206]. As the setting up of the Northern Irish Assembly was provided by an international treaty i.e. the Good Friday Agreement, which makes no mention of concordats, one could ask if the conclusion of such concordats for Northern Ireland is possible at all. During the Committee stage of the Northern Ireland Bill implementing the Good Friday Agreement, an amendment was made that required to call arrangements under clause 21[207] "concordats" and to provide for both Parliamentary and Assembly approval of the drafts. It was argued, that "there is a suspicion... that concordats were a mechanism for the exercise of control over the peripheral parts of the United Kingdom to which devolution was to be granted"[208]. The government replied that "concordats may well be developed in future between the Northern Ireland Assembly and the UK parliament, but they will not, as has been suggested, be a means of central control. The clause 21 arrangements ... work at an operational level, not at a policy level. With a concordat, we would be dealing with policy and the development of different policies"[209]. Later, in the House of Lords' Committee stage on the same bill, the government indicated[210] that there would be concordats with regard to Northern Ireland as a way of promoting effective communications between, and the joint working of the two "governments" (only). Leaving apart the precise difference, generally, it is necessary that all legislatures, both Westminster and devolved, to develop close scrutiny procedures for such matters of intergovernmental co-operation[211].

The government's "guidance"[212] setting out the principles which might govern the concordats outlined that all formally agreed concordats should be published in accordance to the grounds set out in the White Paper on Freedom of Information[213]. The general task of the concordats is therefore to organise the executive co-operation within the devolved structure of the United Kingdom. However, a single framework applying equally to all Whitehall departments would not be practicable[214]. Thus, there was a need to develop a "tailored" structure for contacts and exchange between the devolved administrations and their counterpart at Whitehall when the concordats were prepared in 1999. The devolved bodies did not have any experience in drawing upon such agreements. However, the very fact that the devolved Executives were entitled to conclude these agreements on equal level with their Whitehall colleagues must be

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[206] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 28
[207] Now: Northern Ireland Act 1998, section 28
[208] Grieve, Dominic, MP, in: House of Commons Debates, Vol 316, col 1331, 23 July 1998
[209] Worthington, Tony, MP, in: House of Commons Debates, Vol 316, col 1335, 23 July 1998
[210] Lord Dubs, in: House of Lords Debates, Vol 593, col 1292, 19 October 1998
[211] Hadfield, Brigid: *The nature of devolution to Scotland and Northern Ireland,* op cit, p 28
[212] See Lightman, Ivor: *The Assembly and Whitehall,* in: The National Assembly Agenda, op cit, p 350
[213] White Paper, Your right to know, HMSO, Cmnd. 3818, London, December 1998

seen as an important event. In October 1999, finally, the concordats where published and agreed by the Parliaments and Assemblies framed in a "Memorandum of Understanding supplementary agreements" between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales[215]. The Memorandum of Understanding (MoU), supported by a series of supplemental agreements, set out principles for the devolved administrations in Scotland and Wales but have been drafted with devolution to Northern Ireland in mind. The Memorandum and Concordats refer, where appropriate, to devolved institutions in Northern Ireland[216].

The MoU is composed of two main parts. In the explanatory note it is outlined that "it is not intended that these agreements should be legally binding, but the expression of political intent"[217]. The principal agreement is the MoU (part one) itself. Supplementary agreements provide for the establishment of the JMC[218] and for four separate overarching Concordats, which are intended to apply broadly uniform arrangements across government to the handling of European Union matters, to financial assistance to industry, to international relations touching on the responsibilities of the devolved administrations, and concerning the statistical work in the United Kingdom[219]. The Explanatory note also proposes that individual government departments should enter into bilateral Concordats with their counterparts in Scotland and Wales. Some of such bilateral Concordats are already published in by the departments concerned. There are concordats with nearly all government departments[220]. All of the concordats refer where appropriate to devolved institutions in Northern Ireland. The arrangements as regards Northern Ireland are, however, without prejudice to the position of the Northern Ireland Executive Committee to be established in accordance with the Northern Ireland Act 1998[221]. Moreover, nothing in the Memorandum is to be construed as conflicting with the Belfast Agreement.

The MoU clarifies anew the general principles of co-operation between the devolved bodies and London. However, these principles were already guiding the devolution legislation in

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[214] Lightman, Ivor: *The Assembly and Whitehall,* in: The National Assembly Agenda, op cit, p 344
[215] Memorandum of Understanding, see: Official Site of the Scottish Parliament, SE/99/36 October 1999 (http://www.scotland.gov.uk or http://www.assembly.wales.gov.uk/works/mouestats_e.html)
[216] See Northern Ireland Office, *New Understandings for UK devolution,* Information Service, 1 October 1999 (http://www.nio.gov.uk/991001e-nio.htm)
[217] Memorandum of Understanding, part one, op cit, para 1.2
[218] MoU, op cit, para 3
[219] Memorandum of Understanding, op cit, Explanatory note
[220] See list of 19 concordats between Scottish Ministers, United Kingdom government and the Cabinet of the National Assembly for Wales: http://www.government.scotland.gov.uk/concordats/_e.html

1998. The concordats are to facilitate the day-to day business of the devolved and central administrations, which is nevertheless to adjust through bilateral agreements between the different departments. Thus, the MoU sets out that "all [four] administrations are committed to the principle of good communication with each other, and especially where one administration's work may have some bearing upon the responsibilities of another administration. The primary aim is not to constrain the discretion of any administration but to allow administrations to make representations to each other in sufficient time for those representations to be fully considered"[222]. The MoU merits to be analysed more precisely as one might argue that the arrangements of the concordats are the only co-operative option of the devolution scheme within the British Isle and that all other intergovernmental co-operation is only dependent of the (Northern) Irish question. This would imply that devolution does not attribute much importance to the meaning of the "devolved nations" as the concordats stress especially the individual contact between the United Kingdom government and the devolved governments. In that relationship, however, the balance of power is evidently in favour of the centre and the position of the devolved bodies is weak. The MoU could therefore have excluded the issue of the JMC, which has been established by the Good Friday Agreement and would theoretically not need further definition of parties like the Scottish and Welsh Executives on the one hand, and Whitehall one the other[223]. Even if that is only due to its late start, the administration of Northern Ireland was being left apart in the formulation of the MoU. However, the MoU makes special arrangements for the JMC, which is in fact a summit of the different governments within the United Kingdom. Thus it recognises the constitutional position of the devolved nations, especially of those within the British Isle. Admittedly, the MoU does not create legal obligations[224], but the settlement of the concordats may well establish a convention that the JMC is to continue even if the Irish Question is solved one day by an Irish confederation or re-unification.

2. Freedom of Information

A special problem is to be addressed in the context of the new Freedom of Information (FOI) legislation in the United Kingdom. The government published in December 1997 a White Paper "Your right to know"[225], which outlined the proposals for an improved access of the

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[221] Explanatory note, Memorandum of Understanding, op cit
[222] Memorandum of Understanding, op cit, part I, para4
[223] See above
[224] Memorandum of Understanding, op cit, Part I, 2
[225] HMSO, London 1997, Cmnd. 3818

citizens to governmental information. The Bill[226] has been published in May 1999 to provide for greater access to government information. The provisions of the Bill were, however, widely criticised as being too limited: special focus has been put on the exemption provisions and on the capacity to create new exemptions by ministerial order[227]. The Bill provides for a general right of the citizen to be informed by public authorities[228]. These authorities are defined in Schedule 1 of the Bill. Scotland is, of course, not covered by the Bill, as FOI is not a reserved matter. Thus, it is up to the Scottish Parliament to legislate for freedom of information at the Parliament's institutions[229]. The Scottish Executive published for consultation in November 1999 its own proposals for a statutory FOI regime which will apply to Scottish public authorities[230]. One of the main features of the Scottish proposals is the establishment of an independent Information Commissioner, who will have powers to order public authorities to disclose information if it is in the public interest. There will also be a statutory duty on public authorities to specify categories of information which the authority intends to publish. All public authorities in Scotland who will be included by the scope of the proposed legislation will be subject to the same FOI regime.

The position for the Assemblies in Wales and Northern Ireland is slightly different. While they will be bound by the terms of the new Bill[231], there is nothing in it to prevent them from being more open if they want to do so. Indeed, the Government of Wales Act[232], for example, requires the Assembly to act openly and to make information available to the public except in specified circumstances. Accordingly, the new First Secretary of the Assembly, Rhodri Morgan, made a statement to the Assembly in March 2000 setting out proposals for even greater openness in Wales[233]. While it is possible that the Assembly publishes more information than the UK Government, the First Secretary has made clear that only applies to information generated by the Assembly.

However, the practice may prove as to whether problems between discretion at Whitehall and Westminster prevents the devolved bodies to "open" information to the public. One

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[226] See: Freedom of Information Bill 1999 (http://www.publications.parliament.uk/pa/pabills.htm)
[227] Hazell, Robert (et al.): *The British Constitution 1998-99,* in: Parliamentary Affairs, op cit, p 257
[228] See e.g. Craig, Paul: Administrative Law, op cit, pp 220
[229] Freedom of Information Bill 1999, clause 29
[230] An Open Scotland, Freedom of Information, A Consultation, see http://www.scotland.gov.uk/library2/doc07/opsc-00.htm
[231] Freedom of Information Bill 1999, clause 34, also Schedule 1 (Wales), and clauses 3 (8), Schedule 1 (Northern Ireland)
[232] Government of Wales Act 1998, section 70
[233] See http://www.wales.gov.uk/newsite.dbs?380313AC00046B17000028C300000000+current

meaningful example was the French ban of British beef at the end of 1999 ("beef-ban"). In December 1999, it has been revealed by the French government that it had offered to import Scottish beef, but not British beef[234]. The Scottish Parliament, however, has not been informed about that proposal. The problem might be, however, that either the Scottish First Secretary has not been informed or that he did not communicate his information to the Parliament. Next time, the MSPs may be inclined to ask for "all" information. Clause 26 of the Westminster Bill proposes that information is exempt information if its disclosure under the Act would, or would be likely to, prejudice, relations between any administration in the United Kingdom and any other such administration[235]. Administration in the United Kingdom includes here the Whitehall government, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly and the National Assembly for Wales. The duty to information ("confirm or deny") does not arise if, or to the extent that, compliance with these purposes would, or would be likely to, prejudice any of the matters mentioned[236]. Also, under clause 33, information held by a government department is exempt information if it relates to the formulation or development of government policy or ministerial communications. Then, there is no duty to inform ("confirm or deny") in relation to information[237], whilst "government department" includes the National Assembly for Wales and the Law Officers, and "Ministerial communications" means any communications between Ministers of the Crown, Northern Ireland Ministers or Northern Ireland junior Ministers and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet and proceedings of the Executive Committee of the Northern Ireland Assembly[238]. All this implies, indeed, that the devolution may well challenge the forthcoming Freedom of Information Act, as the devolved bodies might be inclined to adopt in their Standing Orders a greater openness than the Act. Then, however, Ministers or Secretaries may be in trouble especially if the nature of the concerned information is difficult to define. On the one hand, they are bound by the Freedom of Information Act and, on the other hand, the Standing Order allow for the publication. The Assemblies might be tempted to use that information for their own purposes. At the time being, the Act is not yet made and the amendments to the Standing Orders are not tabled in this concern. However, the Executive Committee of the National Assembly in Wales publishes its records in the meanwhile[239]. Thus, temptations and problems

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[234] See *Bulldog gegen Marianne,* in: Die Welt, 17 December 1999
[235] Clause 26 (1)
[236] Clause 26 (3)
[237] Clause 33 (2)
[238] Clause 33 (3)
[239] See Western Mail, 27/04/00

for the administrations in Edinburgh or Cardiff are well foreseeable.

3. The Civil Service

For the impact of devolution on the Civil Service, a review of the first experience of devolution may illuminate some problems. When Northern Ireland gained its own Assembly, a separate Northern Irish Civil Service was also established[240]. Thus, two Civil Services were active in Northern Ireland, one for the devolved functions and, another for the reserved ("imperial") functions such as Revenue, Customs and Defence with definitely different responsibilities[241]. Then, however, the definition of a civil servant as "a servant of the Crown, other than holders of political or judicial offices, who is employed in a civil capacity and whose remuneration is paid... by parliament"[242] is to be changed, because he or she can serve the Crown or a devolved body. This division implied that the staff of the respective service had different loyalties. This system was expected to be questioned by the Kilbrandon Commission. However, the Commission advocated in favour of the extension of two different Civil Services to Scotland and Wales for devolved affairs. It argued that elected governments are "not comparable to departments of the same government; the former have their own power bases while the latter do not. We think that regional governments would wish to be responsible themselves for the selection of their senior officials and would not be prepared to accept that personnel matters should be handled by a department of the central government"[243].

Nevertheless, the Devolution Acts in 1978 did not provide for a separate Civil Service in Scotland and Wales[244], as they would be more expensive reproducing functions at Edinburgh and Cardiff which exist already at Whitehall. Moreover, it could not be assumed that all civil servants of the Scottish or Welsh Office would transfer into a devolved Civil Service. The problem of "divided loyalty", however, would according to the then government not have caused major problems to the Service as they were used to give "wholehearted service to whichever Ministers are in charge of their departments"[245]. The maintenance of a unified Civil Service would allow the Scottish Executive "to draw its officials more easily from a wide pool of talent and experience" and foster the co-operative relationship with other

[240] Constitution Unit: An Assembly for Wales, op cit, p 86
[241] Constitution Unit: Scotland's Parliament, op cit, p 114
[242] Report on the Royal Commission on the Civil Service, 1929-31, Cmnd. 3909, HMSO, London
[243] Royal Commission on the Constitution, Cmnd. 5460-I, op cit, para 807
[244] Constitution Unit: Scotland's Parliament, op cit, p 115

Ministries, which have implemented devolution[246]. Whatever a future Scottish government might have concluded, the then Whitehall government thought that it would take "some years" to establish a new service[247].

That was the departing situation which framed the Civil Service question in the context of a new devolution scheme. When the new Labour government came to power in 1997, there were practical arguments strong enough for the maintain of a unified service[248]. It seemed to be reasonable to establish the devolved bodies with an experienced civil service. Moreover, the recruitment of a new Service would have been necessary before the Scottish Parliament and the Welsh Assembly were to be created. Thus, every decision would have been provisional subject to later parliamentary or assembly decisions about the precise terms of employment[249]. In the meanwhile, new challenges have been put on the Civil Service. Different changes following the White Paper "The Civil Service: Continuity and Change"[250], including a new Civil Service Code[251], have created a "potentially more encouraging framework" for a unified Civil Service[252]. The Welsh White Paper[253] stated that the staff of the Assembly will be members of the Home Civil Service and Section 34 of the Act repeated this fact is terms of status, pay and management. Similarly, the Scottish White Paper stated[254] that "as the Executive powers will broadly include all areas of policy currently within the remit of the Scottish Office, its staff will be drawn largely from the existing staff of the Scottish Office and its Agencies. All officials of the Executive will hold office under the Crown on terms and conditions of service which will be determined in accordance with the provisions of the Civil Service Management Code – thereby remaining members of the Home Civil Service". Thus, "these arrangements will give the Scottish Executive the support of a tried and tested civil service machine, and access to wide pool of talent and experience"[255]. The Scotland Act 1998[256] itself repeats that standpoint and the guidance issued to civil servants outlined[257] that "constitutionally, the position of the Civil Service will be unchanged

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[245] Cited in: Constitution Unit: Scotland's Parliament, op cit, p 115
[246] Constitution Unit: Scotland's Parliament, op cit, p 115; see also White Paper, Scotland's Parliament, op cit, p 32
[247] Constitution Unit: Scotland's Parliament, op cit, p 115
[248] Hazell/ Morris: *Machinery of Government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 138
[249] Constitution Unit: Scotland's Parliament, op cit, p 115
[250] White Paper, The Civil Service: Continuity and Change, Cmnd. 2627, July 1994, HMSO, London
[251] See: Barnett, Hilaire, op cit, pp 376-378
[252] Constitution Unit: Scotland's Parliament, op cit, p 115
[253] A voice for Wales, op cit, p 30, para 4.41
[254] Scotland's Parliament, op cit, p 32, para 10.11
[255] Scotland's Parliament, op cit, p 32, para 10.12
[256] Section 51
[257] Welsh Office guidance, para 14, February 1998

by devolution". That implies that the "ultimate loyalty" of the British Civil Service remains to the Crown, but in practice, the loyalty of individual civil servants is "to whichever administration they are serving"[258]. That expression has been interpreted as "obviously reassuring"[259]. To take Scotland as an example, most civil servants in Scotland are not in the Scottish Office, but in administrative units which are not part of the devolved bodies. The Ministry of Defence and the Department of Social Security have the most important part of the 30.000 servants of non-devolved services[260]. And even within the devolved administration the majority of the staff works in civil service agencies with their own more autonomous structure[261]. Generally, the principle of a United Kingdom-wide Service applies and the only difference might be that the Scottish administration continues to be drawn upon "fast-stream recruitement" procedures for its future heads[262]. However, the decisions for the Scottish administration follow the Civil Service Management Code and therefore do not all need the approval by Whitehall. The Civil Service in Scotland does not include the staff of the Scottish Parliament. The corporate body of the Parliament has its separate organisation[263]. Thus, unlike Wales, conflicts are not likely.

On the government's side, there is a wish to preserve a common basis of employment and professional behaviour. However, one might be inclined to question as to whether such guidance is a proof against new developing loyalties and alternative centres of power. One might question how the office holders at Edinburgh or Cardiff will view themselves in relation to their counterparts in Whitehall[264]. Apart from that, it has been argued that even if the governments in Edinburgh or Cardiff and Whitehall are of the same party, it cannot be assumed that there is automatically a common approach to questions[265]. Thus, it is likely that the unified Civil Service will encounter problems which are able to cause tensions and pressure from the devolved administrations for their own service, like it is the case in Northern Ireland[266]. It is not difficult to imagine that scandals may be taken as an opportunity for the Welsh or Scottish Executives to claim an individual module of Civil Service including

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[258] Welsh Office guidance, para 14, February 1998 cited in Lightman, Ivor: *The Assembly and Whitehall,* in: The National Assembly Agenda, op cit, p 342
[259] Hazell/ Morris: *Machinery of Government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 138
[260] Parry, Richard: *The Scottish Civil Service,* in: Hassan, Gerry: A guide to the Scottish Parliament, op cit, p 66
[261] Parry, Richard: *The Scottish Civil Service,* op cit, p 65
[262] Parry, Richard: *The Scottish Civil Service,* op cit, p 65
[263] Scotland Act 1998, Section 21
[264] Lightman, Ivor: *The Assembly and Whitehall,* in: The National Assembly Agenda, op cit, p 343
[265] Hazell/ Morris: *Machinery of Government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 138 citing the differences between "New" and "Old" Labour
[266] Constitution Unit: Scotland's Parliament, op cit, p 114, see also the comparison in: Lightman, Ivor: *The Assembly and Whitehall,* in: The National Assembly Agenda, op cit, p 343

the control of the recruitment and career development of their own officials. Even without any spectacular event, the fact that the Welsh or Scottish Civil Services have their professional head at the Cabinet Secretary in London[267], may create the "inevitable desire of elected Assembly members to be masters in their own house"[268]. Therefore, conflicting loyalties can be expected to become increasingly real as time passes. Thus, the issue of the devolved but unified civil service is not yet settled[269]. It might be an advantage for the civil servants themselves as their mobility and careers are not restricted. Those who are politically responsible in Cardiff and Edinburgh, however, might tend to see therein a problem of owed loyalty. This has been shown by the standing out of the main senior officials at the Scottish Office. Their retreat was based on the thought that they presage a new breed of more visible public officials in Scotland at a time when the new Civil Service searches a balance between the traditions and practices it has inherited and the novel political context it will face[270]. The challenges of the Civil Service will appear at a moment when the devolved bodies will have "settled down" and will claim different political working practices within and outside the devolved Parliament/ assemblies.

Devolution is likely to create problems at Whitehall and at the administration of central government. The different loyalties and the distinct responsibilities have not been sufficiently considered when the legislation has passed. In part, the issue is due to the asymmetrical nature of the current devolution module. Whilst Scotland (and Northern Ireland later) should theoretically not need their own Secretary of State, Wales is in some way dependent on this position having no primary legislative powers. Additionally, all forms of *cohabitation* lead normally at least to a certain stagnation of government, as the French example shows. Ironically, the argument of a political deadlock has been put forward against federalism[271]. With devolution, it may be now more likely to happen in a situation where the political parties in Edinburgh and Westminster differ. Lastly, the unified civil service does, in the foreground, not really create problems, as almost all departments can independently choose their servants at the lower and middle level. However, the senior figures continue to be chosen by central government. This is likely to create, in theory at least, tensions between the governmental

[267] Hazell/ Morris: *Machinery of Government: Whitehall,* in: Hazell, Robert: Constitutional Futures, op cit, p 138
[268] Lightman, Ivor: *The Assembly and Whitehall,* in: The National Assembly Agenda, op cit, p 343
[269] Parry, Richard: *The Scottish Civil Service,* in: Hassan, Gerry: A guide to the Scottish Parliament, op cit, p 70
[270] Parry, Richard: *The Scottish Civil Service,* op cit, p 71
[271] Royal Commission on the Constitution (Kilbrandon), Cmnd. 5460-I, pp 157

responsibility[272]. Administrative competences are thus a neglected issue in the devolution framework.

C. The Fiscal constitution

One decisive feature of a federal system would be a certain degree of financial autonomy for the various parts of the state[273]. Thus, the financial settlement of devolution also exerts a dominant influence on whether the purposes of devolution are supported or "frustrated"[274]. Financial devolution may well be the "heart of the problem"[275]. There are two main precedents of how the financial responsibility can be organised in the United Kingdom. First, the Northern Ireland module between 1921 and 1972 and later the proposals for the 1978 devolution scheme.

1. Regional integration in the budget

Devolution conferred to Northern Ireland no autonomy in financial matters. Initially, the module framed in the 1920 Act should provide for an autonomous fiscal unit as the province should have its own revenue which was to be used for the "transferred services"[276]. Northern Ireland's taxing power was divided between reserved and transferred taxes, but Stormont was not supposed to be able to pay the whole of the transferred services by transferred taxation[277]. The province should not enjoy financial autonomy at the expense of the centre, albeit the British government had pledged to treat Ireland with generosity[278]. Therefore, on the one hand, Northern Ireland had to pay an "Imperial Contribution", which was to be determined by a Joint Exchequer Board with members of the Treasury and the Ministry of Finance in Belfast[279]. Since tax relief could not be given at the expense of that imperial contribution, Stormont never used its power to offer tax rebates which would have meant cuts in public services[280]. On the other hand, financial devolution did not include major taxes. As the 1920

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[272] See Welsh Case above
[273] Maunz, Theodor; Zippelius, Reinhold: Staatsrecht, op cit, p 119
[274] Bogdanor, Vernon: Devolution in the UK, op cit, p 235; also Tomkins, Adam: *Devolution: A constitutional imperative?,* in: Tomkins, Adam (ed.): Devolution and the British Constitution, op cit, p 111
[275] Lawrence, R.J.: *Devolution reconsidered,* in: Political Studies, Vol 4, Clarendon, Oxford 1956, p 3
[276] Lawrence, R.J.: The government of Northern Ireland, Clarendon, Oxford 1965, p 40
[277] Bogdanor, Vernon: Devolution in the UK, op cit, p 81
[278] Lawrence, R.J.: The government of Northern Ireland, op cit, p 41
[279] Lawrence, R.J.: The government of Northern Ireland, op cit, p 40-41
[280] Bogdanor, Vernon: Devolution in the UK, op cit, p 82

Act was initially conceived for both parts of the Isle[281], Ireland had only the tax raising power for minor taxes like the motor-vehicle licensing tax, entertainment and stamp duties. These taxes constituted only approximately 20 per cent[282] of the total revenue in the province. Therefore, it was treated as a separate fiscal unit concerning its expenditure, but as a part of the United Kingdom concerning the taxation[283]. Northern Ireland's income was based on attributions of revenues, which were decided at Westminster –there was no financial devolution in practice. The financial arrangements were unsuitable from the beginning, although the estimates in 1920 showed a surplus of £2.25m[284]. The revenue fell by 1925 to little more than a half, but the British government was unwilling to allow domestic expenditure to eat up the imperial contribution[285]. In 1923, a Northern Ireland Special Arbitration Committee was set up under the Chairmanship of Lord Colwyn. The Colwyn Committee argued that the initial arrangements were to be changed fundamentally as the connection should be between the per capita spending on services in the province and the per capita expenditure on services in the residual part of the United Kingdom, but not between the Northern Irish revenue and its expenditure[286]. Thus, the Imperial Contribution became not a first charge on the Northern Irish budget, but a residual reduction thereby guaranteeing that the services in Ulster would be improved in the same way as in the rest of the United Kingdom given the premise that the transferred taxation was equal to the taxation in Britain. This implied obviously that Northern Ireland's budget became increasingly dependent upon the British government[287]. However, being based on different needs, that formula did not imply an equal standard of services in Northern Ireland and the rest of the country[288]. There remains a certain uncertainty, as the Joint Exchequer Board has never published any reports and it is apparently taken for granted that the public did not have the right to know in detail, how the province was financed[289].

This model of financial support led the British government in 1938 to the establishment of the "principle of parity"[290] between Belfast and London, which eliminated finally any financial

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[281] Green, Arthur J.: *Devolution and Public Finance: Stormont from 1921 to 1972*, in: Studies in Public Policy, No. 48, University of Strathclyde, Glasgow 1979, p 1; see also above
[282] Bogdanor, Vernon: Devolution in the UK, op cit, p 82
[283] Bogdanor, Vernon: Devolution in the UK, op cit, p 82
[284] Lawrence, R.J.: The government of Northern Ireland, op cit, p 41
[285] Lawrence, R.J.: The government of Northern Ireland, op cit, p 43
[286] Bogdanor, Vernon: Devolution in the UK, op cit, p 83-4; Lawrence, R.J.: *Devolution reconsidered,* in: Political Studies, Vol 4, op cit, p 9
[287] Lawrence, R.J.: The government of Northern Ireland, op cit, p 47
[288] Bogdanor, Vernon: Devolution in the UK, op cit, p 84
[289] Lawrence, R.J.: The government of Northern Ireland, op cit, p 49
[290] Bogdanor, Vernon: Devolution in the UK, op cit, p 88; also Green, Arthur J.: *Devolution and Public Finance:*

autonomy as it was based on the idea that if "a deficit on the Northern Ireland Budget, which was not the result of a standard of social expenditure higher than that of Great Britain nor the result of a standard of taxation lower than that of Great Britain", central government would "make good this deficit in such a way as to ensure that Northern Ireland should be in a financial position to continue to enjoy the same social services and have the same standards as Britain"[291]. Additional expenditure of central government was finally necessary after the introduction of the "concept of leeway"[292] of the then Chancellor, Sir Kingsley Wood, stating that "in certain spheres Northern Ireland has considerable leeway to make up in order to attain equality of standard with the United Kingdom, and [Northern Ireland's government] can confidently rely on the Treasury always considering such a case sympathetically, as indeed the principle of parity requires... to do."[293] At the end of alterations, the Northern Irish finances were determined by its needs and the Whitehall government had to spend more for Northern Ireland than foreseen[294]. Nevertheless, the Stormont government developed in some areas of devolved matters its own module of policy: In the realm of agricultural and industrial development and of regional planning the advantages of transferred responsibility were manifest. The regional autonomy of Belfast was additionally attributed with a better economic performance than the other regions of the United Kingdom, which were confronted with the same problems at the same time[295]. On the contrary, there were areas of devolution, which made less sense as, for example, health and social security[296]. The main problem was that the Ulster government was not accountable for its decision to its electorate, but to the Treasury in London. Northern Irelands budget was decided in private negotiation between the two governments. Therefore, it has been written that the government at Stormont was "both compelled and entitled to look to Britain for help in future budgetary difficulties"[297]. At last, such arrangements proved to be neither efficient nor democratic[298].

The devolution schedule proposed under the 1978 Act envisaged that the devolved Assemblies should not enjoy substantial tax-raising powers[299]. The major funding was to be

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Stormont from 1921 to 1972, in: Studies in Public Policy, No. 48, op cit, p 10

[291] Laid down by Sir John Simon, in: House of Commons Debates, Vol 335, cols 1708-09, 12 May 1938

[292] Green, Arthur J.: *Devolution and Public Finance: Stormont from 1921 to 1972*, in: Studies in Public Policy, No. 48, op cit, p 10; also Bogdanor, Vernon: Devolution in the UK, op cit, p 89

[293] Cited in: Lawrence, R.J.: The government of Northern Ireland, op cit, p 70

[294] Lawrence, R.J.: The government of Northern Ireland, op cit, p 59

[295] Minutes of evidence, HMSO, London 1971, iii, para 71, cited in Bogdanor, Vernon: Devolution in the UK, op cit, p 91

[296] Minutes of evidence, HMSO, London 1971, iii, para176

[297] Lawrence, R.J.: The government of Northern Ireland, op cit, p 59

[298] Bogdanor, Vernon: Devolution in the UK, op cit, p 89

[299] Bogdanor, Vernon: Devolution, op cit, p 196

provided by a block grant, which was to be annually negotiated between Whitehall and the devolved governments. However, that grant should be subject to an annual vote in the House of Commons and thus lie emptily at the government's discretion. The proposition of an annual block fund constituted an improvement for the Secretaries of State for Wales and Scotland, as they were not longer obliged to press their case in cabinet as before. The service-by-service determination of public expenditure ensured an easier position for the devolved institutions in this sense, because each service was provided with the respective funds referring to the formula of the block[300]. In the Select Committee on Scottish Affairs[301], the Scottish Office told in 1980 that "it was calculated that the arrangement was advantageous because public expenditure control was getting tighter and more complex and that the days of table-thumping were ceasing to have their effect. This was the consideration that was borne in mind in accepting this arrangement". Apart from this, the then White Paper "Our Changing Democracy" proposed[302], on the one hand, that the devolved Assemblies should be able to secure extra finance by imposing a surcharge on local authority rates. That purpose was, however, abandoned less later as it was foreseeable that it would create immense tensions between the devolved administrations and local government[303]. On the other hand, the White Paper made clear that the government was not intended to follow the proposals of the Kilbrandon Commission, which had recommended that the amount of the block grant should be determined by an independent Joint Exchequer Board as it was the case in Northern Ireland[304]. The White Paper replied that "no neat formula could be devised to produce fair shares for Scotland (and for England, Wales, and Northern Ireland) in varying circumstances form year to year. The task involves judgments of great complexity and political sensitivity"[305]. Also, it rejected the idea that the Scottish Assembly could be funded from the gains of the North Sea Oil at the Scottish off-shore, an idea often put forward by the Scottish Nationalists[306]. The White Paper told "that the oil must be treated in the same way as other natural resources and the benefits brought into the national pool for distribution in accordance with relative needs. Any other course could destroy not only economic unity but also political unity"[307]. However, that approach was similar to the Northern Irish experience as the new

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[300] See further below
[301] Select Committee on Scottish Affairs, *Minutes of Evidence,* in: House of Commons Debates, Vol 689, Qu 50, 7 July 1980
[302] White Paper, Our Changing Democracy, HMSO, London 1978, paras 95
[303] Bogdanor, Vernon: Devolution, op cit, p 197; see further below
[304] Royal Commission on the Constitution (Kilbrandon), op cit; see also above
[305] White Paper, Our Changing Democracy, op cit, para 100
[306] See above
[307] White Paper, Our Changing Democracy, op cit, para 97

bodies should enjoy wide political powers, but should be unable to raise their own revenue[308]. That criticism was replied by the then Prime Minister, James Callaghen, by the following: "We are not against it [i.e. revenue- raising powers] in principle. We have simply not yet found a scheme which would be satisfactory"[309]. However, the Scottish Executive should be able to borrow up to £75m to cover short term problems in managing its finances[310]. In the aftermath of the critics concerning the tax-raising powers, the government published another White Paper called "Devolution: Financing the Devolved Services"[311], where it put forward the idea that the block grant could be based on a non-statutory formula relating to the total of devolved public expenditure in Scotland or Wales to comparable expenditure elsewhere in the country on the basis of relative need. That formula should reduce the range of conflict between Whitehall and the devolved administrations, but it did not introduce any revenue-raising powers for the latter. However, this project was shelved after the referendums in 1979. What survived was the formula of the annual block, called after the then Chief Secretary of the Treasury, Joel Barnett[312]. In 1976, the Treasury was asked to undertake a "needs assessment study" to calculate the relative amounts of expenditure per capita required to provide the same range and levels of service in Scotland, Wales, Northern Ireland and, England[313]. The study assessed relative levels of spending need for England (100), for Scotland (116), for Wales (109) and, for Northern Ireland (131)[314]. Generally, the study concluded that if the devolved services should provide the same range and levels of service as in England, a higher expenditure would be necessary for them. However, in 1976-77 the share of spending was already higher outside England, as Wales had a spending of 106 compared with England at 100. In Scotland (122) and in Northern Ireland at 135 the spending was even higher than the study assessed. Consequently, the "Barnett-formula" allocated increases or decreases in public expenditure to Scotland, Wales and England in the ratio of 10:5:85, which corresponds to the rounded share of the United Kingdoms population in 1976. For every marginal £85 on comparable expenditure on English services equivalent to those in the Scottish and Welsh block, the Scottish block automatically received £10, the Welsh block £5[315]. That system was enlarged to Northern Ireland, which received £2.75 extra on an

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[308] Bogdanor, Vernon: Devolution, op cit, p 198
[309] James Callaghen, in: House of Commons Debates, Vol 922, col 990, 13 December 1976
[310] Constitution Unit: Scotland's Parliament, op cit, p 80
[311] HMSO, Cmnd. 6890, July 1977, para 76
[312] For the Barnett-forumula see basically: Heald, David: *Territorial public expenditure in the United Kingdom,* in: Public Administration, Vol 72, London 1994, pp 147
[313] Constitution Unit: Scotland's Parliament, op cit, p 65
[314] See for more details, Constitution Unit: Scotland's Parliament, op cit, p 65 (e.g. table 3); or House of Commons Research Paper 98/8, The Barnett formula, January 1998
[315] Bogdanor, Vernon: Devolution in the UK, op cit, p 243

increase of £100 in England. The then government expected that over time these incremental changes could bring about a gradual convergence of country-wide spending[316].

In the aftermath of the 1978 calculations, however, the whole system of public finance has become more and more divorced from the allocation of functions to the public authorities[317]. The progressive weakening of the local authorities under the Thatcher-era limited their tax-bases considerably. Currently, local authorities raise only around 20 per cent of their revenue locally[318]. However, even the Kilbrandon Commission advocated in 1973 a more decentralised financial system stating that the present "degree of financial dependence on the centre is generally considered unhealthy"[319]. Bogdanor[320] identifies two main factors being responsible for the increasing drift to the centre. A first point to be made is that public expenditure in Britain is generally allocated to relative need and not to geography or population. That implies that any transfer of taxing power leads easily to a benefit of the richer parts of the country at the expense of the poorer parts. However, devolution in the United Kingdom has been made in favour of Scotland and Wales, which are not the whealthier parts of the country generally spoken. That is with difference to federal states like Germany or Spain, where the wealthier parts of the state are looking for more financial autonomy[321]. In Britain, the view is taken that only central government is able to allocate public finance on the basis of need both on the left and on the right part of the political spectrum[322]. A second point is that there are different approaches between central and local or devolved authorities concerning the spending of revenues, although that issue exists in all regionalised or federalised states. Central government is generally responsible for the economic stability whilst local or regional government want to finance their expenditure plans. Therefore, there is a fear that the dispersal of tax raising powers makes economic management more difficult or even impossible[323]. Thus, there was a general trend against tax-raising powers for the future devolved bodies. Nevertheless, one of the most distinctive proposals of the Scottish Constitutional Convention was that the Scottish Parliament should have a certain power to vary levels of income tax in Scotland[324].

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[316] Hazell, Robert; Cornes, Richard: *Financing Devolution: the Centre retains control,* in: Hazell, Robert: Constitutional Futures, op cit, p 199
[317] Heald, David: *Territorial public expenditure in the United Kingdom,* in: Public Administration, op cit, p 147
[318] Hazell, Robert; Cornes, Richard: *Financing Devolution: the Centre retains control,* op cit, p 196
[319] Royal Commission on the Constitution (Kilbrandon), op cit, part I, para 659
[320] Bogdanor, Vernon: Devolution in the UK, op cit, p 236
[321] Jeffery, Charlie: Multi-Layer Democracy in Germany: Insights for Scottish Devolution, op cit, p 8
[322] Bogdanor, Vernon: Devolution in the UK, op cit, p 237
[323] Bogdanor, Vernon: Devolution in the UK, op cit, p 238
[324] Himsworth, Christopher; Munro, Colin: Devolution and the Scotland Bill, op cit, Chapter 7

2. Financial devolution in 1997

The SCCs proposal for tax varying powers of the Scottish Parliament was followed by the White Paper[325] and the Scotland Act 1998[326]. The Scottish Parliament has therefore the power to vary the basic rate of income tax by 3p in the pound. That was the maximum even for the Liberals within the SCC because there was the fear that opponents of devolution could attack it as a new "tartan tax"[327]. Though the tax-varying power has been put forward as a common feature of the Scottish devolution model[328], that power is in the present economic climate likely to remain symbolic rather than practical. The media's focus on taxation, in fact, diverted attention from real weaknesses in the financial aspects of devolution, which are crucial for the whole project[329]. Since each 1p change made by the Scottish Parliament would currently increase or decrease by around £150m[330], the volume to levy or reduce income tax for basic rate taxpayers in Scotland lies at around £450m[331]. Compared with the total of the Scottish Office budget of £14.6bn the power is in fact minimal[332]. It would therefore not yield very much. Moreover, the collection of higher taxes in Scotland would generate additional costs for employers who are maintaining PAYE. Setting up costs are estimated at £50m and the running costs at around £6- £15m[333]. Thus, the hurdles for the effective use of that power are quite limited. Furthermore, this tax would be collected by the central government. Apart from this, the power is most likely only to be used to raise taxes[334]. As the resources available to the Scottish Parliament are to be adjusted upwards and downwards by the appropriate amount[335], the cut of taxes would be followed by a cut of the expenditure on public services in Scotland. Thus, the raise seems little financial gain to set against the political pain as raising tax is electorally very unpopular nowadays[336]. The Scottish Parliament will, however, depend completely on central government for its financing as the Labour government pledged not to

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[325] Scotland's Parliament, op cit, para 7.11
[326] Section 73
[327] Bogdanor, Vernon: Devolution in the UK, op cit, p 239
[328] Heald, David; Geaughan, Neal: *Financing a Scottish Parliament,* in: Tindale, Stephen (ed.): The State and the Nations, Institute for Public policy research, London 1996, p 167
[329] Hopkins, John: *Devolution from a comparative perspective*, in: European Public Law, Vol 4 (3), Kluwer 1998, p 326
[330] White Paper, Scotland's Parliament, op cit, para 7.13
[331] Seely, Antony: The Scotland Bill: tax-varying powers, House of Commons Research Paper 98/4, London, 8 January 1998, p 17
[332] Bogdanor, Vernon: Devolution in the UK, op cit, p 239
[333] White Paper, Scotland's Parliament, op cit, para 7.19
[334] Bogdanor, Vernon: Devolution in the UK, op cit, p 239
[335] White Paper, Scotland's Parliament, op cit, para 7.20
[336] Hazell/Cornes: *Financing devolution,* op cit, p 207; see also: Seely, Antony: The Scotland Bill: tax-varying powers, House of Commons Research Paper 98/4, op cit, p 24

use the power during the first term of office[337]. In addition, the leader of the Conservative party in Scotland has promised[338] not to use the tax-varying powers, too. Thus, Scotland is to be in the same situation as the National Assembly for Wales and the Assembly of Northern Ireland, which do not have such powers according to the respective legislation. The future of any tax-varying power for the devolved institutions is therefore unpredictable. On the one hand, one might have been able to presume that a success of those powers could lead to the introduction of more fiscal freedom for all devolved administrations. On the other hand, the longer the powers are not used in Scotland the more likely they will be never used. Therefore, it has been hinted[339] that there might be events which upset these analysis such as for example a "national disaster" in Scotland. However, such speculations are not very "real". Consequently, the United Kingdom is very likely to remain a financially centralised state.

In Scotland and Wales, however, a large part of the grant is directed to local government expenditure. Support for local authority current expenditure remains within the new block, and capital allocations to councils, too[340]. Almost 40 per cent of Scotland's annual block of £14.6bn, that is £5.2bn, is meant for local government expenditure[341]. The Scottish Parliament is able to decide whether to distribute the whole amount or to retain a certain part. It is the same for the Welsh administration in Cardiff, which takes over the distribution of the block grant. In Wales, local government is dependent upon that funds for 85 per cent of its income[342]. £2.7bn of the annual block grant for Wales, which is at £7.4bn, goes to local authorities[343]. It is different in Northern Ireland due to the fact that the Assembly has lesser responsibilities over local authorities[344]. Thus, Scottish and Welsh local authorities depend largely upon the devolved institutions and seek funds at Edinburgh and Cardiff. However, the devolved administration may find its budget small enough to squeeze the revenue "support" grant to local government, even if the capacity to do so is limited. For it was given evidence in the Lords that the proportion of local authority expenditure funded by the council tax could rise from 20 to at least about 25 per cent[345]. Nevertheless, this blurred competence of the devolved bodies to raise revenue is more considerable than the power of the Scottish

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[337] Bogdanor, Vernon: Devolution in the UK, op cit, p 240
[338] David McLetchie, in: *The Daily Telegraph,* 17 September 1998
[339] Hazell/Cornes: *Financing devolution,* op cit, p 208
[340] White Paper, Scotland's Parliament, op cit, para 7.23
[341] Bogdanor, Vernon: Devolution in the UK, op cit, p 239
[342] Constitution Unit: An Assembly for Wales, op cit, p 101
[343] See Blewitt, Nigel: *Allocating the Budget,* in: Osmond, John: The National Assembly Agenda, op cit, p 52, 54
[344] Hazell/Cornes: *Financing devolution,* op cit, p 208
[345] Report of the Lords Select Committee on Relations between central and local government, Rebuilding Trust, House of Lords Paper 97, July 1996, para 5.19

Parliament to raise income taxes by 3p in the pound[346]. The volume of that revenue does not affect additional costs and is higher and politically more effective than a "special charge" in Scotland. That contradiction is a considerable source of conflict between both levels of government[347]. Especially in Wales, the danger may be the biggest, because the Assembly does not have any source of revenue under its own control.

Local government was, however, already in a difficult situation before devolution. The introduction of the unitary authorities in Scotland in 1994 and the introduction of the poll tax were the challenges for the Scottish local government[348]. In Wales, there has been a continual interference by central government. This concerns not only the funding of local government, but also the powers, functions and structures together with a significant centralisation of power[349]. The relationship between upper tiers of government and local government has been marked by the lack of partnership. Thus, the ultimate financial power of the devolved bodies was seen as a threat to local government. Therefore, it has been proposed to take into account the important function of local government. The SCC effectively recommended a constitutional entrenchment of local government by way of insertion in the devolution legislation and the guarantee of subsidiarity[350]. Moreover, a concordat between local government and the devolved bodies has been proposed, which could enshrine the general principles for the conduct of the relationship[351]. In Wales, co-operation between the Assembly Committees and local government has emerged in the Partnership Council[352]. In Scotland, a Commission on local government and the Scottish Parliament has been established[353]. The financial relationship between the devolved bodies and local government is difficult[354] as it appears in the legislation with an attitude of supremacy[355]. Thus, funding and financial control are the indicators of successful co-operation between local government and the devolved institutions.

An excessively increase in local government expenditure due to the withdrawal of a part of

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[346] Bogdanor, Vernon: Devolution in the UK, op cit, p 240
[347] Bogdanor, Vernon: Devolution in the UK, op cit, p 240
[348] Constitution Unit: Scotland's Parliament, op cit, p 122
[349] Constitution Unit: An Assembly for Wales, op cit, p 100
[350] Cited in Constitution Unit: Scotland's Parliament, op cit, p 123; see also, Scottish Constitutional Convention: Scotland's Parliament. Scotland's Right, op cit
[351] Constitution Unit: Scotland's Parliament, op cit, p 127
[352] Essex, Sue: *Local Government,* in: Osmond, John: The National Assembly Agenda, op cit, p 302
[353] Hazell, Robert: *The shape of Things to come: What will the UK Constitution look like in the early 21st century?,* in: Hazell, Robert: Constitutional Futures, op cit, p 10
[354] Constitution Unit: An Assembly for Wales, op cit, p 100
[355] Essex, Sue: *Local Government,* in: Osmond, John: The National Assembly Agenda, op cit, p 301

the grant by the devolved bodies, however, would cause a reaction at the centre. This possibility is mentioned in the Scottish but not in the Welsh White Paper. As "local government" is not a reserved matter, the responsibility for the control of local authority spending lies within the Scottish Parliament[356]. Whitehall expects the Scottish Parliament to exercise this control strictly, for "if growth [of local government expenditure caused by the reduction of the block grant support] relative to England were excessive and were such as to threaten targets set for public expenditure as part of the management of the UK economy [being a reserved matter], and the Scottish Parliament nevertheless chose not to exercise its powers, it would be open to the UK government to take the excess into account in considering the level of their support for expenditure in Scotland"[357]. As to whether that mechanism is capable to secure sufficient funding for the local authorities remains to be seen.

The White Papers for Scotland and Wales stated that "the government have therefore concluded that the financial framework for the Scottish Parliament should be based on the[se] existing arrangements with, in future, the Scottish Parliament determining Scottish spending priorities"[358]. These existing arrangements have been made 20 years ago and they were, at that time, advantageous for Scotland, Wales and Northern Ireland[359]. Then, the government intended to converge the spending in the whole country by way of a temporary higher spending in these areas[360]. Enquiries to the "Barnett-formula" discovered, however, that in 1997 expenditure in Scotland was 19 per cent, that in Wales 12 per cent higher than in average of the United Kingdom[361]. A convergence between Scotland, Wales and England following the "Barnett-formula" was dependent upon two factors[362]: The first factor depends on the population relativity within the United Kingdom. The second factor was less clear as it relied completely on the growth of public expenditure in England. In fact, the faster the rise of spending in England, the higher the absolute surplus in the other areas and, thus, the faster the convergence[363]. However, the aim of convergence has not been realised. Scotland's population has fallen absolutely and relatively to England[364]. In addition, the policy of slight budgets under the Thatcher era ensured that the cumulative effects of the formula was

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[356] White Paper, Scotland's Parliament, op cit, para 7.23
[357] White Paper, Scotland's Parliament, op cit, para 7.24
[358] White Paper, Scotland's Parliament, op cit, para 7.4; see also similar part in the Welsh White Paper, A voice for Wales, op cit, para 1.22, also An voice for Wales, op cit, Annex D.6 and 12
[359] Heald, David: *Territorial public expenditure in the United Kingdom,* in: Public Administration, op cit, p 159
[360] See above
[361] Statistical Analyses 1997-98, Public Expenditure, HMSO, London March 1997, Cmnd. 3601; Heald, David: *Territorial public expenditure in the United Kingdom,* in: Public Administration, op cit, p 158 (Table 4)
[362] Bogdanor, Vernon: Devolution in the UK, op cit, p 244
[363] Heald, David: *Territorial expenditure in the United Kingdom,* in: Public Administration, op cit, pp 164

limited[365]. Nevertheless, the "Barnett-formula" has been adjusted in 1992, following a census in 1991, to reflect the decrease of the Scottish population[366]. The new ratios were then 85.7: 9.14: 5.16. That change, however, did not transform the system of Scottish and Welsh over-spending according to their population and the spending in England. The Labour government has proposed that the population shares which underlie the formula are to be recalculated annually on the basis of the latest population estimates[367].

Apart from the block grant, the 1978 Act allowed the Scottish Parliament to borrow in order to cover short term problems in managing the Scottish finances[368]. The SCC did not mention that source of spending. However, the Scotland Act[369] provides for borrowing up to £500m directly from the Secretary of State. The Treasury may issue such sums out of the National Loans Fund if they are required by the Secretary of State to make loans under the Act's provisions. Thus, the sums available to the Scottish administration is strictly limited for short-term contingencies as it has been proposed by the Constitution Unit[370].

The treatment of the funds given by the European Union is also to be re-examined in the context of devolution. This concerns especially the European Regional Development Fund (ERDF)[371]. Expenditure in agriculture is negotiated separately from the main block, with a support being provided by the Common Agricultural Policy (CAP) in a large measure for Wales[372] and a slighter part for Scotland[373]. The ERDF, however, is required to be matched by funds provided by the recipient according to the principle of additionality. Additionality is a jargon word denoting the principle whereby sums received from the Budget of the Union in support of particular projects (most commonly from the structural funds) are supposed to be additional to those received from national sources[374]. The great temptation - and few Member States of the European Union have been able always to resist it - is to allow receipts from Brussels to take the place of national aid[375]. Theoretically, the public expenditure for the

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[364] Constitution Unit: Scotland's Parliament, op cit, pp 66
[365] Constitution Unit: Scotland's Parliament, op cit, p 66
[366] Hazell/Cornes: *Financing devolution,* op cit, p 200
[367] Hazell/Cornes: *Financing devolution,* op cit, p 200
[368] Constitution Unit: Scotland's Parliament, op cit, p 80
[369] Scotland Act 1998, sections 66-7
[370] Constitution Unit: Scotland's Parliament, op cit, p 81
[371] Constitution Unit: Scotland's Parliament, op cit, p 80
[372] Blewitt, Nigel: *Allocating the budget,* in: Osmond, John: The National Assembly Agenda, op cit, p 53
[373] Constitution Unit: Scotland's Parliament, op cit, p 80
[374] See Bainbridge, Timothy: Companion to European Union, Penguin, London 1998, "Additionality"
[375] See case-study, in: McAleavey, Paul: *The politics of European regional development policy: additionality in the Scottish coalfields,* in: Regional Politics and Policy, Vol 3 (2), London 1993

matching funds in Scotland is included in the block fund, but that seems to be far from being clear[376]. However, the principle of additionality, according to the regulations, allows differing interpretations by the Member States[377]. Generally, nontheless, the principle requires that the financial arrangements distinguish between funds from central government and funds from the European union. The "additionality" should occur at the Scottish rather than at the central government level[378]. At the time being, however, no change to the block occurred in that concern. The Treasury has always treated all European receipts as simply "recycled" taxpayers money and insisted on treating it as part of the overall United Kingdom budget. For Wales, for example, this means that Structural Funds receipts from Brussels are only passed on through the Assembly's budget as "Departmental Expenditure Limit". In the case of the National Assembly's budget, that "Departmental Expenditure Limit" is set through the "Barnett formula", which means that Wales receives a consequential of equivalent spending - including the European Structural Funds - in England. In the Treasury's view, the fact that the Assembly thinks that it "deserves" a greater share of European and regional development monies than it receives through the Barnett formula is offset by the fact that in other areas Wales may "need" less, but is supported nonetheless[379]. Conversely, the Assembly administration is taking the view that the Barnett formula is not adequate to deal with the situation, which is faced thanks to the success of Wales in obtaining Objective 1 status for nearly two-thirds of its population, and intends to press, in the context of the Spending Review, for the Structural Funds to be taken outside the Barnett formula. This would mean that additional resources would be made available over and above whatever Barnett might attribute to Wales, to ensure that the Structural Funds allocations are passed on completely. The Welsh administration holds that the Spending Review[380] is the place to resolve this issue. The results may prove as to whether European Funding will become "additional".

3. A fair assessment

It has been written[381] that the fiscal constitution of the United Kingdom has contained since 1886 only one rule: "what is politically acceptably is fair". The question is, in fact, if the formula offers an adequate basis for funding in the mid-term after devolution. The system of

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[376] Constitution Unit: Scotland's Parliament, op cit, p 80
[377] See Court of Auditors, *Special Report N° 6/99,* in: Official Journal, 2000/C, 68/01 of 09/03/2000
[378] Constitution Unit: Scotland's Parliament, op cit, p 80
[379] As for example pre-5 education, where Welsh provision has always been more generous than in England, but where Wales now benefits from consequentials of money to provide pre-school places for all 4 year olds in England
[380] Taking place in summer 2000

the "Barnett-formula" can be questioned for different reasons. First, it is to examine as to whether the formula issues "fair" solutions to the United Kingdom as a whole. There are different issues concerning its "fairness". Initially, the starting point of the block formula is to be scrutinised. A crucial point about the operation of the formula is that it is composed of two parts. First, there is the inherited expenditure base as at the date of implementation of the formula in 1979. Second, there is the incremental expenditure, which is determined by the operation of the formula itself[382]. The formula itself, however, applies only to the block expenditure. Scotland and Wales, fare well on measured relatives. There, the spending in Scotland remained significantly higher, at a time when the Nation has become wealthier than six out of eight standard regions of England[383]. The problem may well arise that the sub-national elections are dominated by comparisons about funding treatment. As a foretaste of what may come, for example, the independent candidate for the Mayor of London, Ken Livingstone, argued in 1998 for more territorial justice in the context of the funding[384]. The Scottish Mirror replied "You want £2bn from Scotland? Get lost! Fury over cash demand from man who would be Mayor of London". However, it has been outlined[385] that the difficulty consists in the fact that there are many unmeasured impacts of policy. As an example, the matter of "defence" has been taken. The rationale of military facilities is to defend the whole country. The military bases and the defence contracting has, however, a significant impact on regional economies. Here, the concentration of this "expenditure" on the English regions of South-East and South-West were amazing being 51.5 per cent of the UK as a whole[386]. Another issue concerns the argument that the financial arrangements must include an element of equalisation[387]. The initial Northern Irish finance arrangement failed also due to the lack of any equalisation element. The present system is in that sense quite equal, because it leaves the devolved bodies with the money which is necessary for an equal public service. They are, however, able to switch these funds for other purposes. This is in contrast to the Kilbrandon Commission, which argued[388] in favour of a expenditure basis as it would be the only way of a need dependent distribution.

This leads us to a second point referring to the basic idea on which devolution is based: the

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[381] McLean, Iain: *A fiscal constitution for the UK,* in: Wright, Tony: The English Question, op cit, p 80
[382] Heald, David: *Territorial public expenditure in the United Kingdom,* in: Public Administration, op cit, p 162
[383] Hazell/Cornes: *Financing devolution,* op cit, p 200
[384] Quoted in Bogdanor, Vernon: Devolution in the UK, op cit, p 248, footnote 36
[385] Heald, David: *Territorial public expenditure in the United Kingdom,* in: Public Administration, op cit, p 159
[386] Heald, David: *Territorial public expenditure in the United Kingdom,* in: Public Administration, op cit, p 159
[387] Bogdanor, Vernon: Devolution in the UK, op cit, p 252
[388] Report of the Royal Commission on the Constitution (Kilbrandon), op cit, paras 649-56

dispersal of power that devolution is intended to achieve[389]. Even for local government it is accepted that its revenue-raising power is not contrary to a fair distribution of public funds as far as it is accompanied by an element of equalisation[390]. Thus, there can also be good justifications for different choices in public expenditure between the devolved authorities. This is not incompatible with devolution but rather its purpose. However, the formula is quite unsuitable to encourage such competition. The more expenditure patterns differ from the English reference (for the block), the more arbitrary the formula may appear[391]. Policy diversity is the object of devolution, but the "Barnett-formula" does not allow for policy variation[392]. Moreover, the bulk of the devolved budgets comes from a grant whose calculation remains to a large part at the Treasury's discretion[393], although the government has promised a greater transparency in the operation of the formula[394]. Through their power to determine the English budget for services in the block, they continue to dominate the devolved schedule from the centre[395]. In Germany, for example, the Basic Law makes detailed provisions concerning the power of the Federation and the states to their rights to have revenues assigned to them[396].

Thirdly, one may scrutinise the democratic responsibility for financial, i.e. fiscal decisions. An issue of limited interest might be the hidden tax power of the devolved bodies. Even if the power can lead to a squeeze of local government, it can be seen as a democratic advance that this power has been withdrawn from the Secretary of State as part of the Executive and is furthermore attributed to a democratically elected parliament[397]. However, another issue is of greater importance in this context. The central criticism of the maintenance of the "Barnett-formula" is the separation of power to raise money and the power to spend it. That criticism has been made[398] in order to follow a recommendation of the Primrose Committee setting up, in 1912, the financial relationship between Britain and Ireland after Home Rule. The Committee stated that it was "a first principle of sound government that the same authority

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[389] Bogdanor, Vernon: Devolution in the UK, op cit, p 241
[390] Against that idea: McLean, Iain: *A fiscal constitution for the UK*, op cit, p 88
[391] Bogdanor, Vernon: Devolution in the UK, op cit, p 251
[392] Hazell/Cornes: *Financing devolution,* op cit, p 203
[393] Hopkins, John: *Devolution from a comparative perspective,* in: European Public Law, Vol. 4 (3), Kluwer 1998, p 326
[394] Hazell/Cornes: *Financing devolution,* op cit, p 202
[395] Also Bogdanor, Vernon: Devolution in the UK, op cit, p 243
[396] Barnett, Eric: An Introduction to Constitutional Law, op cit, p 62
[397] Bogdanor, Vernon: Devolution in the UK, op cit, p 240
[398] Heald, David; Geaughan, Neal; Robb, Colin, *Financial arrangements for UK devolution*, in: Keating, Michael (ed.), Remaking the Union, Frank Cass, London 1998, pp 28; or Heald, David; Geaughan, Neal: *Financing a Scottish Parliament,* in: Tindale, Stephen: The State and the Nations, op cit, p 167

that has the spending of revenue should also have the burthen , and not infrequently the odium of raising that revenue"[399]. The argument for a higher autonomy in revenue-raising, however, might be unanimous[400], although such competences are in the context of other European states quite unusual[401]. It is argued that the essence of the argument for revenue-raising powers is that – when differentials in needs and resources have been addressed – the marginal expenditure decided upon by sub-national governments should be self-financed from an economically appropriate and politically acceptable tax base. It is obvious that elected office and responsibility for the raising of revenue has been linked since the first parliaments got the right to vote for the budget in the 18th century. In this concern, Tony Blair's comparison of the devolved parliaments with English parish council in 1997 is quite illuminating. In Scotland and Wales, both powers are – apart from the Scottish 3p in a pound- separated. Thus, the temptation will exist that the devolved executives claim for funds at the centre instead of allocating their own budget tightly[402]. Additionally, they will spend more easily money that they get from central government than money they have to raise themselves[403]. This is most apparent in Germany, where the Constitutional Court was challenged in 1999 which stipulated that the financial arrangements are to be changed partly[404].

Finally, one may ask what happens if there is to be regional government in England. The whole assessment of the "Barnett-formula" is based on a notional "English block", which is decided first and in secrecy[405]. However, as soon as that block is unravelled to the English regions, the base of the formula disappears[406]. It is, at the moment, not even possible to unravel the block as there are no data on relative needs and on spending variation in the English regions[407]. Only the allocation of expenditure is identifiable in all English regions. However, it is obvious that the English regions are already interested in the overall allocation of public expenditure and the effects on them[408]. It has also been shown that the population

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[399] Cited in Bogdanor, Vernon: Devolution in the UK, op cit, p 241, footnote 26
[400] Blow, L.; Hall, J.; Smith, S.: Financing Regional Government in Britain, Institute for Financial Studies (IFS), June 1996, p 62
[401] The Australian example is cited with around 20 per cent of revenue raised with devolved taxes, see: Hazell, Robert: *The shape of Things to come: What will the UK Constitution look like in the early 21st century?,* in: Hazell, Robert: Constitutional Futures, op cit, p 9
[402] Bogdanor, Vernon: Devolution in the UK, op cit, p 242
[403] Bogdanor, Vernon: Devolution in the UK, op cit, p 242
[404] BVerfG, 2 BvF 2/98 of 11/11/1999, see http://www.bverfg.de/
[405] Heald, David: *Territorial public expenditure in the United Kingdom,* in: Public Administration, op cit, p159
[406] Hazell/ Cornes: *Financing devolution,* op cit, p 202
[407] Hazell/ Cornes: *Financing devolution,* op cit, p 202
[408] See for example: Treasury Committee, *The Barnett formula,* in: House of Commons Debates, Vol 341, Qu 156, p 21; also Tomkins, Adam: *Devolution: A constitutional imperative,* in: Devolution and the British Constitution, Key Haven, Society of public teachers of law, London 1998, p 113

roundings inherent in the formula have "non-trivial effect", as even small differences in the calculation have large consequences in reality[409].

It has been hinted that the Barnett-formula introduces a "quasi-federal funding element" in the United Kingdom, as it guarantees to Scotland and Wales a fixed proportion of expenditure allocated to England and thereby preserving some historical advantages[410]. However, this does not correspond to what could be called a fiscal constitution for the United Kingdom[411]. Therefore, a "financial pillar" would be necessary for the constitutional settlement. It should be composed by the devolved governments to decide about the division of their "share" of the budget[412]. Currently, financial devolution means that the Welsh and Scottish proportion of the budget to a certain degree is fixed, but only in relation to England. As to whether such autonomy is a suitable condition for a quasi-federal system might be doubtful, as the main decision for the budget of the devolved authorities remains at Whitehall. Additionally, various "bypasses" to the formula are possible to be undertaken by central government. This concerns a large range of policy areas[413], but especially the power of outward investment, which remains centralised. The fiscal subsidies of the centre can be given without territorial reference, as they are concentrated at the Department of Trade and Industry.

However, the idea[414] that if the government is forced to agree on a new formula, the Scottish and other devolved government would have little confidence in the results assessed by the Treasury, might be more important for a quasi-federal financial arrangement. If an intergovernmental commission or an independent Territorial Exchequer Board was entrusted with that task, it would mark the beginning of a new financial "formula". In Germany, the *Länder* are entitled to revenues in place of the relationship of dependence which the Scotland Act and the Government of Wales Act created[415]. However, in the German Federation this entitlement is crucially dependent upon the role of the *Länder* in the process of determining how much revenue they receive from federal government as fiscal legislation needs the

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[409] Heald, David: *Territorial public expenditure in the United Kingdom,* in: Public Administration, op cit, p 164
[410] Kellas, James: *The Scottish and Welsh Offices as Territorial Managers,* in: Regional and Federal Studies, Vol 8, Frank Cass, London 1998, p 96
[411] See also McLean, Iain: *A fiscal constitution for the UK,* in: Wright, Tony; Chen, Selina: The English Question, op cit, p 80
[412] McLean, Iain: *A fiscal constitution for the UK*, op cit, p 90
[413] See Heald, David: *Territorial public expenditure in the United Kingdom,* in: Public Administration, op cit, p 168
[414] Hazell/ Cornes: *Financing devolution,* op cit, p 201
[415] Bogdanor, Vernon: Devolution in the UK, op cit, p 253

agreement of the *Bundesrat* (Second Chamber). The House of Lords, however, is not likely to become a regional Chamber. Hence, it might be true that the greatest tensions in the devolution settlement are to arise over finance[416].

D. Judicial review and devolution

An important indicator for the identification of federalism, which may have been reached with the present devolution legislation is the way in which disputes between the different levels of government are resolved. In federal constitutions, the courts have the responsibility of umpiring disputes between the federation and the states about their respective competences[417]. The courts are constitutionally enabled to strike down federal or state legislation[418]. Generally, however, in these states as Germany and the United States the essentials of the relationship between federal government and the lower levels of government are set down in a basic constitutional document, which distributes powers and responsibilities within the federation[419]. That document can only be changed with the consensus of both levels involved. A "real" federal settlement would thus require a written constitution for the United Kingdom[420]. The United Kingdom, indeed, does not seek a written constitution[421]. Since the glorious revolution in 1688, where the Parliament demonstrated its power lastingly, the role of the courts has been very limited concerning the scrutiny of "*vires*" in this country[422]. Only in the 1960s[423], the House of Lords discovered its role of the highest court for all disputes, including the question of "*ultra-vires*"[424] and the Supreme Court Act 1981 is nowadays the basis for judicial review in the United Kingdom[425]. Generally, however, the courts are not expected to scrutinise the constitutionality of the acts of parliament, but in practice they conquered a more significant position than the constitutional theory attributes to them[426].

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[416] Hazell, Robert: *The shape of Things to come: What will the UK Constitution look like in the early 21st century?,* in: Hazell, Robert: Constitutional Futures, op cit, p 9; see also Hopkins, John: *Devolution from a comparative perspective,* in: European Public Law, Vol 4 (3), op cit, p 327

[417] Barnett, Eric: An Introduction to Constitutional Law, op cit, p 62; Hesse, Konrad: Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 19th ed., C.F. Müller, Heidelberg 1996, pp 90, pp 263

[418] For the Federal Constitution of the United States see e.g. Breyer, Stephen: *Does Federalism make a difference?,* in: Public Law, Sweet & Maxwell, London, Winter 1999, pp 651

[419] Constitution Unit: Scotland's Parliament, op cit, p 34

[420] See proposals of Institute of Public Policy Research: Constitution of the United Kingdom, London 1991 and, Home Rule (Scotland) Bill 1995, HMSO, London 1995

[421] See above

[422] Wiedmann, Thomas, op cit, p 64

[423] Constitution Unit: The constitutionalisation of Public Law, London, May 1999, p 2

[424] Wiedmann, Thomas, op cit, p 65

[425] Barnett, Hilaire, op cit, pp 921

[426] See H.W.R. Wade: Administrative Law, 1982, p 29

Amid all constitutional changes there has been a consistent rejection of judicial review of parliamentary legislation[427]. However, where legislative and administrative power is divided between several institutions it is inevitable that there will be arguments about the exceeding of powers by one or another institution[428]. This cannot be resolved through intergovernmental "consultation"[429]. At the end, it may be necessary to resolve disputes about the vires or competences of the respective institutions through the courts. Hence, judicial review is of central importance to the devolution legislation[430].

1. Precedents

First, it might be useful to look backwards to previous devolution legislation. There, one can see how devolution disputes have been addressed in former legislation. The 1920 Act[431] provided for the resolution of disputes at the Northern Irish courts, with an ultimate appeal to the House of Lords. On constitutional matters, reference was made to the Judicial Committee of the Privy Council[432]. This Committee is composed of the Lord Chancellor, Lord President and former Lord Presidents of the Council, Lords of Appeal in Ordinary and the Lord Justices of Appeal, former Lord Chancellors and retired Lords of Appeal[433]. It has already experience with written constitutions, as it is the final court of appeal for some formerly British territories, which have later adopted a constitution[434]. Following the 1920 Act, the courts were enabled to declare invalid statutes made by a parliament if they were *"ultra vires"*[435]. That was a unusual conception in British constitutional law at this time, as the new institution of Northern Ireland was called "parliament"[436]. However, the *ultra vires* principle is consistent with the doctrine of parliamentary sovereignty[437]. *"Ultra vires"* refers to action which is

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[427] Williams, David: *Constitutional Issues Facing the United Kingdom,* in: The Law Librarian, Vol 30 (1), London, March 1999, p 17
[428] Constitution Unit: Scotland's Parliament, op cit, p 45
[429] See above
[430] Craig, Paul; Walters, Mark: *The courts, devolution and judicial review,* in: Public Law, London, Sweet & Maxwell Spring 1999, p 274
[431] Sections 49
[432] Section 51
[433] See Barnett, Hilaire, op cit, p 362. The Judicial Committee of the Privy Council has been set up under statute by the Judicial Committee Act 1833 and has been enlarged by the Judicial Committee Act 1844.
[434] See Bradley, Anthony W.: *The Sovereignty of Parliament- in perpetuity,* op cit, p 83: E.g. Jamaica
[435] Bogdanor, Vernon: Devolution in the UK, op cit, p 72
[436] Newark, F.H.: *The Law and the Constitution,* in: Wilson, Thomas: Ulster under Home Rule, OUP, Oxford 1955, p 31; also Hadfield, Brigid: The constitution of Northern Ireland, op cit, p 51: The Northern Irish parliament copied the House of Commons
[437] See Barnett, Hilaire, op cit, pp 941; see also for the current discussion about the *"ultra vires"*-principle: Craig, Paul: *Competing models of judicial review,* in: Public Law, Sweet & Maxwell, London, Autumn 1999, p 428, and Jowell, Jeffery: *Of Vires and Vacuums: Constitutional Context of Judicial Review,* in: Public Law, Sweet & Maxwell, London, Autumn 1999, p 448

outside – or in excess of – powers of decision making bodies[438]. To state an example, Lord Browne-Wilkinson defined the *"ultra vires"* concept recently as follows: "If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting *ultra vires* his powers and therefore unlawfully"[439].

The procedure at the Judicial Committee of the Privy Council was, in fact, used only once[440]. The "*ultra vires*" disputes arose in other proceedings as, for example, *Gallagher v Lynn*[441]. There[442], the House of Lords was called upon to determine the validity of the Milk and Milk Products Act 1934 (NI). The appellant was a dairy farmer from Co Donegal (Republic for Ireland) who sold his milk in Northern Ireland previously. The Act in question provided that only milk of specified grades could be sold in Northern Ireland and acquisition of the relevant licence was dependent on previous inspection of the premises by the Northern Irish Agricultural Ministry. Section 4 of the Northern Irish constitution[443] prevented Stormont from legislating with respect of matters outside Northern Ireland. As the appellant was living outside Northern Ireland, he was consequently refused. He argued therefore that the Act was "*ultra vires*" Northern Ireland's Constitution, whose Section 4 made an excepted matter of subjects "in respect of trade with any place outside Northern Ireland". The House of Lords held, however, that the Act's true nature and character, its pith and substance[444] was lawful, because it protected the health of the inhabitants of the province. The Act, following this view, was not passed "in respect of" trade, even if it might have affected trade outside Ulster.

The use of the "pith and substance" principle was possible due to the fact that the Government of Ireland Act 1920[445] listed the reserved matters only. Thus, the Stormont Parliament was responsible to "make laws for the peace order and good government" with several limitations. All non- specified matters fell consequently within the remit of the devolved institution. In contrast to the approach taken in 1920, the 1978 Act specified in great detail the legislative

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[438] Barnett, Hilaire, op cit, p 940
[439] *R v Hull University Visitor ex parte Page*, [1993] 2 AC 237
[440] *In re a Reference Under the Government of Ireland Act 1920* [1936], A.C. 362
[441] [1937] AC 863. In that case, applications were made to have the question of the Act's validity referred to the Judicial Committee of the Privy Council under Section 51, but these were not acceded to.
[442] For more detail see: Hadfield, Brigid: The constitution of Northern Ireland, op cit, pp 84
[443] Government of Ireland Act 1920, see above
[444] Referring to *Russell v The Queen*, [1882] 7 A.C. 829. This case concerned a dispute between the Canadian federal Parliament and the provinces.
[445] Section 4, cited in Constitution Unit: Scotland's Parliament, op cit, p 36

and executive competences devolved from Westminster[446]. Hence, it has been criticised[447] that the absence of clarity was the biggest failing of the 1978 Act and that this led to a more considerable likelihood of litigation. Thus, it has been added that the problem to "trace any discernible principle or rationale upon which the subjects to be devolved have been selected, will cause difficulty to the Judicial Committee of the Privy Council, or any other court, in attempting to provide a corpus of consistent rulings on the legislative competence of the Assembly"[448]. Conversely, the devolution legislation in 1998 followed, in general, the approach of the Government of Ireland Act 1920. There is another difference to the legislation suggested in 1978. At early stages of the then devolution proposals, the government even preferred devolution issues, in general, to be decided by the Executive[449]. The obvious danger[450] of blurred distinction between legality and policy has been avoided at all times in the 1998 legislation. The legality of devolved legislation must be controlled judicially[451]. Legality, however, had limited application under the 1978 legislation, as the initiative for issues of legality of Assembly Bills lay only with the Secretary of State[452]. That proceeding had been put forward by the Kilbrandon Commission[453]. Thus, the Secretary of State was not obliged to submit "Acts of the Scottish Assembly" for Royal approval, even if the Privy Council held at the pre-assent stage that the Act was "*intra vires*"[454].

2. Disputes about competences ("vires")

The Government of Wales Act 1998 makes encompassing provision for legal challenge in case that the National Assembly overrides its powers. Schedule 8 of the Act defines the "devolution issues" which may arise. They can mean

(a) a question whether a function is exercisable by the Assembly,

(b) a question whether a purported or proposed exercise of a function by the Assembly is, or would be, within the powers of the Assembly (including a question whether a purported or proposed exercise of a function by the Assembly is, or would be, outside its powers by

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[446] See above
[447] Constitution Unit: Scotland's Parliament, op cit, p 37
[448] Council of the Law Society of Scotland, cited in Constitution Unit: Scotland's Parliament, op cit, p 36
[449] White Paper, Our changing democracy, op cit, paras 57
[450] Jones, Timothy: *Scottish devolution and demarcation disputes,* in: Public Law, Sweet & Maxwell, London, Summer 1997, p 286
[451] Jones, Timothy: *Scottish devolution and demarcation disputes,* op cit, p 286
[452] Dickinson, I.: *The Secretary of State and Assembly legislation,* in: Journal. Law Society of Scotland, Edinburgh 1978, Vol 23, p 89
[453] Royal Commission on the Constitution (Kilbrandon), op cit, Vol I, paras 756 (entitled "maintenance of minimum standards"!)
[454] Jones, Timothy: *Scottish devolution and demarcation disputes,* in: Public Law, op cit, Summer 1997, p 290

virtue of section 106(7) or 107(1)),

(c) a question whether the Assembly has failed to comply with a duty imposed on it (including a question whether the Assembly has failed to comply with any obligation which is an obligation of the Assembly by virtue of section 106(1) or (6)), or

(d) a question whether a failure to act by the Assembly is incompatible with any of the Convention rights.

The Scotland Act 1998[455] for its part provides for more "devolution issues". Similar to the Government of Wales Act, they are defined in a Schedule as follows

a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,

(b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,

(c) a question whether the purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, within devolved competence,

(d) a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with Community law,

(e) a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with Community law,

(f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters.

Such a "devolution issue" can arise even if the proceeding began in other parts of the United Kingdom[456]. However, a court or a tribunal is entitled to disregard a devolution issue if the claim is frivolous or vexatious[457].

For Scottish legislation, a higher degree of legal scrutiny is necessary according to the very powerful position of the Scottish Parliament due to the stipulation of the reserved matters

[455] Section 98, Schedule 6
[456] Scotland Act 1998, Schedule 6, Parts II, III, IV; Government of Wales Act 1998, Schedule 8, Parts II, III, IV
[457] Scotland Act 1998, Schedule 6, para 2; Government of Wales Act 1998, Schedule 8, para 2

only[458]. Thus, a special interpretative obligation is imposed on the courts, as they have to read both Acts and Bills and subordinate legislation of Holyrood as being "*intra vires*" rather than "*ultra vires*"[459]. Where any provision could be read so as to be "*ultra vires*", it is to be read as narrowly as is required for it to be "*intra vires*", if such a reading is possible. Then, the provision is to have effect accordingly[460]. The Scotland Act, however, does not state "*vires*" but rather "competence"[461]. The competence of the Scottish Parliament relies upon the Scotland Act, which means that the Parliament must have legislative competence for primary legislation and in relation to subordinate legislation, the powers must have been conferred by the Act[462]. There are, generally, detailed rules for two different ways in which devolution issues may be resolved.

Any devolution issue which arises in judicial proceedings in the House of Lords is to be referred to the Judicial Committee unless the House considers it more appropriate, having regard to all the circumstances, that they should determine the issue[463]. It can, however, also be resolved by direct reference to the Judicial Committee. That Committee has not played a role for Wales since the unity of both legal systems. Thus, it has been asked why it was attributed with that new role, although the National Assembly only deals with subordinate legislation. The explanation may lay in Scottish sensitivities vis-à-vis the House of Lords and the desire to establish a common pattern of jurisdiction for devolution issues[464]. That is, of course, an advantage for the Principality. However, the irony in a historical perspective is that the Judicial Committee having its roots with the Empire and jurisdiction over dependent countries is "recycled" when devolution was realised[465].

The Scotland Act[466] provides for pre-enactment scrutiny of Bills of the Parliament[467]. The Advocate General, the Lord Advocate or the Attorney General may refer the question as to whether a Bill or provision of it would be within the competence of the Scottish Parliament to

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[458] See above
[459] Scotland Act 1998, section 101 (1). Lord Hope held, confusingly, that "there is to be created for Scotland a new kind of sovereignty. It is not parliamentary sovereignty...", cited in: Himsworth, Chris: *Securing the tenure of Scottish judges,* in: Public Law, op cit, p 17
[460] Scotland Act 1998, section 101 (2)
[461] A term which is used in the German Basic Law, too. See Art. 72-4 GG
[462] Scotland Act 1998, section 101 (3)
[463] Scotland Act 1998, Schedule 6, para 32; Government of Wales Act 1998, Schedule 8, para 29
[464] Williams, David: *Devolution: The Welsh perspective,* in: Cambridge Centre for Public Law: Constitutional Reform in the UK, op cit, p 49; also Rawlings, Richard: *The new model Wales,* op cit, p 495
[465] Rawlings, Richard: *The new model Wales,* op cit, p 496
[466] Scotland Act 1998, section 33
[467] Reed, Robert: *Devolution and the Judiciary,* in: Cambridge Centre for Public Law: Constitutional Reform in the UK, op cit, p 24-5

the Judicial Committee of the Privy Council for decision[468]. The Judicial Committee is the ultimate dispute resolution institution. Section 103[469] provides that decisions made by the Privy Council are binding in all legal proceedings other than proceedings of the Privy Council itself. The Presiding Officer of the Parliament must not submit a Bill for Royal Assent at any time when such one of these law officers is entitled to make a reference, or where the reference has been made but the Privy Council has not yet disposed of the matter[470]. If the Privy Council has decided that a Bill is "*ultra vires*" then the Presiding Officer cannot submit the Bill for Royal Assent in its unamended form[471]. Section 34 of the Act provides for cases in which the Privy Council may make reference to the European Court of Justice.

With difference to that proceeding for Bills, reference to the Privy Council can be made from existing proceedings at any court or tribunal. As the law officers must be informed about all devolution issues which may arise, they can take part in the proceedings so far as they relate to a devolution issue[472]. Then, they may require the court or tribunal to refer the issue to the Judicial Committee[473] and they are even entitled to refer devolution issues which are not subject to the proceeding[474]. Apart from that, the relevant law officer is independently able to institute proceedings for the determination of a devolution issue and to refer it to the Judicial Committee of the Privy Council, but they are not obliged to any action[475]. The Lord Advocate (as a Member of the Scottish administration) is normally the defendant in such actions.

In Wales, proceedings for direct reference to the Privy Council are very similar. Section 31[476] states that the Attorney General or the Assembly may refer to the Judicial Committee any devolution issue which is not the subject of civil or criminal proceedings. Where reference is made by the Attorney General in relation to a devolution issue which relates to the proposed exercise of a function by the Assembly, the Assembly is to be informed of that fact, and the Assembly shall not exercise the function in the manner proposed during the period beginning with the receipt of the notification and ending with the reference being decided or otherwise disposed of[477]. This form of reference concerns the pre-enactment challenge and scrutiny of

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[468] Craig, Paul: Administrative Law, op cit, p 212
[469] Scotland Act 1998, section 103 (1)
[470] Scotland Act 1998, section 32 (2)
[471] Scotland Act 1998, section 32 (3)
[472] Scotland Act 1998, Schedule 6, paras 5
[473] Scotland Act 1998, Schedule 6, para 33
[474] Scotland Act 1998, Schedule 6, para 34
[475] Scotland Act 1998, Schedule 6, paras 4, 15, 25
[476] Government of Wales Act 1998, Section 31 (1)
[477] Schedule 8, para 31 (2)

the Judicial Committee[478]. As Paragraph 31 does not provide for a time limit of the Attorney General's action, a second possibility is that of post-enactment challenge even if the devolution issue has not arisen in independent proceedings[479]. An issue of subordinate legislation that is subsequently seen to exceed the devolved realm of the Assembly can be referred to the Judicial Committee even if the legislation in question has not been contested in other previous proceedings. Additionally, the Attorney General is entitled[480] to require a court or a tribunal to transfer to the Privy Council any devolution issue which has arisen in any proceedings before it to which he is a party. The Courts are obliged to inform the Assembly and the Attorney General about devolution issues arising in any proceedings[481] and the person or body to which notice is given has the right to take part in the proceedings so far as they relate to the devolution issue[482]. Apart from that, the institution of proceedings due to the determination of a devolution issue can also be made by the Attorney General, the Advocate General for Scotland or, the Attorney General for Northern Ireland. These law officers are entitled by the Government of Wales Act[483] to refer the devolution issue to the Privy Council in one of these ways of direct reference. However, they may have reasons not to exercise this power[484]. It has been blamed[485] that the Law Officers being part of central government should serve Welsh, i.e. devolved institutions in such matters. It is true that this conflict of interest may be a basic constitutional issue, but this will depend on the way of exercising those functions. Devolution is not federalism and thus, central government is entitled to overview its own legislation. Hence, the conflict of interest might be more political than constitutional. However, the Chief Legal Adviser[486] of the Assembly is supposed to inform the Secretaries about these issues.

Devolution issues may also arise in a civil proceeding in a court in proceedings involving individuals or between an individual and a public body[487]. Provision is made that a court can refer a devolution issue to a higher court. The Scotland Act establishes a reference system for all jurisdictions: criminal, civil and, judicial review. In non-criminal proceedings, magistrates'

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[478] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 278
[479] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 278
[480] Schedule 8, para 30 (1)
[481] Schedule 8, para 5 (1)
[482] Wales Act, Schedule 8, para 5 (2)
[483] Wales Act, Schedule 8, paras 4, 13, 23
[484] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 278
[485] Rawlings, Richard: *The new model Wales,* op cit, p 494
[486] It was one of the first appointments made on behalf of the Assembly
[487] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 286

courts can refer devolution issues to the High Court[488]. Other courts may refer devolution issues to the court of appeal, but not the magistrates' courts, the court of appeal or the House of Lords[489]. For criminal proceedings, the Scotland Act[490] empowers the courts, other than the court of appeal or the House of Lords, to refer devolution issues to the High Court (for summary proceedings) or the court of appeal (for indictment proceedings). A tribunal from which there is no appeal has to refer any devolution issue which arises in proceedings before it to the Court of Appeal; and any other tribunal may make such a reference[491]. The court of appeal can refer to the Privy Council any devolution issue arising before it other than by a court's reference[492]. Appeals from a High Court or a court of appeal lie to the Privy Council, but leave is required[493]. These provisions concern only England and Wales, but proceedings in Scotland are very similar, taking account, indeed, of the differences of the Scottish jurisdiction[494]. Ironically, of course, although "the legal system is at the heart of the Scottish difference that justifies devolution"[495], the "continued existence" of the High Court of Justiciary and the Court of Session is a reserved matter[496].

The Government of Wales Act[497] makes similar provision that a court can refer a devolution issue to a higher court. A distinction is, however, made between civil and criminal proceedings. Civil proceedings are all proceedings other than criminal proceedings. Thus, the rules for civil proceeding include judicial review[498]. As in Scotland, the referred court has to decide the devolution issue, and once that court has issued a decision, the proceeding is to continue at the lower court for final decision of the dispute. A magistrates court may thus refer a devolution issue to the High Court[499] or to the Court of Appeal, albeit the latter one can neither be questioned by a magistrates' court and nor does it apply to the Courts of Appeal, the House of Lords or a magistrates' court overtaking a case from a magistrates' court[500].

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[488] Scotland Act, Schedule 6, para 18
[489] Scotland Act, Schedule 6, para 19. Further exception is made for a High Court acting under para 18.
[490] Schedule 6, para 21
[491] Scotland Act, Schedule 6, para 20
[492] Scotland Act, Schedule 6, para 22
[493] Scotland Act, Schedule 6, para 23
[494] Scotland Act, Schedule 6, paras 7-13
[495] Dewar, Donald in: House of Commons Debates, Vol 302 , col 30, 12 January 1998
[496] Himsworth, Chris: *Securing the tenure of Scottish Judges,* in: Public Law, Spring 1999, p 15; see also: Jones, Timothy: *Scottish devolution and demarcation disputes,* in: Public Law, op cit, Summer 1997, p 294
[497] Wales Act, Schedule 8, para 1 (2)
[498] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 279
[499] Wales Act, Schedule 8, para 6
[500] Wales Act, Schedule 8, para 7

The rules for criminal proceedings are, in fact, quite similar. If the devolution issue arises in criminal proceedings, a court, other than the court of appeal or the House of Lords, may refer the issue to the High Court in the case of summary proceedings, or to the Court of Appeal if the proceedings are on indictment[501]. The court of appeal can decide itself as to whether it wants to refer the issue arising in its proceedings other than by way of reference from a lower court on to the Judicial Committee of the Privy Council[502]. In order to the provision of Paragraph 8[503] tribunals from which there is no appeal must refer the devolution issue to the court of appeal, but if there is an appeal from the tribunal's decisions it has the power but not the duty to refer the case[504]. This is a general principle in the Act, as it is entirely at the discretion of the courts to refer devolution issues or to decide it themselves. However, they are not completely unconstrained in retaining cases. As the courts or tribunals have to inform the Attorney General or the Assembly who might then take part in the proceedings, some cases may well be referred to upper courts on the Attorney's advice[505].

Finally, the Act provides for appeals from superior courts to the Judicial Committee. The appeal against a determination of a devolution issue by a High Court or a court of appeal lies then to the Privy Council. However, the appeal needs in such circumstances the leave of the court concerned, or failing such leave, with special leave of the Judicial Committee[506].

Devolution issues may also arise in other ways than directly at a court. This may be the case when legislation of the Assembly is enforced and the applicant claims that the enforcement of the legislation is "*ultra vires*"[507]. Recent decisions of the courts have been more open in allowing collateral challenge, even if there remain some uncertainties[508]. Hence, it remains also to be seen as to whether the courts will allow collateral challenge for *ultra vires* questions. It has been argued[509] that the Government of Wales Act resolves the question by giving a right to challenge devolution issues collaterally and directly. On the one hand, the court's power to refer a case implies vice versa not to refer a case and to make a decision. That view boosts indeed the right to collateral challenge. However, on the other hand, one

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[501] Schedule 8, para 9
[502] Schedule 8, para 10
[503] Schedule 8
[504] Schedule 8, para 8
[505] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 280
[506] Schedule 8, para 11
[507] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 280
[508] *Boddington v British Transport Police [1998] 2 W.L.R. 639,* for Scotland see: Mullen, Tom; Prosser, Tony: *Devolution and administrative law,* in: European Public Law, Vol 4 (4), Kluwer, Amsterdam 1998, p 482
[509] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 280

may well argue that any constraints imposed by the general law on collateral challenge structure the conditions under which a court has the authority to decide this type of case for itself. Nevertheless, applicants should normally be able to challenge vires issues collaterally or directly[510]. This would also contribute to take away critics about an increase of uncertainty of law after devolution, but the question depends entirely on the courts.

The Scotland Act[511] gives to the courts the power to make an order removing or limiting any retrospective effect of the decision, or suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected. Under the restriction to try reading Acts within the Parliament's competence, the jurisdiction can find Acts or subordinate legislation to be "*ultra vires*". The courts must also take into account the extent to which persons who are not party to the proceedings would otherwise be adversely affected[512]. However, the Scotland Act allows the passage of subordinate legislation in an extensive way[513]. This concerns especially the "Henry VIII clauses"[514]. Thus, the Scottish Executive can use subordinate legislation[515] to remedy the defects in an Act of the Scottish Parliament[516], which has been found to be "*ultra vires*"[517]. That subordinate legislation, however, is then to be –politically – scrutinised by Westminster[518].

Like in Scotland the courts are without a precise duty to act if they have decided that the Welsh Assembly did not have the power to make a provision of subordinate legislation. The Government of Wales Act[519] empowers the courts also "to make an order removing or limiting any retrospective effect of the decision, or suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected". However, even if there is no detailed obligation, the courts "shall have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected by the decision". The Lord Advocate and the respective law officer are to be given notice[520] and the Assembly and

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[510] Craig, Paul: Administrative Law, op cit, p 757
[511] Section 102 (2)
[512] Scotland Act, section 102 (3)
[513] Scotland Act, section 104 (1)
[514] See Bates, T. St. J.: *The future of parliamentary scrutiny of devolved legislation,* in: Statute Law Review, Vol 19 (3), London 1998, pp 155; see also above
[515] See Scotland Act, Schedule 7
[516] That is with significant difference to the Government of Wales Act, see above
[517] Scotland Act, section 107
[518] See Scotland Act, Schedule 7, para 1 (2), for the principles for scrutiny see Bates, T. St. J.: *The future of parliamentary scrutiny of devolved legislation,* op cit, p 156
[519] Section 110
[520] Scotland Act, section 102 (4)

the Attorney General are to be informed of such a decision in advance following section 110 (4) of the Government of Wales Act.

Northern Ireland has not been considered yet. This is due to the fact that Northern Ireland's devolution scheme must differ in several points from the general organisation in Scotland and Wales[521]. Thus, the Northern Ireland Act 1998 makes different special provisions which have been made with the bearing in mind that the province is to have a distinct position in the constitutional settlement of the United Kingdom. Hence, the provisions made in the Northern Ireland Act 1998 following the Good-Friday-Agreement are not as important as other devolution legislation.

The Northern Ireland Act 1998[522] defines the devolution issues slightly different as

(a) a question whether any provision of an Act of the Assembly is within the legislative competence of the Assembly;

(b) a question whether a purported or proposed exercise of a function by a Minister or Northern Ireland department is, or would be, invalid by reason of section 24;

(c) a question whether a Minister or Northern Ireland department has failed to comply with any of the Convention rights, any obligation under Community law or any order under section 27 so far as relating to such an obligation; or

(d) any question arising under this Act about excepted or reserved matters.

Sub-section (b) makes reference to a provision of the Act, which is based on non-discrimination, and sub-section (c) refers to section 27, where provision is made that the United Kingdom retains full control over Northern Ireland. Both different provisions are due to the special situation in Northern Ireland and therefore, they are not really important for the general scope of devolution.

The general ways in which a devolution issue can come before the courts is similar to the provisions of the Scotland and Government of Wales Acts. There is a pre-enactment challenge and scrutiny provision[523], and there is also the possibility of a direct reference to the Privy Council from existing proceedings[524]. Moreover, direct reference can be made to a devolution issue, which is not the subject of existing proceedings[525]. As under the Scotland

[521] See above
[522] Northern Ireland Act 1998, Schedule 10, para 1
[523] Northern Ireland Act 1998, section 11 (1)
[524] Northern Ireland Act 1998, Schedule 10, para 33
[525] Northern Ireland Act 1998, Schedule 10, para 34

Act, the relevant law officers are allowed to institute proceedings[526]. These proceedings are to be observed by the First and Deputy First Minister acting jointly or the Attorney General for Northern Ireland as defendant[527]. The reference to upper courts by a court or by appeal is provided as in the previous described Acts. Additionally, the courts are able to lay down Acts and subordinate legislation.[528] Special provision is given to the Secretary of State to remedy "*ultra vires*" legislation. In contrast to other devolution legislation, he or she may make such provision as he considers necessary or expedient in consequence of any provision of an secondary act of the Assembly which is not, or may not be, within the legislative competence of the Assembly; or any purported exercise by a Minister or Northern Ireland department of his or its functions which is not, or may not be, a valid exercise of those functions[529].

3. Review of intergovernmental co-operation and finance

The relations between the devolved administrations and central government are of crucial importance[530]. However, these relations are not regulated in the devolution Acts but only in the Concordats. The only provision made in the Scotland Act is, that even though there were some contradictory precedents[531] under the Northern Ireland legislation rights and liabilities can exist between the governments[532]. This stresses the divisibility of the Crown in right for the Scottish administration or acting by way of central government for the purpose of devolution. Each government can owe duties to and be sued by another[533].

The concordats, however, are of a very informal nature. The Scottish Office stated that "relations will be conducted on the basis of formal, non-statutory understandings"[534]. The concordats, explicitly, deny any legal binding and state that the "memorandum is a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties. It is intended to be binding in honour only"[535]. The then Secretary of State's description that their "purpose is not to create legal obligations or

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[526] Northern Ireland Act 1998, Schedule 10, para 22 (1)
[527] Northern Ireland Act 1998, Schedule 10, para 22 (2)
[528] Northern Ireland Act 1998, section 81
[529] Northern Ireland Act 1998, section 80
[530] See above
[531] See Taylor, Greg: *Devolution and the applicability of statutes to the Crown...*, in: Public Law, op cit, Spring 2000, p 12 citing the presumption that statutes do not bind the Crown.
[532] Scotland Act 1998, section 99
[533] Taylor, Greg: *Devolution and the applicability of statutes to the Crown...*, in: Public Law, op cit, Spring 2000, p 11
[534] Scottish Office: Guide to the Scotland Bill, Edinburgh 1997, para 23
[535] MoU, Part I, para 2

restrictions on any party, or to constrain the discretion of the Scottish Executive, or Parliament or that of any UK department"[536] thus became reality. The inter-governmental relationship is therefore completely uncovered by judicial review on the grounds of "vires". That is, however, one feature of devolution with clear contrast to a federal state. There, the co-operation between federal and state level is statutorily organised and the states are entitled to take part in several matters[537]. The MoU stipulates in the same way, but its nature is not a statute but an agreement. Thus, in principle, the courts have no possibility to be challenged for violations of the MoU.

It has been shown that tensions between Whitehall and the devolved administrations will be most significant over finance. However, the block grant is currently a matter completely at the discretion of central government, and even if there should be greater transparency about finance, this does not imply that the devolved bodies are empowered to claim a certain percentage of revenue, for example in relation to their population. Finance is a reserved matter – withheld by Whitehall from devolved administrations and the judiciary.

The Scotland Act provides for the first time statutorily for review of primary legislation by the courts. It does –indirectly – also provide that Scottish Acts cannot be challenged for procedural grounds if they came into existence different from the "devolution issues" outlined in Schedule 6[538]. Hence, the judges have to adapt to a new role of "vires" jurisdiction, but they do not need to operate in a vacuum[539]. There is a certain degree of devolution experience of Northern Ireland and there are the experiences of the Commonwealth and Federal States. The devolution Acts are statutes of the United Kingdom Parliament, but they are, of course, of constitutional significance[540]. The constitutional quality of the Acts may not only be of theoretical interest but also of vital meaning for the interpretation of the courts. The Acts can be interpreted as usual statutes according to the canons of statutory construction or in a liberal manner stressing the shifting of social and political context[541]. The importance of such a constitutional interpretation would be that the text's meaning may evolve in time[542]. In the United Kingdom, however, even if some legal acts were attributed with labels as

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[536] Hansard's Written Answers, 23 February 1998, Question of Rosemary McKenna
[537] Maunz/ Zippelius: Staatsrecht, op cit, p 119
[538] The 1978 Act provided that Scottish Acts could not be challenged on procedural grounds (section 17 (4))
[539] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 288
[540] Hazell/ Cornes: *Introduction,* in: Hazell, Robert: Constitutional Futures, op cit, p 8, see above
[541] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 289; see also: Hesse, Konrad: Grundzüge des Verfassungsrechts der BRD, op cit, pp 24
[542] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 290

"fundamental law", the courts have been very reluctant to infuse these acts with justiciable force[543]. It might be different for the devolution Acts 1998. The best way to bring up such a constitutional view of that legislation might lay in the development of a convention preventing the Westminster Parliament from amending the Scotland Act unilaterally[544]. That possibility has already been proposed by the Kilbrandon Commission[545].

Primary (Scottish) legislation within the United Kingdom is thus to be determined by a process of reasoning that involves the classification of challenged legislation according to the subject matter. A contested Act is to be invalid if it is made "in respect of"[546], or if it "relates to"[547], a matter over which the legislature has no competence. A law is so invalid because it invades a matter over which the legislator has no competence rather than conflicting with a law made by another institution in their realm[548]. That sort of competence limitation has nothing to do with concurrent legislative competence. Even if the questioned act touches on matters outside the scope of the legislator in a way, which is consistent with existing laws it is invalid[549]. Hence, the problem is to define what acts are within the realm of the devolved matters and what acts are beyond. Statutes are likely to touch always on more than only one precise matter. Then, some of the issues touched by the statute may lie within its realm, others beyond. The question is how to unravel these connections and to identify the constitutionally relevant issue[550].

One of the ways, which have been used in British constitutional law, has already been outlined when the Northern Irish model of judicial devolution has been analysed[551]. It is the *pith and substance* doctrine[552]. For a court to strike down all legislation affecting matters outside the legislature's realm would leave the institution with small scope of action. As long as the predominant aspect (that is the pith and substance or the true nature and character) of the contested act is within the legislative competence then the measure is valid in all aspects even if it affects partly subject matters over which the legislature has no authority[553]. Thus,

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[543] E.g. *MacCormick v Lord Advocate*, op cit, see above
[544] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 291, see also Constitution Unit: Scotland's Parliament, op cit, p 49
[545] Royal Commission on the Constitution (Kilbrandon), op cit, para 768
[546] Government of Ireland Act 1920, section 4 (1)
[547] Scotland Act 1998, section 29 (2)
[548] Craig, Paul: *Constitutionalism, Regulation and Review,* in: Hazell, Robert: Constitutional Futures, op cit, p 71
[549] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 297
[550] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 297
[551] See above
[552] See Hadfield, Brigid: The constitution of Northern Ireland, op cit, pp 86
[553] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 299

the pith and substance doctrine implies concurrent legislative power. It clearly tends to enlarge legislative power of the authority in question[554]. The relevance of this doctrine to the Scotland and Northern Ireland Act (Wales is not concerned) might be complicated[555] by provisions of the Acts. The Scotland Act 1998 provides for protected provisions[556], which an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify These provisions are as follows

(a) Articles 4 and 6 of the Union with Scotland Act 1706 and of the Union with England Act 1707 so far as they relate to freedom of trade,

(b) the Private Legislation Procedure (Scotland) Act 1936,

(c) the following provisions of the European Communities Act 1972- Section 1 and Schedule 1, Section 2, other than subsection (2), the words following "such Community obligation" in subsection (3) and the words "subject to Schedule 2 to this Act" in subsection (4), Section 3(1) and (2), Section 11(2),

(d) paragraphs 5(3)(b) and 15(4)(b) of Schedule 32 to the Local Government, Planning and Land Act 1980 (designation of enterprise zones),

(e) sections 140A to 140G of the Social Security Administration Act 1992 (rent rebate and rent allowance subsidy and council tax benefit) and,

(f) the Human Rights Act 1998.

The Northern Ireland Act 1998 provides also for entrenched enactments[557], which an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department shall not modify

(a) the European Communities Act 1972;

(b) the Human Rights Act 1998; and

(c) section 43(1) to (6) and (8), section 67, sections 84 to 86, section 95(3) and (4) and section 98 of the Northern Ireland Act.

- Furthermore, an Act of the Scottish Parliament[558] cannot modify, or confer power by subordinate legislation to modify the law on reserved matters[559]. This does, however, not apply to modifications which are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to

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[554] Hadfield, Brigid: The constitution of Northern Ireland, op cit, p 86
[555] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 300
[556] Scotland Act 1998, Schedule 4, Part I
[557] Northern Ireland Act 1998, section 7
[558] For Northern Ireland, only the consent of the Secretary of State is necessary, see Northern Ireland Act 1998, section 8

reserved matters, and do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision[560]. Thus, Schedule 4 intends to address not incidental effect on subject matters but incidental modification of rules of law, subject to rather a strict form of proportionality requirement[561]. One could see this in a way that Scottish Acts predominantly concerned with non-reserved matters may incidentally affect reserved subject matter, and when these incidental provisions conflict with rules of law in the reserved sphere they prevail and serve to modify those rules of law so far as they would otherwise apply for Scotland. Conversely, one might be inclined to read that this provision is only applicable to incidental effects modifying rules of law in the area of reserved matters, because they are directly addressed[562], but not to incidental effects to the reserved matters themselves. This might lead to the fact that the Scottish Parliament has a power to modify rules of law on reserved matters incidentally, but that is has no power to enact laws that simply touch on reserved matters incidentally without actually changing an identifiable rule of law on the reserved matter. That would be, however, an anomalous conclusion[563]. The courts, hence, have two solutions. Either one accepts simply that there is not any jurisdictional difference between an act incidentally affecting and an act incidentally modifying a rule of law of a subject matter, or that the distinction between affecting incidentally reserved matters and modifying incidentally rules of law on reserved matters is possible. In the first case, the consequence would be that any and all incidental effects on reserved matters fall within the realm of Schedule 4 thus limiting the scope of the Scottish Parliament. The second solution makes that Scottish acts, which affect incidentally reserved matters, are not invalid. Such acts would still have to "relate to" a reserved matter for being "*ultra vires*"[564]. "Relate to" means, however, that only such acts, which relate in pith and substance to reserved matters, are "*ultra vires*"[565]. The provisions of the Scotland Act are actually very far reaching for this concern. The principle guiding the definition of legislative realm in Germany is simpler, although the distribution of power is similar to that of Scotland. The German states are also entitled to legislate over matters which are not reserved to the federation as far as these matters are

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[559] Scotland Act 1998, Schedule 4, para 2
[560] Scotland Act 1998, Schedule 4, para 3
[561] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 300
[562] Scotland Act 1998, Schedule 4, para 2 (b)
[563] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 301
[564] As under the Northern Ireland Act 1920, see above
[565] For more detail see: Craig/ Walters: *The courts, devolution and judicial review,* op cit, pp 299 and Hadfield, Brigid: The constitution of Northern Ireland, op cit, p 86; Calvert, Harry: Constitutional Law in Northern Ireland, op cit, p 194

not especially attributed to the *Länder*[566]. However, in these cases the federal legislation prevails over the state legislation[567]. Only the federal legislation is supposed to intrude in a limited way into the vacuums of the distribution of constitutional competences[568].

At face value, a challenged act may appear to relate to a subject matter over which the legislature is competent, but this legislation may have a purpose or effect relating to a reserved matter. In Canada, such acts have been called "colourable" and being "*ultra vires*"[569]. The idea that law might be valid in form, but invalid because of underlying purpose or actual effect was also applied in *Gallagher v Lynn*[570]. The Scotland Act follows this direction stating that the question whether a Scottish Act related to a reserved matter is to be determined with reference "to the purpose of the provision, having regards to its effect in all circumstances"[571]. The Northern Ireland Act 1998, however, does not have such a provision[572]. This might be due to the fact that the legislation for Northern Ireland may be devolved one day completely.

The conclusion about judicial review in the post-devolution is that the Judicial Committee of the Privy Council has to issue decisions about all these questions in the near future. The way in which the Judicial Committee is to operate under the devolution legislation is incremental and silent on different matters of principle. It relies mostly on informal practices[573]. Devolution requires a strong legal system, and a system which commands confidence and respect on all sides[574]. Thus, the Union should be held together even if political tensions will became stronger. Hence, some doubts have been put forward as to whether the Judicial Committee of the Privy Council is able to comply with this task[575]. At the House of Lords stage, a number of amendments were tabled to establish a constitutional "final" court, based on the Judicial Committee, so as to "protect the independence of the judiciary and the

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[566] See Hesse, Konrad: Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, op cit, p 97
[567] Art. 31 GG
[568] See e.g. Hesse, Konrad: Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, op cit, p 97
[569] Craig/ Walters: *The courts, devolution and judicial review,* op cit, p 297
[570] See above
[571] Scotland Act 1998, section 29 (3)
[572] See Northern Ireland Act 1998, section 6
[573] Oliver, Dawn: *Comment,* in: Public Law, Sweet & Maxwell, London, Spring 1999, p 2
[574] Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* in: Public Law, Spring 1999, op cit, p 93
[575] Craig, Paul: *Constitutionalism, Regulation and Review,* in: Hazell, Robert: Constitutional Futures, op cit, p 71; Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* in: Public Law, Spring 1999, op cit, p 93

constitutional separation of powers in the determination of constitutional issues"[576]. For the time being, however, the Judicial Committee has considerable flexibility in terms of membership, extending to those who hold or have hold high judicial office[577]. Thus, a practice could emerge of including judges with strong "national" connections on panels hearing disputes involving the devolved bodies[578]. Different proposals have been made as to achieve a national composition of the Committee[579].

The Privy Council is thus likely to create a dual apex for the legal system in devolution cases[580]. The Judicial Committee may also become flexible to hear devolution issues in Scotland and Wales[581]. Nevertheless, the Privy Council could well become in future a troublesome institution being part of the House of Lords. It is not the final court of appeal in the United Kingdom legal system, but stands largely outside it. Thus, it may be a temporary arrangement, which will be re-opened when wider reform of the House of Lords opens up the question, as to whether a Supreme Court would not be the best solution. Then, it would be a real apex of the judiciary and completely independent. Thus, Walter Bagehot's dictum that the English Constitution was "laid down as a principle of English polity, that in it the legislative, the executive and the judicial powers are quite divided"[582] would become finally true. This idea has been already proposed by the Kilbrandon Commission, where the Memorandum of Dissent stated that there was a case for setting up a Constitutional Court[583] emphasising "that court adjudications of this constitutional kind [are] hardly a fundamental innovation in our legal system". The functions of such a court must not be exclusively constitutional but it would provide a valuable forum for final arbitration of constitutional issues[584]. In fact, there is even a constitutional difference between a judicial challenge of the wide-ranging discretionary powers of a Minister of the Crown and an act made by a devolved

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[576] House of Lords Debates, Vol 593, cols 1963-68, 28 October 1998

[577] Reed, Robert: *Devolution and the Judiciary,* in: Cambridge Centre for Public Law: Constitutional Reform in the UK, op cit, p 25

[578] For Wales: Rawlings, Richard: *The new model Wales,* op cit, p 496 citing the case *Morris v Crown Office* [1970] 1 W.L.R. 792, where this happened already; also Reed, Robert: *Devolution and the Judiciary,* op cit, p 25

[579] Lord Goodhart, Lord Lester proposed that the number of its members should be limited at nine, see: House of Lords Debates, Vol 593, cols 1963-68, 28 October 1998; Robert Hazell proposed to increase the number at seven, see: Hazell, Robert: *The new constitutional settlement,* in: Constitutional Futures, op cit, p 244

[580] Hazell, Robert: *Reinventing the Constitution: Can the State survive?,* in: Public Law, Spring 1999, op cit, p 93

[581] Scotland's Parliament, op cit, p 15

[582] Bagehot, Walter: The English Constitution, Longman 1867, Fontana 1993 introduced by Richard Crossman, p 61

[583] Royal Commission on the Constitution (Kilbrandon), op cit, Vol II, para 308

[584] Williams, David: *Constitutional Issues facing the United Kingdom,* in: The Law Librarian, Vol 30 (1), London, March 1999, also *Bias; the judges and the Separation of powers,* in: Public Law, Sweet & Maxwell, London, Spring 2000, p 59

democratically elected parliament. The role of the Lord Chancellor could be of special interest in this context. Without prescribed and appropriate standards and criteria the way in which the senior Law Lord exercises his discretionary power of appointment to the Judicial Committee on the Lord Chancellor's behalf could become a matter of controversy when the political composition in Westminster and the devolved assemblies differ. Such controversy would be, of course, a concern of independence and legitimacy of the judiciary. The Lord Chancellor, however, states that it is not "desirable to lay down any rigid principle"[585] in view of his right to sit in his judicial capacity in constitutional and human right cases arising under the devolution legislation[586].

It is to note, of course, that the judicial mechanisms described are asymmetrical in a manner that they do not entitle the devolved institutions to refer to the Privy Council where it is argued that the Westminster Parliament has overridden its "reserved" powers[587], that means that it legislated on a topic which falls within the remit of the Scottish Parliament, for example[588]. That was the same in the devolution legislation 1978. Then, the limits set to the powers of the Assembly have been described being "one way boundaries"[589]. The resulting situation can be analysed in a way, which is completely compatible with the traditional view of parliamentary sovereignty[590]. Viewed from that point, the sovereign parliament at Westminster has established a subordinate body with law-making powers in compliance with the European Convention on Human Rights and other requirements mentioned in the Act. However, it has been argued[591] that "naturally", over time something like a convention may develop, that forbids Westminster to trespass into a non-reserved area.

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[585] House of Lords Debates, Vol 593, Written Answers 138, 20 October 1998
[586] This might even be a breach of Art. 6 of ECHR, see Oliver, Dawn: *Comment,* in: Public Law, op cit, Spring 2000
[587] Craig, Paul: *Constitutionalism, Regulation and Review,* in: Hazell, Robert: Constitutional Futures, op cit, p 72
[588] Scotland Act 1998, section 28 (7), Northern Ireland Act 1998, section 5 (6), for Wales, no such provision is necessary.
[589] MacCormick, Neil: *Constitutional points,* in: Mackay, Donald (ed.): Scotland – The framework of change, Harris, Edinburgh 1979, p 56
[590] Lord Irvine of Lairg, in: House of Lords Debates, Vol 583, col 539, 18 November 1997
[591] Barnett, Eric: Introduction to Constitutional Law, op cit, p 63

VI. Conclusion

Devolution alters the governmental system of the United Kingdom significantly. As has been outlined in Chapter two, the political and constitutional culture of the United Kingdom was that of a unitary state. While there were special arrangements for the different "nations", these arrangements were only featured for the implementation of Westminster- made policy[1]. Devolution has been defined as a partial transfer of power from the centre to the periphery[2]. This implies that the devolution has nothing to do with independence of the nations[3], but with an attempt to re-organise the former centralised unitary-state to preserve its unity, as shown in Chapter three. How does devolution now change the character of the British State? How can we constitutionally characterise devolution?

The United Kingdom is no longer a unitary state, as the institution in the Nations establish new political centres. These institutions will challenge the centre at Westminster. The United Kingdom could therefore be seen as an evolving Union-state: As outlined in Chapter one, it means that pre-union rights survive and the infrastructure provides some degree of regional autonomy. The character of a Union-state could justify the asymmetrical nature of devolution. One is inclined to question, whether this asymmetry creates problems for the territorial organisation of the state. It has repeatedly been stated[4] that the evolving union is unbalanced, or that it is even "messy, lopsided and asymmetrical". The author of the phrase, Labour MP Tony Wright, believes that this has to do with the British "maxim of muddling along. [...] "Living with anomalies and preferring common sense to logical abstractions is supposed to be what the political genius of the English is all about". As an explication, he finally cites Burke, who stated that "it is in the nature of all greatness not to be exact"[5]. However, nothing is "wrong with asymmetrical government" as Keating[6] has pointed out. It is possible that certain areas of a state enjoy self-government whilst others do not. The Spanish example of devolution all round shows that asymmetry must not lead to the "slippery slope" of independence. However, the British case is in some way different from Spain. The powers of

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[1] See above
[2] See above
[3] Even though a recent poll showed that most people in Britain expect Scotland to leave the Union in ten or twenty years. See Wright, Tony: The English Question, op cit, p 9
[4] Wright, Tony, in: The English Question, op cit, p 13; also Luff, Peter in: House of Commons Debates, Vol 308, cols 632, 16 January 1998
[5] Wright, Tony, in: The English Question, op cit, p 13
[6] See Keating, Michael: *What's wrong with asymmetrical government?,* in: Elcock/ Keating: Remaking the

the Spanish regions are entrenched and, most of all, although being intended otherwise at the beginning, all regions have gone down the devolutionary road. Thus, even if their respective powers may still be different for health and social security, there is at least equality of all other powers[7].

Furthermore, arguments against asymmetry of devolution which are based on the issue of the described principle of complete parliamentary sovereignty are serious, but may become mere theoretical features[8]. Additionally, autonomy is a reasonable solution for areas with strong nationalist movements. Conceded self-government may be able to decrease the centrifugal effects. Besides, the argument of equality remains, in the context of the European Union, an academic issue, both for civil and social rights. The issue of equal representation ("West-Lothian") can be resolved, even if there are currently no attempts to do so. Apart from that, the access of the regions to the European Union may be seen as a more problematic issue, as the asymmetry disfavours currently the poorer English regions. However, their demand to have directly elected Regional Assemblies is not excluded, even if the government imposes high obstacles. Finally, the material disadvantage of these regions is currently not due to their non-existing tax powers.

Generally, asymmetry is thus not the kernel of the problem. Devolution in its current form proves to create other problems. For example, there is the blurred structure of the administration, which disfavours the devolved bodies. Apart from the administration, there is the issue of finance; no fair and clear assessment has yet been undertaken. Lastly, asymmetrical devolution would not exclude an entrenchment of powers in a constitution. The self-governed areas want to be involved at the centre. However, their status can –theoretically – be changed without their consent and they have currently no stake at the centre. All these issues make it difficult to believe that devolution is able to "strengthen the Union". The issue is rather as to whether there is a better solution than asymmetrical devolution. But what could be the better solution for the United Kingdom?

Chapter five tried to outline the differences between devolution and a federal system. Whilst devolution is not federalism, there are important academics who argue to have already

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Union, op cit, p 195

[7] Barnes, John: Federal Britain. No longer unthinkable?, Centre for Policy Studies, London 1997, p 5

[8] See Keating, Michael: *What's wrong with asymmetrical government?,* in: Elcock/ Keating: Remaking the Union, op cit, p 195

identified quasi-federal[9] structures within the current legislation of devolution. This implies, however, that the "British form of quasi-federalism" is also asymmetrical. Conversely, there are fears that the devolution settlement is only a move, to borrow a phrase, where the periphery changes so the centre can stay much the same[10]. This fear is based on the fact that quasi-federalism, in contrast to real federalism, does not entrench the division of powers[11] and that the United Kingdom has not yet completely left the context of a unitary state . The question is, hence, what a real federal solution for the United Kingdom would imply and in which way devolution may evolve in a "federal direction".

Federalism has been defined in Chapter One as a pattern of territorially diversified structures, with more or less centralised control mechanisms being only possible to amend by common decision. Hence, there are three salient points to show as to what degree federalism would match the aim of devolution and solve its deficiencies. It will be shown that federalism would clarify, firstly, the division of powers between the respective levels of government, and the allocation and review of these powers. Secondly, the issues of England's position and the financial organisation can be refined. Thirdly, the general question of a "Constitution" for the United Kingdom would be necessary to address. However, as the current legislation is too recent for a judgement without taking into account future evolutions, we may also need to speculate about the evolution of the new constitutional settlement in ten years time.

In federal systems there are two different divisions of competences[12]. One line of division is "vertical" that means that there is a general separation of federal and national competences. Another division draws a horizontal line giving a power of "control" to the Nations on federal matters, as for example by way of a Second "regional" Chamber. Concerning the vertical division, we scrutinise the division between Westminster's powers and the devolved bodies' powers. Formally, the Scotland Act, the Government of Wales Act and, the Northern Ireland Act divide the reserved and devolved legislative powers. The Scottish Parliament has open-ended residuary powers[13]. However, although being a devolved matter, the Scottish Parliament allowed Westminster recently to legislate for the Sexual Offences (Amendment) Bill. This Bill is the first example of the existence of a convention, which has been outlined in

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[9] Hazell, Robert: *The new constitutional settlement,* in: Hazell, Robert: Constitutional Futures, op cit, p 231 or Bogdanor, Vernon: Devolution in the UK, op cit, pp 289
[10] See Osmond, John: *The JMC and the BIC,* in: Osmond, John: The National Assembly Agenda, op cit, p 353
[11] Barnes, John: Federal Britain. No longer unthinkable?, op cit, p 7
[12] See Hesse, Konrad: Grundzüge des Verfassungsrechts, op cit, pp 94
[13] Hazell, Robert: *The new constitutional settlement,* in: Hazell, Robert: Constitutional Futures, op cit, p 231

Chapter five. Westminster did so only with the consent of the Scottish Executive and Parliament[14]. Even though Westminster has the continuing power to legislate even on devolved matters, it will not normally do so under the "Sewel" convention. Thus, there is a clear draft for the division of legislative powers in the devolution settlement.

Concerning the powers on administration or the judiciary, the division is less evident. Even if the Scottish Executive has some administrative powers, the primary division of power remains the devolution of legislative competence[15]. Even worse, the judiciary is not independent, but dominated by the apex of the Lord Chancellor, a member of the Executive. This might indicate the lack of a clear division of powers. However, the political establishment in the United Kingdom is used to living with such anomalies. Therefore, the judiciary should be considered apart. Nevertheless, the lack of a transparent delimitation of the functions of the devolved administrations from those of Whitehall have already put the devolved Executives "in disarray"[16]. In Scotland, the resignation of the First Minister's chief of staff served to feed speculation about in-fighting and ministerial factions within the Scottish Executive[17]. The issue of a loyal administration has, however, been more flagrant in Wales when the Presiding First Officer of the Assembly could not get legal advice independent from an administration guided by a First Secretary in question[18]. Thus, one could say that federalism implies a real division of administrative functions, which is not achieved with devolution. However, devolution requires also a clear position of the administration, which, unfortunately, is not achieved by the current legislation.

Examining the "horizontal" division of powers within the United Kingdom, we need to identify some form of "national" or "regional" influence on federal, i.e. reserved matters. In a federal context, the sub-units must have some sort of "control" on central government[19]. For example, this power of control is linked in Germany with the influence of the *Länder* (Nations) in administrative areas via the *Bundesrat*, as they have a large experience in this area. Horizontal federalism creates thus a certain balance of powers. However, it has been put

[14] See Constitution Unit: Monitor, Vol 10, March 2000, p 3
[15] Jeffery, Charlie: *Multi-Layer democracy in Germany*, op cit, p 3
[16] See "Scottish Executive in Disarray", in: The Scotsman, 27 January 2000
[17] Scottish Council Foundation: Nations and regions: The dynamics of devolution, Second report, February 2000, p 1 (see http://www.ucl.ac.uk/constitution-unit/leverh/index.htm)
[18] Osmond, John: Devolution relaunched, IWA, March 2000, pp 20 (see http://www.ucl.ac.uk/constitution-unit/leverh/index.htm)
[19] Hesse, Konrad: Grundzüge des Verfassungsrechts der Bundesrepublik, op cit, p 95

forward[20] since the 1960s that the modern welfare state blurs the general spheres of federal and national power increasingly and leaves the nations only with a mere capacity co-operation instead of a power of co-ordination at the centre. It could be the same about devolution. It establishes no regional power of "control" of the centre, rather than an unforeseen need of co-operation between the nations and central government. This can best be shown through the JMC. The JMC becomes the main forum of co-operation between central and devolved government, although it was not envisaged at the beginning and it was inserted later in the context of British-Irish co-operation. The JMC marks the interdependence[21] between these governmental levels. The more the different levels are interdependent, the more central government has to accept their power. This may create good conditions for federalism. The JMC, although it is only composed by the Executives, could be seen as a "horizontal" institution. This is mostly because of its functions on European Union matters, which are reserved matters, but other reserved matters may be added to its work. Generally, however, the role and function of the JMC as a body existing only by "gentlemen's" (i.e. Executives) agreement is too blurred and unclear given the premise that is should represent the nations of the United Kingdom at the centre. It is obvious that the reform of the House of Lords could decide about the future of the regions' and nations' powers. A regional dominated House of Lords would be the first (and only) constitutional entrenchment of their powers at the centre[22].

Another issue is added. As the new bodies do not have clear ideas about their powers, they may be inclined to test them. One way to do that is through the debating powers of the devolved bodies of non-devolved matters. The Scottish Parliament has thus begun to debate matters within Westminster's jurisdiction. Especially, the SNP tried to use their debating time on non-devolved issues. Hence, the Scottish Parliament had to debate a motion deploring the discrimination contained in the Act of Settlement 1700 preventing any Catholic from succeeding to the Crown. The Crown and its succession is a reserved matter. Hence, the Scottish Parliament cannot make laws in this area, but it can debate matters lying outside its legislative competence, as it has been outlined in Chapter five. The motion led the former Scottish Secretary Michael Forsyth to move in the Lords that parliament should consider removing the bar against Catholics succeeding to the Crown. This would require consultation with the other 15 Commonwealth governments where the Queen is still head of state.

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[20] Hesse, Konrad: Der unitarische Zentralstaat, Müller, Heidelberg 1962; Smend, Rudolf: Verfassung und Verfassungsrecht, Staatsrechtliche Abhandlungen, 2nd ed., Müller, Heidelberg 1968, p 270; see also: Jeffery, Charlie: *Multi-Layer democracy in Germany*, op cit, p 4

[21] See Bogdanor, Vernon: Devolution in the UK, op cit, pp 283

[22] Also Bogdanor, Vernon: Devolution in the UK, op cit, p 289

Effectively such action can only be taken by government, but the event shows the tensions and dynamics of the "debating powers". This proves that the newly created institutions do not have only divided powers, but also interdependent powers[23]. Devolution is establishing also shared, and less divided, competences between Westminster and the devolved bodies[24]. This is a new experience in the United Kingdom, which has always been dominated by the centre. Therefore the action at the centre will attract the most attention. The question is as to whether Whitehall is able to move towards a more inter-dependent practice of policy making with the new bodies in Edinburgh, Cardiff and Belfast. In a comparison between Britain and federal Germany, Jeffery put forward the idea that the German federal government is "constrained"[25] and thus unable to ignore regional concerns. Whilst Britain was different before devolution, it is likely to be subsequently constrained too.

In a federal state, all constituent parts are treated equally. Devolution, however, is not given to all parts of the Union. Wales is to be, at the time being, quite a limited "political nation" although an increase of its power seems to be quite likely[26]. Even though Wales has a devolved institution, it has not real legislative power but the National Assembly is rather "a county council on stilts". Wales is, however, a "normal" member of the JMC, for example. There is now a protocol establishing a procedure for legislative proposals of the Assembly on non-devolved matters to be put forward at Westminster by the Secretary of State[27]. That half-way-legislative situation led the former Secretary of State for Wales and the Presiding Officer of the Assembly to think about a Welsh "Speakers Conference" to expand the Assembly's powers. Sir Thomas states that the Government of Wales Act cannot be a "new" constitutional settlement as it is too close to the 1978 legislation. In his view the present Act was rather merely the best that could be achieved in the circumstances of the time and the new legislation is not based on a clear legislative principle.

> "It could be said to have elevated piecemeal development to an art form. [...] We are not at the beginning of a new constitution for Wales. We are at the beginning of the end of the old constitution [...] We have the least that could be established at the time. We shouldn't say that a political fix is a national constitution. It is time we looked for

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[23] See above
[24] Cornes, Richard: *Intergovernmental Relations in a devolved United Kingdom: Making devolution work,* in: Hazell, Robert: Constitutional Futures, op cit, p 157
[25] Jeffery, Charlie: *The decentralisation debate in the UK: Role-Modell Deutschland?,* in: Scottish Affairs, N° 19, op cit, p 45
[26] See *MP's for increase of Assembly powers*, Western Mail, 16/05/00

more[28]".

His statement may prove that the devolution legislation for Wales is not yet "settled". Hence, it is questionable whether the Scotland and Wales Acts are really a new Constitution[29] or if a Constitution would not need such an initiative. In contrast to England and Wales, the Northern Irish question is to be seen in a broader context, which is largely outside the remit of Westminster. The political will at Dublin and London to find one solution after the other is very strong. This can best be proved with the forthcoming Disqualifications Act 2000 allowing Members of the Irish Parliament to become Member of the Executive of the United Kingdom. However, the problem and its conclusive solution lies in Ulster itself.

Chapter four stressed the fact that the treatment of England raises also questions[30]. On the one hand, there is the problem as to whether there should be an "English vote on English law[31]" in the House of Commons. However, the proposition[32] of an English Parliament is impossible, as the Union would be completely imbalanced[33] with this huge member. The Labour government seems to opt for the revival of the Regional Affairs Committee being already in use between 1976 and 1978. Whether England, however, will be satisfied with that solution is unclear. On the other hand, the government has internally not yet found a common position on the "regional future" of England. Whilst the Prime Minister seems to prefer a system of elected Mayors, his Minister of Transport seemingly favours the approach of Regional Chambers. The election of the London Mayor and the disastrous result for Labour may contribute to a regional module for England. England would best fit into a federal United Kingdom, if it is split into powerful regions. The argument that there is no popular identification with these regions is based on previous experiences with the alteration of these regions (see Chapter four). Also, the example of Germany shows that even artificial regions can develop a certain degree of popular identity in time. However, such a regionalisation of England cannot be made against the opinion of the population by some sort of "big bang", but by a gradualist approach including the enduring maintenance of the existing regional boundaries and sensible political leadership. It would also be helpful if the threshold to

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[27] See Osmond, John: Devolution relaunched, op cit, p 37
[28] Citation from Osmond, John: Devolution relaunched, op cit, p 26
[29] Hazell, Robert: *The new constitutional settlement,* op cit, p 231
[30] See Wright, Tony (ed.): The English question, Fabian Society, London 2000
[31] See Hague, William, speech to the Centre for Policy Studies, London, 15/07/1999
[32] Barnes, John: Federal Britain. No longer unthinkable?, op cit see also above the Bill of Conservative MP Theresa Gorman
[33] See for example: Hazell, Robert: *The new constitutional settlement,* op cit, p 241 citing the example of Prussia

establish regional government in England was not as high as it is currently. By all meanings, powerful English regions would be with respect to the population and the geography the most balanced solution for the Union.

A salient feature of devolution in the United Kingdom is that it is demanded from the poorer regions. That is with clear difference to other European states where it is generally demanded from the wealthier sub-national units[34]. That view, however, has already been taken when Northern Ireland enjoyed its "Home-Rule" scheme in the aftermath of 1921. As Northern Ireland's Prime Minister put it already in 1940: "What keeps the matter right in Great Britain is the fact that there are great rich areas such as London which help to carry the burden of the areas not so favourably circumstanced. Our claim here is that as part of the UK we have the right to expect the same [social] security [as the other parts of the UK][35]". Thus, the centrifugal forces are coming from the part of the poorer regions. How long England's population will accept that share of money is undetermined. As long as the precise bases of the Barnett-formula are not available and thus being able to be explained there is no financial settlement. The South-East is likely to contribute always more than other parts of the country. However, even in the short-term there have been signs for a change of the formula's definition[36]. The issue is less about the tax-raising power of the devolved bodies themselves, but rather about their share of the budget in general and the determining factors. This seems to be a troublesome task, but it is of central concern for devolution. A fair and transparent "deal" between the wealthier and poorer parts of the country is needed to avoid the expected tensions over finance[37].

The judicial review of Scottish Parliament has already started and the courts adopted a non-constitutional interpretation of the Scotland Act[38]. On a petition for an interdict brought by the Countryside Alliance against the Protection of Wild Mammals Bill, moved by a MSP, the appeal court rejected the petition, but ruled that the courts have jurisdiction over the Scottish Parliament, as a body created by statute, and with powers limited by statute. The Lord President stated that the

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in Germany of the "Weimar" Republic

[34] As in Spain or Germany

[35] J.M. Andrews cited in: Boyce, D.G.: The Irish question and British politics, op cit, p 105

[36] See Morgan, Rhodri, in: Wales on Sunday, 13 February 2000

[37] See Hazell/ Cornes: *Financing devolution: The centre retains control,* op cit, p 196

[38] *Whaley v Scottish Parliamentary Corporate body*, 16/02/00, see http://www.scotcourts.gov.uk/

> "Lord Ordinary gives [in the first decision] insufficient weight to the fundamental character of the Parliament as a body, which - however important its role - has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law"[39].

However, that case was a low-key matter that did not impinge on "constitutional" issues. Nevertheless, the statement is clear. As it has been outlined in Chapter five, devolution establishes parliaments as statutory bodies, which are under political control of Westminster. In contrast, federalism would require some sort of independent legal control. This implies the need for a constitutional court. This role has been given to the Judicial Committee of the Privy Council, which is in some sense, however, not a real court but rather an advising council according to its constitutional position. The famous "conventions" guiding the British constitutional law are currently not reviewed by any court. Hence, the devolved institutions may well have interest in an independent body for appeal – especially when there is no written constitution. Even if devolution is not federalism, the establishment of a constitutional court would create new "confidence" in the peripheral areas of the United Kingdom and thus being a huge contribution to a "strengthened" Union.

If devolution is constitutionally different from federalism, there are similar features under a political analysis[40]. Devolution leaves the Scottish Parliament as a subordinate body. Politically, however, its most important power lies in its representative function for the Scottish people. Thus, it may well be anything than subordinate[41]. Politically, different signs show that there is a movement of federalisation under way in the United Kingdom. The internal organisation of the political parties had to deal with the handling of "regional" conflicts and balances. This has been most apparent within the Labour party. The election of its London Mayor candidate showed the gap between the demands of the centre and the wishes of the local party members. Even if the centre "retained control" the independent candidate Ken Livingstone easily won the election and will thus be a powerful opposition to

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[39] *Whaley v Scottish Parliamentary Corporate body*, 16/02/00, op cit, p 7
[40] See Bogdanor, Vernon: Devolution in the UK, op cit, p 287
[41] See Bogdanor, Vernon: Devolution in the UK, op cit, p 288

"new Labour" at Westminster. In Wales, the former First secretary Alun Michael was widely perceived to be the choice of London rather than Wales. It was believed that this perception contributed already partly to his failing to win a majority in the Assembly elections[42]. Additionally, his continued emphasis on the need to take account of Wales' links with Britain and reluctance to entertain distinctive Welsh initiatives led to his failing. This served to emphasise the perception that he was "Blair's man in Wales", and he lost finally the support of the Assembly and of its own party. Both events prove that the political structure and party organisation within the United Kingdom are changing in favour of the parties' regional branches.

Constitutionally, the doctrine of parliamentary sovereignty, as explained in Chapter two, remains unchanged. However, as Bogdanor writes, "the formal assertion of parliamentary supremacy will become empty when it is no longer accompanied by a real political supremacy"[43]. The experience of Northern Ireland proves that the political supremacy lies no longer at Westminster. Even in a context when devolution was given to a region which did not demand it, Westminster had difficulties to exercise its supremacy. Hence, the assertion of parliamentary supremacy could become "so empty that it could eventually be given effect only by what would be in reality be a revolutionary act"[44]. Devolution thus blows a second hole though the middle of Dicey's doctrine of parliamentary sovereignty[45] after the signing of the European treaties. This proves that the United Kingdom is no longer a unitary state, but rather a "de facto federal state". Rhodri Morgan, after his confirmation as new Welsh First Secretary, reflected on the nature of devolution within the United Kingdom. In his view, a process towards greater self-determination was under way. He predicted that

> "one day we are going to have a written constitution to demarcate the powers of the devolved assembly – to decide what the balance of powers is between the lower and the upper chambers of the Houses of Parliament; and to demarcate the powers of Europe, the European Courts of Human Rights and the British Government. But at the moment, Britain muddles through. We don't want to write it down. [...] It means that it is easier to make constitutional changes in the UK. This is wonderful – as long as the constitutional changes are going in the direction that you want. It is dreadful – if the

[42] Osmond, John: Devolution relaunched, op cit, p 3
[43] Bogdanor, Vernon: Devolution in the UK, op cit. p 291
[44] Enoch Powell, in: House of Commons debates, Vol 924, col 458, 19 January 1977
[45] See above

constitutional changes could also be removed in the direction that you don't want. This is the issue of entrenchment." [46]

During the first year of the Assembly it became obvious that the public is unable to understand the division of powers between Westminster and the devolved bodies[47]. Therefore, Morgan concluded that

> "it would be healthy for the Assembly if at some stage over the next ten or twenty years a written constitution entrenched the powers of the Scottish Parliament and the assembly. Because of this dreadful phrase 'power devolved is power retained' there was not what you could call a revolution to take the powers of the Welsh Assembly. It was all done in an orderly manner of party manifestos and elections and referenda and Houses of Parliament and so forth. Therefore in theory, with the theory of the elected dictatorship it could be reversed by a future Government. I do not think it ever will be. When you look at the last thousand years, rather than the last hundred years, you can see that in this tortured relationship between the Celts and Anglo-Saxons within these islands up to 1920, it was an imperial expansion of England into Wales initially, then into Scotland, and then into Ireland through various forms of Acts of Union. But then from about 1850 onwards the talk was gradually not about Acts of Union but about movements towards disunion, of redefining the rights for the Celtic nations of Ireland, Scotland and Wales"[48].

What, in his view, differs in theory and practice, can be also seen as a gap between constitutional and political application. The elective dictatorship[49] may thus come to an end even in practice in the foreseeable future. Devolution creates undoubtedly more "checks and balances" than the United Kingdom ever had before. Thus, the forthcoming process, but not the event of devolution itself, to borrow a phrase, may prove as to whether the current model of asymmetrical devolution evolves to federalism.

What can we now conclude about devolution and the Constitution? Everything changes in the

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[46] Morgan, Rhodri: Variable Geometry UK, IWA, Cardiff 2000, p 10. This view is, however, not uncontested, see e.g. MacCormick, Neil: *The English Constitution, the British State, the Scottish Anomaly,* op cit, p306
[47] See *Just who is running this country*, Western Mail, 12/05/00
[48] Morgan, Rhodri: Variable Geometry UK, op cit, p 10
[49] Hailsham, Q.: The dilemma of democracy, Collins, London 1978

United Kingdom, but not the Constitution, one could say. The future balance of the two competing principles affected by devolution, sovereignty of parliament and self-government at a sub-national level is not yet adjusted or settled. This question must, however, be addressed[50]. There is a good reason that the dictum of Alan Peacock's Memorandum of dissent prevails: "The system of government of the United Kingdom can only be based on *equality* of political rights for all citizens in the separate regions and nations.[... This] can only be brought about by increasing regional participation in the system of government"[51]. Hence, the "fundamental" constitutional principle of Britain, the sovereignty of parliament, could become a mere theoretical one. Obviously, the case for moving towards a really federal constitution is in 2000 much more likely than ever before[52], because Britain is already to be governed by some sort of de-facto federalism as far as the devolved institutions are left "in peace"[53] – as it was the case in Northern Ireland in the aftermath of 1920. Compared with the two hundred years of history of the United Kingdom in its current feature, this was evidently a long time.

For a federal scheme, there must be a "Constitution". The United Kingdom does not have a written constitution, which has been deplored subsequently. However, constitutions of federations usually spring from a truly national constitutional assembly where the representatives of the constituent parts meet[54]. Such a meeting did not happen in 1998, but it would now be possible. That could be the revolution, which might be necessary for the change of parliamentary sovereignty. Following Wade[55], that principle "is a rule which is unique in being unchangeable by parliament – it is changed by revolution, not by legislation; it lies in the keeping of the courts, and no act of parliament can take it from them". The current devolution legislation also moves more power over primary legislation to the courts. Thus, a reformed House of Lords with a "new" Judicial Committee of the Privy Council becoming a real court may well be inclined to fulfil that revolution[56]. Britain's Membership of European Union already eroded the principle and even the then Members of the Committee left the sovereignty of Parliament falling short[57]. Federalism becomes thus a real prospect for the United Kingdom.

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[50] Keating, Michael: *What's wrong with asymmetrical government?,* op cit, p 213
[51] Royal Commission on the Constitution (Kilbrandon), op cit, Vol II, p x
[52] Brazier, Rodney: *The Constitution of the United Kingdom,* in: C.L.J., Vol 58(1), op cit, p 126
[53] Brazier, Rodney: *The Constitution of the United Kingdom,* in: C.L.J., Vol 58(1), op cit, p 126
[54] Brazier, Rodney: *The Constitution of the United Kingdom,* in: C.L.J., Vol 58(1), op cit, p 127
[55] Wade, H.: *The basis of legal sovereignty,* in: C.L.J., Vol 25 (2), op cit, p 189
[56] Olowofoyeku, Abimbola A: *Decentralising the UK: The federal argument,* in: Edinburgh Law Review, op cit, p 78

Federalism –in whichever form – would contribute to a more consensual and "interdependent" future of Britain's constitutional settlement and, also, ensure its constituent parts of their entrenched rights and duties thereby "strengthening the Union". The United Kingdom is passing a "European experience" with the granting of power to sub-national units and the resulting struggle for power between central and regional government. All arguments against federalism should remember the dictum of Jennings[58] that a "federation is not a magic formula. It is nothing more than the name of a complicated system of government which nobody would wish to see established anywhere if he could think a better". A clear structure of government could be one more factor that devolution is not supposed to prove to be the "stepping-stone" to disintegration[59]. Also, a step towards federalism would encounter the "gradual deterioration of Britain's constitutional arrangements"[60] in comparison with other European constitutional models[61] and render the United Kingdom into a role of a constructive contributor in shaping the future constitution of Europe[62]. Britain's future is linked very deeply with the continent. As Gladstone put it more than hundred years ago: "We are part of the community of Europe, and we must do our duty as such!"[63]

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[57] See above
[58] Jennings, Ivor: A federation for Western Europe, CUP, Cambridge 1940
[59] Davies, Norman: The Isles, op cit, p 928
[60] Walker, Neil: *Constitutional Reform in a could climate,* in: Tomkins, Adam: Devolution and the constitutional reform, op cit, p 79
[61] See Walker, Neil: *Constitutional Reform in a could climate,* in: Tomkins, Adam: Devolution and the constitutional reform, op cit, p 79; also: Würtenberger, Thomas: Speech at the annual meeting of the Young Christian Democrates (Germany), Furtwangen, 24 April 1999 stating the positive export of the German Basic Law.
[62] See Hazell/ Cornes: *Introduction,* in: Hazell, Robert: Constitutional Futures, op cit, p 4
[63] Gladstone, William: Speech at Carnavon, 10 April 1888

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Appendix

Appendix 1

Relevant electoral results

General Elections 1997

	% of Vote	Seats
Labour	43.2	418
Conservatives	30.7	165
Liberals	16.8	46
SNP	2.0	6
SDLP	0.6	3
UUP	0.8	10
Plaid Cymru	0.5	4

Elections for the Scottish Parliament, May 1999

	% of Vote	Seats
Labour	43.4	56
SNP	27.1	35
Liberals	13.2	18
Conservatives	14.0	17
Others (Green, Socialist Party)		3

Elections for the National Assembly, May 1999

	% of Vote	Seats
Labour	36.5	28
Plaid Cymru	29.5	17
Conservatives	16.2	9
Liberals	13	6

Elections for the Northern Ireland Assembly, June1998

	% of Vote	Seats
UUP	21.3	28
SDLP	22.3	24
DUP	18.1	20
Sinn Fein	17.6	18
Others (Alliance, UK Unionist, Independent Unionist, NI Women)	20.7	18

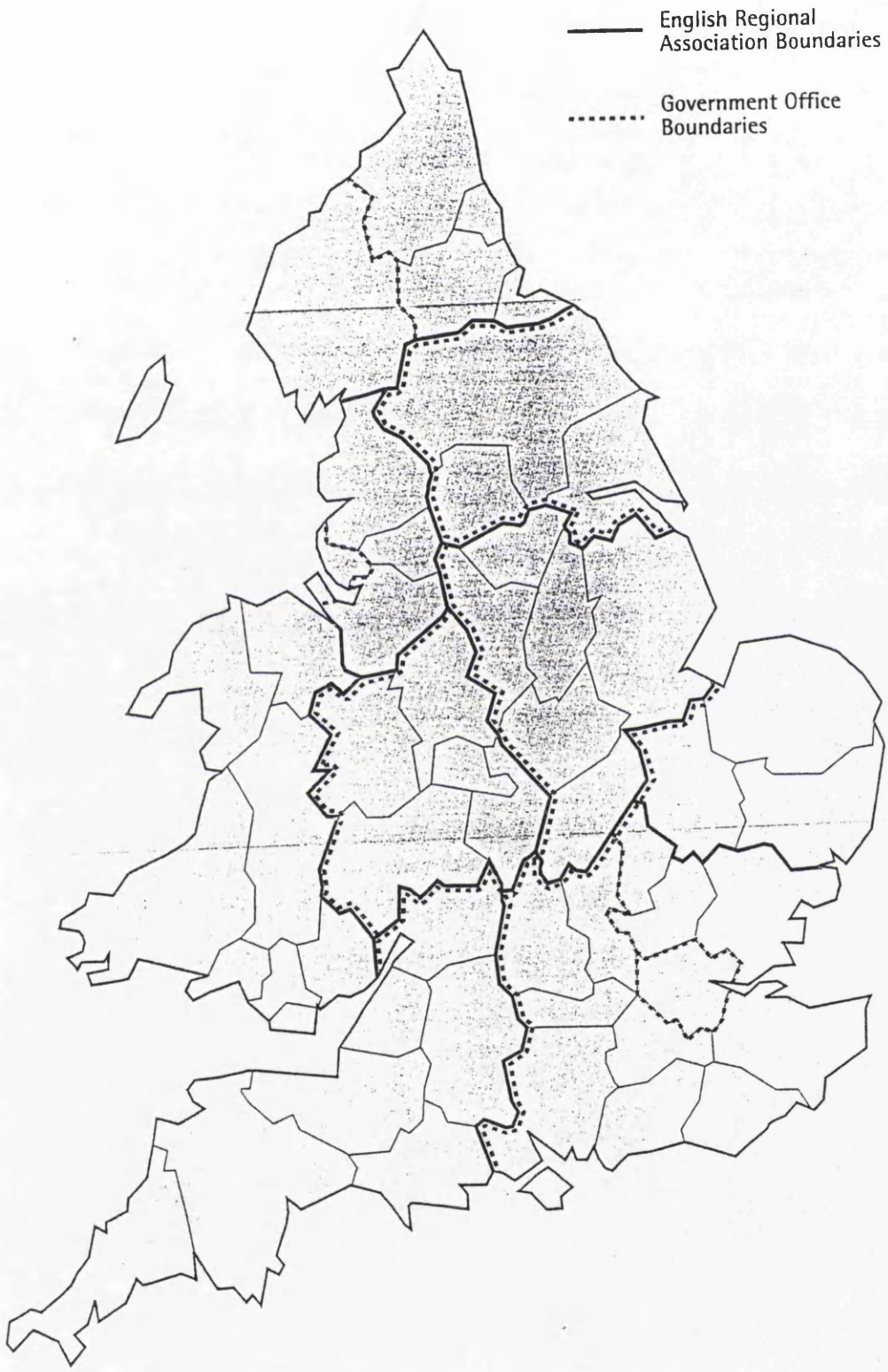
Referendums in 1997

	Date	Turnout	Yes-Vote	Tax-Varying powers
Scotland	11/09/1997	60.4 %	74.3 %	63.5 %
Wales	18/09/1997	49.7 %	50.3 %	--

(Sources: http://www.election.demon.co.uk/ge1997.html, http://www.scottish.parliament.uk/whats_happening/research/pdf_res_papers/rp99-01.pdf, National Assembly for Wales, 1999)

Appendix 2

The regional boundaries in England: The GORs and the regional associations
(source: Constitution Unit, Regional Government in England, London 1996)



Appendix 3

The regional Chambers boundaries in England
(source: DETR, London 2000)