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UNITED KINGDOM

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I. OVERVIEW

The United Kingdom is a unitary, not a federal state. The UK experience is, therefore, not that of a federal state. Indeed, a UK National Report on the present theme would have had much less to contribute only a few years ago.

Today, however, there are four relatively distinct separate components of the UK, England, Wales, Scotland and Northern Ireland, with devolved legislative powers to the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly, while the UK Parliament at Westminster in London retains its overall sovereignty over the whole of the UK, and continues to legislate directly for England on all matters, and for Wales, Scotland and Northern Ireland on reserved matters. This devolution of legislative power is *sui generis*, being neither a purely legislative delegation of secondary rule-making power by the Westminster Parliament, as, for example, in the case of local authority by-laws and regulations, nor a purely independent primary law making power granted under a common constitution, as in the case of US State laws; An exception are certain sovereign powers of the Scottish parliament. Additionally, the centuries-old judicial plurality in the UK, in which England and Wales, as one common jurisdiction, and Scotland and (to a lesser extent) Northern Ireland, traditionally enjoyed independent and separate systems of administration of justice and common law sources, a plurality in itself unique and fascinating, was recently substantially reshaped in a major Constitutional reform of the judiciary in the UK. Therefore, the current UK experience, although not that of a federal state, may still be valuable from a comparative perspective, especially in the light of the absence of a detailed written Constitution and the special nature of judicial common law making in the UK component parts. An important early *caveat* must be entered: The devolution of legislative powers and the Constitutional reforms of the judiciary are recent developments and just barely fully operative and it is too early to know what the effect will be of the diverse new institutions and legal regimes, on legal uniformity in the UK.

This paper will look at two distinct forms of plurality of legal sources in the UK:[2]

- Legislative plurality, recently reshaped by the devolution reforms, and
- Judicial plurality in common law making, also recently reshaped by the Constitutional reform of the UK judiciary.

The paper will address the unification and harmonization processes and influences underpinning UK law as a whole:

- The multi-layered Constitutional framework
- The effect of European Courts and Institutions, the uniform development of the common law by UK courts under the stare decisis doctrine, and the transnational development of English common law.

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[2] Constraints of time and space prevent me from discussing in this paper at any length the allocation and effect of secondary or delegated legislative powers in different parts of the UK.

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- The role of legal doctrine and legal culture.

- The role of the Law Commissions, entrusted with law review and legal reform in the UK's constituent parts.

This report has not followed the general reporters' questionnaire as closely as its author might have wished to, because the questionnaire does not fit the emerging situation in the UK as well as it fits other, more truly federal systems.

II. CENTRAL DISTRIBUTION AND EXERCISE OF LAWMAKING POWER

1. *Legislative plurality in the UK-devolution of legislative power*

A significant development in the UK in the last years of the 20th century has been political, economic and legal devolution, first of Scotland, and then of Wales and Northern Ireland. The debate for further devolution of powers within the English counties continues but with no concrete results of any importance to date.[3]

Primary law making for the whole of the UK has been in the hands of the Westminster Parliament in London (hereafter the UK Parliament), since the union of England and Scotland at the beginning of the 18th century, with the Union with Scotland Act 1706 and the Union with England Act 1707.[4] The UK Parliament is constitutionally composed as the Monarch, the House of Lords and the House of Commons. The Monarch remains the UK Head of State after the devolution, and appoints the UK Prime Minister, who selects his cabinet with a free hand, subject, of course, to the consent of Parliament. The House of Lords remains an unelected body, despite recent major reforms, and the way its members should be selected is still hotly debated in the evolution of this reform process. Suffice to note here that the House of Lords functions entirely as a UK legislative chamber and its members do not represent regions in the way that the US Senate represents States or the German *Bundesrat* represents German *Länder*. The House of Commons members are elected in UK-wide general elections, representing their individual constituencies that are dotted all over the UK, without any regional deviations of any kind. Both the members of the House of Lords and the House of Commons are not representing regions and are not in any way connected with devolved bodies, with the exception of House of Commons members from Northern Ireland that can be, simultaneously, members of the Northern Ireland Assembly or, indeed, the Northern Ireland executive.

For legislation to be properly enacted, all three branches of the UK Parliament, i.e., the Monarch, the House of Lords and the House of Commons must assent, in reverse order. The House of Commons decides first, the House of Lords must then assent and the Monarch's assent is the last one before the Act of Parliament can be promulgated. However, after a second rejection of a Bill by the House of Lords, following a complicated procedure, the House of Commons can proceed without the consent of the Lords, under the terms of the Parliament Acts of 1911 and 1949. The second of these Acts, further curtailed the

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[3] The current debate about devolution for English regions cannot be entered into here. It is often linked to the so-called 'East Lothian' question, i.e. Scottish members of the Westminster Parliament having a vote on laws passed by that Parliament exclusively for England. There are, however, eight English Regional Assemblies, besides London, but with no primary legislative powers, described on the official UK government site as follows: 'Voluntary, multi-party and inclusive Regional Assemblies have been established in each of the eight English regions outside London, building on the partnership working arrangements that already existed in some regions between local authorities and regional partners. Assemblies operate within the same boundaries of the Government Offices in the regions and the RDAs. Their constitutions vary from region to region'. See *http://www.communities.gov.uk/citiesandregions/ regional/regionalassemblies/* (last visited 4.9.2008)

[4] [1706 c. 11.]; [1707 c. 7(S).]

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power of the Lords by reducing the time that they could delay bills voted by the House of Commons to a maximum time of one year.

Before the devolution process, which is analyzed below, came into effect, the UK Parliament would legislate in all areas of law for the whole of the UK, i.e., England, Wales, Scotland and Northern Ireland. Although the separateness of the Scottish legal system from English common law, and the separate and largely independent judicial system in Scotland, were preserved after the union in the 18th century, all new legislation for Scotland before the recent devolution had to pass through the UK Parliament. The separateness of Scottish (or Scots) law was, however, always acknowledged in that legislation for Scotland was passed separately from legislation for England and Wales, often with different provisions of a procedural and technical nature to fit it with the special features of Scots law and often with different commencement dates.[5] This practice is likely to continue after the devolution with regard to all legislative measures for Scotland that have been reserved for the UK Parliament (see below).

Primary law making for England and Wales remains in the hands of the UK Parliament, for the time being. As far as Wales is concerned, the Welsh devolution process, analyzed below, may one day in the future lead to greater law-making autonomy for Wales, but Wales remains and is likely to remain firmly integrated into the judicial structure of the English legal system.

Northern Ireland is a special case. Several attempts at devolution of law-making powers to Belfast were made and failed during the province's turbulent political history in the second half of the 20th century, culminating in the devolution process actually in progress and described below. And unlike Wales, Northern Ireland always enjoyed a separate court system. But, like in Wales, the common law in Northern Ireland has always being essentially English in sources and style, with limited exceptions often imposed by the special political problems facing the province.

A. *The Scottish Parliament*

Most important in terms of actual significance and impact in the UK has been the Scottish devolution, with the creation of the new Scottish Parliament, which now sits in its splendid new building in Scotland's elegant capital City, Edinburgh. The main legislation is contained in the Scotland Act of 1998.

This Act gives to the Scottish Parliament sovereign powers to legislate in Scotland, and to confer or remove functions exercisable in Scotland, except in areas reserved for legislation exclusively by the Westminster Parliament.[6] But the ambit of these exceptions can be modified, increased or decreased, by the UK executive, acting as Her Majesty by Order of Council, under a special provision in the Act.[7]

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[5] As an example, the Human Rights Act 1998 came immediately into effect in Scotland but only two years later, i.e. in 2000, in England and Wales.

[6] Section 29 of the Scotland Act 1998 entitled 'Legislative competence', provides the following on the legislative competence of the new Scottish Parliament (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. (2) A provision is outside that competence so far as any of the following paragraphs apply— (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland, (b) it relates to reserved matters, (c) it is in breach of the restrictions in Schedule 4, (d) it is incompatible with any of the Convention rights or with Community law,
(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

[7] Section 30 of the same Act entitled 'Legislative competence: supplementary' provides: (1) Schedule 5 (which defines reserved matters) shall have effect. (2) Her Majesty may by Order in Council make any modifications of Schedule 4 or 5 which She considers necessary or expedient. (3) Her Majesty may by Order in Council specify functions which are to be treated, for such purposes of this Act as may be specified, as being, or as not being, functions which are exercisable in or as regards Scotland. (4) An Order in Council under this section may also make such modifications of (a) any enactment or prerogative instrument

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Importantly, the independence of Scots Private law and Scots Criminal law is preserved and enhanced by the Scotland Act, as the Scottish Parliament is given powers over these matters even in areas reserved for Westminster, unless the rule in question is special to a reserved matter.[8]

Matters of Constitutional importance reserved for Westminster include freedom of trade in the UK guaranteed by the Union with Scotland Act 1706 and the Union with England Act 1707;[9] certain provisions of the European Communities Act 1972;[10] the provisions of the Local Government, Planning and Land Act 1980 on designation of enterprise zones;[11] the provisions of the Social Security Administration Act 1992 on rent rebate and rent allowance subsidy and council tax benefit;[12] the Human Rights Act 1998, which implemented in the UK the European Convention of Human Rights, which first came into force in Scotland.[13]

Other reserved matters, on which the Scottish Parliament has no legislative powers, are defined by Schedule 5 of the Scotland Act. These include, first, several aspects of the UK constitution, namely, the Crown, including succession to the Crown and a regency, the Union of the Kingdoms of Scotland and England, the Parliament of the United Kingdom, the continued existence of the High Court of Justiciary as a criminal court of first instance in Scotland and of appeal, and the continued existence of the Court of Session as a civil court of first instance and of appeal. Even the determination of the remuneration of judges[14] of the Court of Session, sheriffs principal and sheriffs, members of the Lands Tribunal for Scotland, and the Chairman of the Scottish Land Court is a reserved matter. This shows that, despite the traditional independence of the Scottish legal system recognized in the devolution legislation, all matters relating to the tenure and remuneration of judges, important for judicial independence from party politics, are reserved as matters of UK Constitutional importance. Significantly, however, Her Majesty's prerogative and other executive functions, functions exercisable by any person acting on behalf of the Crown, or any office in the Scottish Administration are not reserved,[15] showing the extent of devolved executive power to the Scottish executive. Other reserved matters include the registration and funding of political parties, foreign affairs, such as international relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organizations, regulation of international trade, and international development assistance and co-operation. But observing and implementing international obligations, obligations under the Human Rights Convention and obligations under Community law, are tasks for the devolved Parliament, showing the significant extent to which the new Scottish Parliament can legislate in these areas.[16] Public service reserved matters include the Civil Service of the State, but exclude amending the Sheriff Courts and Legal Officers (Scotland) Act 1927, on the appointment of sheriff clerks and procurators fiscal etc., allowing the Scottish Parliament powers to change the way frontline judicial offices are designed and fulfilled. Defense matters are also reserved.

In relation to financial and economic matters, besides fiscal, economic and monetary policy, including the issue and circulation of money, taxes and excise duties, UK government borrowing and lending, the

(including any enactment comprised in or made under this Act), or (b) any other instrument or document,— as Her Majesty considers necessary or expedient in connection with other provision made by the Order.

[8] Or the subject-matter of the rule is interest on sums due in respect of taxes or excise duties and refunds of such taxes or duties, or the obligations, in relation to occupational or personal pension schemes, of the trustees or managers.

[9] Articles 4 and 6 of the Union with Scotland Act 1706 [1706 c. 11.] and the Union with England Act 1707 [1707 c. 7(S)].

[10] [1972 c. 68.]—Section 1 and Schedule 1, Section 2, Section 3(1) and (2), Section 11(2).

[11] Paragraphs 5(3)(b) and 15(4)(b) of Schedule 32 [1980 c. 65].

[12] Sections 140A to 140G [1992 c. 5].

[13] [1998 c. 42].

[14] Head L, Schedule 5.

[15] Section 2 (1) of Schedule 5.

[16] Always, however, *praeter* and not *contra* the Constitutionally entrenched European Convention: see *infra*, in the text.

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currency, other reserved matters include the regulation of financial services, investment business, banking and deposit-taking, collective investment schemes and insurance, the financial markets, including listing and public offers of securities and investments, the transfer of securities and insider dealing as well as the law on money laundering. The law of business associations i.e., the creation, operation, regulation and dissolution of all types of business associations,[17] is also reserved. The definition of "business association" includes 'any person (other than an individual) established for the purpose of carrying on any kind of business, whether or not for profit'; and "business" includes the provision of benefits to the members of an association'.[18] All aspects of insolvency law are also reserved, such as the modes of, the grounds for and the general legal effect of winding up, and the persons who may initiate winding up, liability to contribute to assets on winding up, powers of courts in relation to proceedings for winding up, arrangements with creditors, and procedures giving protection from creditors. Competition law remains in the province of the UK Parliament, regarding the regulation of anti-competitive practices and agreements, abuse of dominant position, monopolies and mergers.

Regulations of professions such as architects and auditors is also reserved for the Westminster Parliament but, significantly, not the regulation of particular practices in the legal profession for the purpose of regulating itself or the provision of legal services. This exception recognizes the historical independence and differences of the legal professions in the constituent parts of the UK. Central UK legislative competence is further reserved in another important area of commercial law, i.e., intellectual property law, and, perhaps inevitably, in the light of wide EU harmonization, consumer protection law, including product liability, product standards and safety.[19] Telecommunications, postal services and internet services law, including electronic encryption are also reserved. In the field of energy supply, legislative regulation of nuclear energy, electricity, coal, and more controversially, oil and gas is largely reserved. The same is true for road, rail, air, and marine transport.

In the sphere of general private law and social policy, and against a background of the historically distinct evolution and independence of Scottish private law already mentioned, a number of significant issues are matters reserved for the Westminster Parliament. The list begins with social security law, including national insurance, provision of benefits, pensions, allowances, grants, loans and any other form of financial assistance, child support, occupational and personal pensions. Other significant reservations are employment law, employment rights and duties and industrial relations, and equal opportunities. Health and safety law is also reserved, with several important aspects of modern medical law, such as regulation of medicines, abortion and xenotransplantation, embryology, surrogacy and genetics.

B. *The Welsh Assembly*

With the Government of Wales Act 2006, the Welsh Assembly was granted power to make laws, which, at the present stage, and before a constitutional referendum envisaged by the Act is held to strengthen devolution, are called 'Measures of the National Assembly of Wales'.[20] An Assembly Measure 'may make any provision that could be made by an Act of Parliament'[21] However, the power of the United

[17] Excluding particular public bodies, or public bodies of a particular type, established by or under any enactment, and, significantly, charities.
[18] Section C1
[19] Excluding food, agricultural and horticultural produce, fish and fish products, seeds, animal feeding stuffs, fertilizers and pesticides, in relation to which Scottish self-regulation was long established before the devolution.
[20] Section 93 (1), entitled 'Assembly Measures', provides: 'The Assembly may make laws, to be known as Measures of the National Assembly for Wales or Mesurau Cynulliad Cenedlaethol Cymru (referred to in this Act as "Assembly Measures")'. After the referendum envisaged in section 103 is held and shows a positive result, the Assembly may (Section 107 (1) entitled ' Acts of the Assembly') 'make laws, to be known as Acts of the National Assembly for Wales or Deddfau Cynulliad Cenedlaethol Cymru (referred to in this Act as "Acts of the Assembly").
[21] Section 94(1)

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Kingdom to make laws for Wales is retained,[22] and, as in the case of Scotland, it is made clear in the 2006 Act that a provision of an Assembly Measure applies only in relation to Wales.[23]

Unlike in the case of the Scottish Parliament, which, as already shown, has a residual legislative competence in all matters other than those reserved for the UK Parliament, the areas of legislative competence of the Welsh Assembly are set out in Part 1 of Schedule 5 of the Act,[24] mainly covering areas that are usually left to local government regulation, with the addition of powers in relation to the distinct cultural and linguistic heritage of Wales. As there never was a separate legal system in Wales like there was in Scotland, and as English Private and Criminal Law always applied in Wales, and as English Law Courts always had common jurisdiction over England and Wales, there was no scope for granting to the Welsh Assembly any general competence over private or criminal law matters.

Besides, however, the areas of competence set out in the list in Schedule 5, Part 1 of the 2006 Act, the Welsh Assembly may submit to Her Majesty a draft Legislative Competence Order (LCO) for approval in Council, after the consent is obtained of both UK Houses of Parliament, adding a new area of competence to the list, in a procedure laid down by Section 95 of the Act, entitled 'Legislative competence: supplementary'. The power to submit a draft LCO adds a certain dynamic to Welsh devolution as it allows the Welsh Assembly to actively engage in new areas of legislative policy in Wales. This is already pursued with a certain enthusiasm by Welsh political leaders in the Assembly.

C. *The Northern Ireland Assembly*

In the troubled history of Northern Ireland, devolution finally arrived when, in 2007, the Northern Ireland Act of 1998 was given effect by the election of members of the Northern Ireland Assembly, established by the Act. In September 2007 they sat for the first time in their Chamber in Belfast and assumed their legislative powers.
According to the Northern Ireland Act 1998, ' the Assembly may make laws, to be known as Acts'.[25] But it shall be the Secretary of State for Northern Ireland, a UK Government minister, who submits Bills passed by the Assembly for Royal Assent.[26] The usual caveats apply, with regard to European Convention rights, European Community law and, a particularly sensitive issue in Northern Ireland, discrimination against any person or class of person on the ground of religious belief or political opinion.[27] Furthermore, there are lists of excepted[28] and reserved[29] matters. The consent of the Secretary of State is required in relation to a Bill containing a provision which deals with an excepted matter and which is ancillary to other provisions (whether in the Bill or previously enacted) dealing with reserved or transferred matters,

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[22] Section 93 (5)
[23] Section 94 (4) (b)
[24] They are the following: Field 1: agriculture, fisheries, forestry and rural development; Field 2: ancient monuments and historic buildings; Field 3: culture; Field 4: economic development; Field 5: education and training; Field 6: environment; Field 7: fire and rescue services and promotion of fire safety; Field 8: food; Field 9: health and health services; Field 10: highways and transport; Field 11: housing; Field 12: local government; Field 13: National Assembly for Wales; Field 14: public administration; Field 15: social welfare; Field 16: sport and recreation; Field 17: tourism; Field 18: town and country planning; Field 19: water and flood defense; Field 20: Welsh language.
[25] Section 5 (1); section 5 (6) contains the usual proviso 'This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland'. And section 6 (2) (a) provides that the Assembly has no legislative power to make laws that 'would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland'.
[26] Section 14.
[27] Section 6 (2) c, d, e. Also section 7, 'Entrenched enactments', (1), provides that these include the European Communities Act 1972, and the Human Rights Act 1998.
[28] Schedule 2.
[29] Schedule 3.

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or a provision which deals with a reserved matter.[30] In these matters, where consent is given, a Bill to which the Secretary of State has consented cannot be submitted by him for Royal Assent unless he has first laid it before the UK Parliament for information and possible debate.[31] The Secretary of State may decide not to submit for Royal Assent a Bill containing a provision which he considers incompatible with any international obligations of the UK, with the interests of defense or national security or with the protection of public safety or public order; or which would have an adverse effect on the operation of the single market in goods and services within the United Kingdom.[32]

The list of excepted matters in Schedule 2 of the Act starts with the integrity of the status and property of the Crown, the UK Parliament, international relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organizations, and international development assistance and co-operation; the defense of the realm; trading with the enemy; the armed forces of the Crown, war pensions; the Ministry of Defense Police, control of nuclear, biological and chemical weapons and other weapons of mass destruction, dignities and titles of honor, treason (but, significantly, not powers of arrest or criminal procedure), nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area and issue of travel documents. The list also includes taxes or duties under any law applying to the United Kingdom as whole, and national insurance contributions. The appointment and removal of judges of the Supreme Court of Judicature of Northern Ireland, other holders of judicial offices, county court judges, recorders, resident magistrates, justices of the peace, members of juvenile court panels, and coroners; elections, including the franchise, in respect of the Northern Ireland Assembly, the European Parliament and district councils, the registration of political parties, coinage, legal tender and bank notes; nuclear energy and nuclear installations, including nuclear safety, and regulation of activities in outer space.

The list of reserved matters in Schedule 3 includes the conferral of functions in relation to Northern Ireland on any Minister of the Crown, property belonging to Her Majesty in right of the Crown or belonging to a department of the Government of the United Kingdom or held in trust for Her Majesty for the purposes of such a department, navigation, including merchant shipping, but not harbors or inland waters, civil aviation but not aerodromes, the foreshore and the sea bed and subsoil and their natural resources, submarine pipe-lines, submarine cables, domicile, the Post Office, posts (including postage stamps, postal orders and postal packets) and the regulation of postal services. Significantly, it also includes disqualification for membership of the Assembly; privileges, powers and immunities of the Assembly, its members and committees, the criminal law, the creation of offences and penalties, the prevention and detection of crime and powers of arrest and detention in connection with crime or criminal proceedings, prosecutions, the treatment of offenders (including children and young persons, and mental health patients, involved in crime), the surrender of fugitive offenders between Northern Ireland and the Republic of Ireland and compensation out of public funds for victims of crime, the maintenance of public order, including the conferring of powers, authorities, privileges or immunities for that purpose on constables, members of the armed forces of the Crown and other persons, the establishment, organization and control of the Royal Ulster Constabulary and of any other police force (other than the Ministry of Defense Police), the Police Authority for Northern Ireland, and traffic wardens. Also firearms and explosives, civil defense; additionally, all matters, other than those specified in Schedule 2 (above), relating to the Supreme Court of Judicature of Northern Ireland, county courts, courts of summary jurisdiction (including magistrates' courts and juvenile courts) and coroners, including procedure, evidence, appeals, juries, costs, legal aid and the registration, execution and enforcement of judgments and orders, but not bankruptcy, insolvency, the winding up of corporate and unincorporated bodies or the

[30] Section 8.
[31] Section 15.
[32] Section 14 (5).

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making of arrangements or compositions with creditors, and the regulation of the profession of solicitors; import and export controls and trade with any place outside the United Kingdom, financial services, including investment business, banking and deposit-taking, collective investment schemes and insurance, financial markets, including listing and public offers of securities and investments, transfer of securities and insider dealing; regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers; intellectual property; units of measurement and United Kingdom primary standards; telecommunications, wireless telegraphy, Internet services, electronic encryption; xenotransplantation, surrogacy arrangements, human fertilization, human genetics; consumer safety in relation to goods; technical standards and requirements in relation to products in pursuance of an obligation under Community law but not standards and requirements in relation to food, agricultural or horticultural produce, fish or fish products, seeds, animal feeding stuffs, fertilizers or pesticides; environmental protection (emission limits), the environmental protection technology scheme for research and development in the United Kingdom, and data protection.

2. *Plurality Of Judge-Made Law*

The account, above, of the plurality of legislative powers in the recently devolved systems of the United Kingdom does not give a complete picture of legal pluralism in this country. What needs to be added is a note on the plurality of judge-made law because that continues to play a very important role as a primary source of law in all parts of the UK. In most fields of private law, both substantive and procedural, as well as constitutional and administrative law (to a lesser extent), traditional legislative lethargy has surrendered detailed development of the law to the courts of record, under the doctrine of *stare decisis* (see below, section on judicial plurality). Broadly speaking, judge-made law in the UK shows a sharp dividing line between, on the one hand, English common law, applicable in England and Wales and also, despite its separate courts system, in Northern Ireland, and, on the other hand, Scots law, applicable only in Scotland. Origins, tradition, sources, precedent, literature and legal culture of these two are clearly distinct and different, so much so as to make Scots law terra incognita for lawyers in England, Wales and Northern Ireland[33] (although this cannot be said about English common law in Scotland).

The devolution process has arguably consolidated this divide to the extent that, as detailed below, the recently inaugurated UK Supreme Court will have to wear different hats when deciding appeals from different regions. Still, the fact that, for the first time in the UK's legal history, all appeals now converge in London (except Scottish Criminal law appeals that are now firmly domesticated in Edinburgh), where the UK Supreme Court, staffed, as it is, with judges from every part of the UK, deals with them as one, central, last resort jurisdiction is bound to counterbalance this devolution. This could develop into a showcase of how the goal of *e pluribus unum* can be achieved in practice.

3. *Concluding Remarks: What Is Ruled in the Province and What Stays in the Centre?*

There is no easy and quick way out of the labyrinth of devolved and non-devolved legal powers to a landscape, where who has legal powers for what is clearly mapped. But the broad lines of what powers are allocated to the parts and what are reserved for the centre could be drawn as follows:

A. All matters of constitutional, administrative, European and international law are reserved for the UK Parliament and the UK Government. Included are areas of private law that are regulated by European or international law transposed into domestic UK law, such as commercial law, company law and

[33] As an example of a personal experience, I can reveal that my English law students have consistently failed throughout the years of teaching generations of them to identify the Scottish Supreme Court, the name of the legal profession in Scotland, or a single Scots law author or legal journal. They are more likely to have more knowledge of French or Australian law.

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competition law, human rights, and criminal law unified or harmonized in Europe or by international treaty. Employment law is also the responsibility of the Centre, as is pensions law.

In other areas of public law, such as social security law and taxation, Scottish, Welsh and Northern Irish legal bodies are allowed a certain degree of local autonomy, as detailed above. Essentially, income tax is central, UK-wide, and Inland Revenue is the UK Government's agency that collects it. The Scottish parliament can raise some additional taxes for services in Scotland, such as education, health, police and social security. And local authorities all over the rest of the UK raise so-called local council taxes to fund local services, such as schools, the police, roads, and garbage collection. The UK Government does allocate substantial funds to the regional executives and local authorities, and there is a controversy over the size of the Scottish grant from Westminster. To put it rather crudely, the power of the purse certainly lies with the Centre.

B. It is in areas of private law, broadly defined, that devolved parts of the UK have greater competence, provided they are areas not affected by EU legislation, which would be reserved for the Centre.

The Scottish Parliament has competence in areas such as health, education, industry, local government, social work and housing, economic development and transport, criminal and civil law and home affairs, environment, agriculture, forestry and fishing, sport and the arts, unless matters are specifically reserved for the UK Parliament, as detailed above. Scottish private law within the competency of the Scottish Parliament includes the general principles of private law, private international law, the law of persons, the law of obligations, as well as the law of property and succession,[34] and the law of actions. Similar competencies in private law areas have been granted to the Northern Ireland Assembly. The Welsh Assembly has more restricted powers in these areas, depending often, as detailed earlier in this section, on a Legislative Competence Order granted by the Westminster Parliament.

III. THE MEANS AND METHODS OF LEGAL UNIFICATION

1. *The Multi-Layered Constitutional Framework*

As a preliminary, it should be recalled that even before the recent devolution reforms, there were in the United Kingdom three separate legal systems, with distinct sources and court systems.

- English law, applicable in England and Wales;
- Scots law, applicable in Scotland
- The law of Northern Ireland, essentially identical with English law, but often with important divergences enacted by Parliament in view of the special political circumstances of the Northern Ireland provinces.

According to fundamental Constitutional principles, the main sources of the law in the whole of the UK are:

[34] Characteristically, Scots law has only relatively recently caught up with the rest of the UK in important areas of Property and Succession law: The Conveyancing and Feudal Reform (Scotland) Act 1970 modernized heritable securities and created new ways of changing land conditions. The Land Tenure Reform (Scotland) Act 1974 allowed for the redemption of feu duty and the Land Registration (Scotland) Act 1979 provided for a new Land Register where titles to land are given a government-backed indemnity. Many of these matters were already dealt with by a series of major codifications in the rest of the UK in the mid-1920s.

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- Acts of Parliament, i.e. statutes enacted by the Westminster Parliament in London for England and Wales, Scotland, or Northern Ireland, as the case may be. Following the devolution reforms, competent legislative acts of the devolved bodies must be added as sources of law exclusively in the devolved region (see details above).

- Statutory Instruments and subordinate (delegated) legislation, again, issued for England and Wales, Scotland, or Northern Ireland, as the case may be; these are ministerial orders issued under the authority of an Act of Parliament.

- Judicial Precedents, i.e., final decisions of courts of record (known as the common law). The authority of this judge-made law is equal to that of legislation, except that, by reason of the fundamental Constitutional principle of the Sovereignty of Parliament (see also below), the common law gives way to Acts of Parliament that expressly, or by implication, govern a specific matter. The supreme court of record, with authority to change its own precedent and overrule any other court in the land, is the new UK Supreme Court, which since 1 October 2009 has replaced the House of Lords as the supreme appellate jurisdiction in the UK. Yet, and in matters of European law and Human Rights law, the supreme courts of record are the European Court of Justice and the European Court of Human Rights in Strasbourg respectively (the final decisions of which are now binding on UK courts after the introduction of the Human Rights Act 1998)

The UK's constituent legal parts are subject to a multi-layered unification and harmonization process, under principles of UK Constitutional law, EU treaties and the European Convention of Human Rights, which has been fully incorporated into domestic UK law since the enactment of the Human Rights Act 1998.

It is a special feature of UK Constitutional law that there is no written Constitutional text that can be used for the constitutional control of devolved legislative power, in the way that it is in other jurisdictions such as the USA or Germany. The doctrine of sovereignty of the UK Parliament vitiates against the formal recognition of superior legislative authority to a preexisting legislative text. The degree to which this doctrine has been affected by important transfers of sovereignty from Westminster to the EU and the European Convention of Human Rights is hotly debated by scholars and judges. But to the extent that judges as the ultimate arbiters of legality accept, in a Kelsenian sense, the supremacy of certain principles embedded in UK legislation, namely, those that stem from the EU Treaty, the European Convention of Human Rights and European legislation protecting individual rights such as non-discrimination, data protection, consumer safety and the like, or policies such as environmental protection, these principles acquire de facto a superior legislative authority and are increasingly used as Constitutional parameters of legality of legislative and executive action. Formally, the courts in the UK have no jurisdiction to review the constitutionality of Acts of the UK Parliament, because of the doctrine of parliamentary sovereignty. But, as already noted, after the devolution process, the UK Supreme Court has jurisdiction to review the compliance of legislation passed by the devolved law-making bodies with the devolution Acts. The UK Supreme Court, which is, unlike the Judicial Committee of the House of Lords that it replaced, clearly detached from the Upper House of the UK Parliament, could, however, enhance the process of a gradual de facto judicial review of constitutionality of legislative acts, both of the UK Parliament, and of the devolved legislative bodies, as far as respect for the basic individual rights and policies, described above as embedded into UK law, is concerned. It is not impossible to imagine the growth of a UK Supreme Court jurisprudence establishing practices of interpretation of rights and principles of constitutional import, reminiscent of the work of the US Supreme Court in interpreting the US Constitutional amendments to develop a constitutional control of State legislation. This new constitutional reality is already to some extent reflected in a common theme emerging from the devolution legislation, in the lists of matters reserved or excluded from the legislative power of devolved legislative bodies, or the enumeration of entrenched UK legislation that cannot be abrogated or modified, or in provisions that

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legislative acts of devolved bodies must not be incompatible with any of the Convention rights, or Community law, or must not discriminate against any person or class of persons on the ground of religious belief or political opinion. In a historical perspective, these new developments are a significant advance towards a consolidation of the fragmented sources of the UK Constitution into a modern charter of constitutional principles. Let us now take a closer look at those sources.

Formally, and in the absence of a written constitution, the primary sources of constitutional law in the United Kingdom continue to be the same as the sources of legal rules in general, namely:

A. Islation, i.e., Acts of Parliament, legislation enacted by Ministers and other authorities upon whom Parliament has conferred power to legislate, exceptionally, legislative instruments issued by the Crown under its prerogative powers, and, since 1973, legislation enacted by competent organs of the European Communities. Many Acts of Parliament have been enacted which relate to the system of Government. Most topics of Constitutional law have been affected by legislation; constitutional law, unlike, for example, the private law of contract and tort, is mainly statutory law. But the numerous statutes enacted throughout the centuries, from medieval charters to present day Acts of Parliament, can by no means be seen as forming a constitutional code. They do not form part of a systematic exposition of principles or rules, and, unlike in most other contemporary legal systems, they can be formally repealed or altered by another Act of Parliament, under normal Parliamentary legislative procedure. But there are a few statutes, which, although of no different formal status than the other Acts, have special Constitutional significance in the field of civil liberties and individual rights:

The Magna Carta first enacted in 1215, long before the formation of the present state of the United Kingdom, and confirmed on numerous occasions thereafter. It is a Charter setting out the rights of various classes of the medieval communities according to their needs. Famous clauses guarantee judgment by the law of the land or one's peers (jury trial) and that to none justice should be denied (habeas corpus). Today, the Magna Charter is more of symbolic value than actual legal force.

Petition of Right, enacted by the English Parliament in 1628; most important contents include protests against taxation without consent of Parliament and against arbitrary imprisonment.
Bill of Rights and Claim of Right. The first was enacted by the English Parliament in 1689, laying the foundations of the modern constitution by disposing of the more extravagant claims of the Monarchy to rule by prerogative right. Its articles are still part of English law and guarantee that the Monarchy cannot legislate without Parliament's consent. The Claim of Right was enacted by the Scottish Parliament in 1689, with similar provisions.

The Act of Settlement passed by the English Parliament in 1700, providing for the succession to the throne and the independence of the judiciary.

The European Communities Acts implementing the various EU Treaties have introduced a variety of new individual rights into English law, of a constitutional nature. It must be noted that these two Acts are viewed by the British judiciary as having, unofficially, a higher status than ordinary legislation, although, in theory, of equal formal authority with any other Act of Parliament.

The consolidating Treaty of Lisbon, made the Charter of Fundamental Rights of the European Union an integral part of EU law, under a special Protocol attached to the main text of the Treaty. This was considered potentially dangerous to the independence of the common law system of British justice. Accordingly, a separate Protocol has been agreed, under which the Charter has no binding force on any court, and the European Court of Justice no jurisdiction to enforce the Charter in the UK (or Poland, which raised similar concerns) . Since the Human Rights Act of 1998 has incorporated into UK law the European Convention of Human Rights (see below), the exclusion of the EU Charter mainly avoids the

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binding effect of so-called 'social' or 'economic' rights. To that extent, UK Fundamental Rights might not be harmonized with such rights in the rest of Europe. Furthermore, since 1999, the UK and Ireland have had an opt-out right to choose on legislation in the field of civil judicial co-operation – essentially, measures that relate to cross-border civil litigation and family law. So far, the UK has taken part in most civil litigation measures, including small claims and cross-border legal aid, but not measures that deal with divorce and family law. Under the Treaty of Lisbon, this opt-out has been extended to cover police and judicial co-operation, essentially measures that deal with the fight against organized crime and terrorism, cross-border prosecution, and investigation and rights for the individual. Essentially, the UK kept the choice to opt in to measures, such as these, which will bolster individual rights and procedural guarantees, or to adopt only measures which will expand cross-border police powers and investigative activity.

The Human Rights Act (HRA) 1998, incorporating into UK domestic law the European Convention of Human Rights, and other important legislation concerning equality and non discrimination that are regarded as implying an obligation of legislative compliance with fundamental rights now embedded in the UK Constitutional order.
The HRA 1998 was endowed by the UK Parliament with a provision that primary and secondary legislation must be compatible with its provisions. Courts are given the power to review and declare the incompatibility of primary legislation with the HRA, although the doctrine of the sovereignty of Parliament is preserved by an express provision that a judicial declaration of incompatibility is not binding on the parties and does not undermine the validity of the legislation. However, even if these declarations cannot bind the UK Parliament, or the executive as a party to judicial proceedings, recent experience has shown that they carry a lot of weight as expressions of the power of the courts to defend fundamental democratic values of the country. In the words of the UK's greatly respected former Senior Law Lord, Lord Bingham, '[T]he 1998 Act gives the courts a very specific, wholly democratic, mandate' in this connection.

It is noteworthy that this legislation is declared as entrenched in the devolved legislative competences in all the devolution reforms, as is also the legislation establishing the EC Treaties (see above). Also, decisions of the UK Supreme Court on devolution issues arising from action incompatible with either the Human Rights Act or the EC Treaties will be binding on both the legislative and the executive of the devolved parts of the UK.

B. A second important source of UK Constitutional law is judicial precedent, i.e., decisions of the courts expounding the common law or interpreting legislation. This includes, since 1973, the decisions of the European Court of Justice in relation to European Community law, and since 2000 the decisions of European Court of Human Rights in Strasbourg in relation to Human Rights law. An important judicial task is the interpretation of enacted law. Although courts do not have the authority to rule on the validity of an Act of Parliament, they can do so in the case of subordinate legislation, and are always expected to interpret statutes.

Secondary sources of the U.K. constitution are:

a) Custom or constitutional convention, i.e. rules of conduct based upon political, social or commercial custom and recognized by the courts as having binding force.

b) *Lex et consuetudo Parliamenti*, i.e. the law and custom of both Houses of Parliament, the House of Commons and the House of Lords, which both have the inherent power to regulate their own affairs.

c) Doctrinal Writings, of writers of constitutional works of authority (more below).

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Where does this wonderful UK mix of constitutional law sources take us? For a conclusion in this brief survey of the UK constitutional landscape, it must first be observed that written constitutions make it possible for the legal structure of government to assume a variety of different forms. They allow the protection of certain rights of the citizen by placing these rights beyond the reach of the organs of government created by the constitution. Such rights become fundamental or basic rights, which, as in the case of the German Basic Law (*Grundgesetz*), may be designated as being in essence unalterable. A further important goal that can be achieved by a written constitution is that of the separation of powers, legislative, executive, and judicial. The United Kingdom has no written constitution that can implement these tasks and serve as a higher fundamental law. As there is no single written document to serve as the fundamental law of the country and the foundation of the legal system, the position of *Grundnorm* in present day U.K. law is occupied by the legal doctrine of the legislative supremacy of Parliament. What is meant by this doctrine is that there are no legal limitations upon the legislative competence of Parliament. No present Parliament can formally bind its successors. The doctrine of sovereignty of Parliament clearly distinguishes the United Kingdom from those countries in which a written constitution imposes limits upon the legislator and vests ordinary courts or a special constitutional court with the power to decide whether legislative acts are in accordance with the constitution. U.K.'s membership of the European Community, however, has led to a restriction of this doctrine, as Community law must prevail over inconsistent legislation passed by the U.K. Parliament, whether before or after the enactment of the European Community Act 1972. This principle, affirmed by the European Court of Justice with regard to the national law of all member states, was also accepted by U.K. courts. The introduction of the Human Rights Act 1998 has further undermined the traditional supremacy of the doctrine, as already pointed out and as evident in the devolution legislation. Whereas it will be hard for the UK Parliament to act in a way contrary to fundamental legislation, which it has itself declared as entrenched in the legislative powers of devolved legislative bodies, in theory, it still retains absolute sovereignty and power to do so.

2. *The Effect of European Courts and Institutions, the Uniform Development of the Common Law by UK Courts Under the Stare Decisis Doctrine, and the Transnational Development of English Common Law*

The recent major Constitutional reforms in the UK, both in the devolution process and with regard to the system of administration of justice, have not affected the centuries-old stare decisis rule that ensures a strict adherence to the precedent laid down by a superior court, in a hierarchy currently topped by the new UK Supreme Court. Indeed, the inauguration of the UK Supreme Court has removed the last remaining ambiguity as to whether the top UK Court has absolute power to lay down precedent for all UK courts from which it can hear an appeal, as the former separate jurisdiction of the Privy Council on matters of UK law, including devolution matters, has now been abolished.

Stare decisis ensures the maximum effect of at least three different layers of forces of uniform development exercising their gravitational pull on the UK as a whole, at the present time.

A. First, there is the crucial, centralized supervision by the UK Supreme Court of a strictly uniform application of the common law across the UK (except Scots Criminal law), and equally uniform interpretation of statutory law and the exercise of judicial review of administrative action.

Before the inauguration of the new UK Supreme Court, the grip of the House of Lords on the interpretation of all legislation, the judicial review of administrative action and the development of the common law by UK courts in all parts of the UK had already been tightened, after the so-called Practice Statement of 1966, in which the then Lord Chancellor, Lord Gardiner LC, announced that the House of Lords in its judicial capacity would no longer be bound by its own precedent, and concluded with the words that '[T]his announcement is not intended to affect the use of precedent elsewhere than in this House'.

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Thus, the courts below, in all parts of the UK, are bound by the House of Lords' and now the UK Supreme Court's precedent, and cannot change their own. This applies equally to the two major appeals courts in the UK, the (English) Court of Appeal and the (Scottish) Court of Session. The Court of Appeal, the highest court in what the legislation abolished when the new UK Supreme Court became operational, designated as 'The Supreme Court of Judicature', traditionally exercised an important role in consolidating precedent and ensuring discipline in the development of English common law, with a considerable influence also in other jurisdictions in the British Commonwealth. This role had increased in significance after the reforms in the 19th century that finally ended the judicial separation of law and equity, integrating the chancery jurisdiction into the system of a Supreme Court of Judicature, with a single High Court and a Court of Appeal. Focusing exclusively on English law, unlike the House of Lords that had a wider UK remit, the Court of Appeal grew in authority. When Lord Denning returned from a brief spell in the House of Lords to preside over it as Master of the Rolls, he inaugurated a debate on stare decisis in the Court of Appeal, supporting the view that the court ought to have power to review and depart from its own precedent, without House of Lords authority. But in the important case of Davis v Johnson,[35] the House of Lords put beyond any doubt the hierarchical application of the doctrine of stare decisis also to decisions of the Court of Appeal, confirming the authority of the Court of Appeal's own more orthodox judgment in Young v Bristol Aeroplane Co Ltd.[36]

Several judges and observers of the debate on the power of the Court of Appeal to depart from its own precedent without the authority of the House of Lords had concentrated on the implications of such a departure from the doctrine of stare decisis for English law, but the affirmation of the absolute authority of House of Lords to control and alone change precedent had obvious implications for the uniformity of the law in all constituent parts of the UK. Had the Court of Appeal, which, as the sole Appeal Court in England and Wales and Northern Ireland, pronounces exclusively on English law, and which has no jurisdiction whatsoever in Scotland, been granted power to change English law without the intervention of House of Lords, English law would have been allowed to proceed entirely separately from the law of Scotland. By affirming its authority on the Court of Appeal the House of Lords put a stop to this possibility. As the final arbiter of all appeals from all parts of the UK, the House of Lords had always been a fertile forum of exchange of concepts and techniques of English and Scots law. Whenever general principles of significant importance were under consideration, the House would rarely distinguish between the two, although care was always taken to have enough Scots Law Lords on a panel and give them appropriate authority, when hearing a Scottish appeal. But English Law Lords were never prevented from judging a Scottish appeal, and vice-versa. Indeed, some of the most influential developments of English common law have been the work of Scottish Law Lords and Lord Chancellors, of which there were always aplenty in Westminster. In establishing or changing precedent across the UK, the House of Lords had always used indiscriminately appeals from any part of the UK, rarely, if ever, confining its effect to the UK part from which the appeal originated. Characteristically, one of the more celebrated House of Lords judgments, creating the modern law of negligence and one of the most important principles of English tort law, came from a Scottish appeal.[37] Only occasionally, exceptional results would be explained as caused by a special doctrine of Scots law, but even then they would retain their influence on English law.

Will there be an important change now that the new UK Supreme Court has come into existence? As already noted, according to the Constitutional reform legislation passed by the UK Parliament, and in order to avoid a conflict with the aspirations of the devolution process, a decision of the UK Supreme Court, 'on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as a decision of a court of that part of the United Kingdom'. This may imply that,

[35] 1979 AC 264.
[36] [1944] KB 718 CA.
[37] Donoghue v Stevenson [1932] AC 562.

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technically, any such decision should be regarded as having no overall UK effect. In reality, however, it is hard to contemplate that the Supreme Court judges will not use their power, inherited from their predecessors in the House of Lords, to change the law in any part of the UK in a way that allows a common pursuit of an optimal development. Additionally, devolutions issues, in which the Supreme Court will officially decide as a UK court, include important entrenched and reserved matters (described in Part One above), in which UK law as a whole must remain uniform.

B. A second layer of transnational uniformity operating on all UK law exists in the already emphasized superior authority of the EU Court of Justice in Luxembourg (ECJ), and other empowered EU Institutions such as the EU Commission, to make or interpret EU law, on all matters of EU Law; and the superior authority of the European Court of Human Rights in Strasbourg (ECHR), on all matters of the European Convention of Human Rights. ECJ and ECHR precedent is binding on all courts in the UK.

C. A third layer of transnational uniformity affects all UK law as a result of the remarkable extent to which English common law is developed transnationally in all jurisdictions within the British Commonwealth, where close attention and respect is still being paid to important developments in different jurisdictions, even after the almost complete eclipse of the Privy Council's power to hear appeals from the member states of the Commonwealth.

3. *The Role of Legal Doctrine and Legal Culture*

Whereas the sources of the UK's legal systems, especially that of Scotland, after the devolution, are different, legal culture, an important factor of uniformity, is largely the same in all of its parts: it is the common law culture. In this culture, supreme authority in the interpretation of the law is vested with judges, as the leading juris prudentes, not with doctrinal writers. Doctrinal writing is, admittedly, held in greater esteem in Scotland, where the systematic collection of the Institutions of Scottish law by Lord Stair (published in 1683) is an important depository of Scottish law institutions and doctrines. But even in Scotland authority is sought in precedent rather than scholarly opinion.

This fact has affected seriously the extent to which textbook writers and others writing on the development of the law by legislators and courts can influence that development. It has been noticed in other jurisdictions, for example, the US, that textbook writers have exercised great influence in creating and safeguarding the perception of uniformity in American common law, despite the jurisdictional fragmentation into State laws, which escapes to a considerable extent any central federal judicial control. In the UK textbook writers do not have the same impact. However, they are cited across jurisdictional borders. But, usually, these are only writers writing on 'English' law (rather than 'Scottish') or, simply, 'law'.

As already noted above, it is the judges of the UK Supreme Court and of the other courts of record, rather than the scholars, that exercise the greatest influence in the uniform development of the law in the UK. However, judges increasingly cite non-judicial sources in their reasoning, and this enhances the indirect influence of scholarly writing on the development and interpretation of the law. Indeed, the House of Lords had recently even cited the jurisprudence of foreign jurisdictions, common law and European, as well as doctrinal writers from such foreign jurisdictions. Moreover, the integration into all the legal systems of the UK of the jurisprudence of the European Court of Justice and the European Court of Human Rights has increased the indirect authority of scholars writing in these fields. In this way, the unifying influence of these two European courts (and also of the EU Commission legislating or interpreting EU law) is enhanced.

All judges in the UK are recruited from the ranks of experienced practitioners. This applies equally north and south of the English/Scottish border. And while it is true that the legal professions in England, Wales

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and Northern Ireland (barristers and solicitors) are completely separate from the legal profession in Scotland (advocates), with separate historical development and traditions, the reality on the ground is that legal culture is remarkably similar all over the different parts of the UK. In practice, the training, skills and organization of lawyers are generally identical, the only major difference being that in the south, in London, one finds large law firms that do not exist in Scotland. As judges of all jurisdictions across the UK are drawn from the ranks of practitioners, they share a common culture of pragmatism, social and economic awareness and aversion of theoretical and dogmatic constructions. They are also immune from party political pressure since they are not elected, as some judges in the US, for example, are, but are selected on merit by their peers. This culture is conducive to similarity of judicial reasoning and alertness to developments in all parts of the UK and beyond, enhancing uniformity of solutions at the point of delivery of justice, despite the plurality of formal sources of legislative and judge-made law.

4. *The Role of the Law Commissions, Entrusted with Law Review and Legal Reform in the UK's Constituent Part*

The Law Commissions Act 1965 created 'a body of Commissioners, to be known as the Law Commission, consisting… of a Chairman and four other Commissioners appointed by the Lord Chancellor', for the purpose of 'promoting the reform of the law' of England and Wales. The Act provides that the person to be appointed as Chairman shall be a person who holds office as a judge of the High Court, or Court of Appeal, in England and Wales. This Law Commission, with a remit only to review English law, is accompanied by a Scottish Law Commission, created by the same Act, for the purpose of promoting the reform of the law of Scotland.

The function of both Commissions is described by the Act as follows:

'It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernization of the law'. Significantly, the Act provides that the Commissioners' have a duty 'to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions'.

The work of both Commissions has had a significant effect on preserving the coherence and uniformity of English and Scottish law respectively. And although the two Commissions work separately, it can be safely assumed that in their duty to reform the law in the light of the experience of 'other countries' they take into account the current position in the other part of the UK, when making proposals of law reform. Admittedly, and by reason of its broader use in several overseas jurisdictions, it will be more often the case that English law will inspire recommended reforms of Scots law, such as in the law trusts , than vice versa. It remains true that harmonizing the two separate legal systems of England and Scotland is clearly not within either Commissions statutory remit. Still, in the end, the work of these two independent statutory bodies, with membership drawn from eminent academics and practitioners in the two countries, is bound to contribute to the congruence of the two legal systems, as the Law Commissioners are less susceptible to national politics and genuinely concerned with improving the state of the law, if necessary, with the adoption of a foreign idea.

IV INSTITUTIONAL AND SOCIAL BACKGROUND

1. *The UK Supreme Court*

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The UK Supreme Court is the final court of appeal in the United Kingdom of Great Britain and Northern Ireland, except for Scottish criminal cases. There are twelve judges in the UK Supreme Court. The Court will normally only be engaged in appeals on points of law that are not settled but disputed, or if there is a clear need to review and possibly change existing law. The UK Supreme Court hears appeals from any order or judgment of the Court of Appeal in England and Wales, and subject to certain statutory restrictions, directly from a decision of the High Court of Justice in England and Wales. It also hears appeals from any order or judgment of the Court of Appeal in Northern Ireland and again subject to statutory restrictions, direct from a decision of the High Court of Justice in Northern Ireland, as well as, finally, from judgments or certain orders of the Inner House of the Court of Session in Scotland. Criminal appeals are only heard from judgments or orders of the Court of Appeal Criminal Division in England and Wales or the Court of Appeal in Northern Ireland on an appeal to that court, the Courts-Martial Appeal Court on an appeal to that court and the High Court of Justice in England and Wales or of the High Court of Justice in Northern Ireland. Generally, leave to appeal must be granted by the court below or, if refused, by the UK Supreme Court. There are no automatic rights of appeal under UK law.[38] The UK Supreme Court has, significantly, taken over from what was formerly the Judicial Committee of the Privy Council the adjudication of "devolution issues", under the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998. The three devolution Acts contained a significant new rule of precedent with respect to the relative authority of judgments of the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council, which now applies to the judgments of the UK Supreme Court. The Scotland Act 1998, provided,[39] as do the other two Acts in similar provisions, that '[A]ny decision of the Judicial Committee in proceedings under this Act.... shall be binding in all legal proceedings (other than proceedings before the Judicial Committee).' But the number of appeals heard by the Judicial Committee of the Privy Council on devolution issues has been low,[40]

The Constitutional Reform Act 2005 was an overhaul of the UK constitutional order in which a clear separation of powers between the executive, the legislature and the judiciary was created for the first time in British constitutional history. The Act also modified the ancient office of the Lord Chancellor, and provided that the Lord Chancellor, who now carries also the title of Secretary of State for Justice, other Ministers of the Crown and all persons with responsibility for matters relating to the judiciary, or otherwise to the administration of justice, must uphold the continued independence of the judiciary.[41] This independence is strengthened in the Act by granting the chief justice of any part of the United Kingdom' the right to lay before Parliament (or the Scottish parliament, as appropriate) written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom. It is specified that in relation to England and Wales or Northern Ireland, the right belongs to the Lord Chief Justice of that part of the United Kingdom, and in relation to Scotland, to the Lord President of the Court of Session. Under the Act, the appellate jurisdiction of the House of Lords, together with the devolution jurisdiction of the Judicial Committee of the Privy Council, was transferred to the new Supreme Court of the United Kingdom on 1st October 2009.[42] The first members of the Court were 11 of the 12 Lords of Appeal in Ordinary,[43] in office when section 23 of the Constitutional Reform Act came into effect. All judges appointed to the Supreme Court in the future will not be members of the House of Lords and will be called 'Justices of the Supreme Court', and the current Law Lords have ceased to be members of the House of Lords. Significantly, the method of appointment of future members of the Supreme Court is

[38] Unlike the civil law tradition of the right 'to be heard twice'
[39] Section 103(1)
[40] In 2000, when the jurisdiction began, there were 3 such appeals, 10 in 2001, 4 in 2002, 1 in 2003, 4 in 2004 and only 2 in 2005, all from Scotland.
[41] Section 3 (1)
[42] Under Section 23 of the Act, the Court will comprise 12 judges (to be known as "Justices of the Supreme Court"), including a President and Deputy President, appointed by the Queen (the number can be increased by Order in Council).
[43] One did not accept the appointment, creating a vacancy.

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transformed. A special selection commission is established, which must consult senior judges, the Lord Chancellor and, importantly, the devolved executives.[44] The selection "must be on merit"[45] and the commission must ensure that the judges of the Supreme Court between them have knowledge and experience of practice in the law of each part of the United Kingdom.[46] The Lord Chancellor may accept, reject or request the reconsideration of the selection of an individual candidate,[47] not only for lack of merit, but also on the ground that there is not enough evidence that if the person were appointed the judges of the Court would between them have knowledge of, and experience of practice in, the law of each part of the United Kingdom.[48] Thus the Lord Chancellor, this most ancient office of the realm, becomes the guardian of legal plurality in the UK at the highest level.[49] Furthermore, it is declared[50] that the creation of the Supreme Court must not '[to] affect the distinctions between the separate legal systems of the parts of the United Kingdom' and that a decision of the Supreme Court 'on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as a decision of a court of that part of the United Kingdom'.[51] These two provisions are intended to safeguard the existing autonomy of the separate legal systems of different parts of the United Kingdom. The UK Supreme Court will make decisions as a national UK court only on appeals on devolution matters. Indeed, in doing so, it will be the only national UK court of any jurisdiction or level.

From a comparative perspective, these two provisions are particularly interesting. Unlike Supreme Courts elsewhere, e.g., the US Supreme Court, the German *Bundesverfassungsgericht* and *Bundesgerichtshof*, the Swiss *Bundesgericht*, which are visibly guardians of national legal unity, the UK Supreme Court is designed to safeguard the separateness of the legal systems in the country. These other courts are, however, all in countries of a federal structure, whereas the UK, despite the devolution and other current constitutional reforms, remains a unitary state. It appears that while the emphasis in a federal state may need to be placed on a national Supreme Court with visible wide nationwide jurisdiction in order to safeguard fundamental federal unity, the emphasis in a unitary state such as the UK, restructured after extensive devolution of lawmaking power to several constituent parts, needed to be placed on a Supreme Court that safeguards the independence of the legal systems of these parts, preempting federalist demands created by concerns about the Court's impact on such independence. Additionally, it must be taken into account that so-called devolution issues, on which the UK Supreme Court wil decide as a national UK court, include fundamental legal principles of national UK law and legislative texts declared by the devolution acts as entrenched in any acts of the devolved legislative bodies in different parts of the UK.[52]

The UK Supreme Court has inherited the power of the House of Lords, since the Practice Statement of 1966, to overrule existing precedent and lay down new law, also in Scotland, except in criminal matters. It is the only court in the land that can do so. All other courts in the UK must abide by authority laid down by the UK Supreme Court; otherwise their judgments may be held to be *per incuriam* and be reversed. The UK Supreme Court has, in other words, inherited an important function of unifying the law and keeping it uniform across the land. If its final pronouncements must be regarded, officially, as judgments

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[44] Section 27(2).
[45] Section 27(5).
[46] Section 27(8).
[47] Section 29.
[48] Section 30 (2) (c).
[49] In an official statement released on 08 October 2007, Jack Straw MP, the current Lord Chancellor and Secretary of State for Justice, announced that he would adopt the new appointments process for Justices of the new UK Supreme Court with immediate effect, stating: "I believe that it is sensible to adopt the new process from now on. This is because those newly appointed to the Appellate Committee of the House of Lords will spend the majority of their career in the Supreme Court. I will therefore adopt Section 8 of the Constitutional Reform Act on a voluntary basis, as any new appointments made will help to determine the character of the Court".
[50] Section 41 (1).
[51] Section 41 (2).
[52] See, extensively, supra in the text.

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of a court of the part of the UK from which the appeal originated, this function may have been significantly undermined by the Constitutional reform, except in the case of the all too important devolution issues. But the reality on the ground is likely to be different.

2. *Courts in England and Wales, Scotland and Northern Ireland*

The legal landscape in the UK has become richer since the recent Constitutional reforms. By far the greatest diversity exists between Scotland and the other constituent parts of the United Kingdom. Whereas both Wales and Northern Ireland have been granted significant legislative autonomy under the devolution programme of the present Government, Wales is integrated into English common law and the English judicial system, and Northern Ireland, although with a separate judicial system as explained below, is also a jurisdiction where English law applies.

A. *England and Wales, Northern Ireland*

In the birthplace of the common law, the Royal Courts of Justice in London have supervised over the centuries a tightly centralized system of administration of justice in England and Wales. Formerly known as the Supreme Court of Judicature for England and Wales, there is one general court of first instance for civil, commercial and chancery matters, the High Court, one Criminal Court, and the Court of Appeal. But while the courts in Scotland are not affected, after the inauguration of the UK Supreme Court, the Supreme Court of England and Wales is renamed the 'Senior Courts of England and Wales'.[53] This change of name may be explained as based on the need to avoid confusion but can also be seen as removing a certain historical symbolism, and, combined with the statutory requirement that the justices of the UK Supreme Court must between them have knowledge of, and experience of practice in, the law of each part of the United Kingdom, can also be seen as establishing formal parity between the three legal systems of the country.

In Northern Ireland, the formerly named 'Supreme Court of Judicature of Northern Ireland' is renamed to "Court of Judicature of Northern Ireland'.[54]

B. *Scotland*

Scotland traditionally possessed its own 'mixed' legal system, of a civil law and common law origin, distinct legal institutions and separate courts. The Court of Session is Scotland's supreme court in civil and criminal matters. It is both a court of first instance and a court of appeal, with a further appeal to the UK Supreme Court in civil matters only. Its origins can be traced to the early sixteenth century. The court presently consists of judges who are designated 'Senators of the College of Justice' or 'Lords of Council and Session'. The court is headed by the Lord President, the second in rank being the Lord Justice Clerk. The Court of Session is divided into the Outer House and the Inner House. The Outer House consists of 24 Lords Ordinary sitting alone or, in certain cases, with a civil jury. They are a first instance court on civil matters, including cases based on delict (tort) and contract, commercial cases and judicial review of administrative action. The Inner House is the appeal court, but it also has a small range of first instance business. It is divided into two Divisions of equal authority, and presided over by the Lord President and the Lord Justice Clerk respectively. Judges are appointed to the Divisions by the UK Secretary of State for Scotland, not the devolved Scottish executive, after consulting the Lord President and Lord Justice Clerk. Each division is made up of five Judges, and the quorum is three. The two Divisions of the Inner

[53] Section 59 of the Constitutional Reform Act 2005.
[54] Section 59

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House hear cases on appeal from the Outer House, the Sheriff Court and certain tribunals and other bodies.[55]

The High Court of Justiciary hears criminal appeals and serious criminal cases. Trials are held before a judge and jury. The principal judge of this Court is the Lord Justice-General. The Court is based in Edinburgh, but trials can be held in towns and cities all over Scotland. There is no further appeal to the UK Supreme Court in criminal cases, meaning that Scottish criminal law is not subject to a central UK overview.

Finally, the first instance courts of general jurisdiction in Scotland, and civil courts of first appeal, are the Sheriff Courts. For purposes of jurisdiction, Scotland is split into six regions called Sheriffdoms. Each Sheriffdom has a Sheriff Principal who manages the Sheriff courts in his area and hears appeals in civil matters. Within the six Sheriffdoms there are a total of forty-nine Sheriff Courts, with a single judge conducting trials, who is called a Sheriff. Sheriff Courts are trial courts for both civil and criminal matters.

3. *Legal Education and Training*

It is not possible to study Scots law in a Law School anywhere in England, Wales or Northern Ireland. But in Scotland, at least one Law School, at the University of Dundee, offers joint honours degrees in both Scots and English law, and this does attract a small number of students from England and Wales. It would be fairly accurate to state that in the United Kingdom there is no exchange of law students between England and Scotland.

The training and access to the legal profession is clearly separate in Scotland and in the rest of the United Kingdom. But legal practitioners in the two parts of the UK, despite their different professional titles (advocates in Scotland, barristers and solicitors everywhere else), education, training and qualification credentials, are fairly mobile across the border. Significantly, a number of very distinguished House of Lords judges in the recent history of the UK, very influential in the development of English law, have been Scottish Advocates-QCs, sitting with their English, Welsh and Northern Irish brethrens Barristers-QCs, with great ease. This does, of course, imply that the reality on the ground, in terms of the judicial development of core areas of the law across the UK, with the exception of purely domestic Criminal law, is much more one of uniformity rather than separateness, although the tradition wants Scotland to be a separate jurisdiction with no historical or cultural ties with English common law.

4. *Officials and other enforcement agencies*[56]

The UK has only one, UK civil service, run from London. Enforcement authorities (e.g. police) are not run by central government (an exception is the London Metropolitan Police), nor by regional executives, but by local authorities (e.g. Cambridgeshire, Strathclyde), but they all have, of course, a duty to apply UK law. There is no equivalent to the US Federal systems of civil servants and enforcement agencies. Armed forces are national, and there are no local auxiliary military bodies (such as the US National Guards), and the Territorial Army is a national UK body.

V. CONCLUSION

[55]The decisions of the Court of Session are reported in Session Cases (cited as 1999 S.C. 100), Scots Law Times (cited as 1999 SLT 100) and Scottish Civil Law Reports (cited as 1999 SCLR 100).
[56] On the appointment of judges see *supra.*

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At a time when the devolution process and historic constitutional reforms of the entire UK system of justice at the highest level have barely been fully implemented, it is hard to predict how the new constitutional and legislative rules, central mechanisms and structures put in place to preserve the separateness of the UK's legal systems, but also to safeguard the basic unity of UK state law, will perform. More political uncertainty lurks beyond the not so distant horizon with the ruling Scottish National Party's pledge in Scotland to hold a referendum on Scottish complete independence from the United Kingdom. However, and until such a dramatic rupture takes place, it can be safely assumed that the long tradition of centralized legal power and delivery of justice initiated in the British Isles by William the Conqueror, coupled with an equally long common legal culture of all legal professions in the UK, will not easily change, despite constitutional and political reforms. Despite the recently institutionalized, with the devolution processes, plurality of formal sources of legislative and judge-made law in the different parts of the UK, the decisive role of judges, who are more empowered than judges in the civil law tradition as well as more independent from party and community politics than judges in the US and some other jurisdictions is likely to keep the UK ship steady in the potentially turbulent seas of devolved legal development lying ahead. Judicial selection strictly on merit and a common legal culture uniting lawyers in all parts of the UK will shield legal evolution from any atavistic fragmentation on grounds of regional nationalism, as it has always done, even before the Acts of Union in the 18th century. Additionally, large chunks of the law are out of bounds for devolved legislators and judges, including the basic core of fundamental rights, European law, public law and the entire private law, commercial and civil, Scottish Criminal law remains the only historical regional preserve that will continue to escape any check of uniformity.[57]

The challenge for the new UK Supreme Court in deciding appeals on devolution issues will be to map the territory of reserved 'UK Law', a challenge similar to that faced by the US Supreme Court since its inception, to define the boundaries of federal law in the US. In deciding other matters, the challenge for the UK Supreme Court will be to preserve uniformity based on pragmatism and common sense in meeting the legitimate aspirations of the nascent devolved legal systems of the UK, to have their own distinct identities and styles. It will be helped considerably by the fact that the authority, and unifying influence, of the two European courts, the ECJ and the ECHR, has been enhanced by the devolution reforms.[58] And its task will be further facilitated when the English and Scottish Law Commissions continue to produce increasingly converging proposals for law reform in the two countries. So, hopefully, like in the ancient Roman recipe, celebrated by Virgil in his poem,[59] the success of which depended on the masterful mix of the different ingredients into one pleasant sauce,[60] the UK's mix of legal systems will continue to set into a miraculously uniform blend, provided, of course, the master chefs, scholars, practitioners and judges, do not forget their centuries-old cooking skills.

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[57] See the detailed lists of entrenched statutes and reserved matters in Part One, above.

[58] Powder to the guns of those campaigning for a 'Europe of the Regions', instead of the present Europe of sovereign nation-States. Among them was one of the most prominent Scottish intellectuals and politicians, the late Professor Sir Neil McCormick, who had also served as an MEP of the Scottish National Party, which advocates `Independence within Europe' for Scotland.

[59] *it manus in gyrum: paulatim singula vires deperdunt proprias*, *color est e pluribus unus*, *nec totus viridis, quia lactea frusta repugnant*, *nec de lacte nitens, quia tot variatur ab herbis* (*Moretum*, by Virgil).

[60] That (probably) still survives today in the artisan pesto sauce of Genoa.

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