

The **Constitution** Unit

# **Nations and Regions: The Dynamics of Devolution**

**Quarterly Monitoring Programme**

## **Devolution and the Centre**

**Quarterly Report  
August 2001**



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***Executive Summary:***

- The SNP and Plaid Cymru have formed a joint group in the House of Commons.
- The debate over the English Question continues.
- The membership of the territorial Select Committees for the new Parliament has been announced.
- The new House of Lords Committee on the Constitution has completed its first report.
- A new Cabinet Committee on the Nations and Regions has been established.
- Devolution is reportedly to blame for the UK's failure to quickly implement EU legislation.
- Temporary sheriffs have been held to be in breach of Article 6(1).
- The first case challenging the legality of an Act of the Scottish Parliament has been heard by the Judicial Committee of the Privy Council.
- Comment on the development of *Legal Wales*.

## **1: Devolution and Westminster:**

### ***1.1: SNP link with Plaid Cymru:***

The Times reported on 28 June 2001 that the SNP and Plaid Cymru had, after discussions with the Speaker of the House of Commons, Michael Martin, formed a joint group in order to achieve more speaking rights in the House and better representation on Select Committees.<sup>1</sup> The group, now comprising 9 MPs, will be the fourth largest in the Commons, above the Ulster Unionists.

A report in The Scotsman suggested that the Liberal Democrats were gaining better representation on committees at the expense of the nationalist parties.

George Kerevan wrote:

The big losers are the SNP and Plaid Cymru, who find they have fewer select committee places than their new, combined Commons representation entitles them to. The SNP has been offered a seat on the Commons Catering Committee, last heard of when its chairman, Bob Maxwell, sold off the wine cellar. Needless to say, the SNP's Westminster leader, Alex Salmond, wine connoisseur though he may be, is unwilling to accept this rather obvious attempt at being sidelined.<sup>2</sup>

### ***1.2: The English Question:***

Following William Hague's announcement that he will step down as leader of the Conservative Party in the wake of the June 2001 general election, the English Question seemed to have slipped down the political agenda. In the run up to the election however, the issue manifested itself in various forms. In a letter to the Commission for Racial Equality (CRE) in which he explained his reasoning behind not signing their anti-racism pledge, the Conservative MP for Yorkshire East, John Townend, added that the English considered themselves "ignored by a government dominated by Scots."<sup>3</sup>

During the sixth day of debates on the Queen's Speech the English Question was raised by Mr Edward Leigh MP who lamented the Government's lack of interest in resolving the debate:

...although we have argued about the West Lothian question for four years, there is still no answer. Our English constituents are still faced with the fact that Scottish MPs vote on our health, education, policing agriculture, transport, housing policy and much else, whereas we have no say on Scottish matters. We should point that out again and again because it is a denial of natural justice.

Over the years, many solutions have been proposed. There is a federal solution, advocated by the Liberal party; and there is the solution

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<sup>1</sup> 'Welsh link up with the Scots', *The Times*, 28 June 2001.

<sup>2</sup> 'Lib Dems join the fixers in gerrymandering', *The Scotsman*, 16 July 2001.

<sup>3</sup> 'Tory complains of Scots domination', *The Herald*, 27 April 2001.

advocated by my right hon. Friends on the Front Bench, and which I favour – that Scottish Members should not be allowed to vote on exclusively English matters. But it is a matter of justice, and it must be dealt with. The Government cannot ignore it.<sup>4</sup>

Later in the debate another Conservative MP, Mr Mark Field (Cities of London and Westminster), expanded on the topic:

Conservative members have perhaps made too much of the idea of English votes for English laws, when the issue should be about Scottish taxes for Scottish expenditure. By dint of a mere 74-vote majority, my hon. Friend the Member for Galloway and Upper Nithsdale (Mr Duncan) is the Conservatives' sole Scottish Member of Parliament. We must face facts: at each of the last two general elections, barely one in six Scottish electors have voted for unionist parties, so we are being taken down the path chosen by the Government.

I am very worried because the Government have upset the equilibrium of the United Kingdom, and it will be difficult to restore. I have a prediction to make, and I hope that I shall be proved wrong...I predict that there will be two distinct powers blocs in the Scottish Parliament: on the one hand, the Liberal Democrats and the Labour party; and on the other, the Scottish National Party, possibly in bed with the Conservatives, who will no longer be a unionist party in Scotland. That will present a great challenge in the years ahead. My great concern is that the Government have not really thought through their modernisation agenda and are blind to many of the difficulties that will arise from it. I beseech then to tread carefully in constitutional matters.<sup>5</sup>

### ***1.3: The Barnett Formula:***

The Chief Secretary to the Treasury, Mr Andrew Smith, was asked in a Parliamentary question to address the concerns of the people of the North East of England over the Barnett formula by Joyce Quin, the Labour member for Gateshead East and Washington West. Ms Quin suggested that due to the Government's commitments on elected regional assemblies it would be timely for the government to also reassess the Barnett formula. Mr Smith replied:

...for those who have concerns about the Barnett formula, I point out, first, that it is not the formula that is responsible for the inequalities in funding about which people are worried. These are historic matters which, of course, the Barnett formula addresses. It is a convergence formula – something on which we receive representations from other parts of the United Kingdom.<sup>6</sup>

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<sup>4</sup> House of Commons Debates, 27 June 2001, Column 674.

<sup>5</sup> Ibid, Column 701-702.

<sup>6</sup> House of Commons Debates, 19 July 2001, Column 245.

Only days beforehand Mr Nicholas Winterton had raised a similar issue with the Secretary of State for Scotland Helen Liddell. Mrs Liddell replied with her usual aplomb:

**Mr Nicholas Winterton:** To ask the Secretary of State for Scotland what discussions she has held with the Secretary of State for Transport, Local Government and the Regions on the operation of the Barnett Formula.

**Mrs Liddell:** I have regular discussions with my right hon. Friend the Secretary of State for Transport, Local Government and the Regions on a wide range of issues.<sup>7</sup>

#### ***1.4: The Future work of the Modernisation Committee:***

The new Leader of the House of Commons, Mr Robin Cook, gave a possible indication of direction in which his tenure in the position will proceed in an answer to a written question posed by the Scottish National Party member for North Tayside, Pete Wishart:

**Pete Wishart:** To ask the President of the Council if he will commission an inquiry into the roles of (a) the Scottish Parliament's Committees and (b) House of Commons Standing Committees in respect of legislation.

**Mr Robin Cook:** I very much hope the Select Committee on Modernisation of the House of Commons will look at the Scottish Parliament to see what we can learn from their experience; I certainly wish to visit that Parliament over the summer adjournment.<sup>8</sup>

#### ***1.5 The Territorial Select Committees:***

The membership of the Territorial Select Committees has been announced for the new Parliament. Members are as follows:

- **Scottish Affairs Committee:**

Irene Adams (Labour, Paisley North).

Peter Atkinson (Conservative, Hexham).

Alistair Carmichael (Liberal Democrat, Orkney and Shetland).

Peter Duncan (Conservative, Galloway and Upper Nithsdale).

Eric Joyce (Labour, Falkirk West).

Mark Lazarowicz (Labour/Co-op, Edinburgh North and Leith).

John Lyons (Labour, Strathkelvin and Bearsden).

Ann McKechin (Labour, Glasgow Maryhill).

Mohammad Sawar (Labour, Glasgow Govan).

Michael Weir (SNP, Angus).

- **Northern Ireland Affairs Committee:**

Michael Mates (Chair) (Conservative, South Hampshire).

Adrian Bailey (Labour, West Bromwich West).

Harry Barnes (Labour, North East Derbyshire).

Roy Beggs (UUP, East Antrim).

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<sup>7</sup> House of Commons Written Answers, 17 July 2001, Column 153W.

<sup>8</sup> House of Commons Written Answers, 17 July 2001, Column 156W.

Henry Bellingham (Conservative, North West Norfolk).  
Tony Clark (Labour, Northampton South).  
Stephen McCabe (Labour, Birmingham Hall Green).  
Eddie McGrady (SDLP, South Down).  
Stephen Pound (Labour, Ealing North).  
Peter Robinson (DUP, Belfast East).  
Martin Smyth (UUP, Belfast South).  
Mark Tani (Labour, Alyn and Deeside).  
Bill Tynan (Labour, Hamilton South).

- **Welsh Affairs Committee:**

Martin Jones (Chair) (Labour, Clwyd South).  
Martin Caton (Labour, Gower).  
Hywel Francis (Labour, Aberavon).  
Julie Morgan (Labour, Cardiff North).  
Albert Owen (Labour, Ynys Mon).  
Adam Price (Plaid Cymru, Carmarthen East and Dinefwr).  
Mark Prisk (Conservative, Hertford and Stortford).  
Chris Ruane (Labour, Vale of Clwyd).  
Bill Wiggin (Conservative, Leominster).  
Betty Williams (Labour, Conwy).  
Roger Williams (Liberal Democrat, Brecon and Radnorshire).

The Welsh Affairs Committee has announced that its first major inquiry of the new Parliament will be on Transport in Wales. The Committee will examine:

- **An integrated transport policy for Wales:** the rationale for, and impact of, an integrated transport policy for Wales, the respective roles and responsibilities of the UK Government and the National Assembly for Wales.
- **Railways:** the new franchise for Wales, the current state of the track and infrastructure, the role of the Strategic Rail Authority in relation to Wales, rail fares in Wales.
- **The use of Objective 1** money for public transport projects.

The Committee has announced two smaller inquiries into Broadband Calling in Wales and Objective One Funding and that it will hear evidence from the Rt Hon Paul Murphy MP, Secretary of State for Wales, on Tuesday 23 October 2001 at Potcullis House.

It would appear that the proposed inquiry into primary legislation as it affects Wales (announced shortly before the general election) has been postponed.<sup>9</sup>

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<sup>9</sup> For details of this inquiry see the February 2001 and May 2001 Devolution and the Centre Monitoring Reports.

For further information on the Welsh Affairs Committee see:  
<http://www.parliament.uk/commons/selcom/welhome.htm>

***1.6: The Grand Committees:***

The Welsh Grand Committee met on 3 July 2001 to discuss the Government's legislative programme as it affects Wales. The Secretary of State for Wales, Mr Paul Murphy MP, took the opportunity to reaffirm the role of the Welsh Grand post-devolution:

The role of the Welsh Grand Committee needs to be examined occasionally and we need to reflect on why we meet in the House according to such a format. It is important that we meet in this way. Everyone knows that 40 Members of Parliament represent the people of Wales in the House, and our Committee gives us an opportunity, which has perhaps become more significant since devolution, to talk about various matters, some of which may be devolved, but which have a resonance for us all because we are public representatives.

The reserved matters for which the Government are responsible also have a particular significance in Wales. That is why it is especially appropriate that we discuss the Queen's Speech, which covers both devolved and non-devolved areas, in the Welsh Grand Committee. The Committee is a forum that enables us to hold such discussions and to ensure that we represent our constituents by raising issues that affect them. In the half-hour during which my hon. Friend the Under-Secretary and I took questions, most members of the Committee raised issues that affect their constituencies, and it is right that that should happen. Our Committee gives Members representing Welsh constituencies the opportunity to get together.

It is also important that the Committee should occasionally meet in Wales. I do not suggest that we should always meet in Cwmbran, but it was helpful when we did. We should meet in every part of Wales—north, south and mid-Wales. Meeting in Wales would allow us to liaise with our colleagues in the National Assembly, who, like hon.

Members, are elected to represent the people of Wales.

He went on to define the continuing role of Welsh MPs:

Our role in the devolution settlement is to fulfil two functions in respect of devolved matters: first, to ensure that we get the resources, which I shall come to in a moment, and, secondly, to provide the legislative tools to enable the Assembly to go about its business in delivering the services that it is charged to deliver. On non-devolved matters, we shall play our part in the House of Commons and as legislators.

The Scottish and Northern Irish Grand Committees have not met since 22 March and 28 March 2001, respectively.

### **1.7: The House of Lords Constitution Committee:**

Since the publication of the May 2001 Devolution and the Centre Monitoring Report a full list of the witnesses who have given oral evidence before the new Constitution Committee of the House of Lords has become available. The full list of witnesses is as follows:

<b>Wednesday 14<sup>th</sup> March 2001:</b>	<b>Jean Corston MP</b> , Chair, Human Rights Joint Committee. <b>David Doig</b> , Commons Clerk. <b>Professor David Feldman</b> , Legal Adviser to the Human Rights Committee. <b>Lord Rodgers of Quarry Bank</b> , Leader of the Liberal Democrat Peers. <b>Dr Tony Wright MP</b> , Chair, Public Administration Committee.
<b>Wednesday 21<sup>st</sup> March 2001:</b>	<b>Lord Tordoff</b> , Chair, European Union Committee. <b>Dr Chris Kerse</b> , Legal Adviser. <b>Tom Mohan</b> , Clerk. <b>Lord Strathclyde</b> , Leader of Conservative Peers.
<b>Wednesday 28<sup>th</sup> March 2001:</b>	<b>Lord Craig of Radley</b> , Convenor of the Cross Bench Peers. <b>Baroness Jay of Paddington</b> , Leader of the House.

The Committee's First Report<sup>10</sup> examined its terms of reference<sup>11</sup>, possible topics for consideration, relationships with the work of other Committees and the resources available to the Constitution Committee. In identifying the boundaries of their jurisdiction the Committee defined a constitution as:

...the set of laws, rules and practices that create the basic institutions of the state and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.<sup>12</sup>

The Committee went on to identify the five basic principles of the United Kingdom Constitution:

- Sovereignty and the Crown in Parliament;
- The Rule of Law, encompassing the rights of the individual;
- Union State;
- Representative Government;

<sup>10</sup> 'Reviewing the Constitution: Terms of Reference and Method of Working', 11 July 2001, HL 11.

<sup>11</sup> "To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the Constitution", *ibid*, at paragraph 1.

<sup>12</sup> *Ibid*, at paragraph 50.

- Membership of the Commonwealth, the European Union, and other international organisations.<sup>13</sup>

A number of witnesses had suggested that devolution, and the relationships between Westminster and the three devolved administrations, fell within the remit of the Constitution Committee (among them were Jean Corston MP, Lord Rodgers of Quarry Bank, Tony Wright MP and Lord Strathclyde<sup>14</sup>). The Committee announced that inter-institutional relationships in a devolved UK would form the subject of its second inquiry, to commence after Christmas 2001.

## **2: Devolution and Whitehall:**

### ***2.1: Ministerial Committee on the Nations and Regions:***

Following the General Election a new Cabinet Committee has been set up under the Chairmanship of John Prescott, the Deputy Prime Minister. Its terms of reference are:

To consider policy and other issues arising from devolution to Scotland, Wales and Northern Ireland; and to develop policy on the English Regions.

Its membership is as follows:

Deputy Prime Minister and First Secretary of State (Chairman),  
 President of the Council and Leader of the House of Commons,  
 Lord Chancellor,  
 Secretary of State for the Home Department,  
 Secretary of State for Environment, Food and Rural Affairs,  
 Secretary of State for Work and Pensions,  
 Secretary of State for Transport, Local Government and the Regions,  
 Secretary of State for Health,  
 Secretary of State for Northern Ireland,  
 Secretary of State for Wales,  
 Chief Secretary, Treasury,  
 Secretary of State for Scotland,  
 Lord Privy Seal and Leader of the House of Lords,  
 Secretary of State for Trade and Industry,  
 Secretary of State for Education and Skills,  
 Secretary of State for Culture, Media and Sport,  
 Parliamentary Secretary, Treasury and Chief Whip,  
 Minister without Portfolio,  
 Attorney General,  
 Advocate General,  
 Minister of State, Cabinet Office (Barbara Roche)  
 (The Foreign Secretary and the Secretary of State for Defence receive

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<sup>13</sup> Ibid, at paragraph 51.

<sup>14</sup> Ibid, at paragraph 24.

papers).<sup>15</sup>

The new Cabinet Committee on the Nations and Regions (CNR) replaces the Devolution Policy Committee (DP) previously chaired by the Lord Chancellor and expands its remit through the addition of the English Regions.

## ***2.2: Devolution and the implementation of EU legislation:***

During the quarter it has been reported that the UK is beginning to fall behind other member states with regard to the speed with which it implements EU legislation, particularly directives.<sup>16</sup> Member states had agreed that implementation rates should aim to be running at a deficit of 1.5% by March 2002. The UK is currently running at a deficit of 3.3% (the third highest in the EU behind Greece and France). To achieve this the UK will have to implement 68 pieces of legislation before March 2002.

According to *The Financial Times*:

The UK government blamed the failure to implement some EU laws quickly on the UK's new constitutional settlement which has involved the establishment of a parliament in Scotland and assemblies in Wales and Northern Ireland.

The assemblies, established in the past two years, are responsible for the implementation of some EU legislation such as environment and transport matters.<sup>17</sup>

In one sense however, it is too simple to suggest that the delays in the transposition of EU legislation is the fault of the devolved administrations themselves. With regard to the National Assembly for Wales there are issues surrounding its limited access to s.2(2) of the European Communities Act 1972 as well as its protracted procedures regarding the passing of secondary legislation.

The scenario is not one, however, that has not been anticipated by the government. The *Memorandum of Understanding and supplementary agreements*<sup>18</sup> deals with the position in its Concordat on the Co-ordination of EU policy issues, adding that should the European Court of Justice impose a fine on the UK government:

To the extent that financial costs and penalties imposed on the UK arise from the failure of implementation or enforcement by a devolved administration on a matter falling within its responsibility, or from the

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<sup>15</sup> For further details see the Cabinet Office website at: <http://www.cabinet-office.gov.uk/cabsec/2001/cabcom/cnr.htm>

<sup>16</sup> See 'Britain falls behind in enacting EU legislation', *Financial Times*, 29 May 2001; 'EU attacks Britain on directives backlog', *The Times*, 29 May 2001; 'Brussels says Britain is worst backslider over EU law', *The Guardian*, 29 May 2001.

<sup>17</sup> 'Britain falls behind in enacting EU legislation', *Financial Times*, 29 May 2001.

<sup>18</sup> The most recent edition of which was published by the Cabinet Office in July 2000 (Cm.4806).

failure of a devolved administration to meet its share of an EC quota or obligation, responsibility for meeting these will be borne by the devolved administration.<sup>19</sup>

### **3: Intergovernmental Relations:**

There have been no meetings of either the Joint Ministerial Committee on Devolution or the British-Irish Council during the last quarter.

It has been announced that the Deputy Prime Minister, John Prescott, will be the UK's representative on the British-Irish Council. Since Mr Prescott's relocation to the Cabinet Office following the general election it has been confirmed that the Regional Co-ordination Unit and the Government Offices in the Regions will also operate under the supervision of the DPM. Writing in *The Times*, Peter Riddell, commented:

This goes part of the way towards creating a department to co-ordinate devolution – although the Scotland and Wales Offices have been retained, for the time being, with separate Cabinet Ministers for political reasons.<sup>20</sup>

### **4: Devolution and the Courts:**

#### ***4.1: David Cameron Millar v. Procurator Fiscal, Elgin and Kerry Payne, Paul Stewart and Joseph Tracey v. Procurator Fiscal, Dundee:***

The Judicial Committee of the Privy Council handed down judgment in the case of *Millar* on 24 July 2001. On appeal from the High Court of Justiciary<sup>21</sup> the appellants sought to challenge the ruling that their right to a hearing before an independent and impartial tribunal had been waived, and that in appearing before a temporary sheriff, each had been denied a hearing before an independent and impartial tribunal. The original proceedings involving each of the appellants took place between 20 May 1999, the date that the Scotland Act 1998 came into force, and 11 November 1999, the date on which the decision in *Starrs v. Ruxton* was made.<sup>22</sup>

The decision in *Starrs v. Ruxton* was summarised on the *Scots Law News* website in the following terms:

On 11 November 1999 the High Court of Justiciary upheld a challenge under Article 6 of the European Convention of Human Rights which brought to an end the system of temporary sheriffs in Scotland. A prosecution before Temporary Sheriff David Crowe in Linlithgow Sheriff Court was challenged on the basis that, the Lord Advocate having a key role in the appointment, dismissal and non-

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<sup>19</sup> *Ibid*, at paragraph B4.25.

<sup>20</sup> 'New look behind the revolving doors of power', *The Times*, 13 June 2001.

<sup>21</sup> *Millar v. Dickson, Marshall v. Richie, Payne v Heywood, Stewart v. Heywood, Tracey v. Heywood* [2000] *SLT* 1111.

<sup>22</sup> *Starrs v. Ruxton* [2000] *JC* 208.

reappointment of temporary sheriffs as well as being head of the public prosecution system in Scotland, such sheriffs could not be regarded as sufficiently independent of the Executive to meet the requirements of Article 6 that an accused have a fair hearing before an “independent and impartial tribunal” (*Starrs and Chalmers v Ruxton*, 1999 GWD 37-1793; Times, 17 November 1999).<sup>23</sup>

The Judicial Committee of the Privy Council found that each of the applicants had been denied a fair hearing and following the ruling in *Starrs v. Ruxton* stated that although there was no reason to doubt the impartiality of the proceedings before the temporary sheriffs the fact that they were appointed by a member of the Scottish Executive, the Lord Advocate, was sufficient to mean that the tribunal could not meet the standards of independence and impartiality set by the European Convention on Human Rights and Fundamental Freedoms.

Lord Hope referred to the need to preserve public confidence in the justice system:

It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about a judge’s impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case.<sup>24</sup>

In conclusion, Lord Hope summarised the findings of the Judicial Committee as follows:

Temporary sheriffs, viewed objectively, lacked the quality of independence and impartiality to which all accused persons are entitled under article 6(1) of the Convention. This lack of independence and impartiality, however slight, was sufficient to disqualify temporary sheriffs from taking any part in the determination of criminal charges at the instance of the prosecutors acting under the authority of the Lord Advocate. It also made it unlawful for prosecutors to conduct proceedings in the sheriff court under the authority of the Lord Advocate with a view to the determination of criminal charges by temporary sheriffs in that court. The Lord Advocate had no power to conduct those proceedings before them in that court, as this was incompatible with the accused’s Convention right: section 57(2) of the 1998 Act. The proceedings were thus vitiated from the moment they were brought before the temporary

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<sup>23</sup> <http://www.law.ed.ac.uk/sln/index.htm>

<sup>24</sup> *David Cameron Millar v. Procurator Fiscal, Elgin and Kerry Payne, Paul Stewart and Joseph Tracey v Procurator Ficscal Dundee*, Judgment of the Lords of the Judicial Committee of the Privy Council, 24 July 2001, paragraph 65.

sheriffs for their determination. The Convention right and the statutory fetter which the 1998 Act has imposed on the powers of the Lord Advocate thus march hand in hand. Under the devolved system the disqualification of a tribunal whose objective independence or impartiality is vitiated gives rise, at once and at the same time, to a lack of competence on the part of the Lord Advocate.<sup>25</sup>

Since the decision in *Starrs the Bail, Judicial Appointments, etc (Scotland) 2000* has been passed by the Scottish Parliament and provides for the creation of a new category of part-time sheriffs appointed under provisions which are compatible with ECHR standards.

Estimates in the press suggested that the ruling would place a question mark over around 9000 other cases decided by temporary sheriffs during the period 20 May to 11 November 1999.<sup>26</sup> However, it has also been suggested that further appeals on this matter may be to the detriment of the appellant as, if the case was sent to retrial by a full time sheriff, a more harsh sentence may be imposed.<sup>27</sup>

#### **4.2: *Karl Anderson, Alexander Reid, Brian Doherty v. The Scottish Ministers and the Advocate General for Scotland:***

The Judicial Committee of the Privy Council has also heard the first challenge to an Act of the Scottish Parliament. During the week beginning 9 July 2001 lawyers for Anderson, Reid and Doherty sought to argue that the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 fell outside the competence of the Scottish Parliament. The Act had been passed by the Holyrood Parliament in September 1999 after a lacuna had allowed the so-called “Kalashnikov Killer”, Noel Ruddle, to be released from Carstairs.

A spokesman for the Law Society of Scotland was reported as saying:

The Privy Council must decide whether [the Act] contravenes the EU [sic] Human Rights Act, and if it does the Scottish law will be overturned.<sup>28</sup>

#### **4.3: *Parliamentary Questions to the Advocate General:***

Of particular interest was a question raised by Mr Russell Brown MP. The member for Dumfries asked Dr Clark whether she had intervened in the recent ECHR challenge to the prison regime at Barlinnie.<sup>29</sup> The case in question, *Robert Napier v. The Scottish Ministers*, came to prominence when a

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<sup>25</sup> Ibid at paragraph 67. Section 57(2) of the Scotland Act 1998, referred to above by Lord Hope, is worded in the following terms: “A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.”

<sup>26</sup> ‘Thousands of convictions made unsafe’, *The Herald*, 26 July 2001.

<sup>27</sup> ‘Scots human rights appeals ‘may backfire’’, *The Times*, 27 July 2001.

<sup>28</sup> ‘Killers put Scottish Parliament powers to the test’, *The Herald*, 10 July 2001.

<sup>29</sup> House of Commons Written Answers, 17 July 2001, Column 154W.

court held that the inmate should be transferred out of the 'inhuman and degrading conditions' at Barlinnie Prison.<sup>30</sup> The Advocate General answered that she had not intervened, although it has since been reported that the Scottish Executive is to appeal against the ruling.

#### **4.4: Retirement of Lord Clyde:**

It was announced on 25 June 2001 that Lord Clyde, Lord of Appeal in Ordinary, will step down from his post with effect from 1 October 2001. Lord Clyde was appointed a Lord of Appeal in 1996.

By convention, two of the 12 law lords are from Scotland. The Lord Chancellor has stated that in advising the Prime Minister on potential successors to the vacancy he will consult the Secretary of State for Scotland, Helen Liddell MP, the Scottish Justice Minister, Jim Wallace MSP, and the Lord President of the Court of Session, Lord Rodger of Earlsferry.<sup>31</sup> Following the advice of the Lord Chancellor the Prime Minister will then make a recommendation to the Queen.<sup>32</sup>

#### **4.5: Legal Wales:**

The article 'Daughters of the devolution', printed in *The Times* on 3 July 2001, drew attention to Legal Wales and the increase in legal cases being heard in Wales. The desire to conduct litigation relating to Welsh affairs within the borders of Wales is perhaps as much an issue of access to justice rather than any grand scheme to separate the jurisdiction of England and Wales. But, as Gareth Chadwick observes, devolution has given the development of Legal Wales a 'valuable boost'.<sup>33</sup>

The concept of Legal Wales was examined by the Hon. Sir Stephen Richards at the Annual Lecture of the Centre for Welsh Legal Affairs on 29 June.<sup>34</sup> Sir Stephen pointed to the increase in sittings of the Court of Appeal, Employment Appeal Tribunal, High Court and Administrative Court taking place in Wales as evidence that recent years have seen a 'radical transformation' of the concept of Legal Wales. Devolution has acted as a catalyst for this transformation:

Until devolution, all Administrative Court (or Crown Office, as it was then called) cases from Wales had to go to London. Documents had to be lodged there and the cases heard there. Following the Government

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<sup>30</sup> 'Prison chaos at human rights case', *The Scotsman*, 27 June 2001.

<sup>31</sup> Press Notice, 'Lord Clyde to retire as Lord of Appeal in Ordinary', Lord Chancellor's Department, 25 June 2001.

<sup>32</sup> For further details of senior judicial appointments see the LCD website at: <http://www.lcd.gov.uk/judicial/appointments/jappinfr.htm>

<sup>33</sup> 'Daughters of the devolution', Gareth Chadwick, *The Times*, 3 July 2001.

<sup>34</sup> 'The Court System in Wales: Challenge and Change', The Hon. Sir Stephen Richards, Lecture at the Centre for Welsh Legal Affairs, Department of Law, Aberystwyth, 29 June 2001 (due to be published in (2001) 32 *Cambrian Law Review*). My thanks are due to Ann Sherlock for providing me with a copy of the text.

of Wales Act, provision was made by the devolution practice direction to enable documents to be filed in Cardiff in judicial review cases involving a devolution issue arising out of the Act or an issue concerning the National Assembly for Wales, the Welsh executive or any Welsh public body. So, in broad terms, documents relating to Welsh judicial review cases could be filed in Cardiff. Applications could also be made for cases to be heard in Wales; and in practice there have been a number of such hearings, in Swansea as well as Cardiff. But it is fair to say that the volume of work has been disappointing, given the potential for public law work in Wales.<sup>35</sup>

The first Welsh-speaking judge has been appointed to the High Court. David Roderick Evans QC was appointed to the Queen's Bench Division in April 2001 having previously been Recorder of Cardiff.<sup>36</sup>

Also appearing in *The Times* an article entitled 'Scotland is hungry for judicial change too'<sup>37</sup> argued that in spite of recent changes to the judicial system in England and Wales (including the advertisement of judicial posts, the reduction in the use of Latin in legal proceedings and the current review of the right to trial by jury) the language and structures of the Scottish legal system still 'reek of ancient authority'. Particular criticism was levelled at the perceived lack of scrutiny of the Crown in its role as prosecutor:

One thing the Scottish Parliament has achieved is to abolish feudal superiors' adverse rights. It should be consistent and bring our prosecution service, a cornerstone of a democratic and peaceful society, into line with modern patterns of political scrutiny.<sup>38</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> Lord Chancellor's Department, Press Release, 12 April 2001.

<sup>37</sup> 'Scotland is hungry for judicial change too', Austin Lafferty, *The Times*, 3 July 2001.

<sup>38</sup> Ibid.