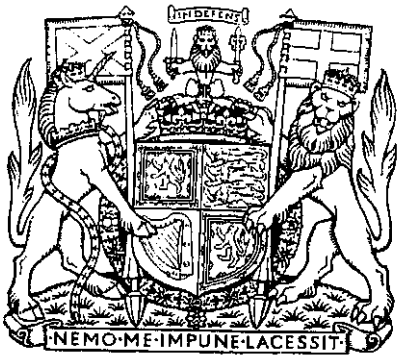

SCOTTISH LAW COMMISSION

MEMORANDUM No: 32

COMMENTS ON WHITE PAPER

"OUR CHANGING DEMOCRACY:

DEVOLUTION TO SCOTLAND AND WALES"

SCOTTISH LAW COMMISSION

Memorandum No. 32

Comments on White Paper

"Our Changing Democracy:

Devolution to Scotland and Wales"

This Memorandum represents the views of the Commission on the White Paper "Our Changing Democracy: Devolution to Scotland and Wales". There is appended to this Memorandum the Commission's earlier Memorandum on "Devolution, Scots Law and the Role of the Commission", dated 27 May 1975.

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MEMORANDUM NO. 32

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SCOTTISH LAW COMMISSION

Memorandum No. 32

Comments on White Paper "Our Changing Democracy: Devolution to Scotland and Wales"

INTRODUCTION

1. This Memorandum is submitted in response to requests made to us by the Lord Advocate and the Scottish Courts Administration for comments on the White Paper "Our Changing Democracy: Devolution to Scotland and Wales."[1] We appreciate that many of the intentions and proposals expressed in the White Paper are substantially political in character and therefore a matter for Government. Moreover it is assumed from that White Paper and other statements of Government policy that there is a settled intention to introduce constitutional changes in the form of legislative devolution for Scotland, and the Commission has not therefore attempted to express opinions upon the choice of this particular constitutional solution in preference to others or upon possible alternatives which might have been open. This necessarily places limitations on our approach to a number of difficult problems, since our comments must proceed on certain assumptions the soundness of which might otherwise be open to critical examination. We are conscious, however, of the Commission's duty as an independent institution with defined statutory functions to consider and examine critically the proposals in the White Paper so far as they relate to areas of legal policy and administration which are of particular concern to the Commission or so far as those proposals affect either directly or indirectly its future position or functions.

2. On 27 May 1975 the Commission submitted to the Lord Advocate a Memorandum entitled "Devolution, Scots Law and the Role of the Commission" in

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[1] Cmnd. 6348, 1975.

which views were expressed on certain matters relating to devolution to Scotland which seemed of particular importance to the Commission. In preparing that Memorandum, as we there explained, we did not have the advantage of information or advice (apart from the contents of the earlier White Paper of September 1974 entitled "Democracy and Devolution: Proposals for Scotland and Wales"[1] and public announcements by Ministers) regarding the specific intentions of Government in relation to devolution or the assistance of consultation, whether with Government or with other concerned bodies. With few qualifications, however, we see no reason to depart from the conclusions contained in that Memorandum which, accordingly, is annexed as an Appendix, and which will for convenience be referred to as "our previous Memorandum". We should add that we have recently been able to carry out some limited consultation on matters covered by our previous Memorandum and we wish to express our thanks to those who assisted us with comments.

3. In some instances, the views which the Commission would wish to express are already covered in whole or in part by our previous Memorandum and for brevity we will from time to time refer to the appropriate passages therein. Certain of the proposals contained in the White Paper were unforeseen by the Commission at the time our previous Memorandum was being prepared and, in the case of these matters and other matters which were not dealt with in detail, we will develop our views more elaborately. In general, however, we will concentrate on questions of principle since much of the detail cannot be made the subject of helpful comment until the contents of the pending legislation are known. When the specific provisions to be contained in the forthcoming legislation are known, the Commission may therefore wish to submit comments on matters of detail.

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[1] Cmnd. 5732, 1974

SCHEME OF MEMORANDUM

4. We propose in this Memorandum to deal first with what the White Paper "Our Changing Democracy: Devolution to Scotland and Wales" (described herein as "the White Paper") refers to as "Constitutional Arrangements". We will consider, in particular, the principles of allocation of legislative authority, possible ways of ensuring that those principles are observed, the need for a formalised machinery for consultation, and the need for a reconsideration of the proposals in relation to European Community and international matters. We then proceed to discuss certain aspects of "The Devolved Subjects". We naturally concentrate upon the legal topics discussed in paragraphs 16, 19, 51-66, 144-151, 160 and 284 of the White Paper and in Appendix D thereto. In particular, we discuss the relationship between those areas of Scots private law which are proposed to be devolved and those which may not be devolved. We also discuss Scots criminal law, the important topic of law enforcement, and responsibility for the courts. The final paragraphs of this Memorandum are concerned specifically with our role as a Scottish Law Commission. We annex to the Memorandum a brief note on certain aspects of the proposed legal qualifications for membership of the Assembly which are considered in paragraph 37 and Appendix A of the White Paper.

PRINCIPLES OF ALLOCATION OF LEGISLATIVE AUTHORITY

5. We first comment upon the central question of the principles relating to the allocation of legislative authority. The White Paper, in paragraph 116, states that:

> "The Act will devolve certain subjects: anything not shown as devolved will remain the direct responsibility of the Government and Parliament as at present."[1]

On the other hand paragraph 160 refers to certain matters, responsibility for which must remain with the Government, even where they affect fields otherwise devolved. These matters are said to include "common standards" and such subjects as "trade unions, industrial relations and the rights of employees; consumer credit; export credit; competition policy; fair trading; insurance; patents; trade marks, designs and copyright; weights and measures; and shipping

[1] see also para. 51.

and civil aviation". The White Paper goes on to say that:

> "Responsibility for these matters, even where they affect fields otherwise devolved, must in general remain with the Government, though as explained in paragraph 145 above, the relationship between the Government's responsibility and the responsibilities to be devolved in the field of Scots private law needs further study."

We find it difficult to suppose that it was not also intended that legislative authority for these matters should be retained as well as governmental authority. If this is so, and the reservation of these matters remains the intention of Government, the scheme at present envisaged is in substance a scheme which specifies both the transferred and retained powers, residual competence remaining at Westminster. This inference appears to be borne out by the form and the terms in which a number of the other proposals in the White Paper are expressed, and possibly receives further confirmation from the statement in Parliament on 25 May 1976,[1] which included the following passage:

> "We have not completed our detailed consideration of United Kingdom reserve powers other than Parliament's inherent power to legislate. We shall, however, make a major change in this field. Any general reserve powers, whatever their precise form and mechanisms, will be limited to situations where their use is necessary to prevent unacceptable repercussions on matters for which the United Kingdom Government will remain responsible. We have never envisaged using such powers simply because we might politically dislike what was being done, and the change we are making puts this beyond doubt."

6. Much depends upon the precise way in which the devolved and retained subjects are specified, but it is clear that any system which envisages the specification of both will enhance the difficulty of ascertaining the precise scope of the devolved powers. It must be emphasised, in the first place, that few legal systems have a systematic organisation of their subject matters. The modern classifications of the English legal system were gradually introduced by legal writers as a matter of expository convenience, but their precise scope is debated and they lack legislative or judicial authority. Thanks to its institutional writers, including Stair, Erskine and Bell, the classifications of Scots law are possibly more systematic than those of English law, but there is still much room for controversy and, equally important, the Scottish classifications

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[1] Parliamentary Debates (H.C.) 25 May 1976, Vol. 912, cols. 270-273.

differ widely from those of English law. It follows that there will be room for considerable uncertainty as to scope, and differences of opinion depending on whether the matter is viewed from an English or from a Scottish standpoint. In the second place, the risk of unclarity would be particularly serious if the Devolution Act were to attempt to define the scope of the devolved and retained powers by adopting simultaneously classifications from different logical series, such as the ordinary classifications of a legal system for the devolved powers and classifications based on the present legislative or administrative responsibilities of Departments for the retained powers. If, for example, the subject matters of private law were generally devolved but there were specific reservations in such matters as "industrial relations", "consumer credit", "competition policy", "fair trading" and so on, there would be areas of wide uncertainty because, since those subjects are in whole or in part relatively new, their boundaries have not as yet been mapped out and, even where mapped, are subject to adjustment. We have ourselves attempted an analysis of existing ministerial responsibilities in legal matters, categorised by Ministers and Departments, basing ourselves on information available to the Commission, and we assume that similar analyses will have been prepared by those who have greater resources for such research and access to fuller and more detailed information, some of which may not have been made public. Such an analysis of the presently existing situation illustrates at many points the great uncertainty which would inevitably result from such an approach and also demonstrates the very substantial extent to which the retained powers and the exceptions from devolved subjects proposed in the White Paper are based on the existing spheres of responsibility and influence of powerful and easily identified Departments in Whitehall.

7. The uncertainty associated with the specification of both devolved and retained subjects would lead to ambiguity and to wide areas of overlapping authority and consequent disadvantages of a political and legal character.[1] Government will be aware of the former. The point was stressed by Lord Crowther-Hunt in "The Times" of 7 May 1976:

> "First, and most important, it is vital to reduce the potential for regular explosive conflict between a future Scottish administration and the United Kingdom Government. This means

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[1] See Memorandum, para. 15.

> that the areas of legislative and executive power to be devolved to the Scottish Assembly must be defined as clearly as possible."

But the specific legal disadvantages of a system which allows of areas of ambiguity and of overlapping legislative authority are also serious. Those concerned with promoting legislation for the reform and development of Scots law ought to know to which legislature a particular enactment should be presented. If, moreover, important areas of legislative competence in legal matters were reserved to the United Kingdom legislature, there would be a risk that many Bills, dealing primarily with distinctive branches of Scots law, would require to be submitted to Westminster because of the limited legislative competence of the Assembly and the unlimited competence of Parliament. In paragraph 18 of our previous Memorandum, we illustrate this point in relation to the Prescription and Limitation (Scotland) Act 1973, an Act based on proposals by this Commission. If legislation of this kind had to be presented to Parliament, the very purpose of devolution would appear to be defeated.

8. Overlapping legislative authority also leads to problems of a different kind: there would be a serious risk of the enactment in a single area of the law of mutually inconsistent policies. At present the Scottish people are frequently required to tolerate Westminster legislation inconsistent with the general policies and principles of Scots common law. Under a scheme of legislative devolution allowing overlap, they would presumably require to tolerate also Westminster legislation inconsistent with the enacted policies of the Scottish Assembly. This would occasion a serious loss of functional efficiency in the system. As we explained and illustrated in our previous Memorandum:

> "the private law of a country is not an assemblage of largely independent acts or rules, but a single and integrated piece of machinery whose component parts must fit in with one another and serve the needs of the machine as a whole."[1]

There would be confusion if incompatible legislative policies were adopted in partially overlapping spheres.

9. In our view, therefore, any system which directly or indirectly envisaged the specification both of devolved and of retained powers would require to be drafted with an almost unattainable precision. We have considered whether this

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[1] Memorandum, para. 17.

objection could be met by specifying the devolved and retained powers by reference to existing legislation. In relation to the specification of the devolved powers we considered in our previous Memorandum whether it would be practicable to give effect to the policy announced by Mr Short on 3 February 1975 that the Scottish Assembly:

> "should have a legislative role and legislative power within fields within which separate Scottish legislation already exists."[1]

We came to a negative conclusion because the question whether measures relating to Scotland appear in a United Kingdom Act or a Scotland-only Act has depended less on discernible principles than on accidental constraints deriving from the nature of governmental legislative programmes, the power and influence of particular Departments, and the availability of Parliamentary time. Moreover, from a practical standpoint the specification of devolved powers by reference to existing legislation would involve scheduling virtually the whole statute book in its application to Scotland. Even this would leave important lacunae in relation to the wide spectrum of subjects which are still the predominant concern of the Scots common law, whose amendment would seem an appropriate function for the Assembly.

10. We consider, therefore, consistently with the conclusion reached in our previous Memorandum,[2] that it would be unsatisfactory to define the scope of devolution by specifying both reserved and devolved subjects. While we have reached this conclusion on general grounds of principle and practicability, we are strongly reinforced in our views as a result of the decisions announced in the recent Government statement in Parliament,[3] and particularly the decision with regard to the examination of <u>vires</u> of Assembly Bills. That decision was stated in the following terms:

> "Firstly, while our consideration of the detailed arrangements for examination of the <u>vires</u> of Scottish Assembly primary legislation is not complete, we have decided that if there is doubt at the pre-assent stage about the <u>vires</u> of an Assembly Bill, the issue will be resolved on a reference to a judicial body, most probably the Judicial Committee of the Privy Council. It follows that the Government will not have the power to reject Assembly Bills on <u>vires</u> grounds."

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[1] Memorandum, para. 10.

[2] Memorandum, paras. 9-21.

[3] Parliamentary Debates (H.C.) 25 May 1976, Vol. 912, col. 272.

We would emphasise that, according to this decision, the reference is to be to a "judicial body". It is a necessary corollary of this decision that it should be practicable for the judicial body to whom the issue is referred to ascertain the precise scope of the devolved powers. In other words, to use well-understood legal terminology, it is of the essence that the issue so referred should be justiciable. We therefore conclude that an attempt to specify both the reserved and the devolved powers is most unlikely to achieve the main objectives which Government have in mind.

11. In relation to the choice between the specification of the devolved powers and the specification of the reserved powers, we see no reason to depart from our previous arguments in favour of the latter approach. In the light, however, of the approach in the White Paper and of subsequent reactions to that Paper, we wish to stress the following points:

(1) If it is the intention of Government, within the framework of the political and economic unity of the United Kingdom, to allow the Scottish Assembly in appearance as well as in fact "the maximum local freedom and initiative", it would seem best to specify the relatively smaller number of areas in which, for over-riding political or economic reasons, the United Kingdom Parliament cannot devolve its legislative responsibilities.

(2) From a practical point of view, the list of devolved powers would necessarily be extremely lengthy, as Appendix D of the White Paper illustrates. Even so, the list envisaged frequently raises problems of definition so that, as we argued in paragraph 15 of our previous Memorandum, scope is left for political and, in view of the recent Government statement,[1] legal debate on <u>vires</u>.

(3) Equally important, it does not seem practicable (as, indeed, it does not appear to have seemed practicable to the draftsmen

[1] Parliamentary Debates (H.C.) 25 May 1976, Vol. 912, cols. 270-273.

of the White Paper[1]) to specify the devolved subjects without at the same time specifying exceptions to them or qualifications of their scope. It follows that any purported system of specification of devolved powers turns out in practice to be a system of specification both of devolved and reserved powers and, therefore, a system open to the objections stated in paragraphs 6 to 10 above.

12. Having considered with care the views and arguments presented in the White Paper, we see no reason to depart from our previous opinions and in particular, looking at the matter from the standpoint of the Commission, we would repeat with emphasis the conclusion reached in paragraph 21 of our previous Memorandum that

> "there would be great advantages in providing for the specification of the powers to be retained by the United Kingdom Parliament, and, subject to the reservation of ultimate sovereignty to Parliament, conferring upon the Assembly residual legislative competence."

13. We wish to add that a system of specification of reserved or retained powers by reference to existing legislation would have less serious implications than a similar specification of both the devolved and the reserved powers, especially if the scope of the latter were not extensive. It is still the case, however, that United Kingdom legislation is not in the form of codes strictly limited to particular subject matters and without overlap on other domains: its content often depends on the accidents of legislative history. While specification by reference to legislation might possibly facilitate the definition of scope of the reserved subjects for the purpose of control of vires, it would fix this scope in an arbitrary way without reference to principle. This solution, therefore, does not commend itself to us.

14. We stress once more our conclusion that the solution to which least objection may be taken is one which, subject to the specification of certain reserved powers, confers upon the Assembly residual legislative competence.

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[1] See, e.g., paras. 19, 116, 133, 143, 145, 147, 148, 160 and 284, and Appendix D 10 i and ii of the White Paper

But, even within the context of such a solution, and a fortiori within the context of approaches which specify both the devolved subjects and reserved matters within those subjects, we consider that it is important to secure that the Scottish Assembly should be able to legislate on matters which may prima facie fall within the reserved or undevolved fields. If no provision to this end were made, bills on matters which might reasonably be thought to be primarily of Scottish concern would have to be presented to the United Kingdom Parliament. This would not only have political disadvantages but disadvantages of a practical character. The practical disadvantages may be illustrated in relation to the legislation which would be required to permit the creation in Scotland of an oil refinery, with new access roads, adjacent harbour facilities, and housing for workers, and to develop the harbour independently as a new fishing port. This would appear in essence to be largely a Scottish matter. Under the proposals in the White Paper the provision and upkeep of accommodation would be a matter for the Scottish administration, as is physical planning and the environment, and roads and local transport planning. Development and industry, however, are in the main undevolved, as are "the main agricultural and fisheries functions" (though the "improvement of fisheries harbours" is devolved) and matters relating to natural resources including oil. It would seem to be an unnecessary handicap and obstacle to future development if, after consultation with the Government, the Scottish administration could not promote legislation dealing with the scheme as a whole. From the standpoint of the Commission, it would mean that much legislation, including not only Programme Bills, but also consolidation and statute law revision measures, would frequently be outside the legislative competence of the Assembly.

15. It is not easy to envisage a practical solution to this problem in the context of the intentions of Government as stated in the White Paper and announced to Parliament. We think it right nevertheless to mention two approaches which might possibly give effect to what we take to be the underlying intentions of Government rather than the precise terms of its announced intentions.

16. If the Government chose to adopt a solution in which there were reserved,

expressly and absolutely, only certain matters fundamental to the retention of Parliamentary sovereignty, such as the Crown, the defence of the realm, treason, treaties with foreign states, and nationality, the result sought in the White Paper could be achieved by specifying the devolved powers with no other formal reservations and by providing that, within certain other fields, the Assembly should be expected to follow the general policies embodied in United Kingdom legislation. There might be differing views as between the the Scottish administration and the Government as to whether a proposed Assembly Bill is in consonance with those policies but an appropriate system of consultation machinery would go far to resolve such difficulties. If for any reason, and exceptionally, such machinery were not to prove effective the remedy would be for Parliament to legislate on the matter. This approach would avoid the fragmentation of the devolved areas and would enable the Assembly to achieve coherence in its legislative programme. Under this scheme we envisage the operation of a system of judicial review, but only in relation to the fundamental reserved matters.

17. We concede that this approach is inconsistent with the scheme of the White Paper which contemplates not only general reservations flowing from the fact that certain subjects are not devolved but broad exceptions and reservations even within the subject areas specifically devolved. If, contrary to our advice, the Government adhere to this pattern of allocation of legislative responsibility, the problems faced by the Assembly in achieving a coherent legislative programme would be extremely serious. Controls on <u>vires</u> of a strictly judicial character, whether in relation to Assembly Bills before their enactment or in relation to Assembly legislation after enactment, would be likely to diminish rather than to extend the powers of the Assembly. Indeed, as the devolved powers and the reservations therefrom are specified in the White Paper, judicial control of <u>vires</u> would scarcely be practicable. We have noted, too, the objections raised to the White Paper proposals under which the Secretary of State would be enabled to decline to send for Assent Bills which are <u>ultra vires</u> and to send back to the Assembly and ultimately pray Parliament to reject Assembly Bills on policy grounds. In view of these objections we had considered whether there might be a case for evolving some other system of pre-Assent vetting which would not be either of a wholly legal

or of a wholly political character. The body concerned with vetting - possibly a mixed Committee of Parliament and of the Assembly - would have a discretion but not a duty to remit back to the Assembly legislation which it considered to be outwith the intended scope of the devolved powers. The Assembly could thereafter, if so advised, resubmit the Bill to Parliament and the Bill, if not rejected by Parliament, would then be submitted for Royal Assent. If the Committee, however, concluded that it was appropriate to do so, it could allow an Assembly matter to go forward for Assent even if it contained provisions which were not "reasonably incidental to a main purpose falling within a devolved field". Putting the matter in different terms, the task of this body would be to determine whether, in its opinion, the provisions or some of the provisions of an Assembly Bill relate prima facie to matters reserved to Parliament and if so whether, by reason of the nature, extent or importance of these provisions, the Bill ought to be considered by Parliament. Since the review body would have a discretion to allow an Assembly Bill to go forward for Assent even if, strictly speaking, the Assembly had exceeded its powers, there would be no place for a system of post-enactment judicial review. An Assembly Bill which received the Royal Assent would have the character of an Act of Parliament. This would have the important advantage of certainty in that it would give an Assembly measure the same authority as an Act of the United Kingdom Parliament from the moment it would receive the Royal Assent.

AMBIT OF SCOTTISH ASSEMBLY STATUTES AND THEIR REVIEW

18. Some of the questions which we canvassed in our previous Memorandum relating to the status of Scottish Assembly statutes have been superseded by events. We argued that

> "within its own sphere of competence the Scottish Assembly must in principle be regarded as exercising legislative powers of an autonomous and not of a delegated character. Its enactments will have the effect of repealing or amending United Kingdom statutes within the devolved sphere, and it follows that these statutes must for interpretation purposes be given the status of statutes rather than the status of delegated legislation."[1]

All this is accepted by the White Paper which declares that the Scottish Assembly

[1] Memorandum, para. 45.

should

> "effectively assume, in the devolved fields, the task of making laws for Scotland."[1]

However, since a retained field is envisaged, the White Paper suggested various controls to ensure that Assembly Bills and enactments come within the scope of the devolved powers. It is now clear from the statement made in Parliament on 25 May 1976[2] that the proposals on this subject in the White Paper have been departed from, and we have therefore thought it unnecessary in this Memorandum to advance or develop criticism of those proposals, which have already been severely criticised by other bodies and persons and which, as we understand the position, no longer raise live issues.

19. The question whether in principle controls of the kinds suggested in the White Paper should be established depends on whether it is thought that the scheme for the scope of the devolved powers embodied in the Devolution Act should be regarded as being relatively fixed or simply a set of guide-lines for the Scottish Assembly and the Scottish executive, which might be departed from by the Assembly subject to veto in one form or another. This question is essentially of a political character and, as we have already pointed out, the political decision has now been made in favour of the first alternative. We would, however, again emphasise that, without suitable controls, the risk of political confrontation between Assembly and Parliament would be greatly increased. The further question whether Assembly Bills or Acts formally come within the scope of the devolved powers is, however, essentially a legal question. This has in effect been recognised in the recent decision of Government that, if there is doubt at the pre-Assent stage about the <u>vires</u> of an Assembly Bill, the issue will be resolved by a judicial body. As we have pointed out[3] that decision involves as a corollary that it should be possible to interpret with reasonable precision the scope of the powers devolved to the Assembly. Indeed, as a practical matter, any effective and satisfactory judicial controls over <u>vires</u> whether at the pre-Assent or post-enactment stage will in our view depend on the clarity of specification and definition of the reserved or the devolved powers or both. If the scope of

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[1] Para. 62.

[2] Parliamentary Debates (H.C.) 25 May 1976, Vol. 912, cols. 271-272,

[3] Para. 10 above.

the devolved powers could not be interpreted with sufficient precision, the body or bodies concerned with vires would be faced with mixed political and legal questions rather than with questions simply of a legal character and, in consequence, those bodies would become exposed to political criticism. It is this very danger which, as we understand the position, the decision recently announced by Government is designed to prevent, and it would indeed be highly dangerous if a judicial body entrusted with this particular constitutional function should be charged with the decision of such questions on other than legal grounds. In our opinion this consideration applies just as much to the Judicial Committee of the Privy Council as to any other judicial body or court which might be selected to fulfil this function. In this connection we assume that, if the Judicial Committee of the Privy Council were to be selected as the judicial body to consider and advise on vires of an Assembly Bill at the pre-Assent stage, references would be made to it on legal and not on policy questions. Section 4 of the Judicial Committee Act 1833 is somewhat widely drawn, but we would think it extremely unwise to invite the Judicial Committee, in such a context, to take into account political or policy considerations. If our views on these matters are well-founded, as we believe them to be, it is of central importance to select the best method of ensuring legal clarity on the scope of devolution, and this, as we have indicated, can in our opinion be best achieved, and probably only achieved, by specifying the powers to be retained by the United Kingdom Government and, subject to the reservation of ultimate sovereignty to Parliament, conferring upon the Assembly residual legislative competence. We therefore in principle maintain the position which we adopted in our previous Memorandum.

20. We note that the White Paper proposes controls for the internal scrutiny of vires when a Bill is before the Assembly similar to those which we envisaged in paragraph 46 of our previous Memorandum. If there are to be pre-enactment controls, other than internal controls within the Assembly itself, they should, as has now been accepted, be operated by an independent judicial body. We state this proposition hypothetically because we are not yet satisfied that, provided there is a system of subsequent judicial review, further pre-enactment vetting would be really necessary or, for the reasons given in paragraph 47 of our previous Memorandum, really desirable. It is extremely difficult, as we explained, to answer questions of legal vires in the abstract rather than in the context of

concrete cases. However, in view of the decision that there should be pre-enactment review of vires by an independent judicial body, careful consideration requires to be given to the question of entitlement to appear and to submit argument. We have not yet formed views on these matters, nor upon the appropriate constitution of the Judicial Committee of the Privy Council if the Judicial Committee were to be selected as the judicial body with the duty of carrying out the pre-Assent constitutional function. There would, however, in that event appear to be a strong case for providing that, when the Judicial Committee is considering the vires of an Assembly Bill, it should contain a reasonably adequate Scottish component including at least two persons holding high judicial office within Scotland. The addition of a member who had had experience of considering questions of vires under the Canadian Constitution might be an advantage because of the special position of the legal system of Quebec which is different in character from the legal systems of the "common law" provinces. Some amendment of existing legislation relating to the Judicial Committee of the Privy Council, and in particular of the Judicial Committee Act 1833, would seem to be required. We would add, under reference to paragraph 48 of our previous Memorandum, that pre-Assent vetting by reference of cases of doubtful vires of an Assembly Bill to a judicial body such as the Judicial Committee of the Privy Council is different in character from subsequent judicial review of the vires of Assembly Acts or of particular provisions therein in a concrete case when the rights of a particular citizen may be at stake.

21. The White Paper leaves open the difficult question of the desirability of subsequent judicial review of vires of an Assembly statute. There are developed in paragraphs 62 and 63 of the White Paper the arguments for and against judicial review in terms similar to those developed in paragraphs 48-54 of our previous Memorandum. We see no reason to depart from our previous conclusions but we would again stress that the condition of any satisfactory legal control of vires, including judicial review, is reasonable precision in defining the scope of the devolved powers. If this can be attained, judicial review would be practicable and would have the enormous advantage of reducing the risk of conflict between the Scottish Assembly and Parliament.

22. We have again considered what might be the appropriate procedure for judicial review of the type we have in mind. We remain of opinion that the better course is to enable questions of vires to be brought rapidly before a higher court, in the case of Scotland the Inner House of the Court of Session, rather than to allow such questions to be decided by inferior courts, perhaps with the result of uncertainty should no appeals be taken. We imagine that it would not be difficult to evolve procedures which would be appropriate if such questions of vires arose in an English court, but we feel that this is not a matter for us, having regard to our statutory functions.

23. In the context of vires we think it appropriate at least to note that the Scottish courts have over the past two centuries on a number of occasions expressed the view that Parliament at Westminster is limited to some extent in its powers by the terms of the Union Agreement of 1707 - which created a new Parliament for a new state. Its origins do not of course depend upon an Act of Parliament but on a constitutional agreement. There are some things - such as the abolition of Scottish private law or the supreme Courts of Scotland - which Parliament cannot lawfully do.[1] Whether disregard of the fundamental law in an extreme case could be justiciable (which is a different question from limitation on the powers of Parliament) has never been conclusively decided, but dicta in modern cases[2] have not rejected the possibility and in the Outer House the fundamental terms have been accepted as justiciable.[3] The judges in Scotland have shown no inclination whatsoever to substitute their own opinions for that of Westminster legislators in political questions. However, two new factors at least may be relevant for judicial scrutiny of Westminster legislation after devolution. First, the Assembly could provide a means for assessing whether legislation on private right was for evident utility of the subjects in Scotland.[4] Second, a Scottish law officer might conceivably challenge Westminster legislation,

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[1] Mitchell Constitutional Law p. 69 et seq., p. 92 et seq.; The Scottish Debate ed. MacCormick p. 37 et seq.; T.B.Smith Studies Critical and Comparative p. 12 et seq.; Short Commentary on the Law of Scotland p. 52 et seq. authorities there cited.

[2] E.g. MacCormick v Lord Advocate 1953 S.C. 396; Gibson v Lord Advocate 1975 S.L.T. 134.

[3] Laughland v Wansborough Paper Co. Ltd. 1921, 1 S.L.T. 341.

[4] Articles of Union, Art. XVIII,

and he would we think be regarded as having title to sue. These are the considerations and requirements which have proved fatal in most previous cases of challenge by private citizens. We mention these matters without expressing any opinion of our own since the references in the White Paper to Parliamentary sovereignty make no express mention of the legal limits on the legislative powers of Parliament at Westminster.

CONSULTATION MACHINERY

24. In paragraph 25 of the White Paper the Government state that they

> "see no reason to fear that the longstanding spirit of partnership within the United Kingdom will be lost; indeed, they believe that it will be enhanced. They look forward to working out effective two-way consultation arrangements with the devolved administrations as soon as possible and to operating them constructively over the years."

The Commission feels that the partnership analogy is false and indeed that the whole statement is unrealistic. In matters affecting Scots law, the Commission's experience has been that the need for consultation is often overlooked, and that such consultation as has taken place has been frequently inadequate and generally too late. We suspect, too, from the form and content of much legislation, that consultation even with Government departments in Scotland has rarely been adequate. There are exceptions to this rule - we may instance the division of the Lord Chancellor's Office concerned with Community Law - but by and large this has been our experience. Failures to carry out effective consultation have no doubt led to the embodiment in such legislation as the Guardianship of Infants Acts, and even the recent Children's Act,[1] of provisions which at best are unhappy from a Scottish standpoint and at worst may be unsatisfactory from any standpoint. Similar faults can from time to time be observed in legislation in a variety of other fields, of which some Revenue and Consumer legislation may be given as examples.[2] It would be inappropriate to enter into detail in the present Memorandum, but it might be instructive, since the example is very recent, for those concerned with legislative proposals for devolution of Scots private law to examine the handling in the

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[1] Children Act 1975.

[2] See the consideration of certain aspects of these problems in the Report of the Renton Committee ("The Preparation of Legislation", Cmnd. 6053, 1975) Ch. XII paras. 12.1 to 12.10, pp. 71-75 and Note by the Duke of Atholl, Sir John Gibson and Lord Stewart, at p. 159.

United Kingdom of the Projet de Directive concernant l'Harmonisation du Droit Applicable au Cautionnement, which on 6 May 1976 was circulated for comment to Scottish legal and other interests under the title "Draft Directive on the Harmonisation of the Law relating to Suretyship" and in a translation which employs English legal terms of art although, as it happens, the French text approximates much more closely to legal terminology in use in Scotland.

25. These problems are thought to arise, in part at least, from the departmental approach to legislation in the United Kingdom even in the private law sphere. Specific subjects are the jealous preserve of particular departments which seek to give effect to what they regard as desirable policies in their own areas of concern without necessarily taking adequately into account the repercussions of those policies upon other branches of the law. In some extreme cases the impression has been gained that those responsible for the initial preparation of United Kingdom or Great Britain legislation have little regard for the law of Scotland or at best consider it a nuisance. The problem, it is conceded, affects English law as well as Scots law but is less serious in relation to that system since those policies will normally have been elaborated against its background and with advice predominantly if not exclusively from English lawyers. The repercussions of the legislative proposals giving effect to these policies are normally considered by other departments in the light of their own interests and in many cases also by the Lord Chancellor's Office against the general background of English law. At the crucial stages of policy formation, no corresponding attention is paid to Scots law. Policies are normally at an advanced stage before the Lord Advocate's Department and the legal advisers to the Secretary of State are consulted. In consequence either of this fact or of their limited resources Scottish departments have not always been able to intervene timeously or effectively to insist upon necessary changes to legislation developed initially against a purely English background. The frequent result is well-intended legislation which, in Scotland at least, merely serves to create a luxuriant crop of new problems.

26. The White Paper does not appear to envisage that the Devolution Act should establish any formalised machinery for consultation. In the context of the European Community and international aspects of devolution the White Paper declares

that

> "No formal machinery is needed for consultation; it will be better to develop pragmatic arrangements between members and officials of the Scottish administration and the Government."[1]

This view is borne out neither by past experience in Scotland nor by experience in other countries. Evidence presented to the Kilbrandon Commission refers to the problems which are currently faced in Scotland through the inadequacy of the present informal arrangements for consultation in legal matters. As the Law Society of Scotland remarked

> "The important time for consultation is at the formative stages /sc. of legislation/. It is believed that such consultation is common in most parts of the world (conspicuously the USA) and that Great Britain has fallen behind in this matter."[2]

We entirely agree with this conclusion. It is a fact of the political scene in such federal systems as those of Australia, Canada and the United States that, although the constitutions themselves did not provide for formalised systems of inter-governmental consultation, it rapidly proved necessary to establish such systems. There has been a similar experience in West Germany. In the legal field an example of a developed system of consultation is the Committee of Attorney-Generals in the Commonwealth of Australia. In federal systems, the formal division of powers and the absence of provisions for "over-ride" entail that both the federal government and the state governments have a mutual interest in consultations on legislative matters and are likely to consult with one another even in the absence of any specific duty. In a devolutionary system, while the subordinate executive has an interest in consultation to avoid the risk of veto, the interest of central administration in consultation is of a much less compelling character. The two Law Commissions face an analogous situation in their own relationship to the Departments of Government and are acutely aware of the problem. It is thought, therefore, that the Devolution Bill should include a provision requiring the United Kingdom Government to consult the Scottish administration, at least when proposing to take any action which would have repercussions on devolved subjects and preferably when any action affecting the law of Scotland,

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[1] Para. 89

[2] Commission on Constitution, Cmnd. 5460, Written Evidence Vol. 5, p. 14.

including in particular its private and criminal law, is under consideration.

27. Such a duty would not be entirely novel even in a Great Britain context. Similar problems have arisen in regard to the Channel Islands and the Isle of Man and, while it is accepted that Parliament has the power to legislate for those Islands, there has been a practice not to so legislate without their consent. As the Kilbrandon Report put it:

> "There has been strict adherence to the practice over a very long period, and it is in this sense that it can be said that a constitutional convention has been established whereby Parliament does not legislate for the Islands without their consent on domestic matters."[1]

Scotland ought not to be placed in a less favourable situation.

28. Obligations to consult as a pre-condition of decision-making are a common feature of modern legislation. In more than twenty cases, for example, the EEC Treaty requires consultation with the Assembly as a pre-condition of the making of regulations, directives and decisions by the Council of Ministers. A duty to consult, moreover, is an increasingly frequent feature of United Kingdom legislation. The effect of such a requirement varies with the terms of the legislation and the circumstances. Generally, the body required to consult is not bound by the views it receives on consultation, but it must place the authority consulted in a position to tender advice, and must take the advice into account in reaching its decision.[2] In the context of planning applications the Privy Council has said

> "The requirement of consultation is never to be treated perfunctorily or as a mere formality. The local authority must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think."[3]

In some cases the failure to consult may entail the nullity of the decision or instrument. This would be true of an EEC Regulation promulgated without

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[1] Commission on the Constitution Cmnd. 5460, Vol. 1 para. 1469.

[2] See, for example, Easter Ross Land Use Committee and Others v The Secretary of State for Scotland 1970 SLT 317; Port Louis Corporation v The Attorney-General of Mauritius /1965/ AC 1111; Rollo v Ministers of Town and Country Planning /1948/ 1 All ER 13; Fletcher v Minister of Town and Country Planning /1947/ 3 All ER 946.

[3] The Port Louis Corporation Case, supra, at p. 1124.

such consultation as the Treaty requires.

29. We conclude that there is a need to embody in the Devolution Act reciprocal duties of consultation between the United Kingdom Government and the Scottish executive in matters both of legislation and of administration where legislative or administrative action proposed by one body is likely to be of concern to the other. We would hope that a Scottish Department of Legal Affairs on the lines suggested in our previous Memorandum[1] would have an important part to play in such reciprocal consultation. The need for an appropriate machinery is particularly important, as we shall explain, in the context of European Community and international matters: but it is also important in other areas, such as those of Scots private law and even of Scots criminal law, because of what the White Paper describes as the complex interaction "between those subjects and certain reserved matters". Such consultation would also be of great advantage in situations where it was desired to have enacted by Parliament or to incorporate in Assembly legislation cross-border provisions or ancillary provisions outside the scope of the devolved powers, which might in appropriate circumstances be made the subject of enabling legislation passed by Parliament in response to a request. While it would not be feasible to envisage sanctions for a failure to consult, the requirement might be so drafted as to have the effect of a constitutional convention, making it difficult for either side to ignore its existence.

EUROPEAN COMMUNITY AND INTERNATIONAL RELATIONS

30. The White Paper proposes that responsibility for international relations, including those arising out of the United Kingdom's membership of the European Communities, must remain with the Government .

"No other course would be compatible with political unity."[2]

In a sense this is axiomatic since, in a devolutionary constitution, only the State as a whole is a State for the purposes of international law. This approach, moreover, has ample precedents both in federal constitutions and in devolutionary constitutions, such as the Government of Ireland Act 1920. But, because the Government represents the United Kingdom abroad, it does

[1] Memorandum, paras. 34-39.

[2] Para. 87.

not necessarily follow that every aspect of legislation in international matters must be the concern of Parliament alone nor every aspect of administration in relation to international matters the concern of the Government alone.

31. International matters are today of the highest importance given both the propensity of the European Communities to enlarge their universe and the ever-increasing number of law-making Conventions outwith the scope of the European Communities. The White Paper recognises this .

> "Nevertheless, both in the European Community and in other contexts international business touches increasingly on matters which will be devolved."[1]

If the Scottish Assembly's legislative powers are to be restricted in all matters involving the international obligations of the United Kingdom, these powers clearly will be subject to increasing rather than to diminishing constraints.

32. The approach of the White Paper is to say that:

> "The Government must remain responsible for all international relations, including those concerned with our membership of the European Community."[2]

It goes on to say that there remained the question of how to ensure the observation of relevant international obligations, and concluded that there were two aspects to this problem:

> "firstly ensuring that existing obligations are not breached, and secondly arranging that any positive action needed to fulfil new obligations is taken."[3]

The White Paper's solution to this problem is to derogate from the general scheme proposed for the devolution of legislative powers by providing, in relation to the first aspect, that the Government's reserve powers for dealing with devolved

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[1] Para. 88.

[2] Para. 87.

[3] Para. 90.

matters may be exercised without the approval of Parliament[1] and, in relation to the second, that the Government should keep:

> "formal responsibility for all matters relating to international obligations, even when these matters arise in fields otherwise devolved."[2]

In neither case is a formalised machinery for consultation envisaged.

33. These passages are open to two major objections. The first objection is that it consists of a whole series of disparate problems rolled-up into one. No distinction is made between the different facets of international relations. Different considerations clearly apply, on the one hand, to international relations of a macro-political and macro-economic character where the role of central government is of crucial importance and, on the other hand, to international relations of a different character. In the former sphere, the relevant subject-matters are not within the scope of the subjects which it is proposed to devolve to the Scottish Assembly, so that in relation to them the derogations proposed to the general scheme of legislative devolution seem quite unnecessary. In other spheres, the matter is more complicated, and we come to the second major objection to the scheme proposed.

34. This objection rests on the belief that the fact that the Government must remain responsible for the conduct of the United Kingdom's international relations does not necessarily entail that the legislation necessary to give effect to international agreements must be, in the first instance at least, a United Kingdom responsibility. Such a provision would make nonsense of the Government's own scheme for devolution of legislative authority. It means, in effect, that any decisions which the Scottish Assembly may take in such matters as the control of nursing homes, children's hearings, the treatment of the elderly, curricula in schools, standards of housing, protection of ancient monuments, local bus services, the law of succession etc, etc are liable to be over-ruled, without even any formal requirement of consultation, by a decision on the part of the United Kingdom Government to ratify an

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[1] Para. 91.

[2] Para. 92.

international Convention or, in appropriate cases, to vote in the Council of Ministers of the European Communities for the approval of a regulation or directive of the Council. Having regard to the growing importance and volume of international law-making instruments referred to above, the proposals in the White Paper negate the very concept of devolution.

35. This general analysis may be carried further in relation to the detailed scheme proposed in the White Paper.

36. In relation to existing international obligations, the White Paper envisages that their breach by the Assembly and Scottish executive will normally be avoided by informal consultations between the Government and the Scottish executive but that if, exceptionally, the Scottish Assembly sends forward a Bill or the executive takes some action contrary to the United Kingdom's international obligations, the Government will be able to use their reserve powers to veto legislation on grounds of policy. It is stated, however, that

> "since international obligation is essentially a matter of fact and law (often involved and technical) rather than of general political judgment, the use of reserve powers in these cases will not require the approval of Parliament."[1]

This is no answer to the contention that the exercise of reserve powers to over-ride Assembly legislation should always be a matter in the last resort for Parliament rather than for the Government. It is not relevant to argue that the existence of international obligations raises difficult mixed questions of fact and law. The hypothesis is that the Assembly, by reason of "the close consultation which the government intend with the Scottish executive" will be aware that the proposed legislation is in breach of a treaty obligation. The question, therefore, is merely whether or not legislation deliberately enacted by the Scottish Assembly in breach of a treaty obligation should be rejected by the Government or Parliament. Constitutional propriety suggests that it should be a matter for Parliament, advised as it

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[1] Para. 91.

will be by the Government, itself advised by its Law Officers.

37. In relation to the assumption of future international obligations the White Paper, in the first place, rejects the view that any formal statutory machinery is required for consultation, and then declares that, since the Government is answerable for fulfilling new European Community or other international obligations, the Government itself must

> "keep formal responsibility for all matters relating to international obligations, even when these matters arise in fields which are otherwise devolved; but for there to be power for the Government at their discretion to delegate to the Scottish administration, by Order, the job of taking any necessary action, whether legislative or executive, to implement the obligation."[1]

38. The White Paper fails to take into account the fact that outside the European Communities the assumption of new international obligations is always a matter of free choice and that even in Community matters, it is often a matter of free choice. To the Commission it seems wholly inappropriate that obligations which may profoundly alter the structure of Scots law should be assumed by the United Kingdom Government without necessary consultation with the relevant Scottish authorities and even, perhaps, without their knowledge. It also seems inappropriate that, unless after the fullest consultation, Parliament should enact legislation in devolved areas which may be inconsistent with both the policies of the Scottish Assembly and the principles of the law of Scotland. For example, Scots law at present does not recognise - except in special cases, such as floating charges - the existence of securities over moveables which remain in their owner's possession. If the United Kingdom Government were to accept in its present terms the Draft Directive on the Recognition of Securities over Moveables without Dispossession, it would be overthrowing an ancient principle of the private law of Scotland. That should not be done without the most careful consideration of its implications for the future of Scots law. There is a similar need to take account of the repercussions of international obligations on Scots law in matters outside the umbrella of the European Communities. In the past there have been examples of

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[1] Para. 92.

Conventions negotiated by the United Kingdom which it has not proved possible to ratify because their provisions, though in keeping with the law of England and Wales, are inconsistent with that of Scotland.

39. These problems, or potential problems, in our view, would not arise with the same force if there were appropriate formal requirements for consultation in international matters affecting Scotland. But, as we have already mentioned, the White Paper in this context has rejected the need for a formal machinery for consultation and has concluded that it would be better to develop pragmatic arrangements between the Scottish administration and the Government. Without desiring to introduce unnecessary obstacles to the attainment of international agreement, we beg to differ and consider that, especially in European Community matters where the regulations of the Council of Ministers may take effect directly as law in Scotland, an organised and formal machinery for consultation will be of the highest importance.

40. The White Paper, in the context of new international obligations, envisages, as we have said, that the Government should keep formal responsibility for all matters relating to international obligations even when these matters arise in fields otherwise devolved; but that the Government should have power to take legislative or executive action to implement any such obligation.[1] It is thought that this approach is an unnecessarily cautious one. If there have been adequate anterior consultations the risk is small of obligations being assumed by the United Kingdom which the Scottish Assembly or Scottish executive are not prepared to implement. It would be preferable, both from a political and from a practical standpoint, to allow these matters to be governed by the normally appropriate legislative or executive organ. We need not insist on the political desirability of allowing the ordinary scheme of devolution to operate in relation to international matters, but it seems desirable to explain the practical reasons which have led us to this conclusion.

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[1] Para. 92.

41. The experience of the Commission, when concerned with the legislation necessary to implement international law-making conventions, is that it is often desirable to go further than is strictly required by the terms of the Convention and, quite possibly, to incorporate in the legislation designed to give effect to the Convention reforms of the internal law of Scotland. This may be exemplified by the Recognition of Divorces and Legal Separations Act 1971 which goes far beyond the strict requirements of the Hague Convention of 1968 on the recognition of foreign divorces and legal separations, the ratification of which it was designed to permit. A similar need to go wider than the strict terms of the Convention is likely to be felt in the context of the legislation required to implement the draft Hague Convention of 1972 concerning the International Administration of the Estates of Deceased Persons, which the Commission has been asked to examine. The implementation of Conventions with important effects on a branch of private law should be a matter for the legislative body with primary responsibility for that branch of law, both on principle and because otherwise the practitioner is liable to be confused by rules of law emanating from different formal sources. It is suggested, therefore, that in relation to international obligations in respect of devolved matters, the Devolution Bill should apply the system otherwise generally envisaged. This would not prejudice the power of the United Kingdom to legislate where obstacles appeared to the enactment of legislation necessary to give effect to the United Kingdom's international obligation.

42. We have carefully considered whether the general conclusions we have reached are valid in the context of European Community rights and obligations. In relation to existing rights and obligations, we note that these are already part of the fabric of Scots law and, in terms of section 2 of the European Communities Act 1972, are to be given legal effect in Scotland. Problems would arise only if the Assembly sought by legislating in devolved subjects to alter Community rights and obligations. It is significant, however, that the subjects which it is proposed to devolve are not in general subjects falling within the ambit of Community responsibilities. The main areas of

Community action concern coal mining and steel manufacture under the ECSC Treaty, atomic energy under the Euratom Treaty, and a variety of subjects under the EEC Treaty. The activities of the Community under the EEC Treaty are conveniently specified in Article 3 and include:

(a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

(b) the establishment of a common customs tariff and of a common commercial policy towards third countries;

(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;

(d) the adoption of a common policy in the sphere of agriculture;

(e) the adoption of a common policy in the sphere of transport;

(f) the institution of a system ensuring that competition in the Common Market is not distorted;

(g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;

(h) the approximation of the laws of Member States to the extent required for the proper functioning of the Common Market.

It will be evident, and it is perhaps significant, that few of those subjects are proposed to be devolved. The subject area most clearly affected is transport, but it is to be borne in mind that under the EEC Treaty the Community is basically concerned with inter-State transport activities.

43. The Commission fully recognise that the range of Community responsibilities is in fact more extensive than the terms of the Treaties at first sight suggest and that the Communities have a vocation for expanding the range of their activities. Directives on matters affecting the private law of

Scotland are, for example, becoming increasingly common. It would be wrong, however, to stress unduly the overlap between the subject fields which it is proposed to devolve in the White Paper and the subject fields which are the concern of the Communities. The fact, for example, that in terms of its duty to promote the "right of establishment" in Article 52 of the EEC Treaty, the Commission is concerning itself with the mutual recognition of diplomas and other evidence of qualification seems no reason either for declining to devolve adult education, or for applying to Assembly measures which affect Community obligations a special system of Governmental veto. Similarly it is difficult to see any reason why the Assembly should be denied the function of giving effect to EEC Conventions and Directives so far as affecting devolved areas of Scots law.

44. In relation to proposals for new Community legislation in devolved areas, a developed system of consultation seems desirable. The Kilbrandon Commission in paragraph 408 of that Report refer to the fact that:

> "Any restrictions imposed by Community law on the internal government of member countries will be such as are accepted by those countries after consultation in the ordinary way with the particular interests (for instance, commercial and professional interests) affected by them ... If there were a system of devolved government the process, more formal and possibly taking longer, would be essentially the same; in some way or another the interest of the area would have to be satisfied."

We suggest, therefore, that a formal duty to consult preparatory to voting on such proposals should be placed upon the United Kingdom Government. If, however, such a duty were recognised and fulfilled in practice, there would seem to be no reason for reserving the "formal responsibility" for these matters to the Government. It should be for the Scottish administration, subject to the ultimate control of Parliament, to take such formal steps as may be required to give effect to agreed Community policies. It would be a strange spectacle to see the United Kingdom Government in substance legislating in an area for which an Assembly of elected representatives had in theory full responsibility.

DEVOLVED SUBJECTS

45. We now consider the approach of the White Paper to the "Devolved Subjects", in particular to those discussed in paragraphs 145-151 under the heading "Law and the Legal System" and in Appendix D 10. Here the White Paper considers the extent of devolution in Scots private law, the criminal law, the enforcement of the criminal law through the police and prosecution system, and the court system and its administration. In this context we note that where legislative authority is devolved, responsibility for the activities of Government in that field will be transferred to the Scottish administration.[1] We trust that this statement is merely one of general intent and that it is not proposed to confine the devolved subjects rigidly to those areas in which it is thought that the Scottish executive may conveniently assume administrative responsibility or, conversely, that administrative responsibility will be conferred on the Scottish executive only where legislative authority is vested in the Scottish Assembly. To apply the principle rigidly in this way would seem undesirable, a point which we illustrate later in the context of law enforcement.

46. Before considering specific subject areas we feel compelled to express disquiet about the pattern and general effect of certain of these proposals. Some of the reasons for this anxiety have already been stated; others will be developed in what follows. It is noted that in addition to the ultimate powers of Parliament to legislate in all areas (subject to the qualifications suggested in paragraph 23 of this Memorandum) and to the proposed scope of retained or reserved areas, the scope of devolution would under the White Paper proposals be qualified in a number of other respects, including numerous and often important exceptions from the areas proposed to be devolved and qualifications such as those proposed in paragraph 160 of the White Paper. On the face of it, for example, the White Paper appears to propose a wide devolution of legislative responsibility for the private and criminal law of Scotland; but we fear that the qualifications and exceptions which accompany almost every proposal are so extensive and

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[1] Para. 114.

important that their effect might be at best merely to formalise and perpetuate by constitutional legislation the present unsatisfactory position and at worst to intensify the fragmentation on a bureaucratic and departmental basis of responsibility for the law of Scotland, including its private and even its criminal law. We note, for example, that in paragraph 16 of the White Paper it is stated that the Scottish Assembly "will be responsible for most aspects of the distinctive private and criminal law of Scotland." As a Commission we strongly support this approach. But we infer from statements made later in the White Paper that the proposal which we have quoted may have to be read subject to very wide, very important and, in some respects, extremely vague qualifications and exceptions. Some important subjects, for example Bankruptcy, are not expressly mentioned, and we would make a reference to what is said on the subject of the Scots law of Bankruptcy in our previous Memorandum.[1] The same tendency to take away with one hand what is given by the other can be discerned in many other parts of the White Paper containing proposals as to the future legislative responsibility for the law and the legal system of Scotland. We refer, for example, to the very large and important areas excepted from the proposed devolution of private law, which could presumably on one interpretation reserve to Parliament and to non-Scottish departments in Whitehall responsibility for the major parts of the commercial and mercantile law of Scotland. We apprehend that phraseology such as "consumer protection" and "the maintenance of a common framework of trade" may be eminently open to interpretation. Similarly the use in the White Paper of expressions of wide connotation such as "the national framework of law and order", "the maintenance of law and order" and "responsibility for law enforcement" may suggest that in the realm of criminal justice the subjects proposed to be devolved could in the event turn out to be a great deal less extensive than at first sight appears. Having regard to the emphasis at the time of the Union of 1707 on the preservation of the law (especially in matters concerning private right) and the legal system of Scotland, a programme of devolution which withheld from a Scottish Assembly responsibility for a substantial proportion of such matters would seem rather strange. While we recognise that in a devolved constitution there are certain matters which may

[1] See particularly paras. 24 and 25.

be regarded as being of such importance to the State that they must be reserved, we strongly advise that the necessary decisions on such matters should be taken on their merits and by reference to constitutional precedents, and not merely on the basis of departmental responsibilities (sometimes fortuitously acquired) or spheres of influence, either existing or claimed for the future. If the latter criteria were to be adopted, large areas of the law of Scotland might in due course become little more than a series or conglomeration of arbitrary and disconnected rules, incomprehensible to the ordinary citizen and even the ordinary lawyer and wholly lacking in the system and the coherence with general principles which through the ages have been demanded from their laws by most civilised and educated societies.

(1) Scots private law

47. We welcome the proposal in paragraph 145 that the Scottish Assembly and executive

> "will have wide responsibilities in the range of subjects constituting Scots private law, such as the law of persons, delict, contract, property, trusts and succession."

The ambit of private law is extensive, and we refer to the description of its scope in Walker: Principles of Scottish Private Law,[1] where the learned author defines private law as "the branch of the municipal law of Scotland comprising the principles and rules applied in defining and determining the rights and duties of ordinary private persons in their relations with one another, and of the State, and of public and Governmental agencies and persons, in respects in which they do not enjoy any special position, right, or immunity, by virtue of any rule of public law." In addition we wish to emphasise that the private law of a country cannot be properly developed without the simultaneous consideration of the associated rules of evidence and procedure which are often themselves interlocked. We have noted the doubt expressed in paragraph 150 of the White Paper but we are clearly of opinion that the law of both evidence and procedure should be devolved subjects. We are of the same opinion in relation to evidence and procedure in criminal matters.

[1] Vol. I (2nd Edn.) pp. 3-5.

We note, too, the statement in the White Paper that

> "Further study is proceeding to find the best way of reconciling maximum devolution in the field of private law with these wider United Kingdom interests."[1]

The interests referred to appear to be the interests of the United Kingdom in areas such as company law, industrial relations and consumer protection. A practical solution to this problem is vital, because one of the principal reasons for dissatisfaction within the Scottish legal profession and elsewhere with present legislative arrangements for Scotland has been the continued failure both in Westminster and in Whitehall to appreciate the wide gulf between the underlying principles of the English common law and those of the common law of Scotland, and to appreciate the need to preserve the coherence of the Scottish legal system. There has also been a failure to appreciate that administrative structures which may be appropriate to the legal system of a relatively large country may be inappropriate to that of a smaller one.

48. The Commission concedes that consistency with the law of other parts of the United Kingdom may be vital in certain cases to ensure that there is an effective common economic, industrial and social policy throughout the United Kingdom. We also agree that there is a complex interaction between the rules of private law and the rules which may be required to give effect to common policies throughout the United Kingdom. Interaction between private law and public law is also productive of complications, which may well increase after devolution. The Commission cannot suggest wholly satisfactory solutions to these problems within a devolutionary framework, but we do suggest that the ambit of the problem may be reduced and the likelihood of discordances diminished.

49. The problem arises in part from the wide scope of the retained matters. The White Paper, in paragraph 160, proposes to retain, not only the range of subjects embraced under the heading of "General Standards", but also such matters as

> "trade unions, industrial relations and the rights of

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[1] Para. 145.

employees; consumer credit; export credit; competition policy; fair trading; insurance; patents, trade marks, designs and copyright; weights and measures; and shipping and civil aviation."[1]

These matters, even where they affect fields otherwise devolved, are envisaged as remaining within the province of the Government and, presumably, of Parliament.

50. We question whether these broad exclusions based on departmental interests are desirable from the standpoint of the future development of Scots law and its maintenance as a coherent system. A common feature of the reserved subjects is that they are the jealous preserve of great Departments of State. A common feature of the concepts used in the specification of these subjects is that their precise boundaries are unclear. In some instances - "fair trading" is a good example - the very concept is at present undergoing a process of dynamic expansion. In many of these subjects our experience has been that past legislation has taken insufficient account of the different physical and demographic environment in Scotland or of its different economic and legal background. There is an urgent need, therefore, to consider whether the need for harmony in substantive law is not often counterbalanced by the need to take greater account of local conditions, local institutions, and the local legal background. Where common strategies are really required, they will arise, as they do in the Scandinavian countries, from the very compulsion of the situation, and in any event it is perfectly practicable for more than one legislature to put into effect a common strategy. It is indeed an advantage to achieve harmonisation by means of legislation which is consistent in form, content and terminology with the existing body of the country's law.

51. We emphasise, therefore, as we suggested in paragraphs 15 to 21 of our previous Memorandum, that it would be desirable to limit the scope of the reserved powers as far as possible and to establish, as suggested in paragraphs 24 to 29 of this Memorandum, formal machinery for consultation between the two administrations. If, however, the Government still intend to achieve the result sought in paragraph 160, we suggest that they should

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[1] Para. 160.

do so not by specifying reservations from, and qualifications to, the devolved powers, but merely by requiring the Assembly to follow the general policies embodied in relevant United Kingdom legislation.[1]

(2) Criminal law

52. We now consider the White Paper's proposals in regard to criminal law. The Commission notes with satisfaction that

> "The Scottish administration will also be given responsibility for the general criminal law, including the right to create new offences, to redefine or abolish existing offences, to determine penalties and to regulate the treatment of offenders ..."[2]

We have reservations, however, in relation to the procedure for enacting legislation in matters specifically excepted from the devolution of "the general criminal law." We have noted also with some surprise that responsibility for legislation on criminal procedure is not thought to follow automatically from responsibility for legislation on the general criminal law. We insist, moreover, that responsibility for legislation on the criminal law should not be separated from responsibility for the associated rules of procedure and evidence. These are clearly appropriate subjects for devolution.

53. With regard to the specific exceptions proposed from "the general criminal law", we accept that there are certain classes of acts, including acts relating to explosives, firearms, dangerous drugs and poisons, and motor traffic, which should be characterised as offences in all parts of the United Kingdom. But this does not mean at present, nor will it require to mean in the future, that these offences need necessarily be characterised in precisely the same way throughout the United Kingdom. The description and evidential requirements in relation to an offence must take into account the general rules of the legal system into which the offence is being introduced. We agree that, in these areas as well as in certain other undevolved

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[1] See para. 16 above.

[2] Para. 147.

areas, it will often be convenient to legislate concurrently in relation to the specification of the citizen's duties and specification of the sanctions attaching to the citizen's failure to comply with those duties. We consider, however, that in those areas the Government should not themselves make, or concur in, legislative proposals incorporating offence-creating provisions without first consulting the Scottish executive. Even if, for example, company law were to be undevolved it seems important that offence-creating provisions should be enacted in that area only after consultation with the Scottish executive. The offence-creating provisions, for example, applicable to Scotland in the Companies Acts do not take into account the general structure of the Scots criminal law and are unsatisfactory in this and other respects. They derive ultimately from sections 11 and 12 of the Debtors Act 1869, an enactment elaborated against a purely English background. It would seem important for the coherence of Scots criminal law that, in undevolved matters, offence-creating provisions should not be presented to Parliament without prior consultation with the Scottish executive as the body with overall responsibility for the state of Scots criminal law. If the scope of undevolved matters were to remain as wide as that contemplated in paragraph 160 (General Standards), such consultations would seem to be a minimum condition of the maintenance of a logical and coherent structure of Scots criminal law.

54. We come next to the exceptions proposed for offences such as treason, espionage and terrorist crimes. We recognise that, since these may directly affect the security of the State, authority for the legislative definition of these offences is likely to be retained by Parliament. If, however, their definition is to be reserved to Parliament we consider, once again, that prior consultation with the Scottish executive will be vital.

55. The older Scottish law of treason was repealed by the Treason Act 1708, which simply declared that from a prescribed date

> "such crimes and offences which are high treason or misprision of high treason within England, shall be construed, adjudged and taken to be high treason or misprision of treason within Scotland."

It was further provided that the Crown might issue commissions of oyer and terminer in Scotland to hear and determine cases of treason. The 1708 Act has subsequently been modified by such enactments as the Treason Acts of 1795 and 1817, by the Treason Felony Act 1848 and by the Treason Act 1945, but the essential principle remains that the English law of treason applies in Scotland. The terms of the Treason Act 1708 gave the greatest offence in Scotland and the passage of time has not reduced the absurdity of requiring a capital offence to be tried in one country according to the laws of another.

56. We had hoped that the lessons of history would have been learned and that, when the law of treason came to be reviewed, a Committee representative of the two legal systems would be appointed to examine the matter. We understand, however, that the law of treason is at present under review in England but, so far as we are aware, without positive Scottish involvement. This suggests that the Devolution Act must contain provisions for the mandatory consultation of the Scottish executive, even in relation to the characteristics of crimes directly affecting the security of the State. The principle should apply to offence-creating provisions in all reserved legislation.

(3) Law enforcement

57. Before proceeding to give our views on the enforcement of the criminal law through the police and public prosecutors, we wish to make certain observations on the concept of law and order.

58. It is stated in the White Paper[1] that such enforcement "... is part of the responsibility of Government for the maintenance of law and order and the security of the State, and will extend to offences within both devolved and other fields". This in turn derives from the view, expressed in paragraph 19, that the sovereignty of The Queen in Parliament means that:

> "... the Government must be able to do whatever is needed for national security ... they must maintain the national framework

[1] Para. 148.

of law and order, guaranteeing the basic rights of the citizen throughout the United Kingdom."

Law and order, however, includes a variety of aspects of Government, which may differ not only in degree but also in kind. There is a difference between providing for the defence of the institutions of the State against attack by organised groups of terrorists and arranging for the arrest of a person drunk and incapable on a Saturday night. It is not difficult to understand that the former responsibility would be considered suitable for reservation to Parliament and the United Kingdom Government, but it is less easy to understand why the latter responsibility - which includes, for example, responsibility for the police presence in Stornoway or day to day law enforcement in Auchtermuchty - should not be devolved. The use of phrases such as "national security" and "law and order" tends to obscure the distinction between functions which differ widely in quality and importance. Such phrases also tend to blur the drastic differences both in fact and in law between a situation in which the object is to deal with normal contraventions of the criminal law and the situation which arises when the military are called in aid of the civil power.

59. In relation to legislative and administrative authority for law enforcement in matters which do not directly affect the security of the State, there is a clear case in our view for it being a Scottish responsibility. The Scottish Assembly, whether or not it has constitutional authority in this domain, will be immediately and vitally concerned with local issues of "law and order" and neither its Members nor the Scottish public will appreciate why it should not have formal authority over such matters. In paragraphs 26-30 of our previous Memorandum we refer to the fact that one of the factors which led in the latter part of the 19th century to the appointment of a Secretary for Scotland (later to become a Secretary of State) was the inefficiency and delay of the Home Office in dealing with public disorders in Skye and elsewhere in Scotland. The consequential decentralisation of administrative responsibility and of decision-making in the realm of "law and order" has been continued and developed up to the present day. It would be strange,indeed, if the effect

of devolution was to put a stop to this trend. Paragraph 148 of the White Paper contemplates that the Secretary of State will retain his present functions in relation to the police. It is for consideration whether this is in fact appropriate in relation to matters which do not directly affect the security of the State. There is a strong case for the Minister concerned with law enforcement being responsible to the political organ with direct interest in the matter: this in our view is clearly the Assembly.

60. The White Paper also envisages in paragraph 148 that the Lord Advocate, as a member of the Government and not of the Scottish executive, should be responsible for the prosecution system, exercising his responsibilities through the Crown Office and the Procurator Fiscal Service. He would be accountable, it is presumed, to Parliament alone. We consider that this proposal is ill-advised for reasons similar to those developed in the preceding paragraph. The public prosecutor in Scotland exercises important discretionary powers and it seems right that he should have to account for his exercise of these powers to the Scottish Assembly, whose members alone will be immediately and vitally concerned with his exercise of that discretion. Having considered the proposals in the White Paper we have concluded without hesitation that the function of public prosecutor in Scotland should be performed after devolution by a Scottish law officer and that legislative responsibility for the distinctively Scottish institutions of the public prosecutor and the Procurator Fiscal Service ought to be devolved.

61. There remains the question of administrative authority for police and prosecution functions in relation to offences directly affecting the security of the State. We concede that, even on a maximalist model of a devolutionary system, this administrative authority must rest with central government. This does pose a difficult problem to which we alluded in our previous Memorandum. In practical terms, however, the police and prosecuting authorities in Scotland would be bound to apply the law impartially, whatever the source from which it emanates. In the last resort, the United

Kingdom Government would be in a position to exercise the reserve powers specified in paragraphs 71-75. There would be no question of Parliament losing its ultimate authority in such matters.

(4) Responsibility for the courts

62. Since the publication of the White Paper the Government's intention was announced of seeking the appointment of a Royal Commission to enquire into the functioning of the legal profession in Scotland including consideration of the operation of the court system. We do not consider, however, that this should deter us from examining legislative responsibility for the court system in Scotland in the context of devolution.

63. We have examined the proposals in paragraphs 149 and 150 of the White Paper. We entirely agree that it would be wrong to separate the responsibility respectively for the Supreme Courts (the High Court of Justiciary and the Court of Session), the Sheriff Courts and the District Courts. As the White Paper indicates, separation would pose difficult problems over such matters as jurisdiction, procedure and administration. It is also a feature of the principal Scottish Courts, the Court of Session and High Court of Justiciary and the Sheriff Courts, that their judges are simultaneously civil judges and criminal judges. It would merely be a damaging absurdity to split the criminal courts from the civil courts and, we imagine, this would not be seriously considered.

64. For similar reasons, legislative responsibility for the special courts and tribunals which have been established in recent times should rest with the authority which has responsibility for the Scottish courts as a whole. In a small country, such as Scotland, the case for specialised tribunals is much less strong than in a larger country, and the system of legislative authority for the courts should permit of the coordinated examination of the whole structure of the courts and tribunals with a view to their rationalisation and integration.

65. The question remains whether legislative authority for the courts as a whole should be devolved. If relative importance of the subject matter is to be the yardstick, as at some points of the White Paper it is assumed to be, legislative responsibility for the administration of justice through the courts is a great deal more important than legislative responsibility for many of the areas at present proposed to be reserved or to be excepted from devolved matters or to be the subject of "reserve powers". However, considerations of history, of sentiment and of practical convenience suggest that legislative responsibility for the Scottish courts should lie with the Assembly. In this context, we make no apology for referring to the Articles of Union of 1707. Article XVIII seeks to preserve the laws of Scotland, especially in matters of "Private right". Article XIX seeks to preserve the courts which administer that law

> "the Court of Session or College of Justice, do after the Union and notwithstanding thereof, remain in all time coming within Scotland as it is now constituted by the laws of that Kingdom and with the same Authority and Privileges as before the Union; subject nevertheless to such Regulations for the better administration of Justice as shall be made by the Parliament of Great Britain."

Article XIX makes similar provision for the High Court of Justiciary and goes on to provide that

> "... all Inferior Courts within /the Kingdom of Scotland/ do remain subordinate as they are now to the Supreme Courts of Justice within the same in all time coming."

The Articles of Union, it is clear, recognised the intimate relationship between the laws of a country and the courts which are its natural guardians. It would fly in the face of history and sentiment to sever that relationship. At a purely practical level, as we have already indicated,[1] it is not easy to see how legislative responsibility for substantive law can be severed from responsibility for the procedural law applicable when it is invoked in court or how that legislative responsibility can be severed from responsibility for the structure and organisation of the courts. Whichever legislative body is responsible, therefore, for the bulk of the law of Scotland

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[1] Paras. 47 and 52 above.

should be responsible for matters relating to the judicial administration of that law, including (except in so far as the superior courts are in use to regulate procedure) the law of evidence and procedure, both civil and criminal, and legislation relating to the administration of justice, including for example Court of Session, Sheriff Court, District Court and legal aid legislation. In our view the Scottish Assembly would be the natural forum for the debate of that law and for its amendment, and we would imagine that the opposite view would be taken only if it were conceived that devolution in the realm of law and of its administration and enforcement was likely to be meagre. We may add that in the long term we would see dangers of a political character if after devolution the Scottish courts came to be regarded as being less independent or as being in any sense subordinate to Parliament or were to lose their distinctively Scottish characteristics.

66. We wish to emphasise that in expressing the foregoing opinions we are assuming that the scope of devolution, particularly of the law and the whole legal system, will be extensive. If devolution on the model of the White Paper proposals is eventually selected for the pending legislation we would have strong reservations about any proposal to devolve to the Assembly responsibility for the Scottish court system and its administration. The White Paper envisages that, in the reserved areas, there will be substantial sections where, at present, specialist tribunals operate in Scotland. We consider it important that responsibility for these should go with responsibility for the ordinary courts so that a coherent system of legal decision-making would be provided. To divide legislative responsibility for the administration of justice between Parliament and the Assembly might well contribute to a withdrawal of control of specialist courts and tribunals from Scotland, a tendency which has already manifested itself. On the other hand, to allocate responsibility for legislation concerned with the administration of justice generally to the Assembly should enable it to legislate systematically in relation to the organisation of courts and tribunals as a whole which might conduce to economy and efficiency.

67. On the assumptions in the White Paper (which include, for example, the assumptions in paragraphs 19, 145, 148 and 160) it would we think be difficult to justify devolution to the Assembly of legislative responsibility for the main Scottish courts and their administration. As will be apparent, the assumptions underlying this Memorandum and also our previous Memorandum differ widely from some of those expressed in the White Paper, and we repeat that upon our assumptions the arguments for devolution to the Assembly of legislative responsibility for the whole administration of justice, including the specialised courts and tribunals as well as the High Court of Justiciary, the Court of Session, the Sheriff Courts and the District Courts are considered by this Commission to be extremely powerful. We would deplore any constitutional solution which involved fragmentation of responsibility for the law and the legal institutions of Scotland as well as for the administration of justice there (including law enforcement), and we apprehend that if the proposals in the White Paper were to be put into effect in their entirety such fragmentation would be inevitable.

68. We do not wish to enter on the political issues relating to judicial appointments. The present system is not the only one available. The methods of selection have varied since the establishment of the College of Justice. Thus at one period the Senators kept a short leet of the ablest practitioners before them from which the Crown selected when a vacancy occurred. At another period, before the present practice developed, the Crown presented a short list to the Senators for them to select the best qualified candidate for elevation to the Bench. It would be possible for the law ministers in Edinburgh and London to submit their own short lists of candidates for selection by the Senators. When the status of Lord Probationer was taken seriously, the judges had the ultimate decision on the suitability of candidates nominated for the Bench, though after they had exercised their right of veto when a person presented by the Crown seemed to them not to be suitably qualified, the Court of Session Act 1723 required the Senators to admit the Crown's nominee. The status of Lord Probationer became a formality long before it was ultimately abolished by

statute. If it is decided that some special arrangement should be made for advising Her Majesty the Queen on the appointment of Judges of the High Court of Justiciary and the Court of Session, we would not be disposed to dissent.

ROLE OF THE COMMISSION

69. In Part V of our previous Memorandum we expressed our views on devolution and the role of the Commission. We have reconsidered these views in the light of Government policy as expressed in paragraph 146 of the White Paper that:

> "the Scottish Law Commission will continue after devolution to have a major role in the coherent development of the whole of Scots law, whether in devolved or non-devolved subjects."

This principle accords closely with the views we have already expressed in Part V of our previous Memorandum, and we assume that this principle will be applied for any detailed legislation affecting or consequent on the proposals in the White Paper.

70. We note that:

> "legislative responsibility for the constitution and structure of the Scottish Law Commission is to remain with the United Kingdom Parliament."

If this course is finally adopted, no major amendment of the Law Commissions Act 1965 appears to be required, although there may have to be clarification of certain matters, including the power under section 2 to appoint members of the Commission,[1] the functions of Ministers respectively of the Government and of the Scottish executive under section 3(1)[2], and the roles of Parliament and the Scottish Assembly respectively in relation to the submission of programmes and the receiving of reports.[3] It will also be important to ensure that the Commission may continue its work on existing programme subjects and on specific remits.

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[1] Memorandum, para. 65.

[2] Memorandum, paras. 65-68.

[3] Memorandum, para. 71.

71. We also observe that:

> "the Scottish administration will be responsible for appointing the Chairman and members of the Commission, for its running and for its general programme of work, though the Government will remain able to refer non-devolved matters to it."

We favour this approach because it recognises the special nature of responsibility which the Scottish Law Commission, as contrasted with the Law Commission for England and Wales, would inevitably have to undertake under any system of legislative devolution such as is presently proposed for Scotland. In this context it seems right to stress as we did in our previous Memorandum[1] that the Commission must continue both in theory and in practice to be completely independent of party politics. It would, we think, assist the Commission in a future situation where it owed responsibilities to two Governments, perhaps of different political complexion, if there were specific provision that the Scottish administration should consult the United Kingdom Government before appointing a Chairman or a member of the Commission.

72. Apart from these specific comments on the White Paper, we would like to emphasise, as we did in our previous Memorandum,[2] that under a devolutionary system the statutory functions of the Commission under section 3 of the 1965 Act, including consideration of proposals for law reform, work on programmes, preparation of draft Bills and the provision of advice and information, must continue to relate to the whole law of Scotland, whether in devolved or non-devolved areas. Moreover, as we have stressed in the earlier part of this Memorandum, there is likely to be considerable overlapping between those fields. It follows that it would be undesirable to limit artificially the Commission's power to consider proposals for law reform by reference to the source of the proposal.

73. In relation to proposals emanating from members of the public under section 3(1)(a) of the Law Commissions Act 1965 this would clearly be absurd. The man-in-the-street is concerned with a specific grievance and not with

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[1] Memorandum, para. 64.

[2] Memorandum, para. 65.

the legislative or administrative authority which may ultimately be responsible for remedying that grievance. This may be illustrated with reference to specific proposals which the Commission has received from members of the public. One proposal was that "insurance laws be made simpler with fewer traps". Another proposal involved a complicated inter-relationship between motor insurance policies and road service licences. Under paragraph 160 of the White Paper insurance is proposed to be a reserved matter. Another proposal was that "there should be special courts for motoring offences". In this context we note that paragraph 136 of the White Paper envisages that the responsibility for the rules for traffic management and motoring offences will not be devolved. Legislative responsibility for the courts may or may not ultimately be devolved. Another proposal raises mixed questions of the incapacity of Scottish trustees who may be registered as owners of shares in English companies, and the recognition of this incapacity by the registrars of those companies. We take it that matters relating to the incapacity of trustees would be a devolved subject but paragraph 145 of the White Paper seems to envisage that company law should be reserved.

74. Section 3(1)(e) of the 1965 Act envisages that the Commission should:

> "provide advice and information to Government bodies and other authorities or bodies concerned at the instance of the Government with proposals for the reform or amendment of any branch of the law."

We take it, as we suggested in paragraph 66 of our previous Memorandum, that both Ministers of the United Kingdom Government and of the Scottish executive should have power to obtain advice from the Commission under section 3(1)(e). It would present the Commission with considerable difficulties if Ministers of the Government were empowered to refer to the Commission only matters which were strictly within the non-devolved field or if Ministers of the Scottish executive were able to refer to the Commission only matters strictly within the devolved field. Artificial constraints of this nature would be a considerable impediment to the fulfilment by the Commission of its duty to develop and reform the law systematically. Among the matters referred to us under section 3(1)(e) have been requests for advice relating

to Floating Charges, Administrative Law, Products Liability, and Aircraft Mortgages. Some of the references under section 3(1)(e) of the 1965 Act have involved the joint consideration with the Law Commission of international or cross-border matters. These include the reference which resulted in the Joint Report of the Law Commissions on the Hague Convention on the Recognition of Divorces and Legal Separations and our present joint examination of Conflicts of Jurisdiction affecting the Custody of Children.

75. The White Paper envisages that the Scottish administration should be responsible for the general programme of work of the Scottish Law Commission.[1] We find it equally difficult to envisage that this programme could be limited to subjects within the devolved sphere. We repeat, with emphasis, that the need for coherence in the law of Scotland after devolution requires the Commission to have regard simultaneously to devolved and undevolved areas of law, and to make recommendations relating to both areas. Our First Programme item relating to Prescription and Limitation of Actions was followed by a Report on this subject in 1970[2] and by its legislative enactment in the Prescription and Limitation of Actions (Scotland) Act 1973. It was necessary in framing this legislation to enter into subjects which, in terms of the White Paper, were both devolved and undevolved. The law of evidence, both in its civil and in its criminal aspects, is also on our First Programme. Whether or not matters relating to civil and criminal procedure are devolved, the Commission, in reviewing the law of evidence, must be in a position to suggest amendments to the associated rules of procedure. Our Second Law Reform Programme includes Insolvency, Bankruptcy and Liquidation, and we note that the White Paper envisages that company law (including, presumably, matters relating to the liquidation of companies) may be an undevolved subject while the destiny of the law of bankruptcy is at present unknown. Our Second Programme also envisaged an item on the Reciprocal Enforcement of Judgments within the United Kingdom. This subject clearly had cross-border implications. Finally, our Third Programme of Law Reform envisages the Commission taking under review rules of private international law which may be the subject of negotiations or agreements between

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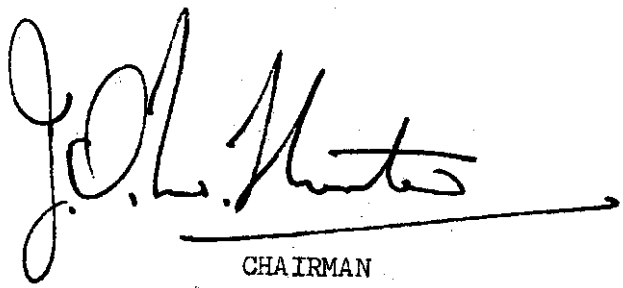
[1] Para. 146.

[2] Scot. Law Com. No. 15.

Member States of the European Economic Community and of the Hague Conference on Private International Law. This programme has both cross-border and international implications.

76. It would seem equally impracticable, as we emphasised in paragraphs 68-70 of our previous Memorandum, to draw a rigid demarcation between devolved and undevolved subjects in relation to the Commission's duties of Consolidation and Statute Law Revision under section 3(1)(d) of the 1965 Act. Past legislation will not necessarily have respected the allocation of devolved and undevolved powers eventually adopted, and the Commission would be faced with daunting problems if its duties under that section were not to extend to both sets of powers. Much of the Commission's work on Consolidation and Statute Law Revision is carried on in close consultation with the Law Commission, and this cooperation should clearly continue. Even so, a satisfactory scheme of Consolidation may require the inclusion of provisions drawn from both devolved and undevolved fields. We consider, therefore, that arrangements will require to be made for the submission of Consolidation Bills including both devolved and undevolved matters either to Parliament or to the Assembly for enactment after consultations with the Government and the Scottish administration.

77. It will be apparent, therefore, that the Commission will be unable adequately to fulfil its role in the coherent development of the whole of Scots law whether in devolved or undevolved matters if it may examine the latter only as a result of a specific reference at the instance of the United Kingdom Government.



CHAIRMAN

Scottish Law Commission
Edinburgh
18 June 1976

NOTE

ON

QUALIFICATION FOR ASSEMBLY MEMBERSHIP

1. Our consideration of the White Paper leads us to comment briefly on a separate matter, namely certain of the proposals in the White Paper[1] on the subject of qualification for Assembly Membership. Once more we confine our comments to legal and constitutional issues. Questions of policy are, we recognise, for others.

2. The White Paper proposes rules on disqualification for membership of the Assembly which "are in substance the same as those for the House of Commons, except in respect of clergy and peers."[2] We are doubtful whether the general application of those rules to membership of the devolved Scottish legislature is altogether appropriate. It will, we think, be important, in providing rules for legal qualification and disqualification in this new context, to be guided by constitutional principles appropriate to a devolved legislature responsible for certain important aspects of Scottish affairs. Such principles would, in the Commission's view, include:

(1) the independence of the Scottish Assembly, within the limits authorised by the devolution statute;

(2) the preservation of the constitutional neutrality of persons holding certain public offices and positions;

(3) the clear definition of lines of constitutional responsibility; and

(4) the prevention of conflicts of interest and of duty.

3. Having regard to these principles, it appears to us that the question of dual or multiple membership of the Scottish Assembly and other bodies, in particular local authorities, should be more closely examined. Bearing in

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[1] Para. 37 and Appendix A.

[2] Appendix A.7.

mind, amongst other matters, that it is proposed to devolve to the Assembly responsibility for central government supervision of most aspects of local government in Scotland,[1] it is for consideration whether dual membership of a local authority and of the Assembly ought to be permitted. It is not difficult to conceive of cases where serious conflict of interest or of duty might arise, especially when it is borne in mind that coming on for half of the population of Scotland is contained within the boundaries of a single regional authority and that legislation for Scottish local government reform might in due course come under discussion by the Assembly.

4. The White Paper[2] proposes that membership of the Assembly should not be barred to Members of the House of Commons or the House of Lords but assumes that practical considerations will often prevent them from standing for election to the Assembly. It appears to us that this proposal might require reconsideration, since conflicts of interest or of duty, indeed of constitutional responsibility, could readily arise, particularly in the case of those holding office in the Government or in the Scottish executive.

5. We conceive that there might be advantages in requiring for membership of the Assembly a residential qualification, either in Scotland or in more limited localities within Scotland. We are unaware whether consideration has been given to such matters.

6. We note the proposal[3] that a citizen of the Republic of Ireland should be qualified for membership of the Assembly. We refer in this connection to Professor J D B Mitchell's consideration of the somewhat anomalous position which has arisen in United Kingdom legislation.[4] This leads us to question whether there is sufficient justification in the context of qualification for Scottish Assembly membership for the further extension of what is referred to by the learned author as "this somewhat ambiguous but convenient legislative policy."

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[1] See e.g. paras. 119-123, 126-137, and 153 of the White Paper.

[2] Para. 37.

[3] White Paper Appendix A.2b.

[4] Constitutional Law (2nd Edn.) pp. 82-83.

APPENDIX

Memorandum by the
Scottish Law Commission
to
the Lord Advocate
on
Devolution, Scots Law and
the Role of the Commission

Contents

Contents (contd) Paras.

PART I: INTRODUCTION

Assumptions on which this paper is written

1. Under the Law Commissions Act 1965 it is the duty of the Scottish Law Commission to take and keep under review the law of Scotland with a view to its systematic development and reform. The White Paper /Cmnd. 2573/ presented to Parliament in connection with that Act pointed out that while each Government Department is responsible for keeping under review the state of the law in its own field there was then "nobody charged with the duty of keeping the law as a whole under review". It envisaged that the Commission would be concerned with the state of the law as a whole, whatever its source or sources might be. The Commission, accordingly, is deeply concerned with the current proposals for legislative devolution in Scotland, and in particular with the scope of devolution in matters of private and criminal law and the methods by which, in a constitutional setting under which legislative responsibility for these matters may be divided, the essential coherence, and with it the quality and efficiency, of the Scottish legal system may be maintained. The Commission is also concerned with its own future duties, both in a United Kingdom and in a Scottish context. The Commission has been handicapped in the preparation of this Memorandum by its lack of knowledge of Ministerial policy or decisions relating to devolution other than those which have been publicly announced. On the basis, however, of the announced decisions, and on assumptions relating to decisions which may be taken, it considers the legal implications of devolution from the standpoints of the functional efficiency and the future development and reform of Scots law.

2. In opening the debate on Devolution on 3rd February 1975, the Lord President of the Council and Leader of the House of Commons (Mr Edward Short) reminded the House that, in the White Paper[1] on "Democracy and Devolution Proposals for Scotland and Wales", the Government had indicated certain fundamental decisions to which they were committed. In relation to Scotland they had decided that (1) there should be a directly elected Assembly in Scotland, (2) the Scottish Assembly "should have a legislative role and

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[1] Cmnd. 5732, 1974.

legislative powers within fields within which separate Scottish legislation already exists", (3) the Secretary of State for Scotland should remain and (4) the existing representation for Scotland at Westminster should be retained.

3. In addition to assuming the implementation of these decisions, we have assumed that the Scottish executive would operate through a Ministerial system rather than through a system of committees on the local authority model. We note that the Report of the Royal Commission on the Constitution[1] (which we shall refer to as the Kilbrandon Report) recommended that executive authority would be exercised by Ministers appointed by the Crown and drawn from members of the Assemblies.[2]

4. In addition to the decisions referred to above, Mr Short indicated that the Government would be guided by certain major objectives. These objectives as they affect Scotland are (1) the Scottish Assembly, while meeting the aspirations of the people of Scotland, must not threaten the unity of the United Kingdom, (2) while significant functions will be devolved there will be retained by the United Kingdom Government those functions essential to the sovereignty of Parliament and to the overall management of the United Kingdom economy, (3) the Scottish Assembly must be able to work quickly and efficiently in their area of decision making and in co-operation with the United Kingdom Government and (4) the systems devised must be able to stand, without fundamental alteration, the changes in political circumstances as well as the economic and social pressures which may be confronted in the future. This paper, therefore, is written within the framework of these announced decisions and these objectives, as we understand them.

Need for coherence in a legal system

5. At the outset, however, the Commission wish to emphasise the importance which Scots lawyers, in common with many other informed persons, attach to their own legal system and the maintenance of its integrity. This is not solely, or even mainly, because the Scottish legal system, as a language might

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[1] Cmnd. 5460, 1973

[2] Conclusion 177, and paras. 1143-1146.

be, is an important focus of national identity for Scotsmen in general. It is because Scots lawyers, who in their daily practice come into frequent contact with English law and legal institutions, are convinced that their own system is better adapted to Scottish needs and in certain respects, arguably, to those of the United Kingdom as a whole. Scots private and criminal law owes much less to statute than does modern English law. It is true that some of its crucial doctrines were originally derived from Acts of the Scottish Parliament, often embodying principles borrowed from other systems, but these doctrines have for long been integrated into Scots common law. In the modern law of Scotland there are wide areas of the law whose basic principles are untouched by modern legislation, including (in stark contrast with English law) the more important aspects of the criminal law and much of the law of obligations and of property. This is itself a consequence of the success of the Scottish judges in emphasising and developing principle rather than attaching excessive importance to detailed rules evolved, perhaps, in the past against a different and irrelevant background. Equity was never a separate system and equitable remedies have always been integrated into the fabric of the common law. Scots law was never an arcane system of lawyer's law, but was and remains a system grounded closely upon the common sense of the common man. As compared with English law it has a relatively simple and untechnical approach to practical problems. This is illustrated in many fields but in few more strikingly than in the law of procedure. In England, that branch of the law is complex because different classes of rights tend to be enforceable in different classes of action, whereas in Scotland two types of action dominate the procedural scene. The Commission thinks that Scots law is worth preserving and developing, just as those who negotiated the Treaty of Union of 1707 insisted, as is provided in Articles 18 and 19 of the Acts of Union, upon the preservation of the Scottish Courts of Justice and upon the unalterability of its "Laws which concern private Right except for evident utility of the subjects within Scotland".

6. In its approach to substantive law, the law of Scotland is in many respects closer to the civil law systems of Western Europe than to the English legal system, but it shares with that system the basic juristic assumption of the primacy of its common law. The common law of Scotland, as set forth in institutional treatises and judicial decisions, is the core of the legal system and statutes are read as leaving that law unaltered except in so far as they expressly or by implication otherwise provide: even "codifying" statutes, such as the Partnership Act 1890 and the Sale of Goods Act 1893, never supplant that law completely. The common law remains as an important matrix of directing principles and policies which may be relevant to construe the effect of the statute, its territorial application or application to persons, and the ambit of such principles as those of public policy and abuse of rights.

7. At a different level of generality the common law states principles and doctrines which are of crucial importance to the citizen in his daily life. The importance of this segment of the rules of the common law was forcibly and convincingly expressed in 1949 by the late Lord President Cooper. Referring to the enacted laws of Government departments in the sphere of public law and administration he remarked:

> ".... these administrative directions have no better title to be recognised as an integral part of our system of jurisprudence than the current issue of the railway timetable. Accordingly, when we speak of a legal system let us think rather of the body of principles and doctrines which determine personal status and relations, which regulate the acquisition and enjoyment of property and its transfer between the living or its transmission from the dead, which define and control contractual and other obligations, and which provide for the enforcement of rights and the remedying of wrongs. These are the matters which inevitably touch the lives of all citizens at many points from the cradle to the grave, and their regulation is a function of government with which no civilised community can dispense and on the due administration of which the well-being of every society depends." /Selected Papers (Edinburgh, 1957), p. 174/.

8. It is the body of principles and doctrines which compose Scots private law, as well as the corresponding body of principles and doctrines which compose Scots criminal law, which are at the core of the Scottish legal system. Scots law historically has borrowed much from other systems but traditionally has integrated

these borrowings into its own fabric. The Scotish legal system, in consequence, until recently at least, remained a coherent one in which the policies and structure of different branches of the law reflected the policies and structure of the legal system as a whole. The coherence of the Scottish legal system is, we believe, fundamental to its quality, its efficiency and its utility to society. Moreover, without it a judge has no sure guide to the decision of new cases. In novel situations, the judge must draw upon principles from different branches of the law and relate them to the particular facts of the case before him. He can do so only if they are consistent with one another. A legal system is not simply a set of separate rules, but rather a body of principles and doctrines which are inter-related and self-consistent. No branch of any legal system, and particularly of a system whose matrix is the common law, can be effective if developed separately from other branches of the system. It seems important, therefore, to keep clearly in mind this need for consistency when reaching views both on the scope of devolution and on ministerial responsibility for aspects of Scots private law. In what follows we proceed to consider these matters.

PART II: PRINCIPLES OF ALLOCATION OF LEGISLATIVE RESPONSIBILITY

Possible methods

9. We turn, therefore, to the principles upon which legislative responsibility in matters of Scots law should be allocated between the Westminster Parliament and the Scottish Assembly. The White Paper on Democracy and Devolution[1] accepted the principle of a devolutionary constitution, a decision confirmed by Mr Short in the Debate on 3 February 1975. Within such a constitution, the principal methods of distributing legislative powers between the Unied Kingdom Parliament and a Scottish Assembly would seem to be:-

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[1] Cmnd. 5732, 1974.

(a) specification of the transferred powers, residual competence remaining with the United Kingdom Parliament;

(b) specification of the retained powers, residual competence residing in the Scottish Assembly; and

(c) specification of both the transferred and retained powers, residual competence remaining at Westminster.

It is implicit in the scheme of devolution, whatever method of distributing powers is adopted, that the United Kingdom Parliament would retain the right to enact legislation on devolved matters, but as a reserved right subject to conventional restraints and to be exercised only in special situations.

10. We have received little or no guidance from public announcements either as to the principles upon which legislative responsibility will be allocated or as to the scope of the devolved powers. Though, as we have noted, Mr Short announced on 3 February 1975 that the Scottish Assembly "should have a legislative role and legislative power within fields within which separate Scottish legislation already exists"[1], we find it difficult to take this announcement at its face value, because, except possibly in certain areas of public and administrative law, it is based on no discernible principle. It is often merely a matter of accident whether legislation affecting Scotland is contained in United Kingdom enactments or in separate Scottish enactments or, indeed, in both. The decision whether to present a Scotland-only or a United Kingdom measure has not necessarily depended on whether a United Kingdom department or the Scottish Office has promoted the legislation: it has frequently been the result of accidental constraints deriving from the nature of Governmental legislative programmes and the availability of Parliamentary time. Legislative responsibility for aspects of company law affected by the Companies (Floating Charges and Receivers) (Scotland) Act 1972 should not presumably be determined solely by the fact that that Act is a separate Scottish enactment. Conversely, the fact that such United Kingdom enactments

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[1] In an Oral Answer on 3 March 1975 Mr Short repeated: "We are proposing that there should be executive and legislative devolution to Scotland - legislative devolution in the fields in which Scotland now has its own legislation" H.C. Deb. Vol. 887 Col. 1038 (Oral Answers).

as the Guardianship of Infants Acts 1886 and 1925, the Adoption Act 1958, and the Guardianship Act 1973, or, in another area of law, the Criminal Justice Act 1972, contain legislative provisions for Scotland should not by itself entail that legislative responsibility for the subject-matter of those Acts should be retained by the United Kingdom Parliament. We add, however, as we emphasised above, that there are wide areas of the common law of Scotland which have remained very largely untouched by legislation. The Commission would have thought that the absence of Scottish legislation on specific subjects is rather an argument for than against the devolution to the Scottish Assembly of legislative responsibility in relation to those subjects. The Occupiers Liability (Scotland) Act 1960 merely restored what had been the common law of Scotland, and it would be paradoxical if, but for the enactment of this legislation, occupiers liability should not be a devolved subject. The Commission concede that questions relating to the scope of the devolved powers are ultimately a matter for political decision, but consider that it would be inappropriate to come to those decisions without weighing the relevant legal and practical considerations. We proceed to examine these.

Analysis of the Royal Commission's views

11. The Royal Commission[1] preferred specification of the devolved subjects for the following reasons:-

(1) Such a course was (apparently) assumed to produce "the greatest clarity and precision"[2],

(2) While the Report admits that transfer by specification of the retained subjects worked well enough in Northern Ireland[3], nevertheless "regional governments in other parts of the United Kingdom might not always be as ready as was the Northern Ireland Government for almost the whole period of

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1 Kilbrandon Report, paras. 737-745.

2 para. 742

3 para. 739.

its existence to reach accommodation with the United Kingdom Government on matters which might become the subject of dispute"[1].

(3) The need for periodic adjustment of the distribution of legislative competence (because of new matters arising, such as atomic energy and space exploration, requiring central finance and control, and increased constraints imposed by international conventions and the EEC) and the difficulty which would arise if the United Kingdom Parliament required frequently to take back powers already transferred.[2]

12. These arguments require careful consideration. First:

(1) If a relatively wide series of powers are to be conferred upon the Scottish Assembly, the specification of transferred matters would be less likely to minimise arguments about their scope than the specification of retained matters. This point may appear to be an elementary one but, because of its importance, we develop it later.

(2) It is a matter of political judgment whether or not the device of specifying the retained subjects would not work as well in relation to Scotland as it did in relation to Northern Ireland. A devolutionary system of its nature must assume a degree of co-operation between the governments or executives concerned, the development of sensible constitutional conventions, and a desire to make the system work. It is arguable, however, that the absence of friction between the Northern Ireland Government and the Westminster Government may be imputed, at least in part, to the facts that the retained powers were specified and not the devolved powers, that the devolved powers were extensive, and that the United Kingdom Parliament, though permitted to intervene in devolved matters, did so with circumspection and after consultation with the Northern Ireland Government.

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1 para. 742

2 para. 743

(3) There is some force in the third argument but it is not by any means conclusive. We are not convinced that the need to meet new problems of legislative competence would arise sufficiently frequently to cause embarrassment by the need for the United Kingdom Parliament to resume powers already granted. The problems specific to the European Communities arise whatever the choice of devolution device. They would certainly arise under a system specifying the devolved powers because, apart from such areas as family law and succession, it is difficult to think of any area of legislative responsibility which may not in the long run be affected by law emanating from or initiated by the Communities. The existence of Community Law, therefore, presents problems whatever the method of devolution.

The solution in the Government of Ireland Act 1920

13. Under the Northern Ireland constitution of 1920, all Westminster statutes extended to Northern Ireland unless the province was excluded by a territorial extent clause or by implication. The subordinate status of the Northern Ireland Parliament was secured by the following rules[1]:-

(a) the legislative sovereignty of the U.K. Parliament is undiminished;[2]

(b) the Northern Ireland Parliament could not alter or repeal the constituent Act or any post-devolution U.K. statutes[3];

(c) Northern Ireland Parliament statutes are void if repugnant to post-devolution U.K. statutes extending to Northern Ireland[4];

(d) the Governor must comply with directions by the Crown to withhold the Royal Assent.[5]

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1 See Lawrence, The Government of Northern Ireland (1965) p. 28.

2 Government of Ireland Act 1920, s. 75.

3 Ibid., s. 6.

4 Ibid., s. 12(1), (2)

5 Ibid., s. 12.

14. The 1920 Act, moreover, specified in section 4 certain "limitations" upon the power of the Parliament of Northern Ireland which, apart from a territorial limitation, included limitations in relation to -

(1) The Crown and property of the Crown;

(2) the making of peace and war;

(3) the Armed Forces;

(4) Treaties with foreign States and the Dominions;

(5) Treason, alienage, naturalisation, and domicile;

and various other matters, some of which were later de-reserved. Apart, however, from these limitations, the Parliament of Northern Ireland under the 1920 Act had "power to make laws for the peace, order and good government of Northern Ireland". We consider that there would be substantial advantages in adopting a similar approach in relation to the powers of the Scottish Assembly.

Arguments for the 1920 Act solution

15. In the first place the approach of the 1920 Act has the advantage that the Devolution Act would contain no lengthy list of debatable powers. This would reduce the risk of conflicts between the United Kingdom Parliament and a Scottish Assembly and the difficulties of construing the precise scope of the devolved and retained powers. A list of specifically allocated powers could never be sufficiently precise to preclude political or (if admitted) legal debate. There would be a penumbra of uncertainty in relation to many of the allocated powers, which would require future definition by judicial decision or by legislation. Such legislation would inevitably have the appearance of extending or withdrawing some of those powers. The scope of devolution would remain a matter of political controversy.

16. In the second place, there would be clear advantages from the standpoint of the development of Scots law if the approach of the 1920 Act were adopted. Successive governments have shown themselves to be unable or unwilling to devote Parliamentary time to bills exclusively relating to Scotland, in particular to measures relating to Scots private law. Perhaps the most notorious example of this relates to the law of succession. The legal profession in Scotland sought

legislation in this field from the 1920's onwards, but in spite of the fact that the Departmental Committee had reported[1] on the subject in 1951, it was not until 1964 that the Succession (Scotland) Act found its way into the Statute Book. We accept the submission of the Convention of the Royal Burghs to the Royal Commission on Scottish Affairs[2] that "legislative proposals on which no real political difference exists, and which are necessary for the promotion of Scottish well-being cannot find a place in the /United Kingdom/ legislative programme". It is no answer to this submission to question, as did that Royal Commission, whether the measures in question were uncontroversial. If they had related to England and Wales, our experience suggests that they would have found a place on the legislative programme, whether or not they embodied controversial principles. This problem will remain, perhaps in an accentuated form, unless general legislative responsibility for legal matters relating to Scotland is conferred upon the Scottish Assembly.

17. In the third place, there would be a risk of loss of functional efficiency if there were a division of legislative authority in important areas of private law. We have explained above that the private law of a country is not an assemblage of largely independent acts or rules, but a single and integrated piece of machinery whose component parts must fit in with one another and serve the needs of the machine as a whole. To divide legislative authority for parts of the machine will certainly reduce its efficiency and utility. It might be suggested, for example, that the law of consumer credit should be a reserved matter and the general principles of the law of property (heritable and moveable) a transferred matter. Scots law, however, - subject to limited exceptions - does not at present admit of the creation of securities over moveables while the debtor remains in possession and, if this position were maintained by the Assembly in its legislation relating to the Scots law on moveables but not by Parliament in its legislation relating to the Scots law on consumer credit, there would be a risk of chaos through the adoption of incompatible legislative policies in partially over-lapping areas.

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1 Cmnd. 8144, 1951

2 See Report of the Royal Commission on Scottish Affairs Cmnd. 9212, 1952-1954, paras. 80 and 81.

This would merely formalise and exacerbate an existing situation. The legal profession from time to time has voiced concern regarding the failure of departments in Whitehall to have regard in the preparation of legislation to specific features of Scots law. We are not thinking particularly of what we take to be obvious errors, such as the equation of deposit (which is gratuitous) with bailment (which is not) in the Disposal of Uncollected Goods Act 1952, nor of the strange terminology sometimes used in United Kingdom statutes. The matter is more fundamental; it is simply that the background against which the policy of the legislation is elaborated is that of the common law of England rather than the common law of Scotland. This leads to distortions, such as those apparent in the Guardianship Acts. From a Scottish standpoint, the wider the area of devolution, the more likely it is that legislation will be enacted having regard to the specific needs of Scots law and the more easy it will be to effect harmonisation and approximation with other systems of law where that appears necessary or appropriate.

18. In the fourth place, there would be grave practical difficulties for those concerned with the reform and development of Scots law if important areas of legislative competence in legal matters were reserved to the United Kingdom legislature. Examples of those difficulties could be multiplied, but we may take as an illustration the Prescription and Limitation (Scotland) Act 1973 enacted on the basis of a review of the relevant law by this Commission. The 1973 Act is a measure which prima facie would have been well suited for enactment by a Scottish legislature, since it repeals many pre-Union Acts of the Scottish Parliament in the course of codifying a highly distinctive branch of Scots law. But it affects incidentally a number of other important branches of Scots law such as commercial law, banking law, consumer law, and even the law of employment. The 1973 Act, for example, replaces the former triennial prescription affecting merchants' accounts and wages and salaries under contracts of employment; the sexennial prescription affecting bills of exchange and promissory notes; and the septennial prescription of cautionary obligations. If the 1973 Act had been promoted after devolution in which any one or more of the above branches of Scots law had been reserved to the United Kingdom Parliament, it seems unlikely that the 1973 Act could have been passed by the Scottish Assembly without special enabling powers. It is clear that, if the scope of the legislative responsibilities of the Scottish Assembly

are narrow similar problems will arise in other matters within our Programmes of Law Reform, even in relation to such specifically Scottish topics as the "Legal Capacity of Minors and Pupils" and many aspects of the law of obligations.

19. In the fifth place, we stress the need to have regard to the convenience of persons within Scotland, including its administrators and lawyers. It is at present a constant source of complaint on the part of those concerned with the administration of Scots law that important legislation affecting Scotland may be tucked away in enactments which are otherwise almost wholly concerned with matters of English law[1]. This leads to occasional though pardonable errors, to constant and wasteful expenditure of time and effort, and to consequent frustration and exasperation. Scottish representations on this matter have so far fallen on deaf ears, but a badly thought out division of legislative responsibility would clearly exacerbate the situation and ultimately have political repercussions. Persons within Scotland should be in the position of being able to refer to a Scottish statute book which is sufficiently complete as to make it seldom necessary to refer to extraneous material. In legal matters the consumer is too often overlooked and the creation of a Scottish statute book is a long overdue reform. Its creation would be practicable only if the scope of devolved powers is maximised.

20. In the sixth place, and lastly, we stress again that the devolution device adopted in section 4 of the 1920 Act on the whole worked satisfactorily in Northern Ireland. If there was a case for its adoption in relation to a system so close to that of English law, there is a much stronger case for its adoption in relation to Scotland, whose system of law in many respects differs widely from that of England and Wales.

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1 E.g. Charities Act 1960, c. 58 Schedule 7 Pt. II; Hire-Purchase Act 1964, c. 53; Powers of Attorney Act 1971, c. 27 s. 3; Criminal Justice Act 1972 c. 71 ss. 23, 24, 28-30, 33, 35 and 51; Powers of Criminal Courts Act 1973 s. 58; Health and Safety at Work etc. Act 1974 c. 37 s. 71, 84(2), Schedule 7.

Conclusions as to principles of allocation

21. We conclude that, from our standpoint as a body concerned with keeping Scots law as a whole under review and with promoting its systematic reform, there would be great advantages in providing for the specification of the powers to be retained by the United Kingdom Parliament and, subject to the reservation of ultimate sovereignty to Parliament, conferring upon the Assembly residual legislative competence. The Commission freely concedes that the ultimate decisions are necessarily political, but it is hoped that account will be taken, when these decisions are being reached, of the crucial importance of maintaining the integrity, quality and efficiency of the Scottish legal system.

22. As we see it, the chief objection that is likely to be directed against this approach is that the devolution of legislative responsibility in certain domains of Scots law would be prejudicial to the harmonisation of law throughout the United Kingdom, and an inconvenience to persons in both countries. This argument is most often advanced in the context of commercial law, but there is little empirical evidence that commercial transactions are in fact impeded by differences in the commercial laws of the countries concerned. The Royal Commission on the Assimilation of the Mercantile Laws of the United Kingdom, reporting in 1854 remarked:

> "In the answers we received /s.c. to a questionnaire/ there is a remarkable paucity of evidence as to inconveniences actually experienced; and in dealing with many instances of differences, we have recommended assimilation, not because evils have been traced to the existing state of the law, but because we think it probable that inconveniences may hereafter arise."[1]

The policy which the Commission advocated was not assimilation for the sake of assimilation but assimilation to remove inconveniences experienced or reasonably be anticipated, or to effect a clear and safe improvement in the laws of the United Kingdom. In pursuance of this policy much of the commercial laws of the two countries has been gradually harmonised. We do not think, however, that this process would necessarily be impeded by legislative devolution, since the interests of commerce in Scotland may demand harmonisation. The Companies (Receivers and Floating Charges) (Scotland) Act 1972, which gave effect to proposals made by this Commission,[2] illustrates the proposition that legislation prepared

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1 P.P. 1854-55, 653 at p. 657

2 Cmnd. 4336, Scot. Law Com. No. 14

in Scotland and taking full account of Scottish needs may in fact contribute to the harmonisation on a sound basis of commercial law within the United Kingdom. Moreover, in areas of commercial law where there is likely to be pressue for harmonisation in a European or wider context there are disadvantages in attempting harmonisation or assimilation on a purely United Kingdom basis, not only because such attempts may be premature but also because of the tendency to overlook the particular background of Scots law.

23. In any case, whatever the advantages of harmonisation even in the field of commercial law, these advantages must be weighed against the very real practical difficulties which arise when a branch of a legal system is severed from its roots. For this reason it should not be assumed that the allocation of legislative responsibility for economic or commercial policy in certain areas should necessarily carry with it legislative responsibility for law reform in those areas. A severance of responsibility for the formulation of legal policy in matters of commercial law from responsibility for the formulation of legal policy generally would be little short of disastrous for the legal system.

24. This proposition may be illustrated by reference to one important branch of commercial law, the law of bankruptcy. The bankruptcy law of Scotland takes it shape from, and is inextricably interwoven with, other branches of the private law of Scotland, including the general law of obligations (especially contract), the law of property (moveable and immoveable) including rights in security, the law of trusts, and the law of diligence (or enforcement of debts). It is a branch of the law which illustrates well the essential interdependence of the constituent parts of a legal system. In relation to jurisdiction to adjudicate, the law of bankruptcy must clearly adopt criteria which harmonise with the general criteria of jurisdictional competence within a system. Those of Scotland have always widely differed from those of England. In relation to the facts which are deemed to justify bankruptcy (in English legal language "acts of bankruptcy"), it must be recalled that the law of bankruptcy is complementary to the law of diligence

and must be keyed into that law. It must have regard to other devices, such as administration orders, which may be available in one legal system, and not in another. It must have regard to the nature of the legal "entities" known to the system. Since a partnership is conceded a measure of legal personality in Scots law the rules relating to the bankruptcy of a firm in Scotland are necessarily quite different from those of English law. In relation to the effects of bankruptcy on past transactions, the law of bankruptcy must have regard to the law of property, including such questions, for example, as whether or not third party acquirers in good faith may acquire by prescription a title to the property; but it must also have regard to other branches of the law including the law of diligence as protecting the rights of creditors. In relation to the property which vests in the trustee in bankruptcy the law of diligence is also relevant - the property vesting must almost necessarily be defined with reference to that property of the bankrupt which may be seized in execution of debts. This principle is implicitly recognised by the European Bankruptcy Convention which, despite its emphasis upon the universal application of the law of the State of the bankruptcy, refers to the local law of the property which vests in the liquidator. But other branches of the law may be relevant in this context, including the law of matrimonial property as defining the rights of the creditors of one spouse in the property of the other. In addition the powers of the liquidator must be powers consistent with the general law of Scotland. Bankruptcy, moreover, is at present and, it is thought, must continue to be a judicial process and, accordingly, must be keyed into the procedural law of the system with which it is concerned.

25. These points are elementary but may be overlooked. Enough, it is thought, has been said to show why policy in the law of bankruptcy must be a matter for those concerned with the general legal policy of the system concerned. Similar arguments may be developed in the context of other areas of commercial law including the law of sale of goods and the law of consumer credit. Our general conclusion is clear: that, if there is to be any meaningful devolution of legislative authority in the domain of Scots private law to the Scottish Assembly, the devolved subjects should include most aspects of commercial law, and we cannot conceive that any proposals for devolution would leave legislative responsibility for the general principles of the Scots law of

obligations, including the general principles of the Scots law of contract, elsewhere than with the Scottish Assembly. As we turn in the next part of this Memorandum to questions of ministerial responsibility for Scots law we would emphasise that in our opinion all areas of Scots law which are at present the responsibility of Scottish Ministers should come within the legislative powers of the Scottish Assembly. This, at any rate, is our assumption, and on that view the main question would be what areas of Scots law, and in particular what areas of the private law of Scotland, for which other Ministers are now thought to be responsible, should come within these powers.

PART III: MINISTERIAL RESPONSIBILITY FOR SCOTS LAW UNDER DEVOLUTION

Historical Introduction

26. The arguments which we have developed above in relation to the co-ordination of legislative responsibility for Scots law are at the same time arguments for the co-ordination of administrative responsibilities in relation to it. However, before considering the implications of these arguments, we propose to consider briefly the present structure of ministerial responsibility for Scots law since, arguably, that structure has certain defects which provide lessons for the future. Historically, these defects may be identified as including the failure to establish a single body whose primary duty is to co-ordinate legal policy in matters relating to Scots law, the division of responsibilities in relation to the central areas of Scots law and their uncertain allocation among a variety of government departments whose outlook is largely conditioned by English law.

27. The existing scheme of ministerial responsibility for Scots private law is the product of a history which, though largely unchronicled, is of some importance in the context of devolution. After the creation of the new State of Great Britain and the Union of Parliaments in 1707, a Secretary of State for Scotland was appointed, but after 1745 his duties were devolved upon other Secretaries of State. From 1782 these duties were assumed

primarily by the Home Secretary, who in 1828, took over general authority for matters of policy affecting Scotland. But successive Home Secretaries in practice acted through the Lord Advocate who, in addition to administering the system of criminal prosecutions in Scotland and to advising Departments of State in matters affecting Scotland as a Law Officer of the Crown, promoted bills relating to Scotland and took charge of these in the House of Commons. When the Secretary for Scotland was appointed in 1885, there was no general transfer of power to him from the Home Secretary or other Secretaries of State, but only powers and duties under specific enactments. Shortly afterwards, however, as a result of serious disorders in the West Highlands in which the division of legal and political responsibilities led to procrastination and delay, the Secretary for Scotland[1] had conferred upon him all the powers of a Principal Secretary of State in matters relating to Scotland.

28. The Secretary of State thereafter assumed responsibility for the administration of Scots criminal law and for legislation in relation to it. The Secretary for Scotland Act 1887, while conferring upon the Secretary for Scotland "all powers and duties vested in and imposed on one of Her Majesty's Principal Secretaries of State by any Act of Parliament, law of custom, so far as such powers and duties relate to Scotland", did not have the effect that the Secretary of State exercised exclusive administrative responsibilities in relation to Scotland or its law. In areas already pre-empted by U.K. departments, such a company law - then a matter for the Board of Trade - Westminster departments still exercised policy-making functions, though there was an increasing tendency for committeesin relation to matters of Scots law to be appointed simply by the Secretary of State and for the legislation following upon their reports to be promoted by the Secretary of State or the Lord Advocate. The appointment of the Cullen Committee on the Bankruptcy Law of Scotland in 1908 and the implementation of its report by the Bankruptcy (Scotland) Act 1913 is a good example of this tendency. But the position was never wholly clear and, with the creation from time to time of new Departments of State with interests in subjects forming part of Scots private law, this uncertainty presented difficulties.

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[1] See Secretary for Scotland Act 1887, s. 2.

29. Although section 9 of the Secretary for Scotland Act 1885 specifically reserved "any rights, powers, privileges, or duties vested in or imposed on the Lord Advocate by virtue of any Act of Parliament or custom" an investigation into those powers and duties conducted while the Secretary for Scotland Act 1887 was in course of preparation suggested that, apart from his role as public prosecutor, the Lord Advocate had no powers and duties which were underived from the Home Office.[1] This view may or may not be historically correct. In a Memorandum to the Royal Commission on the Constitution, the Lord Advocate's Department and the Crown Office refer to the transference by the 1885 Act to the Scottish Office of the non-legal functions of the Lord Advocate. The 1887 Act, however, did not clarify the Lord Advocate's role: apart from his duties as public prosecutor his role was largely a matter of informal arrangement with the Secretary of State. This situation was criticised in 1888 by Lord Lothian:

> "It would be very desirable to have the relative position and duties of the Secretary for Scotland and the Lord Advocate placed on a definite footing - the present state of things is very unsatisfactory and perplexing."[2]

This unsatisfactory state of affairs continued. Successive Lord Advocates claimed that, as one of the great Officers of the Crown in Scotland, they possessed original responsibilities of undefined extent in legal matters.[3] Certainly, they have appointed departmental committees and received their reports.[4] But what might be called the "Scottish Office theory" was that the Secretary for Scotland had inherited from the Home Office (with certain exceptions) responsibility for "law and order" and, under this head, had acquired primary responsibility for the civil law of Scotland. The Lord Advocate, on this view, had no original and undelegated responsibilities except in matters related to criminal prosecutions.

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1 Cab. 37/20/36, F. 4, cited by H.J. Hanham, "The Creation of the Scottish Office" 1965 Juridical Review 205 at p. 242.

2 Cited by Hanham, supra, at p. 243.

3 See H.J. Hanham, "The Development of the Scottish Office" in Government and Nationalism in Scotland (Edinburgh, 1969), p. 55.

4 A notable example is the Law Reform Committee for Scotland established by the Lord Advocate in 1954 and remained in being until discharged by him in 1971. More recently, it was the Lord Advocate who, with the Lord Chancellor, appointed the Faulks Committee on the Law of Defamation.

Existing allocation of ministerial responsibility

30. The Lord Advocate was first expressly conceded original responsibilities by a Statement made in the House of Commons by the Prime Minister on 21 December 1972, when the Scottish Courts Administration was created. The Prime Minister said:

> "The Secretary of State for Scotland will continue to be responsible for the general oversight of all branches of the law of Scotland other than those allocated to the Lord Advocate or which are already the responsibility of Great Britain Ministers."[1]

This statement points to the present multipartite division of ministerial responsibility for Scots law. After the consequent transfer of powers the Lord Advocate undertook ministerial responsibility for the general oversight of certain branches of Scots law, all of which were stated to be connected with the administration of justice, including jurisdiction and procedure in civil proceedings, the enforcement of foreign judgments in civil matters other than maintenance, the law of evidence, and the law relating to prescription and limitation of actions. The Secretary of State was to be responsible for the general oversight of all branches of the law of Scotland other than those allocated to the Lord Advocate, or which were already the responsibility of Great Britain Ministers. The Statement explained that the Secretary of State would have unchanged responsibilities, in particular in matters of criminal law, family law (including parent and child, adoption and maintenance) the law of succession and the law relating to land tenure.

Defects in existing allocation of ministerial responsibility

31. The current division of ministerial responsibility between the Secretary of State and the Lord Advocate in matters of private law bears the marks of short-term administrative expediency, although possibly further steps may have been contemplated which would have made the pattern more bgical and satisfactory. However, it is not easy to justify a division of responsibility for questions of prescription and limitation of actions from responsibility for contract or delict, branches of the law in which the effect of the lapse of time on obligations may be crucial. Nor is it clear why the Lord Advocate's responsibilities in connection with the enforcement of foreign judgments should not extend to maintenance orders. It also seems anomalous that, while

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1 Hansard (H.C.) 21 December 1972: Vol. 848 Written Answers Col. 457.

the Lord Advocate is responsible for the supervision of the Scottish Law Commission's programme work, the Secretary of State has ministerial responsibility for the bulk of the law with which the Commission is concerned.

32. It is also apparent from the Statement that there are unspecified areas of Scots law which are still the responsibility of Whitehall Departments. This leads at best to uncertainty and at worst to confusion, particularly as there are some quite extensive areas of Scots law in respect of which responsibility does not appear to have been precisely or publicly defined. We have carried out considerable research with the object of identifying areas of Scots private law, for which Ministers other than the Secretary of State for Scotland and the Lord Advocate claim departmental responsibility, but we assume that similar work will have been done and the results tabulated by those who have more ready access to the necessary sources of information than we ourselves have. The Whitehall Departments which appear to claim the widest responsibilities for areas of Scots private law are the Department of Trade and the Department of Prices and Consumer Protection, but a number of other Whitehall Departments have functions which may produce legislative effects on a large variety of legal relationships under the law of Scotland. This position is not satisfactory, and creates many difficulties and anomalies. It is difficult, for example, to reconcile the responsibility for bankruptcy which, we are told, is vested in the Secretary of State for Trade with the overall responsibility of the Lord Advocate for the law of diligence, with which bankruptcy overlaps. It is equally difficult to reconcile the responsibilities assumed or claimed by the Secretary of State for Prices and Consumer Protection for such matters as the sale of goods, exemption clauses, and consumer credit with the overall responsibility of the Secretary of State for Scotland for the law of contract and the general law affecting moveable property. There are similar incompatibilities between the interest in "products liability" of the Department of Prices and Consumer Protection and that of the Scottish Office in the general principles of the law of delict. It may be said that similar problems arise in England and Wales because, although these Departments are responsible for legal policy in their specific areas and although the Lord Chancellor's Department has certain general

responsibilities, there is no Minister responsible for the co-ordination of legal policy in different areas, that is to say, there is no Minister responsible for the general state of the law of England and Wales. This is true, but it was the object of criticism by Lord Gardiner amongst others in a Debate on Ministerial Responsibility for the Law in the House of Lords in 1971.[1] In relation to Scots law, however, the problem is certainly more serious since, although the concerned Whitehall Departments are familiar with English law and aim to achieve solutions compatible with its structure, they are likely to be unfamiliar with Scots law and so far as we are aware have no Scots lawyers on their staffs. It is not really an answer to this to argue that they may obtain assistance from the Lord Advocate's legal secretaries or from solicitors in the Scottish Office. Their advice may sometimes help to prevent glaring anomalies, but it is unlikely to secure the radical reappraisal of policies elaborated against the background of a different system of private law.

33. It is self-evident that these difficulties would be aggravated under a devolutionary scheme which conferred only limited legislative powers upon a Scottish Assembly. It is not clear that the Scottish department with overall responsibility for Scots law or particular branches of Scots law would have access to the preliminary or confidential papers of the Whitehall Department concerned and, in consequence, the responsible Scottish department would probably be still less able than in the past to influence the direction of United Kingdom law reform. To our minds this points both to the need to maximise the powers of the Scottish Assembly in legal matters and the need to vest responsibility for such matters in a single and strong department of the Scottish executive. Only in this way is the coherent development of Scots law likely to be assured, and its quality and efficiency maintained and improved.

Need for a Department of Legal Affairs

34. It seems clear to us that there is at present a real need, which would be accentuated by devolution, for the creation of what might be called a "Department of Legal Affairs" for Scotland. The desirability of creating a department of this kind was stressed in evidence to the Royal Commission by the Law Society of Scotland and by the Lord Advocate's Department, but on grounds

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1 Lords Debates, 30 March 1971, Vol. 316, cols. 1273-1313.

primarily related to the need to provide for the more adequate administration of the courts in Scotland.[1] The Lord Advocate's Department explained that functions which in England were carried out by the Lord Chancellor's Department were then divided between the Secretary of State, the Lord Advocate, and the Lord President of the Court of Session. They pointed out that this division of authority led to duplication of effort, waste of time, confusion of responsibility, and difficulties at ministerial level of getting clear cut decisions. These difficulties, as we have seen, largely remain, despite the allocation of functions explained in the Prime Minister's Statement of 21 December 1972. The need for the creation of a single department with responsibility for Scottish legal affairs has become more pressing than ever in recent years, having regard to the movement internationally, but especially at a European level, for the harmonisation of matters of private law. The interests of Scots law in the related international discussions do not always find at present effective and co-ordinated expression. Having regard to the expanding frontiers of the interests of the European Communities, the need for mechanisms to secure the adequate expression of these interests will be crucial if the United Kingdom remains within the European Communities and in any event may be important in a wider international context.

35. These different threads of argument would each be re-inforced under devolution. If there is to be any substantial devolution of legislative authority in relation to Scots private law and criminal law, there would be a crucial need to ensure that the general oversight of Scots law is the responsibility of a Scottish Minister with an adequate departmental machinery at his disposal. His Department (which might be called the Department of Legal Affairs) should, we think, have responsibility inter alia:

(1) to ensure that bills presented to the Scottish Assembly by any Minister of the Scottish executive and Private Member's Bills acceptable to that executive are within the legislative competence of the Assembly and are repugnant neither to United Kingdom law nor to the law of the European Communities. The preliminary vetting of vires would presumably be a matter for the sponsoring department, but it is thought that the Department of Legal Affairs would exercise a general oversight and would develop a special expertise;[2]

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[1] Minutes of Evidence, Vol. 5, page 15 (Law Society), page 21 (Lord Advocate's Department).

[2] It is understood that in Northern Ireland the draftsmen adquired a special expertise in this sphere; see Calvert, Constitutional Law in Northern Ireland (1968), p. 268.

(2) to scrutinise all Bills presented to the Scottish Assembly and to examine their implications for other relevant branches of Scots law with a view, in particular, to avoiding anomalies and incongruities;

(3) in relation to the devolved branches of the law, with the assistance of this Commission, to promote law reform, the consolidation of statutes, and statute law revision;

(4) the Department of Legal Affairs might superintend the publication of an annual volume of statutes affecting Scotland and of a series of volumes of Scots statutes revised, and, if appropriate, indices. Use might be made in this connection of materials available from "Statutes in Force";

(5) in addition to these functions in relation to matters within the legislative sphere of the Scottish Assembly, we consider that this Department should have certain duties in relation to Parliament and the United Kingdom Government. To secure as far as possible the general coherence of Scots law in a situation where there is divided legislative and executive responsibility for different branches of it, it seems desirable that the Department should be consulted by United Kingdom Departments which are contemplating legislation applicable to Scotland, whether or not within the devolved sphere. The Department would render advice on such legislation and advice in relation to the policy to be adopted by the United Kingdom at law-making conferences, whether or not the subject-matter of the discussions is devolved;

(6) the Department of Legal Affairs might conveniently co-ordinate Scottish representation within United Kingdom delegations to law-making conferences, whether or not of the European Communities;

(7) the possible allocations of administrative functions to the Department of Legal Affairs would clearly require careful consideration. The analogy of the Lord Chancellor's Office and of European Ministries of Justice suggest that it would be appropriate for the Department to take over responsibility for the administrative functions exercised by the Scottish Courts Administration. It might conveniently provide the administrative assistance required by the legislative draftsmen to the Scottish Assembly.

36. It may at first sight seem anomalous to recommend that a Department responsible to the Scottish executive and through it to the Scottish Assembly should have advisory functions in relation to Departments whose responsibilites are ultimately to the United Kingdom Government. This result, however, flows from the need to service two legal systems within the same unitary State, and we have concluded after much thought that it is a necessary consequence of the form of devolution which we understand to be proposed. A problem similar in kind would arise were the Scottish Department of Legal Affairs a United Kingdom Department owing primary allegiance to the Westminster Parliament. The anomaly would be more apparent than real if the Department's role in relation to the United Kingdom Government were simply an advisory one. It would merely be an aspect of that inter-governmental consultation and co-operation which is a necessary feature of federal and devolutionary constitutions. Such advice, moreover, would relate to questions which are legal and technical rather than political. The Department, it is hoped, would exercise something of the extra-political judgment which, we understand, is not infrequently contributed by the Lord Chancellor's Department in relation to matters of English law. These duties, however, would have implications for the staffing of the Department, to which we now turn.

37. We envisage the creation within the Scottish executive of a Department analogous to the Lord Chancellor's Department, though with a more general sphere of responsibility in the domain of private law and criminal law. Like that Department, and like European Ministries of Justice, it should be staffed by legally-qualified persons of the highest calibre. We accept the view of the Law Society of Scotland, expressed in evidence to the Kilbrandon Commission, that it is inappropriate that governmental policy in matters affecting the core of Scots law should be a matter for non-lawyer administrators. Although these administrators have given devoted service, they "are for the most part not legally qualified and, in accordance with Civil Service practice, rarely remain in charge of (their legal system) functions for longer than three or four years. They consequently tend to lack authority, specialised competence, and continuity".[1] These defects are not always mitigated by the inclusion of

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[1] Written Evidence to the Kilbrandon Commission, Vol. 5, p. 16. Evidence in a similar sense was given by the Lord Advocate's Department, Col. 5, p. 21.

departmental solicitors on policy-making teams, since these solicitors, for the most part, are specialists in the public law "codes" rather than in private law. As we understand it, this position arose as a mere historical accident. The creation of the Scottish Office in 1885 and its later reorganisation were responses to pressures quite different from the need to ensure the oversight and the reform of Scots law. The main concern of the Scottish Office in legal matters has been and quite properly remains in the areas covered by these public law "codes", particularly those associated with local government. There are obvious justifications for such an approach in such fields such as local government, planning, housing, education, fisheries, and the like, where legislation will not affect the central areas of the law. There is no justification for such an approach in relation to the central areas of private law the structure of which can be irreparably damaged by ill-considered legislation and in relation to which a lifetime may be too short a span to acquire a real understanding.

38. We think it important that ministerial functions in relation to the suggested Department of Legal Affairs should be exercised by a person with no other ministerial duties. This seems essential if the appropriate emphasis is to be given to the maintenance and development of the Scottish legal system. It seems desirable, also, that the Minister concerned should not combine responsibility for the administration of the courts with responsibility for public prosecutions. This principle was considered by the Grant Committee[1], and accepted in the Sheriff Courts (Scotland) Act 1971. We think it important, too, that the person concerned should be a lawyer and a lawyer of some eminence in his profession. That he should be a lawyer seems to flow from what we regard as the primary role of the Department, to co-ordinate legislative policy in relation to Scots law. That he should be a lawyer of some eminence in his profession flows not only from the importance of his legislative role, but because, as we have suggested, he should be responsible for the administration of the courts and because, in our view, he should assume the role of the principal Law Officer of the Scottish executive. As such Law Officer he would render the advice to the Scottish executive in situations where in the United Kingdom Government the advice of a Law Officer of the Crown is at present sought. He would also, we envisage, be the proper representative of the Scottish executive in litigation, as is the Lord Advocate at present under the Crown Suits

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1 Cmnd. 3248, 1967, pp. 269-270

(Scotland) Act 1857. It is clear that there is only one Minister marked out by history for this role, and that is the Lord Advocate who as a matter of precedence in the Scottish legal hierarchy stands second only to the Lord Justice-General. We think that, after devolution, the office of Lord Advocate (or Minister for Legal Affairs) would continue to attract the most eminent members of the profession because -

(1) the duties of the office would be important;

(2) they could be discharged largely in Scotland; and

(3) they would not be inconsistent with future practice and preferment in the profession.

39. The recent history of the Westminster Parliament points to the fact that there may not always be a member of the House of Commons qualified professionally and by experience to assume the duties of Lord Advocate. Recently, a Lord Advocate who was not a Member of Parliament was appointed, and was created a Life Peer to enable him effectively to discharge his functions. Though it may be that the contingency of a suitably qualified Law Officer not having a seat is less likely to occur within a Scottish Assembly, consideration must be given to the possibility. Moreover, if the Scottish Assembly is a unicameral one, as we expect, it would not assist to appoint the Lord Advocate a Life Peer. We understand that in the Scottish Parliament the Lord Advocate had a seat ex officio, and we suggest that serious consideration should be given to allowing a Minister of Legal Affairs, who is not an elected member of the Scottish Assembly, to take a seat therein ex officio. Only in this way could it be ensured that, irrespective of the accidents of the electoral system, the person best fitted for the post could be appointed.

The United Kingdom Law Officer

40. If the Lord Advocate were to become the Minister for Legal Affairs in Scotland, consideration would require to be given to the discharge of the Lord Advocate's United Kingdom responsibilities in a devolutionary context. We assume that these would still be of some importance. They would include the advisory functions of a Law Office of the Crown, the representation of the United Kingdom Government in litigation, duties in relation to United Kingdom legislation, (possibly) duties in relation to certain judicial appointments in Scotland and, on certain assumptions relating to control of the

constitutionality of Assembly enactments, a duty to advise the Crown in relation to their vires. We suggest, therefore, that an additional Law Officer of the Crown should be created whom we will call, for ease of reference, the "Advocate-General for Scotland". The Advocate-General would be assisted, as the Lord Advocate is at present, by legal secretaries. Draftsmen would still be required for the Scottish aspects of United Kingdom Bills, and those draftsmen would presumably be attached to the Advocate-General's Office.

Responsibility for Public Prosecutions

41. The conclusions which we have reached in the preceding paragraphs would involve changes in the responsibility for public prosecutions in Scotland. If this responsibility is not to be a matter for the person holding the office of Minister of Legal Affairs in the Scottish executive, it is suggested that it might be discharged by the Solicitor-General. At present, however, while the Lord Advocate is not responsible to the court for the actings as public prosecutor[1], he is responsible to Parliament for those actings as a Minister of the Crown.[2] This principle has in the past been considered important, but it is not easy to see how it could be maintained after devolution. It might be argued that in principle the Minister responsible for prosecutions should be answerable to the legislative organ which enacted the legislation under which a prosecution may be competent. But, on certain models relating to the scope of devolution, this might be both legislatures. It is not easy to see that the person concerned can be a Minister simultaneously in the United Kingdom Government and in the Scottish executive. The answer, possibly, would be to recognise that that person holding office as public prosecutor has a quasi-judicial role, in the sense that he is concerned with the impartial application of the law, whatever the source from which it emanates.[3] On this view he could perhaps be an officer of either administration, but if he is to be a Minister his place would

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1 McBain v Crichton 1961 J.C. 25., per Lord Guthrie at p. 31; Trapp v G. 1972 S.L.T. (Notes) 46, per L.J.C. Wheatley.

2 See Lord Normand, "The Public Prosecutor in Scotland" (1938) 54 L.Q.R. 345 at p. 354.

3 Cf. the conflict in England between the duty of the Attorney-General to act in the interest of justice and his political interests - Shawcross, "The Office of Attorney-General", Parliamentary Affairs, 1953-54.

appear to be in the Scottish Assembly. As an alternative the office of public prosecutor might be non-political, in which case special provisions and safeguards would have to be devised for appointment to and dismissal from that office. In the whole circumstances we are inclined to think that the alternative suggested in the preceding sentence might prove to be the best course to adopt.

PART IV: STATUS OF ASSEMBLY STATUTES AND THEIR REVIEW

Introduction

42. A number of important and difficult problems are associated with the characterisation of the Assembly's legislative power and with the constitutionality of its enactments. These questions cannot be discussed exhaustively in the absence of information concerning the proposed methods and scope of devolution. There are, however, certain problems which may be discussed in general terms including the following:-

(a) the status of the enactments of the Scottish Assembly;

(b) the machinery to control the constitutionality of Assembly Bills before they have received the Royal Assent;

(c) the machinery, if any, for review of the _vires_ of Assembly statutes after they have received the Royal Assent.

We examine each of these topics in turn.

Status of Scottish Assembly enactments

43. The word "devolution", used by the Kilbrandon Report and the White Paper, implies the selection of a particular constitutional model which can be adapted to the Scottish situation with appropriate modifications. Both the Report and the White Paper are silent on the status of the Scottish Assembly's statutes and on the question of their review. In relation to the former, however, the very nature of a devolutionary system implies that, in contrast with a federal constitution where the federal and provincial legislatures are co-ordinate in their respective spheres, the provincial legislature is intended to be subordinate to and dependent upon, the central legislature. The provincial legislature is subordinate because the central legislature retains sovereign power to legislate in the devolved sphere and may have a power of veto. The provincial legislature is dependent because it can at any time be abolished by the central legislature. _A fortiori_ its powers can at any time be diminished by the central legislature. By convention,

however, in devolutionary constitutions, the central legislature does not, without consent, normally legislate on matters devolved to the provincial legislature, because to do so might among other things undermine the latter's authority and lead to its demise. So long as it exists a devolutionary system is therefore de facto not dissimilar to a federal system.

44. While it follows from the subordinate and dependent character of the provincial legislature in a devolutionary system, that its devolved legislative powers are, in a narrow sense, "delegated", the concept of devolution implies that the provincial assembly is a "deliberative legislative body". Its enactments, therefore, must be classed as statutes and not as mere ministerial regulations or local or public authority byelaws. This has implications for the scope and principles of judicial review. In this respect, the constitutions of South Africa and Northern Ireland have tended to follow the principles of federal constitutions, especially that of Canada.[1] The courts, in a federal or devolutionary system, are in general concerned with the limits of the provincial legislature's powers but cannot review the manner of their exercise. Accordingly, the courts are not concerned with the wisdom or fairness or policy of its statutes or even with the possibility of its abuse of legislative power.[2] The provincial legislature in a devolutionary system "may legislate partially or retrospectively; invade rights without compensation; or delegate its authority"[3] unless it is specifically prohibited from taking any of these steps by the constituent act. In principle, the powers of the provincial legislature within its sphere of competence will resemble the powers of the central legislature except perhaps as regards power to levy taxation (which will usually be closely regulated) and power to enact a privative clause, where special considerations apply.

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1 In the leading South African case, Middelburgh Municipality v Gertzen 1914 A.D. 544, the court followed the Privy Council decision in Hodge v R. (1883) 9 App. Cas. 117 (P.C.) (which related to the provincial legislature of Ontario). In the leading Northern Ireland case, Gallagher v Lynn /1937/ A.C. 863, (P.C.) Canadian authority was also relied on.

2 A.G. for Canada v A.G. for Ontario /1898/ A.C. 700 at pp. 712-713; A.G. for Ontario v A.G. for Canada /1912/ A.C. 571 at p. 583; Royal Bank v. The King /1913/ A.C. 283 p. 296; Co-operative Committee on Japanese Canadians v A.G. for Canada /1947/ A.C. 87 at p. 102.

3 Hahlo and Kahn, The Union of South Africa (1960) p. 182.

45. In transposing these principles into any scheme for legislative devolution in Scotland, it seems clear that within its own sphere of competence the Scottish Assembly must in principle be regarded as exercising legislative powers of an autonomous and not of a delegated character. Its enactments will have the effect of repealing or amending United Kingdom statutes within the devolved sphere, and it follows that those enactments must for interpretative purposes be given the status of statutes rather than the status of delegated legislation. This seems inescapable because Assembly enactments will almost certainly affect wide sectors of criminal law and private law, including the law of property. It would be inappropriate to apply to Assembly enactments the tests of delegated legislation and in particular to allow its legislation to be challenged on the grounds:

(a) that it contravenes the rules against uncertainty, unreasonableness, unfair discrimination between classes of citizens, and retrospective operation;

(b) that it infringes the rules prohibiting sub-delegation;

(c) that there was a procedural defect in the course of the legislative process within the Assembly.

As in other devolutionary systems, the only challenge appropriate would seem to be challenge on the ground that the enactment does not fall within the scope of the devolved powers, ie. that the Assembly had acted ultra vires.

Scrutiny of Scottish Assembly Bills

46. The Government is likely to consider various methods of checking the constitutionality of Bills at various stages of their legislative history. It is obviously desirable that such checks should take place at an early stage of the legislative process on the principle that prevention is to be preferred to cure. These checks might include the following:

(a) Before presentation of the Bill

In the case of Bills presented by the Scottish executive and Private Member's Bills which have been given drafting assistance, there would presumably be a consideration of vires by the sponsoring department and by the Department of Legal Affairs.

(b) After presentation of the Bill

When a Bill is presented to the Assembly it would presumably be checked by the Chairman[1] (or Speaker) of the Assembly. It would be his duty to control the deliberations of the Assembly and to define their scope, and it is considered that the Chairman of the Assembly should be empowered to exclude consideration of Bills, or of provisions in Bills, which are *prima facie ultra vires* or to cause them to be referred to a Scrutiny Committee of the Assembly. The Chairman and the Committee would presumably be aided by the clerks of the Chairman's Office. This would represent merely an internal measure of restraint on the part of one of the Assembly's own organs, but there is no reason to think that it would not be an effective device for constitutional control.

(c) After the Third Reading and before Royal Assent

It is understood that in Northern Ireland the Attorney General for Northern Ireland in practice certified the validity of a Bill before its presentation for Royal Assent. We are not convinced that it would be desirable to provide by legislation for the adoption of a similar procedure in relation to Assembly measures, for the reasons developed in the following paragraphs.

47. If the certifying Law Officer were to be an Officer of the Scottish executive, his intervention would largely duplicate the internal measures for control outlined in paragraphs (a) and (b) above. It would also place him in an extremely invidious position because he would require, where appropriate, to declare the measures of his own executive to be *ultra vires*. If, on the other hand, the certifying Law Officer were to be an Officer of the United Kingdom Government, he would be the focus of criticism from the Scottish Assembly and might well be accused, however unjustly, of political bias. Whichever the Law Officer assigned to this role, his intervention would be open to the objections:-

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[1] The Office of Lord Chancellor of Scotland does not seem to have been expressly abolished, though no appointment was made after that of the Earl of Seafield who died in 1730 (Lord Cooper *Introduction to Scottish Legal History*, p. 344. The term "Chancellor" is used in other Scottish contexts to indicate *praeses* or foreman, e.g. of a jury.)

(a) that this decision at this stage in the proceedings could relate only to the Bill as a whole. It would not seem practicable to allow to go forward for Royal Assent only those provisions of a Bill which the Law Officer certified to be intra vires;

(b) that the volume of legislation might preclude the Law Officer from taking a considered decision without the assistance of a considerable staff;

(c) that executive certification would preclude the development of principles of interpretation which would clarify in advance the extent of the devolved powers;

(d) that the certifying Law Officer would be taking a quasi-judicial decision without the benefit of contradictory argument. For this and other reasons, his certificate, in the absence of specific statutory provisions, could have no binding effect upon a court of law: it would merely have the negative effect similar to anterior administrative vetting.

48. It might be said, however, that the Law Officer concerned should have power to refer the matter to a body such as the Judicial Committee of the Privy Council for independent advice. We would not recommend the adoption of such a procedure. The opinion of the Judicial Committee would necessarily be reached on the basis of abstract questions put to it, and its decision on such questions could not prejudice parties in adducing further argument dealing with new and specific objections to the vires of the enactment. In Attorney General for British Columbia v Attorney General for Canada[1] Lord Haldane remarked: "Not only may the question of future litigants be prejudiced by the court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without ascertainment of the exact facts to which it is to be applied". It seems clear, therefore, that any opinion given by the Privy Council to the Law Officer on whether a Bill should go forward for Royal Assent could have no formal binding effect in subsequent legal proceedings. It might, of course, be suggested that the opinion of the Law Officer of the Crown, whether or not fortified by the advice of the Privy Council, should be conclusive of

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[1] [1914] A.C. 153 at p. 162

the vires of an Assembly enactment in the sense of excluding judicial review of Assembly enactments. We consider, however, that any exclusion of judicial review would be undesirable for the reasons which we proceed to develop.

Disadvantages of Judicial Review

49. It is only when an Assembly Bill becomes law that it has direct impact on the members of the public and that the question arises whether a member of the public should be empowered to challenge its constitutionality. This is a difficult subject and if this paper is to be kept within a reasonable compass only the main principles can be discussed.

50. In both federal and devolutionary constitutions the enactments of the provincial legislature are normally subject to judicial review in the ordinary courts of the land. While this does not conclude debate on the matter, it does seem to throw a heavy burden on those who might propose to exclude judicial review. The objections which might be advanced against judicial review would appear to include the following:

(1) The admission of judicial review might be argued to be inconsistent with the concession of legislative authority to a democratically elected Assembly. This argument must proceed on the assumption that a democratically elected Assembly must exercise unlimited powers. If this view is rejected it is seen that, in a devolutionary system, the organs of judicial review are not trespassing upon the domain of a legislature. Then intervention is merely to ensure that the Assembly exercises its allotted role under the constitution.

(2) Judicial review is sometimes said to lead to a "legalistic" and dogmatic approach to the interpretation of constitutions which require adaptation to the changing forces of political and social life. Major social and economic initiatives on the part of an elected legislature may, it is sometimes argued, be stifled by the intervention of non-elected judges. Such an argument might have some force in a constitution which seeks to establish and protect fundamental rights, but has less force in a situation where the question is simply which of two legislative bodies has the power to take those major social and economic initiatives. In any case, we have every confidence that, in a situation where a clash of social or economic

policy emerged in a case involving vires, the ordinary courts of the United Kingdom would appreciate that the canons of interpretation of constitutional documents are not necessarily those appropriate to the interpretation of ordinary legislation.[1]

(3) Other arguments which might be adduced against judicial review are of a more mundane character. It might be argued, for example, that judicial review may lead to the law being uncertain for a considerable period. We concede that the opportunity to challenge the vires of an enactment in court may only arise long after the statute has come into operation, but the enactment effectively operates as law until it is challenged. The objection is not to the certainty of the legislation, but to the possibility of it being declared invalid. But a problem similar in kind would arise if the method of dealing with ultra vires enactments were simply repeal by the United Kingdom legislature. It is also occasionally insisted that the law's delays are such that judicial methods of review of the constitutionality of legislation are out of place. We are not impressed by this objection: it is within our knowledge that the courts in Scotland, when the need arises, can and do dispose of cases with great expedition.

Advantages of Judicial Review

51. The advantages of judicial review are best seen by supposing a decision to disallow it. We consider that a specific prohibition of judicial review would be necessary if the Devolution Act were to specify either a list of devolved powers or reserved powers, or both. The courts, wherever a question of private right or of criminal guilt arose, would be bound to consider in the context of the Act, the formal authority of the legislative provisions which are drawn to its attention.

52. One effect of specific prohibition of judicial review would be to make it impossible for the Devolution Act to provide, as does the Government of Ireland Act 1920 at various points, that provincial legislation so far as

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[1] See Att. Gen. of Ontario v Att. Gen. of Canada [1947] A.C. 127 per Lord Jowitt, L.C. at p. 154.

contravening the limitations of that Act shall be void.[1] The courts could not fail to take notice of the fact that certain types of provision had been declared void by the Devolution Statute itself. Whether it would be practicable to exclude judicial review and simultaneously retain the ultimate sovereignty of Parliament is not a matter on which we care to speculate. What is clear is that if judicial review were specifically excluded, all Assembly statutes would at once take effect automatically as law and the only controls on their vires, apart from administrative vetting and vetting by the Speaker's Office, would be the withholding of the Royal Assent, and subsequent control by the United Kingdom Parliament in the form of subsequent legislation. It may be strongly argued, however, that such procedures should be reserved for use as a last resort in circumstances where confrontation has become unavoidable.

53. If judicial review were excluded it would be necessary, in the first place, for the Westminster Government to require Assembly Bills to be submitted to it and to use freely its power to secure the withholding of the Royal Assent. This would transform what in principle ought to be legal questions as to the extent of the devolved powers into questions dominated by political considerations. The withholding of Assent, whether or not justified in terms of the constitutional arrangements, would be seen as a political act and be vulnerable to the criticism that the United Kingdom Government was judge in its own case. It would lead quickly and unnecessarily to situations of confrontation, between the Scottish executive, or even the Scottish Assembly and the United Kingdom Government. This possibility is best avoided.

54. The second and ultimate control in the absence of judicial review would be the enactment of subsequent legislation by the United Kingdom Parliament. There are both political and practical objections to control by subsequent United Kingdom legislation. It would be liable, clearly, to occasion situations of political confrontation, whether the repeal of the Assembly enactments were express or implied by the terms of subsequent legislation. As a method of policing vires it would be open to the objection that it would be entirely one-sided and would tend to lead to the gradual resumption by the United Kingdom Parliament of legislative powers in the devolved sphere. We imagine that, on

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1 Cf. 1920 Act, s. 4 at end, s. 5(1), s. 6(2) etc.

this ground alone, this method of policing *vires* would attract strong criticism in Scotland. But it is open to other objections of a practical and legal character. It would be a cumbersome way of removing minor provisions which happened to be *ultra vires* and it would be difficult to find Parliamentary time for such legislation, which might well be controversial. From the standpoint, moreover, of persons within Scotland it would mean that the Scottish statute book would be a quite inadequate guide to legislation affecting Scotland. The situation would be particularly complex in cases of implied repeal by inconsistent legislation. The rules of statutory interpretation would then be required to discharge a burden which they are peculiarly ill-fitted to bear and the Scottish citizen would be left uncertain of his rights until the matter had been tested in the courts. The uncertainty which is sometimes said to be associated with judicial review would arise in a situation where the normal safeguards associated with judicial review would be inoperative. For these reasons, it is considered that it would be mischievous to bar judicial review.

55. Positively, the need for judicial review arises in this way:

(1) Assuming that the Devolution Act specifies by list either the devolved or the reserved powers there may inevitably be some doubtful cases.

(2) However careful the official scrutiny of Assembly Bills cases may possibly occur where the Assembly exceeds the powers conferred upon it by the Devolution Act. The experience of devolution in Northern Ireland shows that these cases are likely to be rare, but they may occur, especially if the scope of the devolved powers is limited.

(3) At a practical level the ordinary citizen must be in a position to know whether or not an Assembly enactment is operative as law. If he acts upon it and his action is challenged in court, the judge cannot have recourse to a *non liquet*: he must decide which enactment has primacy or refer the matter to a specialised tribunal for adjudication.

Conferring upon the courts the duty of policing vires would have the advantage of securing respect for the constitutional arrangements embodied in the Devolution Act and help to prevent their constant questioning in a political forum. It would have the advantage, too, from the standpoint of all concerned - politicians, administrators, lawyers, and the citizen - of enabling a body of principles to be developed and acknowledged governing the boundaries of the respective competences of Parliament and the Assembly.

Procedures for Judicial Review

56. On the assumption that the principle of judicial review is accepted, we would stress the importance of using existing procedures wherever possible, although some adaptations of details of procedure may be found appropriate. Proliferation of different types of review procedure should be kept to a minimum, and it is thought that a considerable degree of uniformity in procedures can in practice be achieved whether the case is concerned with -

(a) repugnancy to or inconsistency with EEC law (apart from applications for preliminary rulings);

(b) reduction of a statutory instrument made under a U.K. or Scottish Assembly enactment; or

(c) declaration of the invalidity of an Act of the Scottish Assembly on the ground of inconsistency with the Devolution Statute or any other ground importing ultra vires.

There are a number of existing procedures which might be available in their present or some adapted form and, although there are a number of other less suitable possibilities, it is thought that the field of choice would probably lie amongst the following:-

(a) Direct challenge by Petition or by Action of Declarator or Reduction or, in cases where agreement on the facts proves possible, a Special Case to the Inner House under the Court of Session Act 1868.

(b) Indirect challenge of validity by way of exception or defence in civil or criminal proceedings.

57. It is also important to consider what would be the appropriate forum in cases where the validity of an Assembly enactment was challenged. It would seem appropriate to consider the matter first in the context of Actions of Declarator or Reduction. Actions of Declarator were formerly competent

only in the Court of Session, although by the Sheriff Courts (Scotland) Act 1907 s. 5(1) the jurisdiction of the Sheriff is extended to Actions of Declarator which do not determine the status of individuals. Actions of Reduction remain incompetent in the Sheriff Court, and an Action of Declarator which is in substance a Reduction cannot be dealt with in the Sheriff Court. Serious difficulties might arise, however, not only for the parties but for the government, if an enactment of the Assembly were declared invalid by a decision reached, possibly on inadequate argument, in an inferior court. Having regard, therefore, to the importance of declaratory or rescissory conclusions relating to Assembly enactments, it is thought that there is a case for referring to the Inner House of the Court of Session all questions concerning the validity or invalidity of such enactments, and such procedure would have the advantage of cutting out at least one tier of appeal. The same considerations seem to us to apply also in respect of cases before the Outer House of the Court of Session. We therefore suggest that the most appropriate process in circumstances where there is direct challenge of the validity of an Assembly enactment would be a Petition to the Inner House of the Court of Session or, in cases where agreement on the facts proved possible, a Special Case to the Inner House under the Court of Session Act 1868.

58. It is a more difficult question whether the same approach should be adopted in cases where the issue of illegality arises by way of exception. In principle the defender in a civil action or the accused in criminal proceedings ought to be able to state objections to a deed or decree or enactment in the course of proceedings. This procedure receives a degree of recognition in relation to objections to deeds or writings both in Rule 174 of the Rules of the Court of Session and Rules 50 and 51 of the Rules of the Sheriff Court. We would, however, hesitate to extend this principle to defences in civil actions either in the Outer House of the Court of Session or in the Sheriff Court which impugned the validity of Assembly enactments. It is thought that, having regard to the special importance or such a question, civil actions in which they arise should be sisted to allow proceedings for reduction to be taken in the Inner House of the Court of Session. Similar considerations would apply to proceedings before administrative tribunals, children's hearings etc.

Where such questions arise in criminal proceedings in any Court, whether the High Court, the Sheriff Court or any other Criminal Court, it is considered that procedures should be provided to bring such questions directly before the Inner House of the Court of Session. This would enable all such questions of ultra vires, in whatever proceedings they arise, to be considered and decided in the same court, and such procedure would have the advantage that the original process whether civil or criminal would remain in the court before which it was pending. In criminal proceedings procedure would have to be provided to enable the case to be continued to await the decision of the Inner House of the Court of Session on the question of ultra vires, and it is possible that the procedure provided for references to the European Court from criminal courts in Scotland might provide a helpful analogy.[1] We would emphasise both in relation to civil and criminal proceedings that the details of procedure would most usefully be contained in Acts of Sederunt or Adjournal.

59. In summary, therefore, we conclude that whenever questions of ultra vires arise in any court or tribunal the most appropriate procedure for judicial review would be a Petition to the Inner House of the Court of Session or, in circumstances where agreement on the facts proved possible a Special Case for Opinion and Judgment to the Inner House. Meanwhile the original civil or criminal process would be sisted or continued, as the case might be, and this would enable the court before which the particular case was pending to retain control of the procedure in that court. We do not consider in this paper the general issue of appeal to the House of Lords. An appeal from the Inner House of the Court of Session to the House of Lords would normally be competent on questions of this kind, and it may be thought advisable in constitutional matters to accept the additional delay and expense which an appeal to the House of Lords necessarily involves. The appropriate composition of the Judicial Committee of the House of Lords to hear constitutional appeals of this kind might merit special consideration.

60. A further set of questions relate to title to sue. In the case of a direct challenge to vires by a private litigant it is thought that the ordinary rules relating to title and interest should apply. In addition, however, it is thought that the Scottish law officers both of the Scottish

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[1] In older Scottish practice the Court of Session exercised criminal jurisdiction in respect of forgery, Erskine I.3.21.

executive and of the United Kingdom Government should have by virtue of their offices a title to present or oppose proceedings for Declarator or Reduction of an Assembly enactment or to be parties to a Special Case. The question will undoubtedly arise whether the Court itself should ex proprio motu take notice of the unconstitutionality of an Assembly enactment. If it is provided that an ultra vires enactment is void the Court will necessarily have to take notice of the fact. Again, however, it may be thought appropriate for intimation to be made to the law officers.

61. Whether the challenge is direct or indirect it seems important that there should be Government participation in the proceedings. In Canada early provision was made to secure intimation to the law officers of the Crown of actions raising the issue of the constitutional validity of any Act of the Parliament of Canada or enactments of provincial legislatures and to concede to the law officers the right to be heard. Legislation to this end was passed in Quebec in 1882, Ontario in 1893 and subsequently in most other Provinces. It would seem appropriate to make similar provision in the Devolution Act, in order to ensure that in all cases where the law officers were not already parties they would be able, if so advised, to enter the process and to take part in any proceedings designed to test the vires of an Assembly enactment.

PART V: DEVOLUTION AND THE ROLE OF THE SCOTTISH LAW COMMISSION

62. Section 2(1) of the Law Commissions Act 1965 provides that this Commission is constituted "For the purpose of promoting the reform of the law of Scotland" and section 3(1) of the Act provides among other things that it shall be the duty of this Commission to take and keep under review "all the law" of Scotland "with a view to its systematic development and reform".

63. While it is presumed that wide areas of the law of Scotland will be within the Scottish Assembly's sphere of competence, nevertheless large sectors may remain within the exclusive competence of the United Kingdom Parliament. Such a division of legislative responsibility might be paralleled by a division of administrative and executive functions between United Kingdom and Scottish departments. We have explained in Parts II and III of this paper

that these divisions of responsibility are not likely to facilitate the coherent development of Scots law. They will make it still more difficult for the Commission to fulfil its task of securing the orderly and systematic development of Scots law, but at the same time make its role more important. The White Paper presenting the Government's Proposals for English and Scottish Law Commissions[1] envisaged that the Commissions should be charged with keeping the whole of English and Scots law respectively under review. It follows that in any scheme for legislative devolution the Scottish Law Commission will require to keep under review the law of Scotland as a whole, whether legislative responsibility for any particular aspects of its resides in Westminster or in Scotland.

64. The Commission, therefore, may in carrying out its statutory duties and functions be responsible to two governments which may be of different political complexions. This may present certain difficulties, but the Commission must continue both in theory and in practice to be completely independent of party politics. The maintenance of the widely praised convention that its Chairman should be a judge would continue to underline the point.

65. We suggest that the power to appoint members of the Commission (under section 2) and the powers conferred on the Commission's "parent minister" (under section 3) should be vested in a Minister of one executive (presumably the Scottish executive), who would exercise his powers either jointly with the appropriate Minister dealing with Scottish legal affairs in the other executive, or after consulting that Minister.

66. We consider that individual Ministers of the United Kingdom executive and of the Scottish executive should have power to obtain advice from this Commission under section 3(1)(e) of the Law Commissions Act 1965. Again, this is made possible by the wholly independent position of the Commission.

67. Under section 3(1)(d) of the 1965 Act it is the duty of the Commission "to prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills".

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[1] Cmnd. 2573, 1965.

68. Consolidation is intended to bring together as far as possible in a single statute and in a systematic way all the statute law on a particular subject. In principle, the substance of the law is left unaltered, though the Consolidation of Enactments (Procedure) Act 1949 enables "corrections and minor improvements"[1] to be made and the system of Law Commission recommendations permits slightly greater elasticity. A Joint Committee of both Houses considers whether or not the changes are such that they should be separately enacted by Parliament but otherwise Bills under the 1949 Act, like other Consolidation Bills, enjoy expedited procedures in Parliament. The work of the Scottish Law Commission in the field of consolidation is briefly described in the Preparatory Note to the Commission's Second Programme of Consolidation and Statute Law Revision.[2] Some of it is effected jointly with the Law Commission since most recent consolidation has been concerned with United Kingdom legislation, but a number of purely Scottish consolidations have been effected.

69. The devolution of legislative powers to a Scottish Assembly will clearly present problems. Their nature and gravity will depend largely on the extent of the devolved powers, because a satisfactory scheme of consolidation may make it necessary for the measure to include both retained and devolved subjects. If the extent of the devolved subjects is small, the Scottish Assembly may be able to play only a limited role in consolidation even when, in relation to their extent, the statutes apply to Scotland only.

70. Similar problems arise in relation to statute law revision. Such revision is concerned essentially with the repeal of obsolete or spent enactments, though the preambles to recent Statute Law (Repeals) Acts refer to "certain enactments which are no longer of practical utility". The current work of the Commission in this field is also described in the Preparatory Note referred to above. At present the Commission discharges its duties in relation to Statute Law Revision in two ways. It usually, in co-operation with the Law Commission, proposes a United Kingdom Bill, repealing concurrently with United Kingdom repeals, or England or Wales or Northern Ireland repeals, Scotland only repeals, though any combination of these is possible. Though United Kingdom

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1 An expression defined in section 2 of the Act.

2 Scot. Law Com. No. 27

Bills are preferred, because of shortage of Parliamentary time, recourse may also be had to Scottish Bills. These deal with repeals of United Kingdom provisions restricted to Scotland in their operation, or repeals of enactments affecting Scotland only. It is evident that if the powers devolved upon the Scottish Assembly are restricted, that Assembly will be able to play only a limited role in statute law revision even in relation to statutes which extend to Scotland only.

71. A minor point arises concerning the laying and presentation of the Commission's publications in the United Kingdom Parliament and the Scottish Assembly. At the present time, the Commission's "By Act papers" which are laid before the United Kingdom Parliament consist of the following:-

(i) programmes of law reform (s. 3(1)(b) and 3(2) of 1965 Act);

(ii) programmes of consolidation (s. 3(1)(d) and 3(2));

(iii) programmes of statute law revision (s. 3(1)(d) and 3(2));

(iv) reports containing proposals for reform arising out of the above s. 3(2);

(v) Annual Reports, s. 3(3).

We consider that these papers should be laid before both the United Kingdom Parliament and the Scottish Assembly.

In addition, certain of the Commission's publications appear as Command Papers. These consist of -

(i) reports arising out of remits by ministers and advisory bodies appointed by government (s. 3(1)(e) of the 1965 Act);

(ii) reports arising out of proposals made by members of the public (s. 3(1)(a)); and

(iii) reports arising out of the consolidation of certain enactments.

Presumably there will be facilities for the publication of Command Papers presented to the Scottish Assembly by the Scottish executive on behalf of Her Majesty. Obviously, the Minister who receives a report under s. 3(1)(e) will present the paper to the legislature to which he is responsible. There may be a case for informal arrangements enabling these to be made available to members of the other legislature. The appropriate legislature for presentation of s. 3(1)(a) reports will be determined by the subject matter and can be decided ad hoc, with informal arrangements for making the reports available to the other legislature.

72. We would draw attention to sections 4 (remuneration and pensions of Commissioners) and 5 (staff and expenses) of the 1965 Act which may require some amendment depending on the financial aspects of devolution.

(Signed) J. O. M. HUNTER

CHAIRMAN

Scottish Law Commission
Edinburgh
27 May 1975