RESEARCH PAPER 98/3
7 JANUARY 1998

The *Scotland Bill*: Some Constitutional and Representational Aspects

The *Scotland Bill* [Bill 104 of 1997-98] is due to be debated on second reading on 12-13 January, and this Paper is one of a series providing briefing on the Bill. Research Paper 98/1 describes the development of the devolution policy in the July White Paper and through the referendum to the publication of the Bill last month. Other Papers deal with specific aspects of the Bill such as the tax-varying power, local government, and so on.

This Paper concentrates mainly on aspects of what has become known as the West Lothian Question, and in that respect replaces RP95/95, Sept 1995.

Barry K Winetrobe

HOME AFFAIRS SECTION

HOUSE OF COMMONS LIBRARY

Related Library Research Papers include:

98/1	The *Scotland Bill*: Devolution and Scotland's Parliament	
98/2	The *Scotland Bill*: Some Operational Aspects of Scottish Devolution	
98/4	The *Scotland Bill*: Tax-Varying Powers	
98/5	The *Scotland Bill*: The Scottish Parliament and Local Government	
97/132	The *Government of Wales Bill*: Operational Aspects of the National Assembly	04.12.97
97/130	The *Government of Wales Bill*: The National Assembly and its partners	04.12.97
97/129	The *Government of Wales Bill*: Devolution and the National Assembly	04.12.97
97/126	Devolution and Europe	04.12.97
97/113	Results of Devolution Referendums (1979 & 1997)	10.11.97
97/97	Time Spent on Government Bills of Constitutional Significance	01.08.97
97/92	Scotland and Devolution	29.07.97
97/82	The local elections of 1 May 1997	27.06.97
97/78	Public Expenditure in Scotland & Wales	09.06.97
97/61	The Referendums (Scotland and Wales) Bill [Bill 1 of 1997-98]	20.05.97
97/60	Wales and Devolution	19.05.97
97/53	The Commons committee stage of 'constitutional' bills	20.05.97

CONTENTS

Summary

This Paper is one of a series of Research Papers prepared for the second reading debate of the *Scotland Bill* on 12-13 January. General briefing on the development of the Government's devolution policy, and an overview and analysis of the proposed devolution scheme in the Bill is contained in Research Paper 98/1. This present Paper explores in more detail some particular aspects of the scheme which have been the subject of debate over the years.

Devolution (especially the scheme for Scotland) is a significant constitutional development for the UK, and much of the debate on the subject in the last 25 years has been as much on the effect that such constitutional change will have on the future of the United Kingdom itself as on the detailed proposals of the various devolution and related schemes themselves. This Paper seeks to examine some of these aspects of the continuing debate, especially those which have been subsumed in the term 'The West Lothian Question'. This was examined in some detail in September 1995 in Research Paper 95/95.

The perceived importance of the West Lothian Question to the whole devolution debate is considered here, as are some of the possible 'answers' to the Question which have been put forward. This Paper also examines the various practical implications of the new representational relationships in and between Edinburgh and Westminster that may emerge in the devolution era. The half-century of devolution in Northern Ireland is also considered, as a possible analogy for the proposed devolution scheme for Scotland (and for Wales).

The Paper examines at the outset a number of more general constitutional issues which arise from the provisions of the present Bill, such as the requirement for some form of 'supremacy clause'. The provisions relating to reserved constitutional matters and to the application of the original Union legislation is also briefly explored. Some constitutional issues, such as the Scottish ministers and the Parliament's legislative role, are considered in the companion Research Paper 98/2.

I Constitutional Issues

A. 'Supremacy'

There has been much debate in recent months about the need or otherwise for any devolution legislation to state expressly the legislative supremacy of the UK Parliament. The Bill contains a number of provisions which appear to be intended to address this point. In particular, *clause 27*, which deals with the legislative power of the Scottish Parliament, states that: "This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland": ***clause 27(7)***.[1]

In addition, the Bill sets out the area of legislative competence of the Parliament and *clause 28(1)* declares: "An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament." What the Bill describes as 'the constitution' is expressly stated to be a reserved matter (*sch 5 part 1*, head 1). The 1706-7 Union legislation is expressly stated to have effect subject to the provisions of the *Scotland Bill* (*clause 35*) .[2]

Reference is often made to the 'supremacy' provision in section 75 of the *Government of Ireland Act 1920*[3]:

> **75 Saving for supreme authority of the Parliament of the United Kingdom**
>
> Notwithstanding... anything contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters, and things in Ireland and every part thereof

The *Northern Ireland Constitution Act 1973*'s section on Measures of the Northern Ireland Assembly contained the following: "This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland ….": *s4(4)*. As Hadfield noted, the inclusion of this provision was not legally necessary given Westminster's inherent sovereignty, but its exclusion may have been regarded as significant, especially following the debates over the 19th century Home Rule legislation and the inclusion of a similar provision in the 1920 Act.[4]

---

1 An equivalent provision appeared in the *Northern Ireland Constitution Act 1973, s4(4).*
2 On these two points, see below.
3 As amended by the *Northern Ireland Constitution Act 1973*
4 B Hadfield, *The constitution of Northern Ireland*, 1989, p108

There was a 'supremacy clause' in the original *Scotland Bill* in the late 1970s, but this was dropped during its Commons proceedings:[5]

> *The legislative supremacy of the U.K. Parliament*
>
> When the Bill was introduced into the Commons, it began with the following clause, entitled " Effect of Act ": " The following provisions of this Act make changes in the government of Scotland as part of the U.K. They do not affect the unity of the U.K. or the supreme authority of Parliament to make laws for the U.K. or any part of it." In part this clause was inspired by s.75, Government of Ireland Act 1920 (supreme authority of U.K. Parliament to legislate for Northern Ireland declared to be unaffected by the 1920 Act), but it was widely criticised in debate and the Commons voted to remove it from the Bill (Hansard, H.C. Vol. 939, col. 1402 (Nov. 22, 1977)). The Government did not seek to reinstate it. On the Diceyan view that Parliament may not bind its successors, the clause was in law unnecessary because Parliament would retain full power to legislate for Scotland, whether or not an Assembly had been created with legislative powers. However, the clause might have served to discourage the development of a binding convention to the effect that Parliament should not legislate on matters that had been devolved to the Assembly.
>
> Regarding the Scotland Act, the following propositions may be advanced: (a) that Parliament retains full legislative capacity to amend or repeal the Scotland Act and to do so at any time, whether before or after the referendum of the Scottish electorate (s. 85) and whether or not the provisions of the Act have come into effect; (b) that Parliament retains full legislative capacity on all matters affecting Scotland, whether or not they are within the legislative competence of the Assembly, and whether or not the Assembly has yet legislated on these matters. Thus Parliament will have power to amend or repeal any Assembly Acts.
>
> The effect of s. 17 (2) must, however, be considered, by which " a Scottish Assembly Act may amend or repeal a provision made by or under an Act of Parliament " (and contrast the provision made in the Government of Ireland Act 1920, 6). The following propositions are also advanced : (c) that the Assembly will, within the area of its legislative competence, have power to amend or repeal Acts of Parliament passed *before* the Scotland Act 1978; (d) that the Assembly may also, within the area of it's legislative competence, have power to amend or repeal Acts of Parliament passed after the Scotland Act 1978, but this will depend on what is held to be the intention of Parliament in passing the later Act; the later Act may be held to demonstrate an intention to amend the Scotland Act in this respect (proposition (a) above). There is therefore no legal basis for any fear of an endless game of legislative " ping-pong" developing between the Assembly and Parliament.
>
> In relation to the legislative supremacy of Parliament note also: (i) that the Assembly's legislative powers do not extend to amending the Scotland Act itself (a. 17 (2) and Sched. 2, para. 7) although Sched. 2, para. 7 does permit the Assembly to legislate on certain matters included in Sched. 16 as amendments to existing Acts of Parliament; (ii) that wide powers of amending Acts of Parliament by subordinate legislation are conferred by s. 37 and s. 82 (3); (iii) s. 37 and s. 82 (3); (iii) that by legislating for the procedure by which certain Bills should pass through the House of Commons, s. 66 breaks new constitutional ground; but it is submitted that no court would be willing to examine whether or not the House had complied with s. 66 (*Edinburgh and Dalkeith Rly. v. Wauchope* (1842) 8 Cl. & F. 710; *Pickin v. British Railways* Board [1974] AC 765, and cf. the analogous provision made in s. 17 (4) regarding Assembly Acts.).

---

[5] A Bradley & D Christie, *The Scotland Act 1978*, Current Law Statutes Annotated, general comment

This raises the thorny question of 'sovereignty', which has bedevilled attempts at major constitutional reform in the UK for many years (as seen recently, in addition to devolution, in the European and human rights arenas), and in particular how power can be effectively dispersed within a fundamentally unitary constitution underpinned by the notion of 'Parliamentary sovereignty' (or the 'legal supremacy of Parliament'). This was considered more fully in Research Paper 96/82, *The constitution: principles and development*, 18 July 1996, especially sections V and VI. The problem that constitutional ideas of sovereignty have for the entrenchment of any new territorial constitutional arrangements[6], such as devolution, has been recognised by those on both side of the devolution argument, including the Scottish Constitutional Convention.[7]

The Opposition protested in their amendment at second reading at the absence of any form of 'supremacy clause' in the *Government of Wales Bill*, as the following exchange during the Welsh Secretary's opening speech illustrates:[8]

Mr. Davies: Secondly, the right hon. Gentleman and his colleagues should try to draft an amendment that can stand more than a passing examination. Their reasoned amendment is an insult to Parliament. At its heart, it calls for a statutory assurance in relation to the supremacy of Parliament. The right hon. Gentleman is called the constitutional spokesperson for the Conservative party, but the idea of a statutory assurance in relation to the supremacy of Parliament is constitutional nonsense. Parliament is supreme, and any statutory assurance to that effect by this or any other Parliament can be set aside by any future Parliament. It is not possible in any circumstances to give the type of assurance that the right hon. Gentleman is seeking.

Mr. Ancram: Would the right hon. Gentleman like to take advice, because he has obviously not done his homework for the debate, about section 75 of the Government of Ireland Act 1920, which is still extant?

Mr. Davies: I am happy to take advice and to read the section to which the right hon. Gentleman refers, but will he answer this central question? How is it possible for-- [Interruption.] --if the right hon. Gentleman wishes to engage in debate, he should do me the courtesy of listening to my question. How is it possible for Parliament to place in a piece of legislation a statutory assurance that the supremacy of Parliament will be recognised and, at the same time, prevent any subsequent Parliament from setting aside that provision? Will the right hon. Gentleman answer that question?

Mr. Ancram: I shall help the right hon. Gentleman. Section 75 of the Government of Ireland Act 1920 states that

"the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters, and things"

in Northern Ireland. That assertion was put into the Act when it was passed and it is still extant in it. If the right hon. Gentleman wants to talk about constitutional precedent, that of 70 years is surely a pretty good precedent on which to rely.

Mr. Davies: Perhaps the right hon. Gentleman will answer this question: what is to stop this Parliament repealing section 75 of that Act? The answer is, nothing at all, which is precisely my point. Given that we have an unwritten constitution and that everyone recognises the supremacy of Parliament, his proposition that there should be a statutory assurance in relation to the supremacy of Parliament is absolutely meaningless.

---

6 This is discussed more fully in Research Paper 96/82, section VI

7 *Scotland's Parliament, Scotland's right*, 1995, pp18-19

8 HC Deb vol 302 cc684-5, 8.12.97

Mr Ancram developed his point during his speech (cc696-7, 8.12.97):

All that the Secretary of State has to do to allay these fears, the phrase used by the Prime Minister in Downing street, is to declare unequivocally to the House--or, better still, to table an amendment--that the supreme authority of this Parliament shall remain unaffected and undiminished over all persons, all matters and all things in Wales.

Mr. Ron Davies: Where has that been done before?

Mr. Ancram: I will tell the Secretary of State: in the only case where there has been devolution of power of this kind within the United Kingdom. I will gladly give way to the Secretary of State if he wishes to make the statement for which I ask, and I look to him to place those words in the Bill.

Mr. Davies: I have given the right hon. Gentleman a clear answer--that provision is meaningless. Will he answer my question? What is to stop this Parliament, if it wishes, repealing that measure?

Mr. Ancram: The supremacy of this Parliament means that it can do what it wishes. If the Secretary of State refers to Northern Ireland, he will see that assurances were given by the inclusion of such a provision in the Government of Ireland Act 1920. Why is he frightened of putting that phrase into the Bill by an amendment, which would merely replicate what is in the Government of Ireland Act 1920? That is a good precedent.

Mr. Davies: I am not afraid of anything. I am trying to explain to the right hon. Gentleman that I am resisting putting a meaningless provision in the Bill. He has acknowledged that there is nothing to stop any future Parliament repealing any measure passed by this or any other Parliament. Why does he not accept that a central pillar of the British constitution is that this Parliament is sovereign? Nothing that this Parliament does can bind any future Parliament. That needs no legislation.

Mr. Ancram: The Secretary of State is wriggling. If he really felt that, he would have no compunction about putting such a phrase in the Bill. He is not prepared to do it because he is frightened of a confrontation with the nationalists. He fought the referendum on the basis that while he was telling one half of Wales that devolution would strengthen the Union, he allowed the leader of Plaid Cymru, the right hon. Member for Caernarfon (Mr. Wigley), to go around Wales talking about how it would lead to the break-up of the United Kingdom and to an independent Wales. He does not want to break up that happy friendship. Perhaps, in due course, we will help him to concentrate closer on the matter.

Winding up for the Opposition the following day, Bernard Jenkin said (c883):

The Secretary of State referred to the supremacy of this Parliament, and said that it was sovereign. When he says that everyone recognises the sovereignty of this Parliament, he is not correct. During his speech yesterday, the right hon. Member for Caernarfon (Mr. Wigley) sidestepped the issue of the sovereignty of this Parliament. He says that sovereignty rests with the people in a democracy. It is true that if the people wanted to overthrow the sovereignty of Parliament, they could do so, but it should not be our purpose to enable that to happen by mistake or by constitutional sleight of hand.

The Government are technically correct in saying that the legal supremacy of Parliament is not affected by the Bill, but it may be affected by the events which follow as a result of the legislation. Sovereignty has a political quality. At a time when the Government are pressing through legislation that could pave the way for the separation of Wales from the rest of the United Kingdom, a clause reinforcing the ultimate supremacy of Parliament would cost nothing but would make the intentions of Parliament absolutely clear. If the Government believe so strongly in the Union, why should they be reticent about having that expressed in the Bill?

In his July statement on the white paper, Mr Dewar said:[9]

> The United Kingdom Parliament is, and will remain, sovereign in all matters, but, as part of our resolve to modernise the constitution, Westminster will be choosing to exercise that sovereignty by devolving legislative responsibility to the Scottish Parliament, without diminishing its own powers.

He was challenged on the sovereignty issue by Michael Ancram from the Opposition front bench, who asked: "Where under his proposals will sovereignty lie: with the Scottish people under the terms of the Claim of Right to which the Secretary of State subscribed; with this Parliament; or with the Prime Minister as an English Member of Parliament at Westminster?" (c1045). Mr Dewar replied (c1046):

> The right hon. Gentleman asked an important question about sovereignty and the Claim of Right. Let me make it very clear to him--the right hon. Gentleman has heard me do so on a number of occasions--that this is a scheme of devolved power which has life because I hope that the House will be persuaded that it is right for the governance of the country. Of course, parliamentary sovereignty remains part of that scheme. The Claim of Right, however, is important because it recognises the principle that people in Scotland, as in any other area, have the right to decide their own political future. I hold very firmly to the view that the scheme that I have presented today reflects their wishes and needs. There is a great deal of evidence to support that, but the matter will be put to the test in the referendum in the autumn. If we get that endorsement, I hope that the right hon. Gentleman will accept that it is time to act and to move forward in unity to make a good job of an important and exciting constitutional reform.

He returned to his theme when opening the 31 July debate on the white paper:[10]

> In previous exchanges in the House, I have stressed that we propose devolution and reform within the United Kingdom. Let me take the opportunity to do so once again. We accept that sovereignty within a devolved system lies with the United Kingdom Parliament. That sovereignty can be exercised in a number of different ways. The choice that we are asking Parliament to make is to pass some of its practical day-to-day power to a directly elected Scottish Parliament representing the people of Scotland. I recognise that, of course, that cannot be done without the consent of a majority of Members of this Parliament, representing every part of the country. It is my job not only to convince Scotland that the proposal is right, but to carry my hon. Friends and hon. Members from all parties in that cause.

---

9 HC Deb vol 298 c1042, 24.07.97
10 HC Deb vol 299 cc455-6, 31.07.97

Mr Ancram, in his speech in that debate, also returned to an earlier theme, by warning that devolution would put the UK constitution at peril by the undermining of existing sovereignty (cc472-3):

> A Parliament, by its nature, always wants more power. How soon would a Scottish Parliament be flexing its constitutional muscles? How soon, claiming credence from the Claim of Right, would it be testing its own view of where sovereignty lay? I doubt whether its view would be that sovereignty lay with the Westminster Parliament. How soon would it be asking for greater powers and greater resources, probably in the knowledge that it would not get them? Then what? It would become the focus for Scottish discontent, the cockpit for national resentment and the arena in which to set Scot against English. That is the virus and the dynamic it would create--it would tear at the bonds that hold this United Kingdom together.
>
> **Mr. John Swinney (North Tayside):** How does the right hon. Gentleman's argument square with the view of the former Prime Minister, Baroness Thatcher, that if the Scottish people wanted to assert their rights, use their sovereignty and determine their independence as their preferred option, no impediment should be placed in the way of their achieving that objective? Does the right hon. Gentleman agree with that? How does he square it with his argument?
>
> **Mr. Ancram:** The hon. Gentleman makes my point for me, because that is precisely what a Scottish Parliament would argue--that sovereignty rests not with Westminster, as the Secretary of State said, but with the people of Scotland.

The SNP's view on the need for a 'supremacy' provision was set out in a statement on 16 December:[11]

> Commenting on the exclusive in today's Scotsman newspaper that there is to be a clause in the Scotland Bill declaring that Westminster is sovereign, the Chief Executive of the Scottish National Party Mr Michael Russell said:
>
> "The reality is that the Scottish people are sovereign, and it is irrelevant what is said in the Scotland Bill. From the Declaration of Arbroath in 1320, to Lord Cooper's 1953 judgement in the Court of Session, to the 1989 Claim of Right, the legal fact in Scotland is that the people are sovereign - and that parliamentary sovereignty is alien to Scottish constitutional law.
>
> "If Westminster MPs want to peddle the fiction of their sovereignty over Scotland in order to mask the reality of London's diminishing power, then that is a matter for them.

---

[11] Irrelevant sovereignty clause in Bill: Independence a matter for people of Scotland, SNP PN, 16.12.97

> "This clause shows how defensive Westminster now is about its sovereignty in the face of Scottish aspirations, because a similar clause in the 1978 Scotland Bill asserting, 'the supreme authority of the UK parliament' was dropped in Committee stage, and the Labour government didn't even bother to reintroduce it, since it was deemed to be irrelevant.
>
> "As the late Labour MP Norman Buchan explained: 'If it is the will of the people expressed through the assembly to crack up the United Kingdom . . . it would not be prevented by this Bill, by cutting out clause 1, or by amendment. We are dealing with the major matter of the possible break-up of the United Kingdom, but the clause does not deal with that. It is an expression of hope and nothing more' (Hansard, 22/11/77).
>
> "The supremacy of Westminster is supposed to be implicit in everything that it says and does, so putting such a clause in the Bill in this irrelevant and clumsy fashion actually raises the whole issue of Scottish sovereignty, rather than reinforcing a claimed but non-existent parliamentary sovereignty over Scotland.
>
> "If the people of Scotland want to move on to Independence, then they will not be stopped by an irrelevant clause in a UK act of parliament."

B. Union legislation

Clause 35 states: "The Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to this Act."[12] This provision was not expressly foreshadowed in the white paper, but the Scottish Office guide to the Bill claims that "this is a technical clause which will ensure that the Acts of Union are construed in the light of the Scotland Act. The Acts of Union will remain on the statute book."[13] This is presumably intended to be a declaratory provision, seeking to acknowledge and underline the basic principles of the UK constitution, while asserting that significant constitutional change is still possible and 'constitutional' within, and as part of, that basic framework. This is emphasised in the white paper:

> **4.2** Under the Government's proposals, the UK Parliament will devolve wide ranging legislative powers to the Scottish Parliament. Scotland will of course remain an integral part of the United Kingdom. The Queen will continue to be Head of State of the United Kingdom. The UK Parliament is and will remain sovereign in all matters: but as part of the Government's resolve to modernise the British constitution Westminster will be choosing to exercise that sovereignty by devolving legislative responsibilities to a Scottish Parliament without in any way diminishing its own powers. The Government recognise that no UK Parliament can bind its successors. The Government however believe that the popular support for the Scottish Parliament, once established, will make sure that its future in the UK constitution will be secure.

---

[12] The 1706 is a statute of the English Parliament, and the 1707 Act is a statute of the Scottish Parliament. For analysis of the status of the Union legislation in a system of Parliamentary Sovereignty see Research Paper 96/82, chap. V

[13] *The Scotland Bill: a guide*, Scottish Office, Dec 1997, annex A , p11

The Scottish Secretary made a similar point on publication of the Scotland Bill: "For the UK we have delivered a new constitutional foundation -- binding Scotland into the UK and giving her the opportunity to take responsibility for her own affairs."[14]

C. Reserved constitutional matters

It is interesting to note that Part I of *schedule 5*, (dealing with general reservations from the Parliament's legislative power) and in particular the first group of provisions, refers to "the constitution". *Paragraph 1* clearly states that "the constitution, including the Crown, the succession to the Crown and a regency and the Parliament of the United Kingdom, are reserved matters", and *paras 2-4* amplify that provision.

It is rare, perhaps unprecedented in modern times, for 'the constitution' to be a statutory term. Devolution statutes (such as the Northern Ireland statutes in 1920 and 1973, and the two devolution statutes in 1978) have tended to list (expressly or otherwise) constitutional matters as non-devolved matters, without resort to the all-embracing term, 'the constitution'. It may be that the courts would regard 'the constitution' as a descriptive term rather than a substantive, catch-all category of reserved powers. If the courts were to adopt the latter approach, it could conceivably restrict the legislative competence of the Scottish Parliament as currently understood.

[14] "Donald Dewar unveils 'Pathway to a Parliament'", Scottish Office PN, 18.12.97, p2

II Representational Issues: 'The West Lothian Question'[15]

A. The West Lothian Question

Perhaps the most appropriate explanation of the West Lothian Question is that attributed to its author, Tam Dalyell. He set out his argument in some detail in his 1977 book *Devolution: the end of Britain*?[16], which can only briefly be summarised here. He asserted that "if the United Kingdom is to remain in being, then 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 in the Assembly - would be deeply suspect, simply because there would be so many areas of concern to their electors on which they could not pronounce." He examined, and rejected, four possible answers to the Question and concluded that "and not one of them can be reconciled with Britain's continued existence as a unitary state ..." :

(i) *No Scottish or Welsh representation at Westminster*
(ii) *Maintenance of the status quo in terms of levels of representation:*
(iii) *Reduction of Scottish and Welsh representation at Westminster:*
(iv) *Scottish and Welsh MPs to speak and vote only on those matters not transferred to Scottish and Welsh Assemblies ('in and out Members')*

The legislative and political problems of the Question were aired at length during the protracted proceedings on the devolution bills in the late 1970s, not least by Mr Dalyell himself[17], as well as by Enoch Powell (who, with other Unionists, emphasised the Northern Ireland perspective), by anti-devolutionists and by the Conservative Opposition. Mrs Thatcher explored the implications of alleged over-representation during the Second Reading of the *Scotland and Wales Bill* on 13 December 1976[18], and Francis Pym, responding to a statement by the Leader of the House, Michael Foot, on the Government's proposals for new devolution bills in the 1977-78 session, described the West Lothian Question representation issue as "the single most contentious problem to arise in our debates on the [Scotland and Wales] Bill .."[19] The Government generally sought to deflect efforts at forcing them to make a detailed response to

---

[15] This section is a revised version of Research Paper 95/95, Sept 1995

[16] See esp pp245-251, and, on an alleged parallel with Northern Ireland, see chap 13. Note that the argument refers to the situation in 1977 in its terminology and factual detail (eg number of Scottish MPs).

[17] Consider the following exchange during the committee stage of the *first* devolution bill:
Mr Dalyell: The point cannot be made too often ---
Minister of State, Privy Council Office (Mr John Smith): Yes, it can.
Mr Dalyell: No, it cannot. [HC Deb vol 925 c262, 1.2.77, extract]

[18] HC Deb vol 922 cc1004-5, 13.12.76

[19] HC Deb vol 936 c316, 26.7.77.

the Question posed by Mr Dalyell and others. Its view was set out in the September 1974 White Paper *Democracy and devolution: proposals for Scotland and Wales*:

> "The setting up of Scottish and Welsh Assemblies does not, however, detract in any way from the overriding interest of all the people of the United Kingdom in the determination of United Kingdom policies as a whole. The United Kingdom Parliament and the central Government Ministers will of course remain fully responsible for the overall interests of the United Kingdom and it is essential that the determination of United Kingdom policies should fully reflect the needs and contributions of all its constituent parts. For this reason the Government regard it as essential that both Scotland and Wales should retain their existing number of Members of Parliament in the United Kingdom Parliament and that there should continue to be Secretaries of State for Scotland and Wales who act as full Members of the United Kingdom Government in forming United Kingdom policies."[20]

The November 1975 White Paper, *Our changing democracy*, simply stated that "The United Kingdom will still be a single state … Parliament will remain ultimately sovereign on all matters, whether devolved or not, and will continue to include the present complement of Scottish and Welsh Members."[21]

The (Kilbrandon) Royal Commission on the Constitution, which reported in 1973, considered the effect of devolution on the Westminster Parliament[22], and noted that "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."[23] The Report then examined the Northern Ireland situation as an example of the difficulty of dealing with this problem, including an 'in and out' arrangement[24], and concluded that "In our view, therefore, all Members of Parliament, whether or not they come from regions with their own legislative assemblies, must have the same rights of participation in the business of the House of Commons"[25], although it did go on to consider the arguments for reductions in the level of representation of countries/regions with their own devolved assemblies.

B. Devolution and the West Lothian Question

---

[20] Cmnd 5732, paras 32-33 (extracts). See also the full debate on a proposed new clause to the *Scotland and Wales Bill* moved by the Opposition seeking a Speaker's Conference on "the appropriate number of Members of that House representing Scottish and Welsh constituencies after the enactment of this Act" [HC Deb vol 925 cc375-512, 1.2.77; defeated 199-277].

[21] Cmnd 6348, para 296.

[22] Cmnd 5460, paras 810-815.

[23] para 811.

[24] See the discussion in para 813.

[25] Para 814. See also Part X on Northern Ireland generally (esp paras 1337-8).

1. Generally

The West Lothian Question has been inextricably linked to devolution over the past twenty years. To some -- generally opponents of devolution -- it has been seen to be a way of undermining their opponents' arguments and proposals by exposing their inherent illogicality and their potential danger for the future of the United Kingdom. To others, generally those on the other side of the argument, it can be viewed either as an irritating irrelevance of the sort often deployed in the cut and thrust of political debate on a highly contentious issue, or as a potentially serious challenge to their devolution plans which needs to be met and resolved. The issues and problems that the West Lothian Question poses are not new, as they were inherent in the debate in the last hundred years and more on the 'Irish Question'.[26]

The West Lothian Question, in its broadest sense, concerns the representational and governmental relationships of various parts and tiers of the national state under some form of sub-national governance. There can be a number of forms of national/sub-national systems within what is, at present, the United Kingdom, ranging from the status quo of a generally unitary state to an arrangement of independence for some (or all) of the various components of the UK. In between these two extremes are systems which reject both a unitary model and partial or full dissolution of the UK, of which federalism and various forms of devolution are the most commonly discussed.

Many of these possible constitutional systems are, to some degree, recognisable, either because they reflect existing practice domestically ('unitary status quo') or in other relatively familiar states (eg federalism in the USA, Canada, Australia or Germany), or because they have some form of inherent logic or symmetry (eg proposals for 'devolution-all-round' for the UK). However, what is currently on offer for the UK -- which can be described as 'partial', 'differential' or 'asymmetrical' devolution -- is neither a system (the Northern Ireland/Stormont era notwithstanding) which can easily be examined in current practice nor easily described in theoretical terms.[27] This means that devolution -- in terms of the individual schemes for Scotland and Wales (and, in the future, perhaps also for Northern Ireland as well as some form of 'regionalism' for England), and of the overall post-reform constitutional structure of the UK as a whole -- can be open to all sorts of arguments and predictions, as to whether it is a stable reform in its own right, or whether it is an inherently unstable structure, which could be a 'stepping-stone' to a federal UK or to dissolution of the UK.

This means that the devolution debate is not just one about whether the present proposals provide the 'right' or 'best' constitutional arrangements for the UK, to be measured alongside other options such as independence, federalism, 'devolution-all-round' or the 'status quo', but

[26] Brigid Hadfield, when analysing these Irish representational issues, commented wryly that "those with short memories called this the 'West Lothian Question' ...", *The constitution of Northern Ireland*, 1989, p89

[27] The unique nature of the Irish situation in the last two hundred years means that both pro- and anti-devolutionists feel that they can cite Stormont devolution in support of their case, for example.

whether, as such, they constitute a viable and stable constitutional option at all. This is where the West Lothian Question becomes, in the eyes of some people who pose it, such a central issue in the overall argument, because the questions it poses, for them, constitute some form of litmus test of the very viability or stability of devolution as currently proposed for the various parts of the UK. In addition, the West Lothian Question, in this sense, can be deployed both by those who believe that devolution is inherently unworkable, *and* by those who may accept devolution as viable in principle, but do not support it in its proposed form (or forms) for Scotland and Wales. For the opponents of the Government's current plans, the fact that some of the Government's allies themselves may support the current policy not as an end in itself, but as a transitional phase to, say, independence, 'devolution-all-round' or federalism, could be seen to add weight to their own opposition to devolution as a stable constitutional reform. These aspects, as they have been debated in recent months, are considered further below.

As the Question's importance rests, in part, on the perception that it is actually or virtually 'insoluble', opponents of devolution, of all colours, feel that they can use it as a political 'trump card' against *any* devolution scheme, by asserting that when, *and only when*, it is answered satisfactorily, can devolution be accepted even as a theoretically viable constitutional option. Only then can the merits of any particular form of devolution be discussed rationally, alongside alternative constitutional options. In other words, in its extreme form, the argument seems to be that a satisfactory answer to the West Lothian Question is a *necessary, but not sufficient*, precondition to acceptable devolution. For the same reasons, some pro-devolutionists often feel obliged to find satisfactory 'answers' to it (rather than admitting it to be yet another asymmetrical feature of the British constitution), such as a form of English regional devolution or by altering territorial representation at Westminster, in order to defend the devolution option itself.

Supporters of the 'status quo' can argue that the perceived insolubility of the Question demonstrates that any radical break with the current constitutional settlement will not only produce a less satisfactory arrangement, but one which is inherently unstable and will inevitably lead to the very end that pro-devolutionists say they seek to avoid -- independence and dissolution of the Union. Supporters of independence, federalism or 'devolution-all-round' can also cite the inherent insolubility of the Question, or at least the failure of the current proposals to answer it satisfactorily, as demonstrating that their preferred options provide a better and more stable constitutional solution to any perceived deficiencies of the current system than 'partial devolution'.

Battles over Irish Home Rule in the late nineteenth century demonstrated the centrality of 'West Lothian'-type representational arguments in such constitutional debates. Joseph Chamberlain, for example, had described the issue as "not a technical point, but the symbol and flag of the controversy,"[28] but later claimed, in an 1898 interview with a biographer, that

---

[28] A Cooke & J Vincent, *The governing passion*, 1974, p419

he saw the issue as a way of killing Gladstone's Home Rule Bill: "… I attacked the question of the exclusion of the Irish Members. I used that point to show the absurdity of the whole scheme."[29] According to Gladstone's recent biographer, Roy Jenkins, "Chamberlain always knew how to find an opponent's solar plexus … His killer instinct fastened on the point to which there could be no wholly satisfactory answer and he was further attracted to it by the fact that, though insoluble, it was on the surface an issue easy to grasp. There were none of the intricacies of the financial settlement or of the abstractions of whether powers had to be specifically reserved or specifically devolved."[30] Jenkins also noted that the representation issue, "strong passions though it aroused, was also one, perhaps because there was no really satisfactory answer, on which the crucial individuals [ie Gladstone, Chamberlain and Parnell in particular] were constantly changing their minds."[31]

The story of Irish Home Rule also demonstrates the potential 'slippery-slope' effect of reformers' attempts to find 'answers' or 'solutions' to such tricky constitutional questions. A proposal considered by Gladstone in 1886 that there could be some form of 'joint delegations' of the Westminster and Irish Parliaments swiftly led to fears, even among Home Rulers, that the Irish Question was leading into wider and deeper constitutional waters, as it could fit into the then current fashion for 'Imperial federation' as a way of transforming an Empire of colonies into a commonwealth of self-governing states in association with the Imperial government. The proposal appeared to offend even those, such as Rosebery, who supported Imperial federation on the grounds that such schemes went well beyond the immediate purpose of Irish home rule.[32] This has some resonance with recent arguments about UK-wide federalism, 'devolution all round' or forms of English regionalism as 'answers' to the West Lothian Question.

2. Devolution as a 'process'?

As noted above, one argument which has tended to be addressed in 'West Lothian' terms is the inherent instability of devolution, as currently proposed, as a viable and effective constitutional model for the UK. Differential devolution, in particular, could well make the existing differences in treatment within different parts of the country more transparent than they are at present, and, it is argued by some, create new ones. Finance and Westminster representation are two obvious areas in this respect.

The Conservative Opposition has highlighted the comments from the Welsh Secretary, Ron Davies, that devolution was a process not an event. In his speech on the second reading of the Government of Wales Bill he said: "Further significant functions over and above those

---

[29] Hammond, p493. *Gladstone and the Irish Nation*, 1964 By 1898, Chamberlain had become a key figure in the Conservative/Unionist party, and may have wished to assert his unambiguous Unionist credentials. Hammond also quotes a letter by him in May 1886 in which he wrote that "to satisfy others I have talked about conciliation, and have consented to make advances, but on the whole I would rather vote against the Bill than not, and the retention of the Irish members is only, with me, the flag that covers other objections." (p495).

[30] Jenkins, *Gladstone*, 1995 pp550-1

[31] Jenkins, p549

[32] Hammond, pp510-14

which I now exercise could be transferred to the assembly at a future date, subject to agreement by both Houses of Parliament. As I have said before, devolution is not an event but a process."[33] The following exchange took place during his statement on the white paper on 22 July:[34]

> **Mr. Alan Williams (Swansea, West):** Does the Secretary of State, like the Under-Secretary, my hon. Friend the Member for Neath (Mr. Hain), see the Assembly as an evolving concept, developing its powers and its role over time? If so, is he not offering the people of Wales the constitutional equivalent of a mystery tour? They can decide whether to get on the bus, but they can have no say in its ultimate destination.
>
> **Mr. Davies:** No, I do not agree with my right hon. Friend that it is a mystery tour. Parliament is sovereign and will decide to what extent it wants to devolve powers to the people of Wales. We propose to consult the people of Wales by means of a referendum, and they will decide whether they want to embark on the process; if they decide that it is a tour in which they have no interest, they will tell us so on 18 September.
>
> However, I do indeed consider the Assembly to be an evolving concept. Since 1964, there has been increasing devolution of power to Cardiff. A Secretary of State with very limited powers was appointed in 1964, and those powers were exercised under the Government loyally served by my right hon. Friend, and increased by successive Conservative Secretaries of State. Now, in 1997, there is an extremely powerful Welsh Office, with a budget of about £7 billion; that is out of all proportion to anything that could have been envisaged in 1964.

From the Opposition front bench at the conclusion of the second reading of the Welsh Bill, Bernard Jenkin cited the decentralisation process in Spain as a warning of the dangers of a rolling programme:[35]

> The lesson of Spain is clear: a rolling programme of devolution generates a process of inter-regional competition, leading to precisely the instability that we should all fear. Yet such a rolling programme is the very essence of the Government's devolution policy. The Secretary of State confirmed this when he said yesterday that
>
> > "devolution is not an event but a process." -- [Official Report, 8 December 1997; vol. 302, c.677]

SNP leaders emphasised, on publication of the Bill, that the devolution scheme contained in the Bill was the beginning rather than the end of the process of Scottish constitutional change, eg:

---

[33] HC Deb vol 302 c677, 8.12.97. By 'process' it could be argued that the Welsh Secretary was describing the development of devolution while retaining its essential features, and not changes which could said to transform it into a different constitutional arrangement, such as federalism or independence.

[34] HC Deb vol 298 cc761-2, 22.7.97

[35] HC Deb vol 302 cc883-4, 9.12.97

- "This is an historic day but it is part of a process that will lead to Independence in Europe … The work will now start to improve this bill and to continue the process of bringing power back to Scotland" (Alex Salmond)[36]

- "The Scotland Bill is not our goal, but it signals the beginning of a new match, with the people of Scotland now the key players. We are well and truly on our way to greater self-determination for our nation, with this Bill just one stage in the process of Independence" (Margaret Ewing)[37]

The Liberal Democrats also made the same point through from their perspective of federalism: "This is the first step on a road which leads to a federal United Kingdom." (Donald Gorrie)[38]

The white paper emphasised that devolution was intended to preserve and enhance the Union:[39]

> 3.1 The Government want a United Kingdom which everyone feels part of, can contribute to, and in whose future all have a stake. The Union will be strengthened by recognising the claims of Scotland, Wales and the regions with strong identities of their own. The Government's devolution proposals, by meeting these aspirations, will not only safeguard but also enhance the Union.
>
> 3.2 There are many matters which can be more effectively and beneficially handled on a United Kingdom basis. By preserving the integrity of the UK, the Union secures for its people participation in an economic unit which benefits business and provides access to wider markets and investment and increases prosperity for all. Scotland also benefits from strong and effective defence and foreign policies and a sense of belonging to a United Kingdom.

In the debate on the white paper, Michael Ancram attacked, in West Lothian terms, what he saw as the unbalanced nature of the Government's proposals:[40]

> The proposals, which were put before us last week, leave a dangerously unbalanced constitutional position within the United Kingdom. The envisaged reduction in the over-representation of Scotland at Westminster may help a little, but I frankly tell the Secretary of State that it is an alarmingly long way down the road. I suspect that it is the price of loyalty from his Back Benchers.
>
> We must continue asking what will be the role of Scottish Members at Westminster. In logic, why should they still be able to vote on matters affecting English schools and English hospitals

[36] "SNP reaction to devolution bill: 'part of a process not an event'", SNP PN, 18.12.97
[37] "SNP reaction to Scotland Bill", SNP Parliamentary Group PN, 18.12.97, p1
[38] "Lib Dems welcome Scotland Bill," Scottish Liberal Democrats PN, 18.12.97
[39] Cm 3658, paras 3.1-3.2
[40] HC Deb vol 299 cc473-4, 31.07.97

when they will not have the right to vote on those matters as they affect Scotland? Why should they decide those matters for my constituents when they cannot decide them for their own constituents? Why should a Scottish Member be able to be the Chief Secretary to the Treasury and decide individual spending programmes for England when he will not be able to do so for Scotland?

Does the Secretary of State really believe that that position is sustainable and that a quiescent England will somehow not notice the proposed constitutional travesty and inequality of treatment?

Mr. Edward Leigh: As my right hon. Friend is sitting on the Opposition Front Bench, perhaps he cannot hear the sotto voce remarks of Scottish National Members, who are saying, "We don't want to come."

Mr. Ancram: I am grateful to my hon. Friend for making up for the fact that my hearing is becoming poorer as I get older. He has also reinforced the point that I was making. Scottish nationalists are supporting a Scottish Parliament because they believe that it will become the sovereign Parliament of Scotland. The intention and policy of the Scottish National party is to create an independent Scotland.

My argument, however, is not with the Scottish Nationalists--like them, I believe that the Government's proposals will achieve their goal--but with the Secretary of State, who tells us that the Government's proposals will secure the Union. I profoundly disagree with him on that belief, because there is nothing in precedent to suggest that that would be the consequence.

The proposals contain a frightening potential to set Scot against English and English against Scot. Far from binding together, the proposals will unbind; far from strengthening relations, they will undermine them; far from stabilising our constitution, they will unbalance and destabilise its very foundations.

For those of us who cherish the United Kingdom and believe that its great amalgam of nations, cultures, traditions and skills has been and can again be a force for immense good, the proposals are a nightmarish beginning of its unravelling. The proposals threaten the United Kingdom, and we oppose them

Winding up for the Opposition, Dr Liam Fox warned of the danger to the UK of an unstable devolution scheme:[41]

The essential question about the Union was asked very powerfully in speeches by my right hon. Friend the Member for Bromley and Chislehurst (Mr. Forth) and my hon. Friend the Member for Cheadle (Mr. Day), and in a far too short speech by my hon. Friend the Member for Aldridge-Brownhills (Mr. Shepherd). We cannot effect changes on parts of the United Kingdom without effecting changes on the whole of the United Kingdom. If the situation changes in Scotland, it will change in the whole of the United Kingdom--a fact that lies at the heart of what has been called the West Lothian question. We are unleashing a process of change, of which the White Paper's proposals--for which hon. Members had varying degrees of affection--are only the beginning.

The hon. Member for Linlithgow (Mr. Dalyell) said--as my hon. Friend the Member for Aldridge-Brownhills has just said--that the biggest flaw in the devolution proposals is that they cannot be enduring. The hon. Gentleman said that a Scottish Parliament would not last 10 years, which cannot be a good recipe for constitutional change. A week ago, the hon. Member for Falkirk, West (Mr. Canavan) said that the proposals offered the possibility of a "dynamic relationship" between a Scottish Parliament and Westminster, but they are a recipe for instability. Proposals that the hon. Member for Linlithgow called a Pandora's box are a guarantee of friction within the United Kingdom and not--as Ministers have tried to convince us in the past week--a blueprint for stability.

---

[41] HC Deb vol 299 cc544-5, 31.07.97

Mr. Dalyell: What I said was that in 10 years' time, the Parliament could not exist in anything approaching the form in which it is proposed.

Dr. Fox: The hon. Gentleman makes the point more eloquently than I could, and very effectively. As my hon. Friend the Member for Aldridge-Brownhills said, it is of course the very reason why the Scottish nationalists are so much in favour of the proposals, but I shall come to that in a moment.

My right hon. Friend the Member for Devizes (Mr. Ancram) said at the outset that one of the things that can easily be predicted about the Scottish Parliament is that it will blame Westminster for whatever goes wrong. It will blame Westminster for any policy failures, whether in education or in health. It will certainly not blame itself. It will blame Westminster whenever it is short of money--I have never known any wing of government not blame the parent government if it is short of finance.

When the Scottish Parliament cannot fulfil the unrealistic expectations that have been raised in the devolution debate, it will blame Westminster. Therein lies the root of the conflict which we will endure, as the former Foreign Secretary said, for a generation and beyond.

What are we to make of the Secretary of State when he tells people on one side of the argument that they should support the White Paper and vote yes in the referendum because it is a way of preserving the Union and the integrity of the United Kingdom, while at the same time he tells the nationalists, with a nod and a wink, that if they vote yes, they may eventually get their way, which they see as an independent Scotland? Mention was made of riding two horses. It is not possible for one White Paper to be a guarantee of the Union and a stepping stone to independence--it has to be one or the other …..

However, there is logic in the status quo, there is logic in arguing for a federal system or for independence, but there is no logic in arguing for this proposal, which does one thing to one part of the United Kingdom and something different in another. The parts are not equally weighted, and the votes are not equally weighted for that reason.

The hon. Member for Banff and Buchan (Mr. Salmond) made it clear that the Scottish nationalists will seek to use a Scottish Parliament as a stepping stone to an independent Scotland. I would have been surprised had he said anything else. He, like the hon. Member for Dundee, East (Mr. McAllion) and others, was absolutely right to say that independence is a matter for Scotland. Should the Scots decide to be independent, that would, as an issue of self-determination, be a matter for them, but devolution within the United Kingdom is rightly a matter for Westminster and a sovereign United Kingdom Parliament. The Secretary of State agrees with that, but the White Paper is a recipe for conflict within the United Kingdom.

Lord Steel said that the White Paper was a stepping stone towards a federal United Kingdom--it cannot be stable and changing. Only the Government seem to believe that the Scottish Parliament will be satisfied with its political and financial lot. We profoundly disagree with that analysis, and believe that the proposals are a recipe for instability.

Tam Dalyell emphasised what he regarded as the inherent instability of devolution as proposed:[42]

My problem with the White Paper is this: how long can a Scottish Parliament last in the form--or anything like the form--in which it has been proposed? People who propose constitutional change must submit proposals that at least have a chance of enduring. After careful study of the White Paper, I fear that there is no possibility of its proposals lasting a decade or more. Therefore, it behoves us to argue for proposals that at least have the possibility of enduring.

[42] HC Deb vol 299 c485, 31.07.97

Once again, it comes down to something has been recognised for a very long time, certainly since the last years of the last century. At some risk, I quote Carson, who said in 1912:

> "We see, as Irish Ministers saw in 1800, that there can be no permanent resting place between complete union and total separation . . . If there were no other objection to the establishment of a separate government in Dublin, it would be impossible because legislative autonomy can only be coupled with financial independence".

That is part of the problem which was reinforced by careful reading of the White Paper, by the reaction to Edinburgh castle and, not least, by the treatment of the subject by *The Scotsman* on that Friday morning. I fear that, at the end of the day, it comes back to the same question: the choice between something indistinguishable from the status quo and something indistinguishable from the general views of the Scottish National party. I stick to it, but the referendum really ought to be on two questions: "I wish to remain in Britain" and "I wish to be part of a Scottish state separate from England".

Mr. Donald Gorrie (Edinburgh, West): Is it the case that, in recent history, the House has passed more laws relating to Scotland against the will of the majority of Scottish Members than laws affecting England against the will of the majority of English Members?

Mr. Dalyell: That is certainly right. Frankly, there is one answer to that: a separate Scottish state.

He concluded by warning that "that reality is whether we want to remain part of Britain or whether we want to be part of a state that is separate from England. That is the choice" (c488).

On publication of the *Scotland Bill* on 18 December, the Scottish Secretary said:[43]

> This Bill will give Scotland the power to boost its self-confidence - economically, culturally and politically. For the UK we have delivered a new constitutional foundation - binding Scotland into the UK and giving her the opportunity to take responsibility for her own affairs.

For the Opposition, Michael Ancram said, on the same occasion:[44] "The whole question of Scotland's relationship with the United Kingdom Parliament and Government … is inadequately addressed ….. On policies affecting the whole of the United Kingdom, Scotland's position as a full and equal partner in the Union should not be diminished, either intentionally or by default. That is not in Scotland's or the Union's interest. Nor has proper consideration been given to the consequential constitutional implications for the rest of the United Kingdom. The West Lothian Question, in particular, remains unaddressed. Left untouched, these will threaten the stability of the United Kingdom as a whole at the very time the new Scottish Parliament will need stability to flourish."

---

[43] Scottish Office PN, 18.12.97

[44] "Michael Ancram explains the faults in the Scotland Bill", Conservative Party PN 1664/97, 18.12.97, p2

C. 'Answers' to the Question?

1. 'In and out'

As the essence of the 'West Lothian Question' is that Members in the Westminster Parliament representing seats in areas of the UK which have devolved parliaments would be able to participate in business concerning all other parts of the UK, whereas Members representing seats in those non-devolved areas would have no say over similar business which had been devolved,[45] an obvious 'logical' solution would be to prevent Members from devolved areas from participating in the 'domestic' business of non-devolved areas which, in their own area, was a devolved matter. Thus, for example, if housing was a matter devolved to a Scottish Parliament, just as Members for non-Scottish seats could not participate on Scottish housing policy, so Members from Scottish seats would be prevented from participating in Westminster business on purely English/Welsh/Northern Irish housing. While, strictly speaking, this non-participation could be absolute, including all forms of Parliamentary business such as questions, motions and debates (including those on relevant primary and secondary legislation), and participation in relevant select committees, in practice the 'in and out' approach tends to be considered in relation to voting on relevant bills.

In 1965 the then Labour Prime Minister, Harold Wilson, had hinted at this approach when he criticised the 12 Ulster Unionists, who supported the Conservatives, for voting against measures which did not apply to Northern Ireland: "I would hope that Northern Ireland Members who are here, and who are welcomed here, for the duties they have to perform on behalf of the United Kingdom in many matters affecting Northern Ireland, would consider their position in matters where we have no equivalents right in Northern Ireland"[46], and "I am sure the House will agree that there is an apparent lack of logic, for example, about steel, when Northern Ireland can, and presumably will, swell the Tory ranks tonight, when we have no power to vote on questions about steel in Northern Ireland…" (c1560)

- **'In and Out' in Irish Home Rule Bills**

In his 1893 Home Rule Bill Gladstone provided for Irish representation, but on an 'in and out' basis. Under clause 9 of the *Government of Ireland Bill*, there were to be 80 Irish MPs (in place of the then 105, including the 2 university seats), who could not vote on five specified types of business, including any bill or motion whose operation "is confined to Great Britain or some part thereof". The clause also provided that "compliance with the provisions of this section shall not be questioned otherwise than in each House in manner provided by the House": clause 9(4) However, during the Committee stage of the Bill, Gladstone proposed the withdrawal of the voting and deliberating restrictions of the clause, while retaining the reduced representation.

---

[45] See generally Research Paper 95/95, September 1995, *The West Lothian Question*

[46] HC Deb vol 711 c1561, 6.5.65

This was agreed to on a division after an extended debate.[47] The bill itself, which passed the Commons, was rejected by the Lords.

The Bill which became the *Government of Ireland Act 1914* proposed a total of 42 Irish MPs at Westminster, but with no 'in and out' restrictions on their activities.[48]

- **Tam Dalyell's view:**

Scottish and Welsh MPs to speak and vote only on those matters not transferred to Scottish and Welsh Assemblies: "This too is indefensible. Apart from the fact that they would inevitably be thought of as second-class MPs, the fundamental difficulty - which bedevils the whole devolution issue - is that it is virtually impossible in a unitary state to distinguish one set of topics from another ... Given all the goodwill in the world - which does not, and is never likely to exist - one cannot have Members of the same parliament with different functions and different limitations ... Rules would have to be drawn up whereby one could decide on which issues the Scots and the Welsh could and could not vote: yet .. it would be almost impossible for the Chair to pronounce satisfactorily on this ... The Speaker would be put in a highly invidious position - and he would inevitably be drawn into the hurly-burly of party politics."[49]

- **Section 66, *Scotland Act 1978***

A variant of this proposal re-emerged during proceedings on the Scotland Bill in the late 1970s, ultimately as s66 of the *Scotland Act 1978*[50]. It applied to "any Bill which does not relate to or concern Scotland or any part of Scotland but would, if it had related to or concerned Scotland, have been within the legislative competence of the Assembly,"[51] which had been passed by the House of Commons, but which required the votes of 'Scottish' MPs for its majority on second reading. Such a Bill would not be deemed to have been read a second time "unless after the next fourteen days on which that House has sat after the division took place that House confirms its decision that the Bill be read the second time."[52] S66(2) provided that this procedure would not

---

47 HC Deb 4th series, vol 14 cc1418-1545, 12-13.7.93.

48 See s45 and sch1 part II of the 1914 Act. In debates on what became the 1920 Act, the Chief Secretary for Ireland, Ian Macpherson, said that 42 was selected for the 1914 Act "not on any logical principle, but as a sort of adjustment to meet circumstances that might arise in the future including a scheme of devolution." [HC Deb vol 127 c940, 29.3.20].

49 T Dalyell, *Devolution: the end of Britain?* 1977, pp250-1. When Gladstone's Foreign Secretary, Lord Rosebery, proposed a form of 'in and out' arrangement for Irish MPs after Home Rule, at the Speaker's discretion, the Prime Minister replied that "I am afraid that the Speakership would hardly bear the weight of your proposal." [H C G Matthew, *The Gladstone diaries*, vol XI p542 (28.4.86)].

50 For a full discussion of this provision, including its convoluted legislative history, see AW Bradley & DJ Christie, *The Scotland Act 1978*, notes to s66.

51 S66(3).

52 S66(1).

have come into operation unless approved by a resolution of the House, thus giving the House control over its own proceedings.

This solution would have not meant any reduction in the level of Scottish representation, nor in the status of 'Scottish' MPs. However normal party whipping could well mean that any second vote would be expected to produce the same result as the first. Therefore the provision appears to have been intended to allow the House to reconsider its decision rather than directly affect or adjust the arithmetic of a vote. Because of the complicated legislative history of the provision, s66 contained some textual difficulties[53]. For example, s66(1) refers to a Bill which " has been passed by the House of Commons" - presumably passed after third reading - yet the subsection is in terms of a further second reading vote. The other main difficulty, which would be likely to arise also in any future 'in and out' proposal, is the determination of which matters are to be subject to the special procedures. S66 provided a complicated definition of Bills subject to its procedure, but did not provide any method of applying the definition to particular measures, especially in cases of dispute. If the matter were to be resolved by the House itself (possibly by arrangements set out by Standing Order), then presumably Scottish MPs would have been eligible to vote on that question. Bradley and Christie conclude their analysis of s66 by stating that "the section seems to create more problems than it resolves."

A brief but critical analysis of the provision by Geoffrey Smith described it as a "muddled modification" of the in-and-out principle, a " 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 the Scottish members." He concluded that it was a "trouble-making provision that would be better ignored." [54] The Constitution Unit's 1996 report, *Scotland's Parliament* also highlighted problems of definition: "That section does not suggest who should decide whether a bill falls within its ambit or not. That judgement requires an assessment of the extent of the Assembly's legislative competence which elsewhere in the Act is a matter for the courts to decide."[55] The IPPR's 1996 report *The state and the nations* described s66 as "a watered-down version of 'in and out'" where "presumably pressure would have been placed on Scottish MPs to abstain in the second vote." It was "an attempt to establish an agreed practice rather than to automatically restrict voting powers. 'In and out' would not have been imposed for each vote on devolved legislation (what might be called maximum 'in and out') but could be occasionally invoked, although it is difficult to see how this would not quickly happen in all cases."[56]

---

[53] See Bradley & Christie, *op cit*, for a full consideration of these issues.

[54] 'Westminster and the Assembly' in D. Mackay (ed.) *Scotland: the framework for change*, 1979, p121.

[55] para 402

[56] p113

- **'In and out': the current debate**

The Constitution Unit's 1996 report considered 'in and out':[57]

> "400 The second answer - special parliamentary procedures - was adopted in the 1978 Act, albeit against firm Government opposition. Section 66 provides for a further vote after fourteen days where a bill which does not relate to or concern Scotland' is carried on a vote which makes the number of Scottish MPs in the count decisive. The fourteen day interim was intended 'to give time for people to think again'. The clause was first proposed as an official Opposition amendment at the Report Stage in the House of Lords by Earl Ferrers. It was rejected in the Commons by the casting vote of the Speaker, but returned again by the Lords and eventually carried by one vote.
>
> 401 Section 66 hints at a version of the 'in and out' principle. under which Scottish MPs would be in the chamber for some votes but out for others. Gladstone's 1893 Government of Ireland Bill contained a provision with this effect, listing five areas from which Irish MPs would be excluded, among them matters 'confined to Great Britain or sonic pan thereof.' It also provided for a reduction in the number of Irish MPs at Westminster from 105 to 80. The 'in and out' provision was criticised for making Cabinet Government impossible (the Government might have a majority for some issues but not for others) and because of the difficulty in practice of defining those areas which would not be subject to votes by Irish MPs. Gladstone offered to withdraw the provision. but maintained the case for reduced representation.
>
> 402 The same difficulty of definition can be seen in Section 66. That section does not suggest who should decide whether a bill fails within its ambit or not. That judgement requires an assessment of the extent of the Assembly's legislative competence which elsewhere in the Act is a matter for the courts to decide. Decisions of this nature would be crucial if any version of 'in and out' were put into operation. If it is left to Parliament to decide whether a measure relates to the legislative competence of the Scottish Parliament or not, should Scottish MPs have a vote in that decision? In practice the only way to make 'in and out' work is federalism or home rule all round: that would provide a clear definition of the remaining legislative responsibilities of the federal Parliament for which all MPs would be 'in'. But this too is an unrealistic proposal in 1996.
>
> 403 Even if problems of definition were surmounted, the bigger problem of categorising two different classes of MPs would remain. In debates on the Scotland Bill Enoch Powell rejected the 'in and out' solution (as he rejected all other' solutions' to the problem) partly for this reason:
>
> > *"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 a basis of equality of responsibility and rights ".*

---

[57] *Scotland's Parliament: fundamentals for a new Scotland Act*, paras 400-405

Besides, there would he the related problem of governing the UK with two different majorities (or perhaps minorities) in the House of Commons according to the issues under debate. That would make coherent Cabinet government impossible.

404 Some dispute this claim. Professor Bill Miller of Glasgow University, for example, noted in a letter to *The Scotsman* last year that:

> *"No UK parliament since the war has over-ruled a majority of English MPs. The Labour governments of 1945-50, 1966-70 and October 1974-79 were all elected with a majority over the Conservatives in England. Only the very short administrations of 1964-66 and February to October 1974 faced a Conservative majority of English MPs. These short parliaments did not inflict major legislative changes on a bitterly hostile electorate".*

405 This has been taken as an argument both for the feasibility of 'in and out' (the feasibility of having a majority in both Scotland and the rest of the UK) and for the status quo (Scottish votes have not in practice been decisive of English fortunes). But the figures should be treated with caution as a basis for settling the West Lothian question for the future. They relate to a period when two party politics predominated which is less true today, they say nothing; about the cohesiveness of' the parties and the practical chances of mobilising either the Scottish or the English majorities *en bloc*, and the excess of' Labour seats over Conservative seats in Scotland has grown from parity in the early 1950s, to around 40 in the 1987 and 1992 elections. The figures might be very different indeed, and the operation of any special parliamentary procedures radically different in effect, if the UK as whole moved to a proportional representation voting system following a referendum".

The IPPR report also examined 'in and out' in some detail:[58]

A third response is the so-called "in and out" approach, the formal restriction of the voting rights of Scottish MPs preventing them from voting on any specifically English, Welsh or Northern Irish legislation concerning matters which had been devolved in the case of Scotland. There has occasionally been the informal practice in the Commons, observed by both Labour and Conservative governments that MPs representing England, Wales or Northern Ireland do not override the wishes of Scottish MPs on issues such as Scottish divorce law reform. On mainstream political matters, however, governments have generally insisted on deploying their full voting powers to get their way, for example in the early introduction of the poll tax in Scotland. Yet, however abhorrent the poll tax was to Scotland, there was at least a mutual ability for Scottish and non-Scottish MPs to vote on each other's legislation, even if the relationship is clearly an unbalanced one. After devolution there will be no such mutual voting power. Should Scottish MPs then be able to vote on anything other than powers retained at Westminster?

---

[58] *The state and the nations: the politics of devolution,* pp111-5. This analysis included a graphic on possible scenarios in Parliament with different party balances, which is not reproduced here (p112).

Despite the simplicity of 'In and out' as a response, it has never found favour with any major party, principally because the creation of two classes of MPS at Westminster is highly controversial and a departure from all UK constitutional practice. It was not imposed on Northern Ireland while the Stormont Parliament sat. However . it attracts considerable support amongst Conservative backbenchers and there has also been recent interest in Scotland amongst those proponents of Home Rule who believe 'In and out' would help to morally entrench a Scottish Parliament by defusing English opposition.

If restricted voting was introduced, a government might only command its own majority on the retained issues of defence, foreign affairs, social security and the budget, and would have to build issue-by-issue alliances on the raft of other domestic issues. Bogdanor (1996) argues that 'in and out' would offer 'the worst of all possible worlds'. The UK is inexperienced 'n the politics of persuasion, pluralism and alliance-building. The prospect of a Blair government in charge of taxation and public spending, and a Portillo-led Conservative Opposition gaining control of the NHS and education budgets in England could not possibly be a recipe for stable government. The potential for a US-Style gridlock might loom large.

A watered-down version of 'in and out' was proposed during the passage of the 1978 Scotland Bill by the Conservative peer Lord Ferrers. His amendment stated that if any House of Commons vote on a matter devolved to Edinburgh was passed on the strength of Scottish votes, an Order could be laid before the Commons requiring a recall vote to be held two weeks after the original vote. Presumably pressure would have been placed on Scottish MPs to abstain in the second vote. This was an attempt to establish an agreed practice rather than to automatically restrict voting powers. 'In and out' would not have been imposed for each vote on devolved legislation (what might be called maximum 'in and out') but could be occasionally invoked, although it is difficult to see how this would not quickly happen in all cases.

Certainly the possibility of institutionalising Conservative dominance in England increases Labour's hostility to this 'answer'. Protecting the 1992 Scottish election results in the new constituencies provides a benchmark for assessing the political impact of such a restriction of voting powers. Labour's Scottish advantage over all the parties exceeds 25 seats, and the Opposition parties have a combined lead of 50 seats over the Conservatives. Labour would therefore need an overall majority in the order of 35 to be reasonably sure that it could form a working majority without its Scottish MPs for the length of a parliament, on both devolved and reserved issues. That is something Labour has achieved twice in the past 50 years. Box 2 sets out the effect of imposing in and out'' for Scottish MPs at Westminster for a number of electoral outcomes. On these simulated figures, the Conservatives could draw level with Labour even if they had won 40 fewer seats. A Labour government and probably public opinion would object to on and of majorities - winning the election but losing the power to govern. Given historical precedents, it seems certain that this scenario would emerge in the future.

It is not clear whether a future Conservative administration would regard in and out' as a convenient route to majority power in English legislative affairs. A Harris poll conducted in the autumn of 1995 indicated that a large majority of Conservative MPs thought that Scottish MPs ought to be prohibited from voting on issues affecting only

> England and Wales (Hawkins 1995). It is impossible to predict how a future Conservative administration would react to the Scottish Parliament. But an Edinburgh Parliament elected by PR could provide the basis for a relative revival of Conservative fortunes in Scotland. In such circumstances the focus may be on Scotland's Westminster representation rather than a direct assault on the Scottish Parliament's powers. Whether the favoured approach would be no change, a variant of "in and out' or the fourth response to West Lothian a direct cut in the number of Scottish MPs - must for now remain a matter of speculation. But the constitutional implications that might flow from an 'in and out' formula should not be overlooked. It could fundamentally weaken Scotland's relationship with Westminster.
>
> To conclude, it is difficult to see where the political support for 'In and out'' might come from in reality. Conservatives may be vocal about such a move while in opposition, but less enthusiastic if they return to power in Westminster and must deal with an established Scottish Parliament. On the Labour side, the fear of the political consequences of 'In and out' will be an important undercurrent of the debate. Thirdly, Scottish public opinion can also be expected to be hostile to any such move. The imposition of two classes of MPs might well be seen as a fundamental assault on Scotland's place in the Union. It is worth noting that the existence of variable geometries in other European countries - such as Spain during the period when Catalonia was drawing more extensive powers to itself more quickly than the other regions - has not resulted in restricted voting rights in the national legislature.
>
> Finally, as more legislation is affected by European Commission rulings, devolution of powers to Edinburgh does not mean an end to Westminster's role in shaping policy, even if it will be less direct. In a growing number of areas to be devolved to a Scottish Parliament, including agriculture and fisheries policy, Westminster's negotiations with Brussels will be critically important. This underlines the need to establish clearer working links between the Scottish Parliament and the EU but also to ensure that Scotland's case is fully heard at Westminster. The argument for restricting the voting powers of Scottish MPs is thus further eroded by this changing distribution of powers to legislate, amend and appeal.

Bogdanor is clearly opposed to 'in and out' as an 'answer' to the West Lothian Question:[59]

> The second possible solution was that Irish MPs should vote only on matters not transferred to the Irish parliament. This is the so-called 'in and out' solution, and Wilson hinted at it in his strictures on the Uster Unionists in 1965. The 'in and out' solution is, however, unworkable for two reasons. The first is that it puts too much power in the hands of the Speaker, who would have to decide on each bill whether or not it was one on which the Irish could vote. 'I am afraid,' Gladstone told Lord Rosebery, who had suggested the 'in and out' solution, that the Speakership would hardly bear the weight of your proposal.
>
> The second reason why the 'in and out' solution is constitutionally impossible is that it could, with different parties in a majority in Scotland and in the United Kingdom as

[59] *Power and the people*, 1997, p37- 8

> a whole, bifurcate the executive. There would be one majority for matters transferred to Scotland and a different one for matters not so transferred. This would in fact have occurred after the general elections of- 1964 and February 1974 when Labour governments would have been transformed into Conservative governments without the Scottish MPs. In February 1992, Robin Cook, then Shadow Health Secretary, drew the conclusion that 'once we have a Scottish Parliament handling health affairs it is not possible for me to continue as a Minister of Health administering health in England'." He was, however, immediately disavowed by Neil Kinnock. The reason for the Labour leader's repudiation is clear: Cook was implying that a Labour majority in the United Kingdom would have no legitimacy in deciding the domestic affairs of England unless there were a Labour majority in England.
>
> It has been suggested that such situations would in fact be highly infrequent, since it has only been in the short parliaments of 1964-6 and February-October 1974 that a non-Conservative government has faced a Conservative majority of English -MPs, and 'these short parliaments did not inflict major legislative changes on a bitterly hostile electorate'."
>
> The chances of an outcome such as occurred in 1964-6 and between February and October 1974 are, however, much greater now than they have been in the past, for the gap between the number of seats won by Labour and by the Conservatives in Scotland has grown considerably. In 1950, the two parties won an equal number of seats in Scotland; but in 1987, Labour won 40 more seats than the Conservatives, and in 1992 39 more. Thus a Labour overall majority in the Commons not dependent upon Scottish MPs is much less likely than it has been in the past.

The Liberal Democrats, in their 1997 election manifesto, not only proposed a reduction in Scottish representation at Westminster and abolition of the of Secretary of State for Scotland, but also that "we believe that, following these reforms, Scottish Members of the UK Parliament should not participate or vote on matters where there is no Scottish interest."[60]

2. Regionalism/'devolution all round'/federalism

As the West Lothian question seeks to highlight asymmetrical territorial governmental arrangements, it follows that any arrangement which treats all parts of the UK in substantially the same way would constitute, at least to that extent, some sort of answer to the Question. There are various forms of arrangement which could, in theory, constitute this sort of answer, including

- **Regionalism**:[61] As England is, in effect the key to any territorial arrangement in the UK[62], various forms of regionalised government have been suggested for it, usually on

---

[60] *Make the difference: the Scottish Liberal Democrat manifesto 1997*, p45

[61] This is considered further in a forthcoming Research Paper on the *Regional Development Agencies Bill*, due for its second reading debate on 14 January.

the basis of a number of regional assemblies, or, sometimes, a body representing the whole country. 'Regionalism' can cover a spectrum of governmental arrangements from a substantially devolved system (as in Northern Ireland until 1972 or as is proposed for Scotland currently) through to some form of top-tier 'local government' system akin (in size and functions) to 'super-counties', depending on the range and type of powers and functions such bodies are given, especially in the legislative, financial and executive contexts.

- **'Devolution all round'**: This refers to some form of arrangement where all parts of the state were granted substantially similar devolved powers, [63] especially in relation to the extent of legislative and other activity remaining at the centre in Westminster and Whitehall. It is sometimes confused with *federalism*, but strictly should refer in the UK only to systems of 'subordinate' sub-national government where the centre remains constitutionally and legally supreme.

- **Federalism**: This generally refers to systems where the sub-national territorial units of government are, within their defined spheres of power and functions, supreme, in the sense that neither the centre nor other sub-national units can override its exercise of legislative and other power[64]. Thus, unlike, devolution, the subnational federal units are not, within their spheres, legally subordinate to the central government. The division of state power in a federal system is usually achieved through a written constitutional law, which is superior to the ordinary law of the centre or of the federal units.

Some critics of devolution have argued that the Labour party's proposals for some system of English regional devolution are as much intended to deal with the West Lothian Question as they are proposals for genuine constitutional reform. Gordon Brown acknowledged the linkage of English regionalism and the West Lothian Question in his speech on 12 January 1995: "And it is because a Scottish Parliament and an Assembly for Wales go hand in hand with the offer of greater regional democracy throughout Britain that what has been called the West Lothian Question should not, in my view, be a barrier to proceeding with change."[65] However in an interview in *The Scotsman* on 8 March, Tony Blair said that "I do not see Scottish devolution in any way shape or form dependent upon what happens in the English regions." When asked about the West Lothian Question aspect of English regionalism, he said "That is not really a basis for legislating for the the English regions. You are not going to answer one question by going for another. The answer to the West Lothian question is what is happening in Northern Ireland ... the Government will not reduce the number of MPs there. Scots MPs will still be coming to Westminster to decide the main parts of economics, foreign affairs and defence policy

---

[62] On the dominant position of England in the UK, see the Kilbrandon royal commission report on the constitution, Cmnd 5460, 1973, paras 531-4

[63] The proposed schemes of devolution for Scotland and for Wales have significant differences (some due no doubt to existing differences in the administrative and legal systems in the two territories), notably in relation to legislative and financial powers, but both are described as devolution by the Government

[64] In such systems, the courts generally have a role in the resolution of jurisdictional disputes

[65] Transcript, p12.

and all the rest of it ..." He also said at that time that Labour had not accepted the possibility of a reduction in the level of Scottish representation at Westminster.[66]

The Government's plans for regional development agencies in England are designed to be the first stage of 'English regionalism', and John Prescott, in his statement on 3 December on the *Building partnerships for prosperity* white paper (Cm 3814), said:[67]

> As we made clear in our manifesto, we are committed to moving, with the consent of local people, to directly elected regional government in England. That complements devolution in Scotland and Wales and the creation of a Greater London assembly. Demand for directly elected regional government varies across England, and it would be wrong to envisage a uniform approach at this stage.

The minister responsible for English regional government, Richard Caborn, has been reported in the press as regarding English regional assemblies as an answer to the West Lothian Question:[68]

> Asked if directly elected assemblies would provide an answer to the West Lothian question, he replies: 'Of course it would ... It will by definition. The more you devolve powers into the [English] regions, the more it answers the West Lothian [question]."
>
> Pressed as to whether the assemblies would have lawmaking and tax-raising powers, like the Scottish parliament, Mr Caborn says: 'It's not on the agenda at this stage. Whether that evolves, one will see."
>
> Mr Caborn's comments are significant in two respects: first, he acknowledges that an answer to the West Lothian question may be required; second, he hints at a federal structure for the UK if Labour wins the next election.
>
> Tony Blair, like other Labour spokesmen, has repeatedly said the West Lothian question does not merit an explicit answer; he also insists that Labour is offering devolution rather than federalism.

---

66 "Blair on devolution", *Scotsman*, 8.3.95. See also, for example, the *Regional government consultation paper* published in August by the North of England Assembly of Local Authorities, prompted in part by the Labour Party's 1995 consultation paper on English regional government, *A choice for England.*

67 HC Deb vol 302 c359, 3.12.97. See also his preface to the white paper, pp7-8. The introductory chapter also expressed the Government's view that their proposals "may be a first step towards greater devolution in England": para 1.7

68 "England's regions will get home rule", *Scotsman*, 1.12.97. In a companion story, this quote is followed by the sentence from Mr Caborn: "That's, I would have thought, pretty obvious" ("Radical planning quiet revolution", *ibid*). By 'federalism', the newspaper presumably actually means 'devolution all round'. The Scotsman had earlier reported that Scottish Office ministers, such as Henry McLeish, were urging a programme of English regionalism as an answer to the consequences (including financial ones such as the 'Barnett formula' distribution) of Scottish and Welsh devolution: "Ministers push for devolved English regions", 17.11.97

> The West Lothian question asks why Scottish MPs should retain the right to vote at Westminster on matters that have been devolved to the Scottish parliament. The question is only likely to become a burning issue in England once the Scottish parliament and the Welsh assembly have been set up in the millennium and 1999 respectively.

Suggestions have sometimes been made for an all-English parliament, rather than for a series of regional bodies for England. The latest instance is the forthcoming private Member's bill by Teresa Gorman, who is making the proposal as a way of highlighting what she saw as the danger of the Government's constitutional policies on the existence of the United Kingdom:[69]

> We have a fudge, pleasing neither nationalist nor unionist, bought at the expense of the United Kingdom and paid for by the English.
> But what is good for the Scottish goose is good for the English gander. Why should the English, who are the principal funders of the Union, get nothing at all out of Labour's shake up? An English parliament would not have an in-built Labour majority.
> Blair has got plans for England. He wants to create regional assemblies. A collection of super councils would make it easier for Labour to keep control in England, as well as in Scotland and Wales.
> South of the border we are only just waking up to the implications of Blair's election ploy. English taxpayers contributed to the cost of holding the referendum and will be expected to go on subsidising the Welsh and Scots.
> "No taxation without representation" the huddled English masses will soon cry. If we are not to be represented in decisions on Scottish affairs then we should not pay for them. Nor can Scottish MPs expect to vote funds for their homelands from the pockets of English taxpayers.
> That is why in January of next year I will introduce a Bill before the House of Commons calling for equal treatment for the English - an English parliament.
> Tony Blair says the Scots will be content with the paltry powers vested in Edinburgh. That is more insulting to nationalists than the straight unionist view. Alex Salmond and co will use an Edinburgh assembly to secure more power and money from Westminster.
> It would be contrary to their nature not to do so. They are happy to go on taking our money until they can worm their way out of the United Kingdom and start living on EU handouts.
> What price the national pride of the Scots as their representatives go back and forth with a begging bowl to Brussels? Donald Dewar and Scottish Labour MPs are officially gleeful at the referendum result.
> Privately many of them are less enthusiastic, facing the prospect of Scottish MPs in Westminster shrivelling from 72 to 59. They wonder whose heads will roll.
> Devolution is an end to a cosy life in Westminster, where many of them only attend when the quasi-municipal, domestic concerns of the Scottish Office are discussed. They will now move to the petty-parliament in Edinburgh.

---

[69] T Gorman, "Wrong division", *Parliamentary Review*, Nov 1997, p81

So what will be their justification for Membership of the Westminster parliament? They know it won't be long before English MPs claim exclusive rights to deal with legislation affecting England.
Devolution cannot work. We cannot have elected assemblies competing for power like fleas arguing who owns the dog they are sitting on.
The establishment of one or more local parliaments must have two consequences - either the conversion of our unitary parliament into a federal state, with a written constitution prescribing restricted powers of the federal and local parliaments, or complete dissolution of the nation. There is no third alternative.

A variant of regionalism suggested by some Liberal Democrats would build upon their local government 'neighbourhood councils' arrangement:[70]

In Liberal Democrat run authorities neighbourhood councils have been set up to run the affairs of groups of wards, each consisting of the elected councillors for those wards. Why don't we apply this to the whole country?

We would elect MPs to Westminster as we do now. If a region decided it wished to be self-governing, those same MPs would form a regional council for the area.
There would have to be some minimum, either in terms of population or territory, for a region to be so designated.

A 'wish to be self-governing' could be a resolution of the existing principal authorities, or a referendum of the electorate, or a mixture of both.

The MPs would take with them to their regional council a whole raft of decision-making previously carried out by the Westminster parliament health, education, transport, economic development, and environment with appropriate tax-raising powers.
Scottish and Welsh parliaments would, of course, be given the same or similar responsibilities.

The UK Parliament would be restricted to those functions which must be administered nationally: foreign affairs and defence, some Home Office functions - but not the police - national economic policy and presumably pensions and benefits.
Where no regional council had been set up, the regional functions would be exercised by an umbrella English Council sitting in London and consisting of all the non-regionalised MPs.

MPs would spend three or four days a week at their regional council and the remaining one or two at Westminster running the UK.

Does this solve the West Lothian question? I think it does.

Regional councils would be set up quickly wherever there is a regional identity. such as London, the west country or the north.

Areas like my own - Oxford. doesn't know if it is south east, Greater London or the Midlands - would hang around in the English Council for rather longer.
If we are right and regional government works, we could expect to see a whole set of regional governments within a decade or so.

This plan scores well when tested against our original three problems:

- The regions define themselves, but the regional split is countrywide from the start.
- It is abundantly clear that the shift of power is from Westminster, not from local government.
- There are no extra elections.

There is one more point in its favour. As soon as the English Council has become redundant, the London Council can take over the Palace of Westminster.

The UK Parliament could arrange to use the chamber for its weekly session or, if it preferred, it could rent some space in the big building on the other side of the river. That feels like poetic justice.

3. Westminster procedures

Michael Ancram considered the options for an 'English dimension' post-devolution – "where is England's voice to be heard?" -- in a speech to the Bow Group at the 1997 party conference.[71] He accepted that none of his proposed options was perfect, and all had significant drawbacks compared to the present constitutional arrangements but, he conceded, "that system of government will no longer exist in five year's time. The Party must therefore consider which would be the 'least bad option' and work out how to address its drawbacks. For be in no doubt: it would be more dangerous to do nothing and leave the constitution wholly unbalanced and unable to cater to the English dimension."

He considered the 'in and out' approach, whereby the Speaker would declare certain business as relevant only to England, and MPs from the devolved countries would be barred from speaking and voting on legislation dealing with subjects devolved to that country, Scottish MPs from such primary legislation, and Welsh MPs from such secondary legislation[72]:

> Another suggestion would formalise this process, designating certain days as 'English'. The House of Commons might, for instance, meet as a Union Parliament on Monday and Tuesday to deal with matters of concern to the United Kingdom. English MPs would then sit on Wednesday and Thursday to consider matters only of interest to their constituents.

Finally he considered "a third and radical option", that of a separate English Parliament, but confessed that he found that proposal "fraught with difficulties."

---

[70] "How to solve the W. Lothian question", *Liberal Democrat News*, 6.6.97

[71] M Ancram, "The British constitution: a fresh approach for the 21st century", Conservative party PN 1323/97, 8.10.97, pp9-10. See also his speech to the Conference itself.

[72] Presumably, on this basis, Scottish MPs would be barred from relevant primary *and secondary* legislation.

He concluded:

> But I shall not set out the 'pros and cons' of each option here. The Party wants to listen [to] its members. I hope that you will consider these – and, indeed, other – suggestions and let me know your views. There are no easy answers, but we must be prepared to listen and to debate.
>
> However we must never become a party of English nationalism: we are the Party of the Union. The only way to defend the United Kingdom is to make sure that all of its member countries are treated fairly. This means that we are entitled, if not obliged, as unionists to get a fair deal for England.

An 'English Grand Committee' would fulfil the same function as a legally separate "English Parliament" in providing a forum where domestic English matters would be dealt with solely by Members representing English constituencies. The Grand Committee approach would, for example, avoid the need for the creation (by legislation) of a separate body, with its own powers, staff etc., and could be set up under Standing Orders and make use of existing Westminster facilities and resources.[73] On the other hand, use of Westminster resources for UK and for English-only Parliamentary activities may lead to criticisms in other parts of the UK that this arrangement simply adds weight to perceived notions that the UK Parliament at Westminster is at present a *de facto* "English Parliament".

A Standing Committee on Regional Affairs already exists under S O no. 117. It consists of all Members for English constituencies, with up to five others. It last met on 26 July 1978. It could be described as a form of "English Grand Committee.[74] The history and background of this Committee is described in the following extract from Griffith & Ryle's *Parliament* (p361):

> "The procedure for a Standing Committee on Regional Affairs was adopted in 1975, and for two years significant use was made of it. This enabled attention to be paid to the problems of various regions (in 1975-76, for example, there were debates on East Anglia, the North West, the South East, and Yorkshire and Humberside economic planning) and gave Members from those parts outlets for expression of their concern without taking up time on the floor of the House or requiring the attendance, in case of a division, of Members from all other parts of the United Kingdom. Again there were sometimes divisions in the committee which, although largely meaningless, could be embarrassing for the Government. As any English Member could attend, the task of the Whips on either side was not easy. It may be that this was one of the reasons that these debates, although they appear to have been popular with the back-bench Members who took part, did not flourish. A debate on plans for the South-East in 1977-78 was the last use of the procedure, although Standing Order No. 100 is still available".

Members, including Ministers, from time to time refer to an already-existing English Grand Committee", by which they presumably meant the Standing Committee. For example Michael Forsyth, during a statement on Scottish Parliamentary business referred to "an

---

[73] Although there could well be a need for increases to meet extra demand.
[74] *Erskine May*, 22nd ed., 1997, pp721-2

English Grand Committee, for which there are provisions in our Standing Orders"[75], and made the same point in a later debate on Scottish business.[76]

This would be an extremely large committee, with 529 Members from English constituencies, which could cause logistical difficulties (it would be too large for the Commons Chamber if most of its potential membership wished to attend). Recent changes to the existing territorial Grand Committees perhaps suggest that such a committee could be granted some Chamber-like features such as questions and adjournment debates.

However, whatever its merits or otherwise as a constitutional reform, an all-England arrangement is, in principle, an available option, which could address the West Lothian conundrum.[77] This could take the form, for example, of a new English body either physically within Westminster or separate from it. The latter option could perhaps be open to criticism as a potentially wasteful duplication of resources. An English body within Westminster could be, say, either legally distinct from Parliament itself, or part of Parliament as some form of an 'English Grand Committee' of the House of Commons.. Questions of membership, including possible dual-membership by English representatives, may arise in some of these possible models.[78] Other ' internal solutions' could involve specific 'English' ministries, with their own question times, or 'English' standing committees to deal with exclusively English legislation.

4. Reduced Westminster Representation[79]

Under the 1707 Union Scotland gained 45 seats, less than a strict population based allocation, in the new 558 seat Parliament of Great Britain; this under-representation gradually reduced in the 18th century[80] and was further diminished after the Union with Ireland in 1801. During the 19th century Scotland was proportionately represented in terms of electorate, until 1922 when the removal of Southern Ireland seats and the allocation of only 13 seats to Northern Ireland boosted Scotland's relative representation so that it had 12 per cent of seats but only 10.8 per cent of electorate.

The Speaker's Conference of 1944 was crucial to the development of the territorial representation in Westminster, as it led to the institutionalisation of the over-representation of Scotland and Wales within the modern boundary review system. For the first time Scotland and Wales were guaranteed a minimum number of seats.The changes that came into effect in

[75] HC Deb vol 267 c1232, 29.11.95
[76] vol 268 c1414, 19.12.95
[77] It must be emphasised that these options are set out solely for illustrative purposes in this Paper and *do not take account of any practical or procedural difficulties there may be*.
[78] On the English aspect see, for example, the Labour Government's 1976 consultative document *Devolution: the English dimension*, 9.12.76, discussed in V Bogdanor, *Devolution*, 1979, pp206-214.
[79] This section written by Oonagh Gay, Home Affairs Section. See further Research Paper 98/1
[80] Full details of Scotland's representation since 1707 is given in Research Paper 97/92 *Scotland and Devolution*, Part N

1945 meant that Scotland had 11.6 per cent of the UK's seats, but 10.2 per cent of its electorate. After the most recent boundary review came into effect in 1997 its share was 10.9 per cent, and its share of electorate was 9 per cent. If the present total of 659 seats were distributed on a strict pro rata basis, the four home countries would have the following numbers of seats:

England 549 (at present 529)
Wales 33 (at present 40)
Scotland 59 (at present 72)
Northern Ireland 18 (the same as now)

Further legislation in 1958 introduced four different electoral quotas for each part of the UK, following a court challenge to the 1945 rules for the redistribution of seats, further institutionalising the 'over-representation' of Scotland and Wales. The Home Affairs Select Committee of 1986/87 concluded that there was a fundamental defect in the operation of the rules, leading to a cumulative increase in the number of seats in the UK Parliament. However the only legislation following the report speeded up the cycle of reviews so that reviews of boundaries must now take place between 8 and 12 years after the last. The next review is not due until 2003 at the earliest. As the rules now stand Scotland is guaranteed a minimum of 71 seats.[81]

TheWhite Paper noted "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."[82]In his statement on the White Paper Donald Dewar said "The actual number of seats allocated to Scotland will be for the boundary commission to recommend, exercising its judgement in accordance with the criteria laid down"[83]

Clause 81 of the *Scotland Bill* amends the *Parliamentary Constituencies Act 1986* to remove Scotland's statutory entitlement to 71 seats and requires the *English* electoral quota to be used in calculating the number of Scottish seats. The normal Rules referring to the need to take into account special geographical considerations will continue to apply so it is unlikely that Scotland would have as few as the 57 seats it would be entitled to under a strict numerical application of the quota for England. The *1986 Act* is also amended to ensure that Orkney and Shetland remain as a separate constituency. Any reduction in the number of Westminster constituencies will reduce the number of seats for the Scottish Parliament.

---

[81] *Rule 1, Rules for the Redistribution of Seats* in Schedule 2 of the *Parliamentary Constituencies Act 1986*
[82] Cm 3658 para 4.5
[83] HC Deb Vol 298 24.7.97 c1042

There are no plans to amend Wales' parliamentary representation as a result of the *Government of Wales Bill.* The National Assembly will not have power to make primary legislation, except to reorganise a selected list of quangos.

D. Devolution in the UK: the Stormont Era

> *"It is an illusion to suppose that institutions always transplant happily from one jurisdiction to another; yet a comparative study may on some occasions sound useful warning notes or give helpful pointers in the right directions."*[84]

Northern Ireland is always a difficult comparator for constitutional purposes, and its experience of devolution doubly so, given the history of Ireland, and Northern Ireland in particular, and the reasons for the creation, operation and ending of the Stormont Parliament. The history of the Stormont Parliament, and its one-party hegemony in particular, means that it is perhaps not an ideal comparison for present or future devolution models in the UK. The Kilbrandon Report in 1973 noted that "the alternation of political parties in power, and important feature of the Westminster system of government which was applied to Northern Ireland under the 1920 Act, was not possible. Single-party rule was the most notable feature of the government of Northern Ireland.[85]

Buckland commented: "Reflecting entrenched positions within the community at large, parliament never became an effective part of the decision-making or policy-making processes in Northern Ireland. MPs refused to take full advantage of what powers parliament did possess … Parliament had little to offer and it largely acted as a rubber stamp for decisions made elsewhere -- between the government and interested parties outside parliament. In fact, in the 1930s parliament became almost irrelevant to many sections of the community."[86]

This section does not purport to be a comprehensive history of the Stormont period, but simply highlights some of the issues relevant to the representational themes of this Paper.

---

[84] K Bloomfield, "Devolution: lessons from Northern Ireland?" (1996) 67 Political Quarterly 135, p140

[85] *Report of the royal commission on the constitution*, Cmnd 5460, Oct 1973, para 172. It did however try to evaluate the Stormont scheme notwithstanding these special features and concluded that "the home rule experiment had considerable success": para 173, and see Part X

[86] P Buckland, *A history of Northern Ireland*, 1981, pp 69-70

1. Northern Ireland at Westminster

The Government of Ireland Act 1920 provided for 13 Westminster MPs from Northern Ireland (including one university seat).[87] Conventions soon developed concerning the relationship between Stormont and Westminster, which the Speakers of the two bodies set out.[88] These conventions were generally adhered to in Westminster, although they were tested when legislation, especially of a constitutional nature, relating to Northern Ireland or what became the Irish Republic was before Parliament; when there was a Labour Government, or when non-Unionists, such as Gerry Fitt from 1966, were Members. See, for example, the Prime Minister, Harold Wilson's responses to Questions on 6 May 1965, which appear to contain West Lothian Question-type sentiments, linked to the Unionists' support for the Opposition[89].

The terminology used by ministers and parliamentarians at Westminster and Stormont during the devolution period occasionally reflected some confusion over the constitutional status of the Northern Ireland. For example, in response to a Labour backbencher during business questions on 4 March 1948, the leader of the House, Herbert Morrison said: " ... He is constitutionally wrong in declaring the Parliament of Northern Ireland to be a subordinate Parliament. Within their statutory powers, the Government and Parliament of Northern Ireland are independent"[90] Following further questioning, the Speaker intervened: "I am afraid that I must rule these questions out of Order. They are questions of law and questions of constitution which this House has no power to discuss" (c536).

The position of the Northern Ireland Members then is of interest. Almost exclusively Unionist, and therefore generally supporters of (and virtually at times part of) the Conservatives, it was not in their interest to raise the profile of Northern Ireland's domestic affairs at Westminster. Calvert, in his 1968 text on the constitution of Northern Ireland, correctly described the constitutional position of these Members: "They are ordinary members of Parliament -- they enjoy full rights of participation in all respects in the business of the House; they have full voting rights and the same privileges as other members; and are equally subject to the rules of the House and the obligation to observe its procedures."[91] However he recognised that they were in an anomalous situation, in that the Westminster

---

87 See s19 and sch5 Part II of the 1920 Act. Provision was also made for 33 Westminster seats from 'Southern Ireland' (s19 and sch5 Part I), but for the purposes of this paper only the Northern Ireland position is examined. See also the *Redistribution of Seats (Ireland) Act 1918.*

88 See, for example, Mr Speaker's rulings on 19 April 1923 that "I think it is very desirable that we should not have questions on matters which we have delegated by Statute to the Irish Governments" [HC Deb vol 162 cc 2246-7, 19.4.95], and on 3 May 1923: " 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 House"[HC Deb vol 163 cc 1623-5, 3.5.23]. The Stormont Speaker ruled, for example, that "since .. we have no power to make laws on any of these reserved matters [ie under the 1920 Act], they are not *prima facie* proper subjects for discussion here, except possibly by means of certain forms of Resolution, such as an Address to the Crown." [NI Parl vol 8 cc490-2, 29.3.27].

89 For example "I am sure the House will agree that there is an apparent lack of logic, for example, about steel, when Northern Ireland can, and presumably will, swell the Tory ranks tonight, when we have no power to vote on questions about steel in Northern Ireland..." HC Deb vol 711 cc1560-2, 6.5.65.

90 HC Deb vol 448 c 535, 4.3.48

91 H Calvert, *Constitutional law in Northern Ireland*, 1968, p77.

Parliament, while legally fully competent to act in all matters in and affecting Northern Ireland, did not in fact generally involve itself in its domestic affairs. He argued that the under-representation of the area at Westminster during the Stormont era strengthened the argument for full rights for the Northern Ireland members at Westminster against any proposals for the application of some sort of 'in and out'-type restriction, and concluded (pp79-80):

> So long as members of the United Kingdom Parliament continue assert the right to interfere in the domestic affairs of Northern Ireland. so long will the Northern Ireland members continue to assert full voting rights. So long as Northern Ireland is underrepresented on a population basis, they will be able to put forward strong justification for the proposition that Northern Ireland's control over internal affairs has already been taken into account. So long as the United Kingdom Parliament remains legally sovereign over all persons matters and things in Northern Ireland, the Northern Ireland members will resist any legal restraints upon their voting rights.
>
> It might be thought that full representation on the basis of a convention of not voting on domestic Great Britain matters would be the most relevant way of taking into account Northern Ireland's de facto exclusive control over its own affairs. The definition of "domestic matters" does not pose insuperable problems-what is sought to be excluded are simply those matters which, in relation to Northern Ireland, are within the powers of the Northern Ireland Parliament, and thus the scheme of definition contained in the 1920 Act would be appropriate. The practical difficulties would be readily dealt with by the device of attaching the Speaker's certificate to domestic bills and motions. But, so far, the question has not been seriously considered. It would be a constitutional change which even a Labour government under the extreme pressure of a very small majority in the House concedes would need a mandate from the electorate.

George Thomas, when a junior Home Office minister, said: "The question has been raised tonight of the voting rights of hon. Gentlemen who come from Northern Ireland. We have always been proud in this House that we have no first or second class members, that we are all here with equal rights. We have always maintained, and none more than myself, 'No taxation without representation'. I therefore leave that matter there"[92]

He also considered the means of inter-governmental communication between London and Belfast during this era, which unlike the means of Parliamentary liaison (at least in the Northern Ireland-to-London direction), were not specifically provided for in the realm of non-devolved matters. This was a matter he regarded as necessary because policy in that area can have an impact in the devolved sphere, or because of occasional overlap or redefinition of the boundary between the two, or where one executive may act as the agent of the other. For example, some Northern Ireland executive bodies (such as the Ministry of Commerce and the Development Council) retained permanent representation in London. The then Northern Ireland Prime Minister described other links in 1960:[93]

---

[92] HC Deb vol 718 c106, 26.10.65

[93] HC Deb (NI) vol 47 cc 231-2, 2.11.60

> Strictly speaking, the official channel of communication between the Government of Northern Ireland and Her Majesty's Government is through our Cabinet Offices and the Home Office. That was the original set-up. Since then, for purposes of convenience, for purposes of speed and for personal contact, Ministers are in direct contact with their opposite numbers on the other side.
>
> Generally a copy of whatever letter has been sent to the Minister or whatever arrangement has been made is sent to the Home Office to keep it informed. In addition to that there is a member of our Cabinet staff permanently at the Home Office**,** which is the centre of all information and all action. Then there are exchanges of information between the civil servants in the various Ministries. That is a daily occurrence.

An example of inter-governmental consultation was described in a written answer in 1965, when a junior economic affairs minister, William Rodgers, said that the operation of prices and incomes controls would also apply to Northern Ireland following the agreement of its Government, and that there would be prior consultation with that Government about any proposed references to the Prices and Incomes Board where the industry involved was of special importance to Northern Ireland.[94]

Calvert considered the conventions which developed in Stormont and Westminster, especially in the bodies' activities other than legislating, that is the discussion of devolved matters at Westminster and of non-devolved matters at Stormont. One approach would have been to regard the spheres of competence of the two Parliaments as mutually exclusive; another to have regarded Westminster's sphere as all-embracing, but Stormont's as limited to devolved matters. In an area with two Parliaments, both acting in relation to that area, but only one acting in the whole state, this is fraught with difficulties: "A local parliament, however, may operate as a forum for the expression of local opinion upon national matters. And a national parliament may operate as a forum for the expression of national opinion upon local affairs" (p86).

He distinguished between legislating and discussing Northern Ireland issues at Westminster. Constitutional theory, made explicit by s75 of the Government of Ireland Act, meant that the UK Parliament did not (and could not) divest itself of legislative competence over Northern Ireland, but political realities meant that a practice developed whereby London did not expressly legislate for it without the consent (willing or otherwise) of its Government,[95] though Calvert quoted examples where Stormont legislated itself under some form of London compulsion/persuasion. Thus Calvert concluded that the fact that London did not generally legislate directly for Northern Ireland was due, not to any sense of legal requirement, but to convention or practice, in effect a self-denying ordinance by the sovereign power. This

---

94 HC Deb vol 720 c 87W, 17.11.65

95 Calvert's work was published in 1968 before the current 'Troubles', which led to direct rule and the end of Stormont, began in earnest.

position was consistent with the principle and purpose of devolution, which was to confer some degree of governmental discretion and autonomy upon the local legislature and executive (p92):

> The position which is thus arrived at is that Westminster legislation in the sphere of transferred matters without reference to Northern Ireland enjoys constitutional propriety only where it is absolutely necessary to ensure, within these very broad limits, the maintenance of good government in Northern Ireland. This, it is believed, is the view of the Home Office which is reliably reported" to have expressed the view that section 75 should only be used in the most exceptional circumstances. It is very much a long stop. Comity would require consultation even before resort was had to it. As long as the Northern Ireland organs of government are doing the job for which they were established and not exceeding their powers in doing it, section 75 will not be used.

As Bloomfield, a former NIO permanent secretary, noted: "It was clear throughout the existence of the Northern Ireland Parliament and Government that successive UK Governments recognised how difficult it would be, having created responsible democratic institutions in a jurisdiction, thereafter openly to over-ride their decisions"[96]

The existence of a practice of non-discussion of Northern Ireland affairs at Westminster was considered by Calvert. He noted that early practice in the 1920s (even before Stormont has come into operation) was to allow some discussion, but this finally changed with a Speaker's ruling in 1923 that questions on matters delegated to Stormont must be addressed to Northern Ireland ministers, not UK ministers in the House of Commons at Westminster. The Speaker rejected any link between the fact that Northern Ireland continued to send Members to Westminster, and the ability of the Commons to discuss devolved matters.[97] Even before then, the Speaker had said that, as Parliament had legislated for Northern Ireland devolution, "it is quite impossible for us to have questions and answers on a subject for which Ministers on this Bench do not hold responsibility. I can say no more than that."[98]

Such a policy by the Chair was then followed consistently, but with varying degrees of strictness for the next 40 years,[99] based, according to Calvert, on the absence of normal ministerial responsibility for devolved Northern Ireland affairs by UK ministers. A useful example of the attitude of the Chair in the 1960s is the Speaker's ruling on a debate on the Common Market:[100]

---

[96] K Bloomfield, "Devolution: lessons from Northern Ireland?" (1996) 67 Political Quarterly 135, p137

[97] HC Deb vol 163 cc1623-5, 3 May 1923

[98] HC Deb vol 151 c1089, 7.3.22

[99] The stance of the Chair and of ministers must be distinguished. The refusal to allow a question, for example, should be distinguished from the practice of a minister to refuse to give a substantive answer.

[100] HC Deb (NI) vol 48 cc3069-70, 27.6.61

Mr. Speaker: The hon. Member for Antrim (Mr. Minford) asked me on Thursday last for a Ruling as to whether this House could debate the question of the European Common Market, and I promised to give a considered Ruling today.

As hon. Members are aware, the Parliament of Northern Ireland is subject to the restrictions imposed by the Government of Ireland Act, 1920, and amending legislation. Section 4, paragraphs (4) and (7), of the Act of 1920 preclude this Parliament from legislating on treaties and agreements with foreign States, and on trade with any place outside Northern Ireland. The effect of subsection (8) of Section 8 of the Act of 1920 is to impose corresponding restrictions on the powers of the executive responsible to this Parliament. From these limitations it follows that it would not be in order to put down any Motion involving direct legislation or direct government action on the subjects excepted by Section 4 of the Act of 1920.

It has, however, in the past been recognised that legislation or executive action at Westminster may have a considerable effect on the internal affairs of Northern Ireland which would be a matter of concern to, this House. This was the basis of the Rulings given by my predecessor to the effect that it is in order to put down substantive Motions asking the Government of Northern Ireland to make representations to Her Majesty's Government in the United Kingdom on matters arising out of legislation or governmental action at Westminster.

Applying these principles to the question asked by the hon. Member for Antrim, I must rule that in this House it would only be in order to suggest that representations be made to the United Kingdom Government concerning matters which, under the Act of 1920, are the sole responsibility of that Government. In the present case it would be proper for hon. Members to ask that representations of this kind be made in relation to the possible effect on the economy of Northern Ireland of the entry of the United Kingdom into the European Common Market. Hon. Members could suggest the making of representations arising out of the possible repercussions on our unemployment situation or on our agricultural - or industrial economy, so that the views of the House may be made known.

I must make it clear that this Ruling is not to be taken as referring to the consideration of any legislation or other action, within the powers of the Parliament of Northern Ireland, which may be thought necessary as a result of any step which the Government of the United Kingdom may take in relation to the European Common Market, or as precluding the seeking of information as to the discharge by officers of a Northern Ireland Department of functions under an arency arrangement made with a department of the Government of the United Kingdom.

I did not accept the two Notices of Motion which were submitted on the subject of the European Common Market on the grounds that they were too widely drawn and could have involved matters which do not come within the jurisdiction of this House.

He examined apparent examples of discussion of Northern Ireland matters being permitted, such as in relation to persons domiciled in Great Britain but affected by the conduct of the Northern Ireland authorities.[101] Activity at Westminster could have arisen if Stormont was seen to step outside its statutory jurisdiction, either in terms of the range of devolved powers, or statutory control on the exercise of such power (eg. against religious discrimination).[102]

---

[101] HC Deb vol 151 cc1084ff, 7.3.***22***

[102] See, for example, HC Deb vol 707 cc 59-92, 22.2.65

A useful way of tracing the development, at least in relation to questions to ministers, is through the various editions of Erskine May. In the 1924 edition, among the list of areas where questions were not allowed because of no ministerial responsibility were "matters which had been transferred to the Parliament of Northern Ireland .. or the Irish Free State."[103] Thereafter the following editions used a similar forms of words as one of the list of 'out-of-order' topics,[104] until the 1971 edition which stated:[105]

> Questions dealing with matters transferred to the Government of Northern Ireland are not in order. When, however, UK Ministers have entered into discussions with Northern Ireland Ministers on matters within the latter's responsibility, questions have been allowed on the subject matter of these discussions.

This form of words was repeated in the 1976 edition, though with a footnote to the first sentence: "This rule has ceased to apply since the assumption of full powers over Northern Ireland by the United Kingdom Government." (fn r), and the matter did not appear at all in future editions.

Some studies have suggested that the major figures in Unionism gravitated to Stormont rather than Westminster. Harbinson, for example, studied the Ulster Unionists at Westminster and concluded that "a very few were major figures in the Unionist Party, and none appears to have been duly rewarded for their service"[106] Bernard Jenkin made a similar point during his speech on the recent second reading of the *Government of Wales Bill*: "Look what happened when Northern Ireland was given Stormont: the long tradition of politicians such as Castlereagh, who played a leading role in the governance of the United Kingdom, was directly ended. Northern Irish politics drew in upon itself, and the parties and policies ceased to have much to do with Westminster."[107]

2. UK matters at Stormont

Calvert noted that “over the years following the establishment of the Northern Ireland Parliament, there developed a practice in its House of Commons that members were virtually debarred from debating reserved and excepted matters in respect of which the Parliament was not competent to legislate. The reasoning was that if the Parliament cannot legislate, it cannot debate."[108] In the early period there was discussion of non-devolved matters by Stormont Members, but, because the Northern Ireland Government had no ministerial responsibility for such matters, criticism of them in relation to such matters was ruled out of

---

[103] 13th ed., 1924, p240 fn3.
[104] "Dealing with matters transferred to the Government of Northern Ireland", eg 14th ed., 1946, p338
[105] 18th ed., 1971, pp325-6. No examples, however, were given.
[106] J Harbinson, *The Ulster Unionist Party 1882-1973*, 1973, p103
[107] HC Deb vol 302 c886, 9.12.97
[108] Calvert, *op cit*, p103

order, though suggestion that Stormont ministers seek to make representations to London were sometimes permitted.

However a stricter exclusionary practice was set by the Stormont Speaker's ruling in March 1923, that there could be no discussion (other than perhaps by certain forms of resolution, such as an Address, or where the Northern Ireland authorities was acting as agent in non-devolved matters) on matters where there was no statutory power to legislate.[109]

Calvert noted that there was a strong contrary argument (p108):

> But there is one other policy argument which deserves great weight. Parliament, leaving aside questions of strict law for the moment, is above all the forum for the expression of popular views by the representatives of the people on matters which concern them. The degree of concern experienced by subjects does not vary according as to whether the matter is reserved or transferred and whilst it should not be inferred that there should therefore be no limit to discussion, there is nevertheless good reason for presuming that discussion should be allowed unless there are very clear countervailing considerations. None have been suggested.

The *1920 Act* did not expressly empower Stormont to discuss or consider non-devolved matters,[110] though Calvert argued that the supplementary powers granted by the Act did, in effect, allow Stormont to regulate its own internal procedure, including the scope and exercise of its non-legislative powers, and the 1923 ruling was therefore ill-founded.

Newark, writing in 1940, criticised the Stormont Speakers' approach to discussion of non-devolved matters, and the ground upon which it was said to be founded:[111]

> The broad ground which supports these rulings of the Speakers is that Parliament which cannot legislate on a given matter. cannot debate that matter. It is submitted that this practice is unwarranted by law or usage, that it is a source of great inconvenience, and that it is based on a misapprehension of the true nature of a Parliament.

He believed that there was no basis in the 1920 Act for such a narrow approach, as its restrictions referred to legislative powers, and argued that the Westminster Parliament, in all its discussions on Irish constitutional matters, had never contemplated the exclusion of the discussion of non-devolved matters in any subordinate Irish Parliament, even citing Gladstone in support (pp 79-80). While not wishing to enter into the arguments of dual representation of Northern Ireland (at Westminster and at Stormont), he noted that "one of the

[109] HC Deb (NI) vol 8 cc490-2, 29.3.27. See further the Speaker's ruling in 1961, HC Deb (NI) vol 48 cc3069-70, 27.6.61, above

[110] Unlike the provision in *clause 34* of the current *Government of Wales Bill*

[111] F Newark, "Parliamentary freedom and the Government of Ireland Act 1920", (1940) 4 *NILQ* 75, 76

evils of such dual representation is the dissipation of political strength which it involves" and is compounded by the fact that those who chose to seek election to Stormont as a way of serving Northern Ireland "are debarred from assisting in propagating a collective view on problems affecting the welfare of the United Kingdom as a whole" (p82).

3. The end of Stormont

When the situation in the province deteriorated in the late 1960s, there was renewed pressure for a more pro-active approach by Westminster notwithstanding the longstanding conventions. This led to protests from Unionists that the conventions were being broken.[112]

> **Mr Stratton Mills:** While acknowledging that the Prime Minister has always acted with constitutional propriety towards Northern Ireland, may I ask if he will confirm that there is a longstanding convention of non-interference in Northern Ireland affairs by the Westminster Government?
>
> **The Prime Minister:** Yes, Sir. I did say that two years ago, But I think that the hon. Gentleman will agree that there has been widespread concern in more than one part of the House about certain events which have occurred in Northern Ireland. Without departing from the convention, I thought it right to embark on a series of talks with the Prime Minister of Northern Ireland to discuss these questions and, as he knows, I have had two very interesting discussions, and a third will take place in due course.

In October 1968, for example, when asked to refer to the Procedure Committee "the convention whereby members of the House are unable to discuss matters or table questions relating to the administration in Northern Ireland", the Leader of the House, Fred Peart, refused, explaining that "the House is already free to discuss, on an appropriate Motion, those Northern Ireland affairs which are within the transferred field" The Liberal leader, Jeremy Thorpe, claimed that "one cause for concern is that the Government have not merely stood by the 1920 Act but have interpreted certain conventions which have no juridical validity to suppress debate in this House.... [W]hen Ulster Members of Parliament have no inhibitions about interfering in our internal affairs, it is quite intolerable that this House does not urgently and in detail discuss matters going on in Ulster today."[113] An interesting account of the Parliamentary convention, and of the Home Office's approach to the province in the 1960s is contained in James Callaghan's book on Northern Ireland, *A house divided.*[114]

---

[112] HC Deb vol 745 c1822, 27.4.67

[113] HC Deb vol 770 cc 882-5, 21.10.68. See also, for example, an exchange during Prime Minister's Questions on 11 July 1968 [HC Deb vol 768 cc 731-3, and the follow-up written answer at c124w, 11.7.68.

[114] pp1-2.

Following direct rule in 1972, Northern Ireland has, at least superficially, adopted many of the Parliamentary and governmental characteristics of Scotland and Wales, with its own department of state, under a secretary of state; its own question time, standing and select committees and so on. The major obvious distinction remains probably the 'Order in Council' legislative procedure for Northern Ireland legislation.

E. Representational Issues: MPs and MSPs

1. General

The essence of the West Lothian Question is one of legitimacy and fairness of representation. This raises a number of issues, some of which have been thoroughly canvassed, and some which have not. For example, one aspect of the 'Question', in its widest sense, which is perhaps not considered as much as others, is the relationship between Members from Scottish[115] constituencies and their constituents. While solutions (such as 'in and out') seek to address the situation of such Members dealing with matters in Westminster not transferred to the Scottish Parliament, especially domestic English business, they do not tend to cover Scottish Members' role in relation to the devolved matters themselves, at least directly. Again, many aspects of the representational role of MSPs (ie the Members of the devolved Parliament) tend to receive relatively little consideration in 'West Lothian' terms.

The British Parliamentary tradition is, generally, that the primary representational relationship lies with people and the locally elected representative for the body responsible (in terms of legislative and other power, and to which the relevant 'executive' is accountable) for the particular issue or function. For example, in matters dealt with primarily by local authorities, the primary relationship is between councillors and their constituents. Members conventionally deal with matters which affect their own constituents. In practice, Members of the Westminster Parliament often deal, at various levels, with local government issues, either directly with the relevant council departments, members and officers, or at national level with the appropriate government department, officials and ministers. Members may often have a close relationship with local councillors within their constituency (especially, perhaps, those of the same party), even to the extent of holding joint 'surgeries' so that they and the councillors can efficiently deal with appropriate issues, on behalf of their constituents. People, who may often seek help from those they know of, or whom they believe are best placed to help them, may resort to their Member of Parliament rather than their local councillor even in local authority matters. Another instance of traditional representational practice is the Westminster convention that Members should not deal with constituency matters of other Members.

---

[115] Readers are reminded that 'Scottish' is used here, as throughout this Paper, for illustrative purposes. Similar issues apply to the different scheme for Welsh devolution under the *Government of Wales Bill*, and some aspects of this

2. Representation under a new voting system[116]

The above analysis presupposes the continuation of the existing electoral system, where those elected represent distinct territorial areas[117], whereas it is proposed that in the devolved bodies in Scotland and Wales, only some of whom will conform to this traditional form of representation.[118] This will not only mean that, under devolution, there will be two classes of Member, in terms of their form of election, but also that this could well make post-devolution representational relationships more complex. In other words, the simplistic form of relationship, **MP↔MSP**, may have to be represented, at least in some senses, as **MP↔constituencyMSP + MP↔regionalMSP + constituencyMSP↔regionalMSP**. The UK has no experience of a 'parliament' where its members are elected under two different systems, and foreign systems which do operate such arrangements may not prove to be appropriate comparators. For example, Bogdanor, when examining the German system, noted that both constituency and list members of the Bundestag seemed to be treated the same, but pointed out possibly relevant differences between the UK and the German political systems, such as the propensity for more disparate grievance channels in a federal state, and the tendency for smaller parties to gain most, if not all, their representation through the list.[119] See also the interesting discussion by Farrell:[120]

> The party leaderships may not see the two sets of MPs as different, but evidence from a survey of the members of the Bundestag in the mid-1980s suggests that the constituency MPs do see their role as different from list MPs, paying closer attention to constituency concerns. The bulk of the MPs asked (70 per cent) felt that 'representatives from single-member districts are more accountable' to the voters (Lancaster and Patterson, 1990: 466). This finding may need some qualification, especially when we try to get a true impression of what German MPs mean by constituency service. For instance, it has been stressed by Geoffrey K. Roberts (1975: 221) that the German political culture differs from the British in that German MPs do not have 'a sensitivity toward the constituency relationship; it did not exist before 1949, and has not been highly developed since then'. Furthermore, German voters do not seem very interested in the distinction between the two types of MPs, indeed, '[m]ost voters are completely unaware of the names of their constituency candidates' (Jesse, 1988: 113). Finally, there is the fact that because Germany is a federation, voters have multiple levels of representatives (e.g. *Land* politicians, local councillors) to choose from when raising constituency problems so 'constituency members necessarily play a smaller role in dealing with grievances than in Britain, a unitary and highly centralized country' (Bogdanor, 1984:57).

---

are considered in Research Paper 97/132, *The Government of Wales Bill: operational aspects of the National Assembly*, 4.12.97, esp sections IIIC and V.

[116] See P Riddell, "Out of kilter with the Commons", *Times*, 25.8.97

[117] Other than MEPs and local councillors in Northern Ireland

[118] On alternative voting systems generally, see Research Paper 97/26, *Voting systems -- the alternatives*, 13.2.97. Representation is a complex political concept, and is more than the simple Member-constituent link which is considered here for the purposes of this Paper. On the wider issues, see, for example, V Bogdanor (ed.), *Representatives of the people?*, 1985 and the works of AH Birch, such as *Representation*, 1971

[119] V Bogdanor, *What is proportional representation?*, 1984, pp56-9

[120] D Farrell, *Comparing electoral systems*, 1997, pp98-99. See further T Burkett, "The West German Deputy", chap 7 of V Bogdanor (ed), *Representatives of the people?*, 1985

The Labour Party's working party on electoral systems under Raymond Plant considered the pros and cons of an Additional Member (or Mixed Member) System:[121]

> (ii) It would be wrong to have two classes of members in the Commons - those who represent constituencies and those who do not. There would be a danger that the latter would still be less directly accountable; and there should be differences in workload, with non-constituency members relieved of constituency casework. This could also mean the latter would be less in touch with the day-to-day concerns of the electors.
>
> Against this, it could be pointed out that the 'highest losers' in a region would have the responsibility of representing the substantial number of electors who voted for a party which otherwise gained little or no representation in that region. These 'regional' representatives in areas with little or no party representation through constituencies could actually have a very substantial workload, in which case there would be little danger of them becoming 'free loaders'. However, unlike candidates from a party list, they would have to face the electorate again directly, if they wanted to be re-elected in future. This plurality point about two classes of member was explored by those members of the Working Party who visited Germany in 1992. Most of those we met argued strongly that there was no significant difference between constituency and additional members, both of whom had substantial constituency workloads.
>
> Of the systems the Working Party has actively considered for the Commons a Mixed Member System would present the greatest challenge to the present wholly constituency-based composition of the House of Commons and the culture which derives from that. Against this, it can be argued that this is inevitable if we are to have a more pluralist system of representation and one in which the very substantial votes in regions for parties which do not win constituencies are to count for something in the political culture of the United Kingdom.

Contrast two views from Members who are now Ministers. "The Additional Member System (AMS) favoured by most PR advocates in the Labour Party would mean two classes of MP: some constituency-based, the others constituency free-loaders chosen from lists and without any constituency responsibilities" (Peter Hain),[122] and "AMS is sometimes criticised on the basis that it throws up two classes of MPs -- those elected in constituencies and those in the 'top up'. I once heard a Parliamentary colleague eloquently argue that Privy Councillors (ie 'Right Hons') are a different class from the rest of us … No PC ever resigns to join the rank and file of MPs! In addition, ministers are extremely restricted in their ability to represent their constituents' interests. Under AMS members will be elected in different ways, but they will all be legitimate … It is crucial that additional members should not be freeloaders. Constituency duties could be assigned either by parties or by an independent electoral commission" (Jeff Rooker)[123]

Similar issues arise in the European Parliament, where many states use forms of list systems. A 1992 study by Bowler and Farrell concluded that "individual voters are better -- or at least more frequently -- served by representatives elected under district based systems and where voters can choose candidates,"[124] and (p16):

---

[121] 1993, p23.

[122] P Hain "Selling the system: the alternative vote", chap 6 of G Smyth (ed.), *Refreshing the parts*, 1992, p47

[123] J Rooker "The additional member system (AMS), chap 6 of Smyth, *op cit*, pp52-53 (extracts)

[124] S Bowler & D Farrell, *Legislator shirking and voter monitoring: impacts of European Parliament electoral systems upon legislator/voter relationships*, 1992, p15. See also R Corbett et al, *The European Parliament*, 3rd ed., 1995, p62

> The move to a unified system of elections will, on the basis of the evidence presented here, change the relationship between citizens and EPS in some states. It may be for the better. For instance, if it should be towards national list PR, legislators freed from constituent demands win be able to concentrate more fully on wider issues of more general concern and so help to shape better public policy. Such a shift may well be for the better; the better for legislators, the better for policy, the better for all Europeans in the long run. But such a shift does, implicitly, define the representative process in a certain way. It is here that we return to the points of wider concern raised at the beginning of this paper. While the claims for more powers for the European Parliament are often made on the basis of the EP being a representative institution, the term 'representative' is rarely spelled out. Who or what is being represented is usually not quite clear. Even if a given commentator does have a clear *normative* answer to this question, it is unlikely that s/he has a clear picture of the institutional mechanisms which are meant to promote that particular picture of representation. Over twenty years ago A. H. Birch wrote:
>
> The concept of representation, like those of liberty, equality and democracy, has been developed more by politicians and propagandists than by political scientists. ...Like them also, it is a rather loose concept, which has been used in different ways by different writers, each of whom tends to claim that the meaning he attributes to it is the only proper meaning (Birch, 1971, p. 124).

Birch's comments still seem appropriate today, especially in relation to the institutional development of the European Parliament.

Devolution, if and when implemented, would inevitably lead to the evolution of new conventions and arrangements for the various accountability and representational relationships inherent in an additional elective/legislative tier.[125] Constituents will find that they have an potential additional source of assistance, especially for devolved matters.[126] (including those where the primary function remains with another body, such as a local authority), and the Scottish and UK Parliaments may evolve conventions as to the extent, if any, of the involvement of each in the areas primarily the responsibility of the other. UK Ministers may, for example, decide not to answer substantive questions on day-to-day devolved matters, much as they did not for nationalised industries or executive agencies in the past. The White Paper simply stated that "it will be for the House of Commons to consider its future arrangements for Scottish business."[127]

On the other hand, subject to the terms of any devolution legislation, a devolved Parliament may wish to take a broad view of its role, and decide that statutory limitations on its legislative competence do not preclude it from considering, by way of debate, question or other procedure, matters not directly devolved to it.[128] The UK Parliament, perhaps including the Members for constituencies in the devolved country, may well object (generally or in particular cases) to this expansive role, seeing it as the devolved body straying into the

[125] Especially if they were not expressly set out in any of the relevant legislation.
[126] For example, MPs and MSPs, if of the same party, may hold joint surgeries
[127] Cm 3658, para 4.6
[128] The Welsh Assembly would be able to consider, and make appropriate representations about, any matter affecting Wales (*clause 34, Government of Wales Bill*)

exclusive preserve of the Westminster Parliament. Crick & Millar, in their 1995 set of draft Standing Orders for a Scottish Parliament, when considering these points, concluded that "the immediate answer is that the Scottish Parliament should be able to debate any subject on which it is itself competent, or on which it can take effective action vis-a-vis the competent authority. But a 'grey area' of responsibility would undoubtedly exist in such a case, and other such cases readily come to mind. It is in order to resolve such borderline cases in a constitutional and effective manner that conciliation machinery between the Scottish and UK parliaments will become necessary."[129] They suggested that the Stormont era may "throw light on this subject" although the proposed devolution package for Scotland would be significantly different.

3. Representational relationships

The main representational relationships of relevance in a 'West Lothian' context can be summarised in the following list. Relationship C is the one usually considered in 'West Lothian' terms, but relationships A, D, G and H are also of potentially practical interest in this context. This list is in terms of Parliamentary relationships; there will also be parallel 'executive-executive' relationships and crossover 'executive-Parliamentary' relationships.[130] In 'West Lothian' terms, the type of business usually considered is legislation, where Members participate and decide by speaking and voting. There are other forms of Parliamentary proceeding, such as questions, motions and petitions, as well as speaking in non-legislative debates, where, in general, factors such as order, ministerial responsibility, and the Chair's discretion will determine what matters are dealt with in the House, and by whom.

The relationships assume a 'normal' situation of devolved matters being dealt with by the Scottish Parliament, and reserved and domestic English matters by the UK Parliament at Westminster. In addition Westminster will deal with devolved matters directly when considering the boundary between devolved and reserved powers (for example, when legislation to amend the boundary is proposed or introduced, or when there are 'demarcation disputes'), or indirectly for comparative purposes when dealing with domestic English business. The Scottish Parliament may also deal with reserved or domestic English matters for similar reasons.

---

[129] B Crick & D Millar, *To make the Parliament of Scotland a model of democracy*, Nov 1995, Appendix B, p35

[129] Especially if they were not expressly set out in any of the relevant legislation.

[129] B Crick & D Millar, *To make the Parliament of Scotland a model of democracy*, Nov 1995, Appendix B, p35

[130] Examples of the latter are the relationship, if any, between Scottish MPs and the Scottish Executive in devolved and in reserved matters.

- ***Westminster:***

A/ Scottish MPs and devolved matters: The nature and extent of representation in a Parliamentary system such as ours depends ultimately on the powers of the Parliament and the responsibilities of the Executive in that Parliament. Therefore, if certain powers are neither within the normal jurisdiction of the Westminster Parliament (subject to its overriding sovereignty) nor the day-to-day responsibility of Ministers in (or answerable to) that Parliament, then it may be argued that the theoretical underpinning for Scottish Members actively involving themselves at Westminster (and Whitehall) in devolved matters *as members of that Parliament* is either weakened or removed. The extent to which, and the ways in which, the Westminster Parliament would deal with devolved matters would be the result of the application of any relevant rules, conventions and practices that exist or evolve in the post-devolution era. Members of Parliament routinely deal with matters within the province of local government, where their constituents have representatives directly elected to the local authorities responsible for these matters, and it may be that something of this practice could evolve in relation to devolved matters.

B/ Scottish MPs and reserved[131] matters: As reserved matters are ones for the UK Parliament, as they concern the UK (or GB) as a whole, English and Scottish Members would appear to be equally entitled, in all senses, to participate fully in such business.

C/ Scottish MPs and English matters: This relationship is at the heart of the 'West Lothian Question' as it has been posed in the last twenty years, together with relationships A and D. Is it fair that Scottish MPs should be able to participate fully[132] in domestic English matters (such as housing or education), when they cannot consider these same matters as they affect their own constituents because they are devolved matters, and neither can English MPs consider them for the same reason? Scottish MPs will be able to act in this way because domestic English matters will continue to be dealt with, as now, by the UK Parliament, the same Parliament which, in relation to Scotland, will only be able (subject to its overriding sovereignty) to deal with non-devolved matters. Defenders of this position argue, for example that English MPs have always been able to involve themselves in Scottish matters to date, and, because of their overwhelming numerical superiority, could override the clear (or even unanimous) wish of Scottish representatives.

D/ English MPs and devolved matters: Unlike Scottish MPs, English Members will have no 'constituency' interests in devolved matters, but will retain such interest in them as the Westminster Parliament chooses to operate, including any legislation to amend the main devolution legislation such as the boundary between the devolved and reserved areas, or

[131] Reserved matters are those retained at a UK (or GB) level, and, for the purposes of this discussion, do *not* include matters of solely 'domestic' English interest (eg English local government finance, housing or education)

[132] This section deals primarily with Parliamentary aspects. MPs (and MSPs) will interact with Ministers in London and Edinburgh in other ways, such as correspondence and meetings.

through any committees and other procedures that may be created at Westminster to scrutinise or observe the operation of devolution.[133] The extent to which, and the ways in which, these relationships evolve may well depend, to a large degree, on the attitude of the Government of the day to devolution as such and to the devolved bodies in practice.

E/ English MPs and reserved matters: As reserved matters are ones for the UK Parliament, concerning the UK (or GB) as a whole, English and Scottish Members would appear to be equally entitled, in all senses, to participate fully in such business.

F/ English MPs and English matters: This is possibly the most straightforward relationship, except in so far as Scottish MPs, in the absence of any 'in and out' arrangement, will be equally entitled to participate in such Westminster business. Procedures may perhaps be evolved at Westminster to permit some 'English-only' activity, such as some form of 'English Grand Committee'.[134]

- ***Edinburgh:***

G/ MSPs and devolved matters: This should, in principle, be straightforward, as MSPs will be elected to serve in a Parliament which has been expressly established by statute to deal with these devolved matters, and in which there will be an Executive answerable to that Parliament for the operation of these devolved functions.

H/ MSPs and reserved matters: Subject to any provisions in the devolution legislation, MSPs will not have any formal role in relation to reserved UK (or GB) matters, although there may be ways (parliamentary or 'extra-parliamentary') in which their views, as elected representatives, on such matters may either be sought by or given to Westminster/Whitehall, perhaps, in some cases, through the Secretary of State and the Scottish Office.

I/ MSPs and English matters: In principle there would be no formal role for MSPs in domestic English matters, except perhaps for comparative purposes, eg where policy in the various jurisdictions is either uniform or diverse. Joint bodies of the two Parliaments may be created to deal with, for example, 'cross-border' issues or for general 'inter-parliamentary relations'.

---

[133] In Wales, of course, all Welsh matters will remain, to some degree subject to Westminster scrutiny and no powers of primary legislation are being devolved to the proposed Assembly.

[134] Such as the Standing Committee on Regional Affairs, under S.O. no. 117

4. Mechanisms[135]

The mechanisms by which any such relationships operate will be an important matter for the success of a devolution scheme. Not every detail will appear in devolution legislation, as, for example, it is usual practice for each House in Westminster to deal with such matters internally[136] (by standing order, resolution and so on), or structures and linkages may evolve informally within and between the various bodies. There may even be linkages through representative bodies such as the IPU or CPA (if devolved bodies are admitted to membership), or by the creation of some form of association, with or without Westminster itself, of UK devolved bodies (including any Assembly for Northern Ireland or any regional assemblies in England).

In a post-devolution House of Commons, consideration will have to be given to the various structures and procedures which currently exist to deal with Scottish and Welsh business, such as the select, standing and grand committees, question times, annual debates and so on. The situation will no doubt take into account not only the existing differences in the taking of Scottish and Welsh business, but also the different forms of devolution proposed in the *Government of Wales Bill* and the *Scotland Bill* (especially in relation to legislative and tax-raising powers), as well as the continuing roles (as they develop) of the two Secretaries of State.[137] To what extent, if any, will Westminster scrutinise the activities and legislative output of the devolved bodies, and have official cognizance of the activities of the devolved bodies (eg reports/papers laid before both Houses)?[138] In addition to the Secretaries of State and their departmental officials and other relevant persons, will representatives of the devolved executives and parliaments be able/required to appear before, or even participate in, Westminster committees and other bodies?[139] From the point of view of the devolved bodies, how and to what extent will they be able to call before them representatives of Westminster and Whitehall?

---

[135] See also, especially in relation to resolution of potential conflict between Edinburgh and London, appendix B of Crick & Millar's *To make the Parliament of Scotland a model for democracy*, 1995

[136] See the two white papers, *A voice for Wales*, Cm 3718, paras 3.44-45, and *Scotland's Parliament*, Cm 3658, para 4.6

[137] On the Welsh position see Research Paper 97/132, esp chaps IIIC and V.

[138] During the second reading of the Government of Wales Bill, for example, Michael Ancram, from the Opposition front bench, appeared to be concerned that Westminster may have no formal means of knowing how the Assembly was exercising its legislative powers: HC Deb vol 302 c696, 8.12.97

[139] If, for example, there develop systems of pre-legislative scrutiny at Westminster, would there be a role for Welsh devolved representatives in the scrutiny of proposed/draft Welsh primary legislation in which the Assembly would have secondary legislative power, perhaps even by some form of joint committee?