

Nations and Regions: The Dynamics of Devolution

Quarterly Monitoring Programme

Devolution and the Centre

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Devolution and the Centre Monitoring Report – May 2002.

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Key Points:

- The English Question again becomes a part of the debates over the future of hunting with hounds in the House of Commons.
- The Standing Committee on Regional Affairs meets for the second time since the general election of 2001 – but interest among MPs remains low.
- The Government announces the establishment of a Joint Committee on House of Lords Reform.
- Lord Palmer introduces the Scottish Parliament (Referendum) Bill – to enable a referendum on the abolition of the Scottish Parliament.
- The House of Lords Select Committee on the Constitution continues its inquiry into *Inter-Institutional Relations in the United Kingdom*.
- The consultation period on the size of the Scottish Parliament comes to an end on 29 March 2002.
- Lord Bingham again advocates reform of the United Kingdom's highest courts.
- A challenge is launched to the Scottish Parliament's Protection of Wild Mammals (Scotland) Act by the Countryside Alliance.

1: Devolution and Westminster:

Figure 1.1 Chronology of Events at Westminster (February–May 2002):

27 February	Welsh Questions in the House of Commons.
27 February	Lords Committee on the Constitution hears evidence from the Deputy Prime Minister, John Prescott MP.
28 February	House of Commons annual debate on Welsh Affairs.
5 March	Discussion of devolved competences of the Scottish Parliament in House of Commons debate on nuclear power.
5 March	Scottish Grand Committee meets to discuss Defence in Scotland.
5 March	Meeting of the Welsh Affairs Select Committee – Broadband Cabling in Wales.
7 March	First Reading in the House of Lords of the Scottish Parliament (Referendum) Bill, introduced by Lord Palmer.
12 March	Discussion of devolution of policing powers to the National Assembly for Wales during the second reading in the House of Lords of the Police Reform Bill.
19 March	Scottish Questions and Questions to the Advocate General for Scotland in the House of Commons.
19-25 March	A series of Early Day Motions tabled on the issue of Scottish Members voting on the Hunting with Dogs Bill.
20 March	Lords Committee on the Constitution hears evidence from the heads of the Territorial Departments of State.
20 March	Scottish Affairs Select Committee meeting – the work of the Commission for Racial Equality in Scotland.
20 March	Northern Ireland Affairs Committee meeting – Introduction of Aggregates Levy in Northern Ireland.
21 March	Meeting of the Standing Committee on Regional Affairs to debate Regional Development Agencies.
10 April	Welsh Questions in the House of Commons.

10 April	Lords Constitution Committee hears evidence from the three Territorial Secretaries of State.
16 April	Welsh Affairs Committee meeting – Broadband Cabling in Wales.
17 April	Second Reading of the Scottish Parliament (Referendum) Bill.
24 April	Welsh Grand Committee meets to discuss the budget statement and its implications for Wales.
2 May	House of Commons Debate on the Welsh Affairs Committee Report on ‘Wales in the World’. ¹
8 May	Scottish Grand Committee meets to discuss the North Sea Oil and Gas Industry.
13 May	Government announces establishment of Joint Committee on House of Lords Reform.

1.1: The English Question:

The English, or West Lothian, Question has again been raised during the course of debates on the issue of hunting with hounds. The Father of the House, Tam Dalyell, long-time campaigner on the issue, suggested in early March that Scots MPs should not vote or participate in the debate on the future of foxhunting held in the House of Commons on 18 March 2002.²

In the event of the debate, 32 Members of Parliament holding Scottish constituencies voted in the division, as pointed out in the Early Day Motion tabled the following day by Peter Duncan MP, the conservative member for Galloway and Upper Nithsdale. The EDM read:

That this House notes that the 32 honourable members with constituencies in Scotland saw fit to express their view on hunting in England and Wales when the House divided on 18th March, despite

¹ Welsh Affairs Committee, First Report, Session 2000-01, *Wales in the World: The Role of the UK Government in promoting Wales Abroad* (HC 38).

² ‘English hunt vote is “no business for Scots MPs”’, *The Independent on Sunday*, 3 March 2002.

each of them having personally voted for the passing of the Scotland Act 1998 which devolved responsibility for this policy in Scotland to the Scottish Parliament; and urges these members to abstain on future votes on hunting legislation brought forward.³

On 21 March an amendment to Mr Duncan's Motion was lodged by Alistair Carmichael MP, suggesting the duplicitous nature of Mr Duncan's argument. The amendment read:

Leave out from 'urges' to end and add 'notes further that this is no different from the participation by the honourable Member for Galloway and Upper Nithsdale in the division on 12th March on the motion on the Quality of Life in London and South East England.'⁴

This exchange set a precedent for a dialogue involving Anne Begg, MP for Aberdeen South, and Peter Ainsworth, the Shadow Secretary of State for the Environment Food and Rural Affairs, which was reported in *The Herald*. In a letter to Ms Begg, Mr Ainsworth called upon her to follow the example set by the Conservative member for Galloway and Upper Nithsdale and 'abstain from divisions on legislation that has no bearing on life in your own constituency'.⁵ Ms Begg replied by suggesting that not only were all MPs equal, but that Mr Duncan, who had 'recently voted on the Northern Ireland

³ EDM no, 1034, Hunting votes and Scottish Honourable Members, Mr Peter Duncan, 19 March 2002.

⁴ EDM 1034A1, Hunting votes and Scottish Honourable Members, Amendment line 5, Mr Alistair Carmichael, 21 March 2002. Two further EDMs were tabled, both on the 25 March 2002, the first, by Jackie Lawrence MP, read: 'after "March;" leave out to end and add "notes that as elected members of the United Kingdom House of Commons they have every right to do so; and congratulates them on voting to extend across the whole of the UK the historic decision of the Scottish Parliament to end the cruel and barbaric sport of hunting animals with clouds." (EDM 1034A2)' The second, tabled by John Robertson MP, read, 'leave out from "March" and insert "as is their constitutional right, notes that the precedent for this was set some years ago when honourable Members on the Government benches at that time voted to introduce the poll tax in Scotland; and urges all honourable Members from all parts of the UK to vote for a ban on hunting." (EDM 1034A3)'

⁵ 'Begg turns tables on Tories over voting', *The Herald*, 23 April 2002.

Bill and three times on the City of London Ward Election Bill',⁶ could hardly be said to be bound by such a self-denying ordinance.

1.2: Liberal Democrat Proposals for Regional Government – Impact on the English Question:

The Liberal Democrat Shadow Secretary of State for Transport, Local Government and the Regions, Don Foster MP, has suggested that regional government in England will go some way towards resolving the issues of representation surrounding the West Lothian Question. In the paper *Empowering the People: Plans for Strong Regional Government*, Mr Foster wrote:

If regional governments are established throughout England, the Westminster Parliament will increasingly focus on federal UK issues and the West Lothian problem will be vastly reduced. Liberal Democrats are clear that regional government is the only sensible way to resolve concerns about the powers that are devolved only to some regions.⁷

Following publication of the regional government paper, reports in the press suggested that a group of Liberal Democrat MPs was pushing for the party to adopt the 'English Votes on English Laws' position advocated by William Hague in the run-up to the 2001 general election. *The Times* reported that Simon Hughes, Matthew Taylor and Nick Harvey did not support Don Foster's view that regional assemblies should be able to adopt legislative powers and felt that 'the party must address the so-called West Lothian Question to prevent a future government without a majority in England and Wales from using Scottish MPs to pass laws that did not apply to Scotland.'⁸

⁶ Ibid.

⁷ *Empowering the People: Plans for Strong Regional Government*, A Spokesperson's Paper by Don Foster MP, Shadow Secretary of State for Transport, Local Government and the Regions, para. 8.1.2.

⁸ 'Lib Dems to consider Scots vote ban', *The Times*, 8 March 2002.

1.3: Questions to the Advocate General for Scotland:

Anne McIntosh, MP for the Vale of York, has called for the amount of time in the House of Commons set aside for questions to the Advocate General for Scotland to be extended. Describing the time allocated to questions ‘complete nonsense’,⁹ Miss McIntosh, who has been critical of the office of Advocate General in the past¹⁰ suggested that questions to Dr Clark should be extended from five minutes every month to between 15 and 30 minutes.

1.4: Alex Salmond to return to Holyrood:

Alex Salmond has announced his intention to return to Holyrood. Mr Salmond, who announced his decision not to contest the Scottish Parliament seat of Banff and Buchan in January 2001,¹¹ has stated that he will not stand again for election to the Scottish Parliament before May 2007.¹²

1.5: The Territorial Select Committees:

The Welsh Affairs Committee:

The Welsh Affairs Committee has announced that its report into ‘Objective 1 European Funding for Wales’ will be published on 22 May 2002. The Committee is currently conducting inquiries into ‘Transport in Wales’, ‘The Post Office in Wales’ and ‘Broadband Cabling in Wales.’¹³

The Scottish Affairs Select Committee:

The Scottish Affairs Select Committee published its third and fourth reports of the 2001-02 Parliamentary session in March and May 2002 respectively. The report into ‘Post Devolution News and Current Affairs Broadcasting in

⁹ House of Commons Debates, 30 April 2002, Col. 797.

¹⁰ See for example: ‘Pressure grows on law officer’, *The Scotsman*, 21 January 2002.

¹¹ See the February 2001 Devolution and the Centre Monitoring Report for further details.

¹² ‘Reheated Salmond’, *Prospect*, June 2002, p. 6.

¹³ For further details of inquiries and Committee meetings see:

www.parliament.uk/commons/selcom/welhome.htm

Scotland' was published on 21 March.¹⁴ The fourth report, 'Customs Services in Scotland', was published on 16 May 2002.¹⁵

Two inquiries are being conducted by the Scottish Affairs Committee as at May 2002; they are into 'Employment in Shipbuilding on the Clyde' and 'The work of the Commission for Racial Equality in Scotland.'¹⁶

The Northern Ireland Affairs Committee:

The Government's response to the Committee's report into 'The Introduction of the Aggregates Levy in Northern Ireland' was published on 30 April 2002.¹⁷ The Committee is currently taking evidence on 'The Impact in Northern Ireland of Cross-Border Road Fuel Price Differentials.'¹⁸

1.6: Select Committees: Power to work with other Committees:

A further recommendation of the Procedure Committee's report into The Procedural Consequences of Devolution¹⁹ has been implemented in the House of Commons. By amendment to Standing Order no. 137A the Committee's recommendation that, 'Select Committees appointed under public business Standing Orders be given power to communicate documents to the devolved legislatures or their committees'²⁰ was endorsed by the House of Commons on 14 May 2002 (the full text of the amended standing order is reproduced below).

¹⁴ Session 2001-02, HC 549.

¹⁵ Session 2001-02, HC 782.

¹⁶ For further details of inquiries and Committee meetings see:
www.parliament.uk/commons/selcom/scothome.htm

¹⁷ Session 2001-02, HC 713.

¹⁸ For further details of inquiries and Committee meetings see:
www.parliament.uk/commons/selcom/niahome.htm

¹⁹ Procedure Committee, *The Procedural Consequences of Devolution* (HC 185), Session 1998-99, Fourth Report.

²⁰ *Ibid.* para. 40.

- (1) Any select committee or sub-committee with power to send for persons, papers, and records shall have power –
- (a) to communicate its evidence to any other select committee or sub-committee of either House of Parliament, or to the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly or to any of their committees; provided that evidence from the National Audit Office shall first have been agreed between that Office and the government department or departments concerned;
 - (b) to meet concurrently with any committee or sub-committee of either House of Parliament for the purpose of deliberating or taking evidence; and
 - (c) to meet concurrently with any other select committee of this House for the purpose of considering a draft report.
- (2) Where two or more select committees have agreed reports to the House in identical terms, those reports may be published as a joint report.

1.7: Grand Committees:

The Welsh Grand Committee met on 24 April 2002 to discuss the implications of the Budget for Wales. The Secretary of State for Wales, Paul Murphy, and the Parliamentary Under-Secretary of State for Wales, Don Touhig, answered questions on, among other matters, postal services, the steel industry, tourism, job losses in manufacturing industry, primary education and European funding.

The Scottish Grand Committee met on 5 March 2002, and again on 8 May 2002. At the former meeting the topics of discussion were defence in Scotland and maritime transport services. At the meeting on 8 May 2002 the Committee heard a statement from the Financial Secretary to the Treasury, Paul Boateng MP – the first from a UK Minister not holding a Scottish constituency since devolution – on the implications of the budget for

Scotland. There followed discussion of the North Sea oil and gas industry and Scottish-UK trade.

The Northern Ireland Grand Committee has not met since 13 December 2001.

1.8: The Standing Committee on Regional Affairs:

The House of Commons Standing Committee on Regional Affairs met on 21 March 2002 to discuss the role of Regional Development Agencies (for further details of the debate see May 2002 English Regions Monitoring Report). The Committee meeting on 21 March was poorly attended with only seven of the 13 members of the Committee present.²¹ Three additional MPs attended under standing order 117(3).²² The previous meeting of the Standing Committee was attended by eight of the appointed Committee members and a further seven MPs.

1.9: House of Lords Reform: Indirect Election of Scottish Peers?

During April 2002 reports in the press suggested that Robin Cook, Leader of the House of Commons, backed proposals for the Scottish Parliament to indirectly elect a quota of Scottish representatives to sit in the reformed House of Lords.²³ Mr Cook had been speaking at a conference entitled 'The New UK – learning the lessons of devolution', in Central Hall, Westminster, and began by saying, 'it is a feature of most second chambers around the world that they provide a distinctive regional dimension to bicameral systems.' He went on to say that although the Wakeham Commission had found little evidence in the devolved administrations to support the idea of indirect election to the

²¹ The members in attendance were: Edward O'Hara (chair), Louise Ellman, Andrew George, John Mann, Ian Pearson, Lawrie Quinn, and Anthony Steen.

²² They were: Minister of State in the DTI, Alan Johnson, PPS in the DTI, Ian Stewart and Nigel Waterson the DTI shadow spokesperson.

²³ See: 'Cook backs a quota of Scottish peers', *The Herald*, 17 April 2002; 'Let Holyrood choose six to sit in the Lord', *The Daily Telegraph*, 17 April 2002.

second chamber – but realised that the Commission had reported very early in the lives of the three devolved institutions. He concluded by saying:

It remains to be seen whether there is more support today for appointment by [the devolved administrations] of a modest element of the new membership of a reformed second chamber. It would, of course, always be problematic to devise a consensus system of indirect election to the second chamber when only a minority of the United Kingdom is represented by a devolved body, but this difficulty will diminish, if regional assemblies develop in England.²⁴

1.10: Joint Committee on House of Lords Reform:

On 13 May 2002 the Government announced that a Joint Committee on Reform of the House of Lords would be established. The move had been prompted by lack of support for the Government's White Paper, *The House of Lords – Completing the Reform*,²⁵ and the change in approach to the vexatious issue of Lords reform was justified by both the Leader of the House of Commons and the Lord Chancellor when they said:

On this vital constitutional issue, which concerns not only the composition of the House of Lords but also the role of Parliament as a whole and the relations between the two Houses, we have decided that it would be right to invite the two Houses to establish a Joint Committee, in the hope that we can forge the broadest possible Parliamentary consensus on the way forward.

The Committee, which would be established 'as soon as possible' would examine:

- the role and authority intended for the Second Chamber within the context of Parliament as a whole;

²⁴ The full text of Mr Cook's speech is available at: <http://www.privycouncil.org.uk/general/new.htm>

²⁵ *The House of Lords – Completing the Reform* (London: The Stationery Office, November 2001), Cm. 5291.

- the impact of that role and authority on the existing supremacy of the House of Commons and relations with the Executive;
- the composition and powers of the Second Chamber best suited to give effect to the role and authority intended for that House.
- the most appropriate and effective legal and constitutional means to give effect to any new Parliamentary settlement, including any mechanisms required for resolving conflicts between the two Houses.²⁶

The Government intention would then be to introduce legislation based on the recommendations of the Joint Committee. Any proposed legislation would be subject to free votes in both Houses.

1.11: Lord Palmer’s Scottish Parliament (Referendum) Bill:

The Scottish Parliament (Referendum) Bill²⁷ received its first reading in the House of Lords on 7 March 2002 and was debated at second reading on 17 April 2002. The Bill, to ‘make provision for the holding of a referendum in Scotland on whether the Scottish Parliament should continue to exist or be abolished’, was introduced by the Cross-bench peer Lord Palmer, who claimed not to have met ‘anyone from any walk of life’ who approves of the way in which the Scottish Parliament conducted its business. Lord Palmer said that the Bill was:

... intended to test Scottish opinion as to whether the Scottish Parliament is achieving its aims and whether its people would be better governed from Westminster.²⁸

The peers who participated in the debate generally welcomed the opportunity to ‘say something about Scotland, which, in these post-devolution days, is a little difficult to do in the Westminster Parliament’.²⁹ But the general feeling

²⁶ Above at n. 24.

²⁷ HL Bill 63.

²⁸ House of Lords Debates, 17 April 2002, Col. 1026.

²⁹ House of Lords Debates, 17 April 2002, Col. 1031 (Lord Hogg of Cumbernauld).

was that it was too soon since the establishment of the Scottish Parliament to be discussing a bill which could play a part in its abolition.³⁰ The Conservative peer, Baroness Carnegy of Lour stated that:

The creation in Scotland of an entirely new Parliament, new people elected on a new electoral system and new ways of arriving at the laws within which we live, is a far greater change than any local government reorganisation. Few of the elected MSPs have ever legislated before. The committee system and the relationship of the Executive to Back-Benchers was new and hitherto untried in the United Kingdom. The civil servants were unused to their much more visible and exposed roles. The public and countless non-governmental groups in Scotland had a totally unfamiliar system to which to relate.

Therefore I suggest to the noble Lord, Lord Palmer, that it is still early days for the Scottish Parliament, and that he should be a little more patient.³¹

Nevertheless, as Lord McIntosh observed, the debate provided a useful opportunity to discuss matters which, due to their devolved nature, would have been out of order in the House of Commons.³²

1.12: The House of Lords Select Committee on the Constitution:

The House of Lords Select Committee on the Constitution has not yet published any of the evidence taken during the course of its inquiry into *Inter-institutional relations in the United Kingdom*, but has heard evidence from the three Territorial Secretaries of State,³³ the Deputy Prime Minister³⁴ and

³⁰ See comments of Lord Hogg of Cumbernauld and Lord Munro of Langholme (Cols. 1031-2 and 1034 respectively).

³¹ House of Lords Debates, 17 April 2002, Col. 1041.

³² House of Lords Debates, 17 April 2002, Cols. 1062-3.

³³ On 10 April 2002.

³⁴ On 27 February 2002.

Officials from the Cabinet Office and Treasury. The Committee, during May and June 2002, will be travelling to the devolved administrations in Edinburgh, Cardiff and Belfast to take evidence from local ministers and officials.

The composition of the Committee has also changed slightly, with Lords Weatherill and Cranborne stepping down and being replaced by the crossbencher Lord Jauncey of Tullichettle and Lord MacGregor, the former Conservative Cabinet Minister. The full membership of the committee is reproduced below.

Lord Acton	Labour
Lord Fellowes	Crossbench
Baroness Gould of Potternewton	Labour
Lord Holme of Cheltenham	Liberal Democrat
Baroness Howells of St. Davids	Labour
Lord Jauncey of Tullichettle	Crossbench
Lord Lang of Monkton	Conservative
Lord MacGregor of Pulham Market	Conservative
Earl of Mar and Kellie	Liberal Democrat
Lord Morgan	Labour
Lord Norton of Louth (Chairman)	Conservative
Baroness Young	Conservative

The Committee, is due to hear evidence on the following dates:

- Wednesday 26 June: from HM Treasury and Sir Richard Wilson KCB, Secretary of the Cabinet and Head of the Home Civil Service;
- Wednesday 3 July: from Mrs Irene Adams MP, Chairman of the House of Commons Scottish Affairs Committee; Mr Martyn Jones MP, Chairman of the Welsh Affairs Committee; and Mr Michael Mates MP, Chairman of the Northern Ireland Affairs Select Committee.

- Wednesday 10 July: from Professor Robert Hazell, Director of the Constitution Unit and Professor of Government and the Constitution, University College London.

2: Devolution and Whitehall:

Figure 2.1 Chronology of Events in Whitehall (February–May 2002):

11 March	Paul Murphy MP delivers the St David’s Day lecture at the University of Cardiff: ‘Devolution – The View from Whitehall and Torfaen’.
21 March	Helen Liddell delivers speech in Crieff entitled, ‘Public Services Reform – The Next Stage of Devolution’.
27 March	Scottish Parliament holds debate on the issue of MSP numbers.
29 March	End of consultation period on the size of the Scottish Parliament.
15 April	Helen Liddell MP gives speech in Segovia, Spain, on ‘European Enlargement, Decentralisation and Institutional Reform’.
16 April	Robin Cook MP gives speech at the forum, ‘The New UK – Learning the Lessons of Devolution’, held at Westminster.
9 May	Government publishes the White Paper on English Regional Government, <i>Your Region, Your Choice: Revitalising the English Regions</i> .

2.1: Consultation on the Size of the Scottish Parliament:

The consultation period on the size of the Scottish Parliament ended on 29 March 2002 with almost 230 responses being submitted to the Secretary of State, Helen Liddell MP.³⁵ This represents a significant increase in the response rate during the final weeks of the consultation period – as reported in the February 2002 Devolution and the Centre Monitoring Report, at 27 February 2002 the Scotland Office had received only 32 replies. The Secretary

³⁵ House of Commons Written Answers, 30 April 2002, Col. 634W.

of State has indicated that details of the submissions will be published in due course.³⁶ In a press notice released by the Scotland Office Mrs Liddell indicated that responses had come from a wide range of sources:

Between its launch in December 2001 to the end of the consultation period last week, 783 copies of the consultation document were issued. It was accessed 1290 times on the Scotland Office website. 222 responses had been received by this morning.

84 of these were from bodies representing a range of organisations at the heart of civic Scotland – from the Scottish Executive, local authorities, electoral administrators and political parties to churches, industrial interests and trades unions.

There have been 17 responses from MPs and 25 from MSPs and 96 other individuals and members of the public have written to me setting out their views.³⁷

Within the political parties the Labour, Liberal Democrat and Scottish National Party positions are that the Scottish Parliament should continue to function with 129 MSPs. The Conservatives however, favour a reduction in the size of the Parliament to 108 members. David McLetchie, Leader of the Scottish Conservatives, was quoted in *The Herald* as suggesting that the annual money saved by the Parliament through such a reduction would pay for 100 more nurses and 80 police officers.³⁸ The Conservative policy, which would reduce the size of the Parliament in line with the recent proposals of the Boundary Commission and which would require no amendment to the Scotland Act 1998, would claim to produce:

³⁶ Ibid.

³⁷ Scotland Office Press Release, 'Close of Consultation on Scottish Parliament Size', 2 April 2002.

³⁸ 'Tories call for Scottish Parliament to have only 108 MSPs', *The Herald*, 13 March 2002.

... a leaner, more focussed Parliament which concentrates not on the politically correct nonsense which has been our diet for far too many of the last 1,000 days, but on the issues relating to our public services, which are of real concern to the people of Scotland.³⁹

The Conservative proposals further advocated:

... that the cuts go beyond MSPs. We would halve the number of Executive Ministers from 20 to 10. We don't need junior ministers or the recently created team of spear-carriers and gofers rejoicing in the title of 'Ministerial Aides.'⁴⁰

The Labour Party, the Liberal Democrats and the Scottish National Party have all voiced their concerns over the commitment to reducing the size of the Scottish Parliament as set down by the Scotland Act. Each, in particular, has drawn attention to the inability of the committee system of the Parliament to be able to function effectively with fewer than the current 129 members.⁴¹ The SNP submission in response to the Scotland Office consultation document drew comparisons between the workload of the present Scottish Parliament committee system and that of House of Commons Select Committees:

The average MSP sits on 2.5 times as many committees as the average MP. In addition the Scottish Parliament Committees meet more often than Westminster Committees and have a heavier workload. The Social Justice Committee of the Scottish Parliament, for example, met 28 times in 2001, and produced 8 reports as well as dealing with Stage 2 of the Housing Act 2001. This contrasts with the Scottish Affairs

³⁹ Scottish Conservatives Press Release, 'MSP Numbers: McLetchie Breaks the "Self-Serving Consensus"', 27 March 2002.

⁴⁰ Ibid.

⁴¹ See for example: Scottish Liberal Democrats Press Release, '129 MSPs are Vital for the Future of the Scottish Parliament – Brown', 27 March 2002; 'Executive wants to keep all 129 MSPs', *The Scotsman*, 27 March 2002; 'Lib Dems back MSP status quo', BBC News Online, 26 March 2002.

Select Committee at Westminster which met 7 times during 2000-2001, produced 2 reports, and had no divisions.⁴²

The MSP for Falkirk West, Dennis Canavan, has also pointed to the issue of constituency workload:

Reference has been made to the relative workloads of MPs and MSPs. From my experience of both jobs, the MSP has a much larger share of constituency casework compared with the post-devolution Westminster MP, as most of the constituency work is generated by issues devolved to the Scottish Parliament. If the number of MSPs were reduced to 106, it would lead to an increase of around 20% in the average workload, and the standard of service to constituents will suffer.⁴³

The Executive believes that the effective working of the Parliament and its Committee system outweighs the argument for coterminosity of constituency boundaries.⁴⁴ However, it would seem that some MPs at Westminster are particularly against the creation of disparate constituency boundaries in Scotland. Martin O'Neill, the MP for Ochil, was reported to have said, 'it will become hopelessly confusing and unworkable within a very short time if we have MPs and MSPs with different Parliamentary boundaries'.⁴⁵

The Scottish Executive has suggested that the size of the Parliament should remain at 129 MSPs for the moment, but has added that the issue should be revisited by a 'UK-Scottish Advisory Committee' following the Holyrood elections in 2007. Patricia Ferguson, the Minister for Parliament suggested that a reduction in the number of MSPs in the Scottish Parliament would

⁴² The Response of the Scottish National Party to the Consultation on the Size of the Scottish Parliament (available at www.snp.org/news/), p. 3.

⁴³ Dennis Canavan, 'Size Matters for the Scots Parliament', *The Herald*, 10 April 2002.

⁴⁴ Patricia Ferguson, Scottish Parliament Official Report, 27 March 2002, Col. 10654.

⁴⁵ 'Too many chiefs and too few indians at Holyrood', *Scotland on Sunday*, 3 March 2002.

‘considerably change its dynamics’, adding that ‘it would amount to a considerable upheaval for no good purpose’.⁴⁶

2.2: ‘Devolution – the View from Whitehall and Torfaen’:

The Secretary of State for Wales and Member of Parliament for Torfaen, Paul Murphy, delivered the annual St David’s Day lecture at the Welsh Governance Centre, Cardiff University, on 11 March 2002.⁴⁷ As Keith Patchett has written, the lack of primary legislative powers in the National Assembly for Wales ‘makes effective co-operation [with Westminster and Whitehall] essential if the Assembly is to be able to implement policies of its own making’,⁴⁸ and Mr Murphy began by detailing the developments in the relationship between the National Assembly and Westminster, the Secretary of State drew attention to the September 2001 meeting of the Joint Ministerial Committee held in Cardiff, the appearance of the First Minister, Rhodri Morgan, before the Welsh Affairs Select Committee and the presence of Don Touhig, Minister of State in the Wales Office, at meetings of the National Assembly’s Education and Lifelong Learning and Health and Social Services Committees. These events, Mr Murphy said, demonstrate that ‘one of the key strengths of the constitutional settlement which this Government has implemented is that it has enabled the UK government and the devolved administrations to share best practice.’ Indeed the Secretary of State was not concerned by the Assembly’s lack of primary legislative powers suggesting that:

Critics of the new dispensation usually focus on the lack of primary law making powers in the Assembly. That issue should not be allowed

⁴⁶ ‘Executive admits MSPs could be cut – but not now’, *The Herald*, 27 March 2002; ‘Appeal for stay of execution on MSP numbers’, *The Scotsman*, 27 March 2002.

⁴⁷ The full text of the lecture is available on the website of the Office of the Secretary of State for Wales at: www.oss.wales.gov.uk

⁴⁸ K. Patchett, ‘The Central Relationship: The Assembly’s Engagement with Westminster and Whitehall’, in J. Barry Jones and J. Osmond (eds), *Building a Civic Culture: Institutional Change, Policy Development and Political Dynamics in the National Assembly for Wales* (IWA, 2002), p. 17.

to become a substitute for the real debate that needs to be had in the Assembly, which is about how it should exercise its powers.⁴⁹

Outwith the political sphere there is a growing body of opinion stressing the importance that the Assembly develops a strategy to exert effective influence on the legislative process at Westminster.⁵⁰ As Ann Sherlock has written, the Government of Wales Act 1998 contains only 'weak and vague' requirements that the Assembly be consulted as a part of the Westminster legislative process, and offers no guarantees that the any such consultation will be fed into the process. Sherlock therefore argues that:

... it is crucial ... that the Assembly is effective in monitoring proposals for new legislation at Westminster to ensure that powers are not removed inadvertently or otherwise, and in pressing for new primary legislation to accord powers in the areas the Assembly considers necessary.⁵¹

The Assembly itself has not failed to see the significance of these issues – as demonstrated by the recommendations of the National Assembly's Internal Review of Procedure (as reported in the February 2002 Devolution and the

⁴⁹ 'Devolution: The View from Whitehall and Torfaen', see above at n. 47.

⁵⁰ See for example: K. Patchett, 'The Central Relationship: The Assembly's Engagement with Westminster and Whitehall', in J. Barry Jones and J. Osmond (eds), *Building a Civic Culture: Institutional Change, Policy Development and Political Dynamics in the National Assembly for Wales* (IWA, 2002); Ann Sherlock, 'Government in Wales and the Development of a New Legal System within a System', *European Public Law*, Vol. 8(1), 16-23; John Osmond, 'In Search of Stability: Coalition Politics in the Second Year of the National Assembly for Wales', in A. Trench (ed.), *The State of the Nations 2001: The Second Year of Devolution in the United Kingdom* (Imprint Academic, 2001). For the opinions of Assembly Members on the current arrangements see Alistair Cole and Alan Storer, 'Political Dynamics in the Assembly: An Emerging Policy Community', in J. Barry Jones and J. Osmond (eds), *Building a Civic Culture: Institutional Change, Policy Development and Political Dynamics in the National Assembly for Wales* (IWA, 2002).

⁵¹ Ann Sherlock, 'Government in Wales and the Development of a New Legal System within a System', *European Public Law*, Vol. 8(1), 16-23, p. 19.

Centre Monitoring Report) – and they are sure to be raised again once the Independent Commission on Assembly Powers, under the Chairmanship of Lord Richard of Ammanford, begins its work later in 2002.

2.3: ‘Decentralisation Processes in Europe’:

On 15 April 2002 the Secretary of State for Scotland delivered a speech entitled ‘Decentralisation processes in Europe’ to a seminar on ‘Enlargement, Decentralisation and Institutional Reform’ held in Segovia. Mrs Liddell used the opportunity to stress the role played by the devolved administrations in the UK’s relations with the European Union. The Secretary of State said:

The devolved administrations are fully involved in developing the UK’s negotiating positions in matters that affect them. They participate in a Joint Ministerial Committee to discuss the UK’s European agenda. And on occasion a Minister from, say, the Scottish Executive will join or even lead the UK delegation in the Council of Ministers, in support of the agreed position.⁵²

One area where the Scottish Executive has been particularly active in its involvement in the UK’s dealing with the EU has been with regard to sea fishing.

The Secretary of State also took the opportunity to respond to an article recently published in the *Political Quarterly* which had been critical of the UK Government’s devolution settlement:

The recipe for each element of devolution has ... been different, for the peoples of each part of the country have different histories, different perceptions of their role in the UK and require different solutions. This may not appeal to the tidy-minded who want what works in theory, not what works in practice. Only last week three professors of

⁵² Speech by the Secretary of State for Scotland, ‘Decentralisation Processes in Europe’, 15 April 2002. The full text of the speech is available at the Scotland Office website: www.scottishsecretary.gov.uk

geography – all from English universities I might add – branded devolution a failure because each of the settlements was different. Yet that is precisely why it has succeeded. In an ancient union within an unwritten constitution, we have a history of choosing the pragmatic over the obvious.⁵³

3: Devolution and the Law:

3.1: A New Supreme Court for the United Kingdom?

In the Constitution Unit Spring Lecture, Lord Bingham of Cornhill, the Senior Law Lord, pointed to the role of the Judicial Committee of the Privy Council under the Devolution Acts of 1998 as one of the reasons why reform of the United Kingdom's highest courts had become topical over recent years. Lord Bingham said that the role of the Judicial Committee as, 'the arbiter of demarcation questions between the central government and the devolved institutions', would, in contrast to the waning overseas jurisdiction of the court, give the Judicial Committee 'an enhanced role and much greater prominence in the United Kingdom context.'

Prior to the passing of the Scotland Act 1998, some commentators predicted that the Privy Council would begin to play a vital role in the settlement of intergovernmental disputes between the UK Government and the devolved administrations:

... if the Judicial Committee decides a dispute in Scotland's favour, it would be difficult for Westminster to legislate for Scotland on that matter when the Judicial Committee has ruled that it lay within the scope of Scotland's transferred powers. The decisions of the Judicial Committee, therefore, may well come to have the consequence that the prerogatives of Westminster are diminished. If that happens, Westminster will lose yet another of the characteristics of a sovereign parliament, the right to make any law it wishes. For both Westminster

⁵³ Ibid.

and the Scottish Parliament will have come to depend on the Judicial Committee for the protection of their sphere of action...⁵⁴

Such an extreme set of circumstances has not yet come to pass as there has been but one challenge to an Act passed by the Scottish Parliament.⁵⁵ Commentators have though begun to point to seemingly innocuous deficiencies in the devolution legislation which may yet come to create problems for the UK's administrations, and indeed for the UK's highest courts.⁵⁶

The Senior Law Lord however, summarised the current position as follows:

Thus ... the Advocate General for Scotland, The Lord Advocate or the Attorney General may refer [to the Judicial Committee of the Privy Council] a question of whether a bill or any provision of a bill would be within the legislative competence of the Scottish Parliament (section 33(1) of the Scotland Act 1998). Even more significantly, the three devolution statutes relating to Scotland, Northern Ireland and Wales all provide (section 103 of the Scotland Act, section 82 of the Northern Ireland Act and paragraph 32 of Schedule 8 of the Government of Wales Act) that any decision of the Privy Council in proceedings under the relevant Acts shall be binding in all legal proceedings (other than proceedings before the Privy Council) involving devolution issues, which may concern the compatibility of a governmental act with the European Convention, and so involve a ruling on human rights, as several devolution issues have already done. While the volume of

⁵⁴ Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70 *Political Quarterly* 185, at page 188.

⁵⁵ *Anderson, Reid and Doherty v the Scottish Ministers and the Advocate General for Scotland* [2001] UKPC D5 (reported in the November 2001 Devolution and the Centre Monitoring Report).

⁵⁶ For example the problems which may come to be caused by the dual-apex at the pinnacle of the UK legal system alluded to by Aidan O'Neill QC in 'Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council', *Modern Law Review*, Vol. 64(4), (2001), 603-618.

business generated so far has been relatively modest, this may or may not continue to be so. It is not inconceivable that the number of challenges will increase as the devolved institutions progress from infancy to boundary-testing adolescence. In any event, this new role has inevitably and rightly prompted the question whether it would not make sense in effect to amalgamate the Appellate Committee of the House of Lords and Judicial Committee of the Privy Council into a single supreme court for the United Kingdom.⁵⁷

3.2: *Kenneth Mills v Her Majesty's Advocate*:

The case of *Kenneth Mills v Her Majesty's Advocate*, reported on in the November 2001 Devolution and the Centre Monitoring Report, is due to be heard by the Judicial Committee of the Privy Council on 17 and 18 June 2002.

3.3: Challenge to the Protection of Wild Mammals (Scotland) Act:

The Countryside Alliance, by way of judicial review, is seeking to challenge the legality of the Protection of Wild Mammals (Scotland) Act – the Act of the Scottish Parliament prohibiting hunting with dogs which comes into effect in August 2002. The Court of Session in Edinburgh is due to hear the petition over six days, beginning on 2 July 2002.⁵⁸ The challenge, based on Articles 7, 8, 14 and Article 1 of Protocol 1 to the European Convention on Human Rights,⁵⁹ say the Scottish Countryside Alliance will argue that ‘the provisions of the act are so unreasonable that they amount to a serious breach of the Scottish Parliament’s legislative powers’.⁶⁰ Should the judicial review petition

⁵⁷ The full text of Lord Bingham’s lecture is available at: www.ucl.ac.uk/constitution-unit/

⁵⁸ ‘Hunting lobby mounts legal challenge to “draconian” law’, *The Herald*, 15 May 2002.

⁵⁹ The rights that the claimants suggest have been infringed are: Article 7 – no punishment without law; Article 8 – Right to respect for private and family life; Article 14 – prohibition of discrimination; and Article 1 of Protocol 1 – protection of property.

⁶⁰ ‘Hunting lobby mounts legal challenge to “draconian” law’, *The Herald*, 15 May 2002. See also ‘Campaigners challenge hunting ban’, *The Scotsman*, 15 May 2002; ‘Pro-hunt campaign goes to court’, *The Daily Telegraph*, 15 May 2002.

be dismissed the Countryside Alliance suggest that they would be willing to take the case to the Judicial Committee of the Privy Council, and then the European Court of Human Rights.

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