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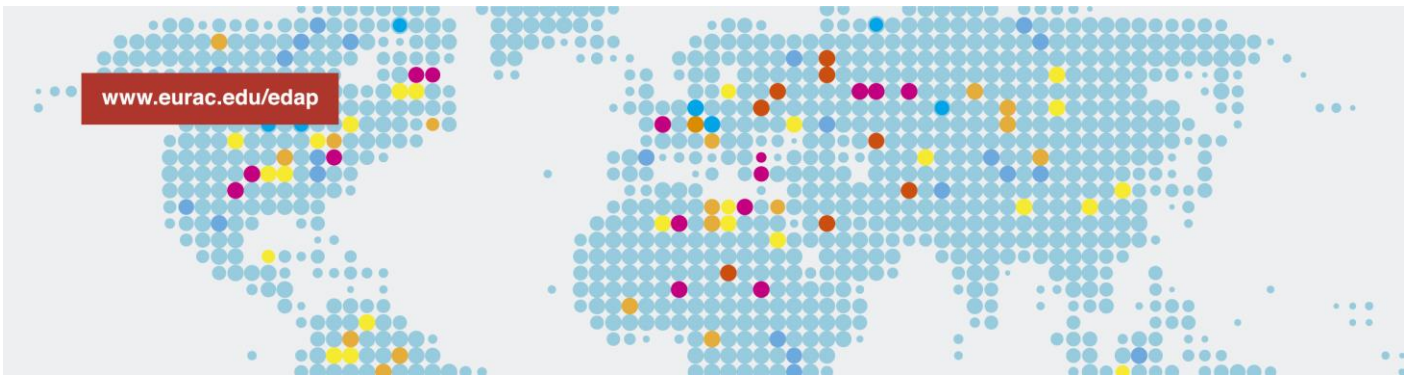
EDAP 01/2019

Devolution in Scotland and the Case Study of the Scottish Higher Education System

Francesca Masetti



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Abstract

The United Kingdom is a unitary parliamentary constitutional monarchy, however Scotland, Wales and Northern Ireland are devolved nations with devolved powers within the UK. This paper focuses on the case of Scotland and analyzes for which reason and in which way Scottish devolution was achieved. Before joining England in 1707, Scotland was an independent country; even after the Union, the country was able to maintain some distinctive features and a certain grade of autonomy, therefore the will of the Scots to obtain more local powers from Westminster. This can be seen as the origin of the devolution of powers which was finally reached in the 1990s in Scotland, after several previous attempts. An important role is played by the Scottish Parliament which can legislate on the matters that are not reserved to Westminster. Beyond historical aspects on devolution, this paper focuses also on the case study of Scottish higher education system as an example of a devolved matter. Several are the differences from the English education system that have emerged after devolution, mostly regarding tuition fees for students.

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Key words

Devolution – Scotland – Devolved powers – Scottish Parliament – Asymmetry – Independence – Scottish higher education system – Tuition fee policy.

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Devolution in Scotland and the Case Study of the Scottish Higher Education System

Francesca Masetti

1. Introduction

Devolution can be defined as "the moving of power or responsibility from a main organization to a lower level, or from a central government to a local government."[1] Starting from this general assumption, this paper will investigate on what devolution means in the context of the United Kingdom and, more specifically, it will focus on the case study of Scotland as a devolved nation with devolved powers within the UK.

In a period in which it is considerably spoken of the UK in the context of the Brexit Referendum and the future exit of the Kingdom from the European Union, these pages will maintain the focus on the United Kingdom, but with a different perspective. In fact, some relevant internal dynamics related to devolution will be analysed, that is the process of decentralization of powers that has been part of British political life for over a century.[2] This transfer of powers has characterised and is still characterising Scotland, Wales and Northern Ireland but the focus will be put on the case of Scotland, because the Scottish Parliament is today "one of the most powerful devolved administrations in the world."[3]

[1] Definition given by The Cambridge Dictionary.
[2] Gay, Oonagh, "Scotland and Devolution". *Research Paper 97/92* (1997), 3, at https://www.researchbriefings.files.parliament.uk/documents/.../RP97-92.pdf
[3] As UK government's Scottish Secretary David Mundell said. See BBC News online: http://www.bbc.com/news/uk-scotland-scotland-politics-36353498

Taking Scotland as an example, the paper explains in which way this country became a devolved nation, and what it means today to have devolved powers.[4] One of the most important concepts that should be taken into consideration while reading these pages, is that devolution should be conceived as a process that has started because of some specific reasons: why did the Scots ask for more autonomy and devolved powers, and which were the elements that made Scotland different from the rest of the UK? After answering this first question, we will analyse the development of devolution throughout the centuries. The aim of this work is to understand what it means for a country to be part of such a process, which powers can be devolved, and which effects can emerge as a result of it: for instance, the Reforms, wanted by the Labour party in the late 1990s, that brought to devolution in the UK, led to a strong asymmetry within the UK. After analysing several historical and political aspects of devolution, the paper explores what it means for the Scottish Parliament, in practical terms, to have devolved matters on which it can legislate. The case study of the Scottish higher education system is taken as an example of a devolved matter.

In a few words, the aim of this work is to present Scottish devolution under different perspectives: from a more theoretical and historical analysis to a practical case study.

2. Scotland before devolution

2.1. Scotland's past: the Act of Union 1707

As Donald Campbell Dewar[5] once said: "Devolution is a process not an event."[6], therefore the intent to show that devolution is not an event that has a definite start and a definite end, but a long process which, in order to be understood, needs to be

[4] See: Jeffrey, Charlie, "Devolution and Local Government", *36 (1) Publius: The Journal of Federalism* (2006), 57-73.

[5] A Scottish politician, who was a strong advocate of devolution. He became the First Minister of Scotland´s first Parliament in 1999. The Editors of Encyclopaedia Britannica, "Donald Campbell Dewar", *Encyclopædia Britannica* (2000), at https://www.britannica.com/biography/Donald-Campbell-Dewar

[6] Towers, Lynda, "Devolution is a process not an event", *Public Law Today* (2017), at http://www.publiclawtoday.co.uk/analysis/304-view-articles/comment-a-analysis-articles/36202-devolution-is-a-process-not-an-event

analysed from the origins to the most recent years.[7] This section will, thus, take account of Scotland's past, focusing on the Act of Union in 1707 and on the features, which have always made Scotland different from the rest of the UK.

The United Kingdom consists today of four countries: England, Scotland, Wales and Northern Ireland.[8] Interestingly, the historico-political fundament of British devolution can be seen in the Acts of Union which led to the birth of the United Kingdom as it is known today[9]; in fact, the UK was formed because four nations (England, Scotland, Wales and Ireland) came together.[10] The way in which these nations joined England differs. This paper, however, focuses on Scotland.[11]

As V. Bogdanor claimed,[12] this union was not achieved through a constitutional document, but through ordinary Acts of Parliament, which abolished the legislatives of the single nations and created one common Parliament, which played the key role in the process of union. This is very important in order to understand the process that brought Scotland from being an independent Kingdom to a country of the United Kingdom, and again to the events of the twentieth century of the devolution of power. It is also necessary to evoke the Treaty (later Act) of Union which gave birth in 1707 to the United Kingdom of Great Britain (and later of Northern Ireland) through the parliamentary union of the Kingdoms of Scotland and England; only in this way it is possible to understand the origins of today's devolution.[13] Torre argued that Scotland presents a political and institutional system that has a strong connection with the past of the country and for this reason it is said that Scotland was "genetically predisposed to devolution".[14]

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[7] See: Mitchell, James, *Devolution in the UK*, (Manchester University Press, Manchester, 2009).
[8] See: Jeffrey, Charlie; Wincott, Daniel, "Devolution in the United Kingdom: Statehood and Citizenship in Transition", *36 (1) Publius: the Journal of Federalism* (2006), 3-18.
[9] Mainardi, Sara, "Il referendum in Scozia: tra devolution e indipendenza", 17 *Federalismi.it* (2014), 4, at https://www.academia.edu/12800274/Il_referendum_in_Scozia_tra_devolution_e_indipendenza .
[10] Bogdanor, Vernon, *Devolution in the United Kingdom* (Oxford University Press, Oxford, 1999), 3. Also available at: https://books.google.it/books/about/Devolution_in_the_United_Kingdom.html?id=KGcs_RMjQIsC&redir_esc=y
[11] For further information about Scotland's history and culture see: Harvie, Christopher, *Scotland: A Short History* (Oxford University Press, USA, 2014).
[12] *Ibid.*, 4.
[13] Torre, Alessandro, "Scozia: devolution, quasi-federalismo, indipendenza?", in 1 *Istituzioni del federalismo* (2013), 154, at http://www.regione.emilia-romagna.it/affari_ist/Rivista_1_2013/Torre.pdf
[14] *Ibid.*, 154.

The Act of Union 1707,[15] after some tensions between the two close but independent kingdoms of Scotland and England, created a "union by incorporation"[16] through the fusion of the Scottish and the English legislatives into one single Parliament at Westminster.[17]

Interestingly, the Treaty created a new kingdom with a new Parliament, while maintaining two different legal systems and two separate state churches.[18]

2.2. Scotland's distinctive features

This incorporation did not prevent Scotland from maintaining some of its distinctive features. A peculiar element of the Union was the fact that the Scottish institutions were able to maintain a certain grade of autonomy[19]; it is claimed, in fact, that the Scots did "co-exist with the English in a unitary state with a common parliament, while at the same time maintaining their national identity."[20] The feeling of belonging to a proper nation, which took shape in the Scottish population of the time, has a strong connection with the ask for more autonomy and for the devolution of powers of the twentieth century (as will be seen in the following section).

What is clear is that, after the union of parliaments of Scotland and England in 1707, the Scots preserved some social institutions such as the Bank of Scotland (instituted in 1696) and the education system (regulated by the Education Act 1696[21]), that were different from the English ones.[22] Furthermore, it must be underlined that the autonomy of the education system was one of the most important aspects of Scotland's

[15] See the Articles of the Union with England Act 1707, at*:* http://www.legislation.gov.uk/aosp/1707/7
[16] As defined in Mainardi, Il referendum in Scozia …, 6.
[17] *Ibid*., 6.
[18] See: Benedikter, Thomas, *The world's working regional autonomies: An introduction and comparative analysis*, (Anthem Press, London, New York, Delhi, 2007).
[19] Torre, Scozia: devolution …, 155.
[20] Bogdanor, Devolution …, 9.
[21] The Education Act has to be considered as the foundation of the modern Scottish education system, and of the four ancient Scottish universities (University of St Andrews, Glasgow, Aberdeen and Edinburgh) which later became the cradle of Enlightenment. Middleton A. R. highlighted the fact that the scholar system born with this Act was characterised by the mixture of the principles of the Protestant Calvinist Reform and Presbyterian dogmas. See: Middleton, Andrew R., "Presbyterianism and Schools. The Education Act of 1696", *Middletom.com*, at http://www.middletome.com/microsoftwordeducationanotabletercentenary.pdf
[22] Torre, Scozia: devolution …, 155.

national identity[23], a topic which is still very interesting today, if considered under the point of view of devolution (this will be analysed in section 4).

After the Treaty, the Scottish Act of Security secured the Church of Scotland (the Kirk) and Presbyterianism as national religion in Scotland, while the Act of Security in England secured the Church of England. The recognition of their state church was highly important to the Scots and it is also thanks to this concession that they agreed to the Treaty.[24]

Even considering Scottish people's rights, what was observed was their autonomous *Claim of Rights* (1689)[25] and not England's *Magna Carta Libertatum* and the later *Bill of Rights*. Still today there are doubts whether the *Human Rights Act 1998* (very important for the English constitutional order) can be automatically applied to Scotland or not.[26]

All these elements were enough, according to Torre, to create a sense of identity in Scotland that could survive despite the incorporation into the United Kingdom. To that may be added a structure of law courts which permitted to preserve the legal system of Scots Law.[27]

The Scottish legal system is an element that continues to make Scotland different from the rest of the UK.[28] It can be said the Scots Law is predominantly codified and with strong origins concerning Roman law[29], thus it presents institutions and sources of law which are closer to the civilian tradition; on the other hand it also presents some similarities to the legal systems in England, Wales and Northern Ireland (which are all systems of common law)[30] as the Scots law was partially influenced by the English

[23] *Ibid.*, 155.
[24] Bogdanor, Devolution …, 11.
[25] The full text can be found at http://www.legislation.gov.uk/aosp/1689/28/contents
[26] Torre, Scozia: devolution …, 155-156.
[27] *Ibid.*, 158.
[28] Articles 18 and 19 of the Treaty of Union carefully preserved Scotland's legal system: the former Article laid down that Scots private law would remain as before the Union, whereas public law would be regulated by Westminster. The latter provided for the preservation of Scotland's different legal system, by guaranteeing the inalterability of the Scottish Court of Session, the Court of Justiciary and the Court of Admiralty and by establishing that English judges would have nothing to do with Scottish lawsuits: the English Courts of Chancery, Queen's Bench, Common Pleas and any other Court were not allowed to decide on any Scots case.
[29] Torre, Scozia: devolution …, 158.
[30] Mainardi, Il referendum in Scozia …, 8.

Common law, whose influence was stronger in Wales and Ireland.[31] [32] Therefore, it is possible to claim that Scotland has a mixed legal system,[33] as there have been influences both from Civil law and from Common Law. However, there is a debate on the balance of the different parts which have built this mixed legal system.[34] Nevertheless, today it is generally accepted that the influence of Civil law tradition has been relevant and that "the civilian element is a 'deep and powerful' one in the Scottish legal tradition".[35]

Moreover, it is argued that the process of devolution proves again the differences and the autonomy of the Scottish and the English legal systems.[36]

2.3. Some considerations

This first section has shown that Scotland has always had a specific institutional and legal system that was the result of a different historic origin and that has made this country different from the rest of the UK, developing a strong sense of identity among the Scots. These distinguishing elements, carefully preserved after the Act of Union of 1707, were maintained in Scotland despite almost three centuries of Westminster's hegemony.[37]

This has to be taken as the starting point when speaking about the process of devolution in the United Kingdom since the second half of the twentieth century. According to Torre, all the devolved matters that, in pursuance of the Scotland Act 1998, were put under the powers of the Scottish legislative, find their origin in the pre-union Scotland and in the protective clauses of the Act of Union.[38] Interestingly, the process of devolution can be seen as the historic and constitutional opposite to the Union in 1707;

[31] Torre, Scozia: devolution …, 158.
[32] William M. Gordon in *Roman Law in Scotland* agrees on the fact that Scots law has had more contact with the European civil law rather than with the English common law, however it can't be denied that there have been influences from Common law, especially since the Union in 1707. Gordon, William M., "Roman Law in Scotland", in Evans-Jones R. (ed.), *The Civil Law Tradition in Scotland* (The Stair Society, Edinburgh, 1995), 13-40, at 13. Also available at: http://iuscivile.com/legacy/reprints/gordon-1.pdf
[33] Palmer, Mixed Jurisdictions Worldwide …, 201.
[34] For more details about it, see: Palmer, Mixed Jurisdictions Worldwide …, 202-203.
[35] *Ibid.,* 203.
[36] Mainardi, Il referendum in Scozia …, 9.
[37] Torre, Scozia: devolution …, 159.
[38] *Ibid.,* 159.

in the same way the Scotland Act 1998 can be seen as the legislative antithesis to the Act of Union 1707. The most important role of these two processes (the one of aggregation and the other one of disaggregation) is played by the Parliament, the legislative power. In both cases, the changes carried out on the Parliament have determined the new structure of the country: in 1707 it was unitary and centralized, later in 1998 it became unitary but devolved.[39]

3. The achievement of devolution in Scotland

3.1 Steps towards devolution

After having considered in section 2 the prerequisites which brought the country to ask for more autonomy and devolved powers, this section will take account of the development of the process of devolution in Scotland.

The nineteenth century saw the need for a new system of local governments connected to the specific policy of the home rule, "in order to give speedier and fuller effect to the special desires and wants of the respective Nationalities constituting the United Kingdom."[40] Therefore, the first motion which demanded more autonomy for Scotland appeared in 1889, as Westminster was not efficient enough and thus "something [was] required to be done to enable the Parliament to discharge its duty to the whole country".[41] Even if this motion was important because it contained the first reference to the idea of devolution, it was rejected; nevertheless, new local bodies were created in Scotland, such as the Scottish Office in 1885 and the Scottish Grand Committee in 1894, with the aim of providing the country with territorial policies.[42] [43] In 1886 also

[39] *Ibid.,* 160.
[40] As cited in Mainardi, Il referendum in Scozia …, 9.
[41] As cited in Mainardi, Il referendum in Scozia …, 9.
[42] Mainardi, Il referendum in Scozia …, 10.
[43] The Scottish Office exercised several government functions under the control of the Secretary of State for Scotland from 1885 until 1999 (when the Scottish Parliament was established). Even if it was under the UK government in London, the Scottish Office's work was firmly rooted in Scotland.
See: Torre, Scozia: devolution …, 159.

the Scottish Home Rule Association was founded: it advocated the need to reform the licensing, land, game and fishery laws.[44]

The debate on the first claims of devolution exploded after the Second World War when the Welfare State[45] expanded and there was need for a change,[46] for modern solution for the government structure of the country.[47] Due to post-war decline of industry and the economic imbalance of the Kingdom, the nationalist parties and their support started growing considerably during the 1960s.[48] This is the case of the Plaid Cymru Party in Wales and of the Scottish National Party (SNP) in Scotland.[49]

Following these events, the Prime Minister Harold Wilson of the Labour Party decided to set up the Royal Commission on the Constitution (also called Kilbrandon Commission) in 1969 with the purpose of considering the possible options for the future of the UK government. The Commission rejected the solution of independence and federalism but proposed devolved assemblies with legislative, executive and advisory powers in Scotland and Wales.[50] Thus, they proposed a form of devolution for Scotland and Wales,[51] defining devolution as "the delegation of central government powers without the relinquishment of sovereignty."[52] [53]

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[44] Gay, Scotland and Devolution …, 7.

[45] See: Keating, Michael, "Intergovernmental Relations and Innovation: From Co-Operative to Competitive Welfare Federalism in the UK", *14 (2) The British Journal of Politics and International Relations* (2012), 214-230.

[46] See also: Birrell, Derek, *United Kingdom: The Impact of Devolution on Social Policy*, (The Policy Press, Bristol, University of Bristol, 2009).

[47] Mainardi, Il referendum in Scozia …, 10.

[48] "Scottish Devolution (1997-9)", in Institute for Government, 73, at: https://www.instituteforgovernment.org.uk/sites/default/files/scottish_devolution_0.pdf

[49] The SNP was founded in 1934 with the union of the National Party of Scotland and the Scottish Party, thanks to the initiative of the student John MacCormick, whose original aim was to secure a Scottish Parliament within the UK, but during the Second World War it also developed separatist tendencies favouring independence. From 1955 the SNP electoral support increased steadily and in 1967 its member Winnie Ewing won in Hamilton by-election. See: Mainardi, Il referendum in Scozia …, 10 and Gay, Scotland and Devolution …, 7.

[50] "Scottish Devolution (1997-9)" …, 74.

[51] For devolution in Wales, see: Williams, David, "Devolution: the Welsh Perspective", in University of Cambridge, Centre for Public Law, *Constitutional Reform in the United Kingdom: practice and principles*, (The University of Cambridge Centre for Public Law, Hart Publishing, Oxford, 1998), 41-49.

[52] As cited in Gay, Scotland and Devolution …, 9.

[53] Noteworthy is also the Memorandum of Dissent of 1973, a minority report written by two dissenting members of the Commission, Lord Crowther-Hunt and Alan Peacock, who supported a scheme for devolution to all the regions advocating the creation of seven elective assemblies in Scotland, Wales and five English regions. Moreover, the report wished for a stronger democratic component at all levels of government. Therefore, Crowther-Hunt and Peacock wanted to underline the fact that the British system was too centralized and a devolution of powers was the only possible solution. Parolari, Sara, *Il regionalismo inglese: the dark side of devolution* (Cedam, Padova, 2008), 9.

Despite these pro-devolution documents, Scotland had to wait other twenty years before seeing a considerable turning point. In fact, the conservative Heath government decided not to follow the proposed solutions.[54]

3.2 The first attempt of the 1970s

After the discovery in the 1970s of significant oil and gas fields in the North Sea, the SNP, with the slogan "It's Scotland's oil", wanted to manage the oil fields independently in order to enrich their region, without paying English taxes.[55] This was the SNP successful campaign at the October 1974 general election: it became the second largest party in Scotland, behind the Labour Party, which won the election, and ahead of the Conservative Party.[56]

Some months earlier, after the February 1974 general election, Wilson (forced not to lose the support of the nationalist parties), promoted the first White Paper entitled *Democracy and Devolution: Proposals for Scotland and Wales*:[57] the government proposed to create directly elected assemblies with legislative powers in Scotland and executive powers in Wales. After the second general election in October 1974, a second White Paper was published in 1975 by the re-elected Labour Government: *Our Changing Democracy: Devolution to Scotland and Wales*,[58] followed by a Scotland and Wales Bill.[59] However, the Bill faced opposition in Parliament and was then abandoned by the government. Despire this defeat, the government remained focused on devolution, also because it was an area in common with the Liberal Party.[60] Again, these parties tried to do something for devolution, and separate Bills for Scotland and Wales were

[54] "Scottish Devolution (1997-9)" …, 74.
[55] Mainardi, Il referendum in Scozia …, 10.
[56] Gay, Scotland and Devolution …, 7.
[57] McFadden, Jean, "Constitutional law: Framework of Scottish devolution", *The Laws of Scotland: Stair Memorial Encyclopaedia* (2002), 5, at https://strathprints.strath.ac.uk/856/
[58] McFadden, Constitutional law …, 4.
[59] It is interesting to observe that there was the tendency to consider Scotland and Wales together, and this choice had two main reasons: firstly, the strong opposition of both the nations towards the centralized powers at Westminster; secondly, the popular support for devolution was stronger here than in the rest of the UK. However the Bill did not come into effect and later, in 1978, two separate Acts were proposed. See: Parolari, Il regionalismo inglese …, 11-12.
[60] In fact, when the Labour Party lost its majority in the House of Commons, it signed the Lib-Lab Pact in 1977, a working arrangement between the Liberal and the Labour Party.

introduced.[61] The Bills[62] were introduced to Parliament, but they were severely attacked by the opposition.[63] Cunningham, a Labour rebel who was against devolution, introduced an amendment which decreed that 40 per cent of the electorate had to vote 'Yes' in consultative referendums before the Acts (the Scotland Act and the Wales Act 1978) could be approved.[64] The referendums were held on 1 March 1979 in Scotland and Wales with no positive results:[65] the 40 per cent threshold was distinctly not reached. It was a defeat for the Labour government. In May 1979 the general election saw the Conservative Party win: Margaret Thatcher became Prime Minister and soon repealed the Scotland and Wales Acts.[66]

Even if all these attempts failed, they were relevant for the time, because they showed the real need of a devolution of powers from the centre to the peripheries, in the respect of territorial diversities.[67] In fact, the debate on devolution did not disappear and after eighteen years of Conservative government, the demand for a constitutional change was even stronger.[68]

Right after the 1979 referendum, a Campaign for a Scottish Assembly (CSA) was formed in 1980: it was a cross-party organisation whose members were most of the Labour Party, but many were also of the Scottish National Party, members that were committed to some form of Home Rule for Scotland.[69] In this way, the Scottish Constitutional Convention (SCC)[70] was established in 1989: this is a significant step for Scottish autonomy. The members of the SCC signed a Claim of Right in which it was claimed that the sovereign right of the Scottish people should determine the form of

[61] "Scottish Devolution (1997-9)" …, 75.
[62] See: Leicester, Graham, "Scottish and Welsh Devolution", in Blackburn, Plant (eds.), *Constitutional Reform – The Labour Government's Constitutional Reform Agenda* (Longman, London, 1999).
[63] McFadden, Constitutional law …, 5.
[64] "Scottish Devolution (1997-9)" …, 75.
[65] 32.9 per cent of Scots voted 'Yes' and in Wales only 11.9 per cent of the electorate voted 'Yes'.
[66] McFadden, Constitutional law …, 5
[67] Parolari, Il regionalismo inglese …, 12.
[68] "Scottish Devolution (1997-9)" …, 75.
[69] McFadden, Constitutional law …, 6.
[70] The Convention was a broad-based coalition that included representatives from political parties (Labour and Liberal Democrat Parties were involved), local authorities, trade unions, Churches, Women's Forum Scotland and the Racial Equality Council; thus, it can be said that the Convention was based on inclusion, democratic dialogue and consensus building. The Conservative party did not take part in the Convention and the SNP, even if at the beginning supported it, decided then to withdraw because the Convention did not share the idea of Scotland's independence. See: "Scottish Devolution (1997-9)" …, 76.

government in the country, therefore there was also the need of a Scottish Assembly or Parliament.[71] The activity of the SCC culminated with the publication of *Scotland's Parliament: Scotland's Right* in 1995, which suggested a model of devolution based on the creation of a Scottish Parliament that should have legislative powers over a wide range of domestic issues and the power to vary income tax.[72] It is necessary to underline the importance of this document: in fact, its conclusions, fruits of a truly Scottish initiative, were the fundament of the later developed reform which introduced devolution in Scotland.[73]

3.3 The 1990s: the achievement of devolution

The constitutional reform, proposed in the manifestos of the Labour Party and of the Liberal Democrat Party for the 1997 general election, was based on the proposals of the SCC, thus it supported Scottish devolution. After eighteen years of Conservative government, the Labour Party won the election in 1997 and Tony Blair became Prime Minister:[74] this was the turning point for Scotland. Labour government soon published a White Paper on devolution: *Scotland's Parliament*. This document was important because it contained the acknowledgment from a British government of a specific Scottish national identity. Blair, in fact, described Scotland as a "proud historic nation in the United Kingdom."[75] Therefore it is mostly thanks to the commitment of the civil society, shown by the work of the Scottish Constitutional Convention, that devolution in Scotland was finally introduced. For this reason, it is argued that in Scotland there is a *quasi autochthonous* constitution: it means that the Scottish government system was not actually imposed by Westminster but found its roots in Scotland itself.[76]

However, Blair's government wished the proposals of the White Paper to be approved by the Scottish people in a referendum[77], before introducing a Bill to establish a Scottish

[71] *Ibid*., 76.
[72] Parolari, Il regionalismo inglese …, 13.
[73] See: Poggeschi, Giovanni, "La devolution in Scozia", *5 Le Istituzioni del Federalismo* (1998).
[74] McFadden, Constitutional law …, 7.
[75] As cited in Parolari, Il regionalismo inglese …, 13.
[76] Hadfield, Brigid, "The United Kingdom as a territorial state", in Bogdanor (ed.), *The British Constitution in the twentieth century*, (Oxford University Press, Oxford, 2003).
[77] See: Bogdanor, Vernon, "Our new Constitution", in *120 The Law Quarterly Review* (2004).

Parliament.[78] [79] Referendums took place in September 1997. Scottish people had to vote on two issues: the first question was about the Scottish Parliament and the second one about its tax-varying powers. The answers to both questions resulted affirmative. The Labour government was obliged to introduce Bills, through which many powers would be devolved from the centre to a Scottish Parliament with legislative and tax-varying powers and to a Welsh Assembly with executive powers.[80] The Scotland Bill was published in December 1997 and then received royal assent one year later becoming the Scotland Act 1998[81] and in this way realizing the proposals of the Scottish Constitutional Convention[82] and the White Paper *Scotland's Parliament* in 1997: it changed the relation between Scotland and the United Kingdom by introducing new institutions with legislative and administrative powers. In particular, it introduced an advanced form of legislative devolution, as the Scottish Parliament got residual legislative power for all those matters that had not been explicitly delegated to Westminster (residual criterion).[83]

3.4 The Scottish Parliament and Westminster sovereignty

The Scotland Act 1998 made provision for a Scottish Parliament, which is the devolved national, unicameral legislative of Scotland, located in the Holyrood Palace in Edinburgh.[84] It has full legislative powers over devolved matters .[85] The Scotland Act also introduced a Scottish Executive[86] whose main task is the one of controlling whether

[78] McFadden, Constitutional law …, 7.
[79] In Scotland, the announcement of the referendum was "viewed as something of a betrayal" and it was seen "not as a way of endorsing the package but of stopping it." The opinions about this political decision were many but what Blair later claimed was that: "The strategy was clear: to devolve after a hundred years of waiting. The tactic was obvious: get the people to say yes, then the Lords could not say no." As cited in "Scottish Devolution (1997-9)" …, 78.
[80] McFadden, Constitutional law …, 8.
[81] See the webpage Gov.uk: https://www.gov.uk/guidance/devolution-settlement-scotland
The full text of the Scotland Act 1998 is available at: https://www.legislation.gov.uk/ukpga/1998/46/contents
[82] See Bogdanor, Devolution...
[83] Parolari, Il regionalismo inglese …, 14.
[84] Mainardi, Il referendum in Scozia …, 13.
[85] The Parliament is made of 129 members known as Members of the Scottish Parliament, elected for four-year terms under the mixed-member proportional representation. It means that 73 members are elected under majioritarian representation and 56 members under proportional representation, see: Parolari, Il regionalismo inglese …, 14.
[86] The Scottish Executive consists of the First Minister, other ministers appointed (among the members of Parliament) by the First Minister, and two Law Officers (Lord Advocate and Solicitor General for Scotland), see: Torre, Alessandro, *Il territorial government in Gran Bretagna*, (Cacucci, Bari, 1991).

the Parliament legislates respecting the limits of the devolved matters or not, moreover, it is responsible for functions of government within Scotland, as far as they concern devolved matters.[87] The relation between the Scottish Legislative and Executive is similar to the one between the British Parliament and Government.[88]

Interestingly, the Scotland Act 1998 did not specify the matters that were devolved to the Scottish Parliament, rather it specified in Schedule 5 only those matters that were reserved to Westminster,[89] which are: the constitution and the constitutional structure of the UK, foreign affairs, defence, international development, the Civil Service, financial and economic matters, immigration and nationality, misuse of drugs, trade and industry, aspects of energy regulation and transport, employment, social security, abortion, genetics, surrogacy, medicines, broadcasting and equal opportunities.[90] Consequently devolved matters on which the Scottish Parliament can legislate are: health and social work, education and training, local government and housing, justice and policing, agriculture, forestry and fisheries, the environment, tourism, sport and heritage, economic development and internal transport.[91]

An important issue to investigate is Westminster sovereignty in a devolution context. Dicey's definition of parliamentary sovereignty in *The Law of the Constitution* (first published in 1885) is that "the principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament […] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[92] [93]

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[87] Most of its powers and functions were inherited from the former Scottish Office (instituted in 1885) and other UK government departments operating in Scotland.

[88] See: HM Government, *Scotland in the United Kingdom: An enduring settlement* (Cm 8990), (2005).

[89] See: https://www.gov.uk/guidance/devolution-settlement-scotland#the-scottish-parliament

[90] List of matters reserved to the UK Parliament available at: https://www.gov.uk/guidance/devolution-settlement-scotland#the-scottish-parliament

[91] List of devolved matters available at: https://www.gov.uk/guidance/devolution-settlement-scotland#the-scottish-parliament

See also: Winetrobe, Barry K., "Scottish devolution: aspirations and reality in multi-layer governance", in Jowell, Oliver (eds.), *The Changing Constitution*, (Oxford University Press, Oxford, 2004).

[92] See: Dicey, Albert Venn, *The Law of the Constitution* in *The Oxford edition of Dicey* (Oxford University Press, Oxford, 2013, ed. by J.W.F. Allison).

[93] The aim of this work is to focus on the case of devolved Scotland, for this reason there is no place here for further discussion about Westminster sovereignty in Britain. If you want to discover more about this, see:

Interestingly, both the White Paper 1997 and the Scotland Act 1998 underlined the fact that devolution did not want to affect Westminster's supremacy.[94] As the White Paper claimed: "The UK Parliament is, and will remain, sovereign in all matters […] Westminster will be choosing to exercise that sovereignty by devolving legislative responsibilities to a Scottish Parliament without in any way diminishing its own power."[95] Moreover, Section 28 of the Scotland Act 1998 stated that "this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."[96] Therefore, it is evident that the Scottish Parliament remained subordinated to the UK Parliament and that "for devolution is intended to preserve the sovereignty of the Westminster Parliament."[97]

However, a limit was put on Westminster's freedom to legislate on devolved matters thanks to the motion promoted by Lord Sewel which brought to the Sewel Convention:[98] the British Parliament can make laws on devolved matters, but only if there is a previous agreement with the Scottish legislative.[99]

Another important aspect of British devolution, according to Parolari, is asymmetry. However, it is argued that asymmetry can be found in every federal, regional and devolved system that is born after a process of disaggregation.[100] The Labour reforms

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Allison, John W. F., "The Westminster Parliament's formal sovereignty in Britain and Europe form a historical perspective", *47 Legal studies research paper series* (July 2018).
Dicey, Albert Venn, *The Law of the Constitution* in *The Oxford edition of Dicey* (Oxford University Press, Oxford, 2013, ed. by J.W.F. Allison).
Dicey, Albert, Venn, *Comparative Constitutionalism* in *The Oxford edition of Dicey* (Oxford University Press, Oxford, 2013, ed. by J.W.F. Allison).
Dicey, Albert Venn, *Introduction to the Study of the Law of the Constitution*, (Macmillan and Co., London, 8th ed., London).
Bagehot, Walter, *The English Constitution* (Chapman and Hall, London, 1867).
Leyland, Peter, *The Constitution of the United Kingdom: A Contextual Analysis* (Hart Publishing, London, 2007).

[94] See: Cantero Martìnez, Josefa, "La devolucion de poderes en el Reino Unido: tres modelos diferentes de descentralizacion para Escocia, Gales e Irlanda del Norte", *155 Revista de Administraciòn Pùblica* (May-August 2001), 361-384.

[95] As cited in Parolari, Il regionalismo inglese …, 16.

[96] As cited in Parolari, Il regionalismo inglese …, 16.

[97] Bogdanor, Vernon, "Devolution: decentralisation or disintegration?", in *70.2 Political Quarterly* (April-June 1999), p. 185.

[98] See: Munro, Jane, "Thoughts on the 'Sewel Convention'", *23 Scots Law Times* (2003), 194-206; Burgess, G., "The Sewel Convention – Westminster legislation in devolved areas", *1 Scottish Constitutional and Administrative law and practice* (2000), 12-16.

[99] See: Ruggiu, Ilenia, "Le politiche della devolution scozzese: unus rex unus grex una lex?", *6 Le Regioni* (2004), 1267-1305.

[100] Parolari, Il regionalismo inglese …, 1-2.

on devolution of the 1990s determined the redistribution of powers within the United Kingdom but these powers differed widely from one nation to another. In particular, England was completely excluded from the reforms on devolution: in fact, only Scotland, Wales and Northern Ireland obtained devolved powers after the Scotland Act, the Government of Wales Act and the Northern Ireland Act in 1998[101]. The exclusion from devolution has negatively affected England both from the politico-constitutional and socio-economic point of view. The main reason for these negative consequences is that this asymmetric devolution has shown itself to be a "haphazard devolution"[102] which presents different measures in a confused context, with the result of creating anomalies.[103]

3.5 The Scottish National Party (SNP) and the Scottish Independence Referendum 2014

The Scots first elected their own representatives in the Scottish Parliament in May 1999: Labour leader Donald Dewar became the founding First Minister of Scotland and held office until he died in 2000. After Dewar, there were other Labour leaders until 2007, when Alex Salmond, leader of the Scottish National Party, was elected First Minister of Scotland.[104] The victory of the SNP was something completely new in the political scenario of the UK, as the SNP was a pro-independence party.[105] Despite the high degree of autonomy reached through the Act 1998, Scotland's aim was to obtain a wider form of devolution. The result of the election in May 2007 showed the aspiration of the Scots to demand for further devolution[106] (known as 'devo-max'): the victory of the SNP was

See also: Tierney, Stephen, "Giving with one hand. Scottish devolution within a unitary state", *5 (4) International Journal of Constitutional Law* (2007), 730–753.

[101] However, the Greater London Authority Act 1999 can be added to these Acts: it has reformed the structure of the metropolitan government of London. For more information about it, see: Parolari, Il regionalismo inglese …, 33-38.

[102] As cited in Parolari, Il regionalismo inglese …, 3.

[103] For a deep analysis of the asymmetric character of devolution, see: Parolari, Il regionalismo inglese …, 42-51.

[104] Montserrat, Guibernau, "Devolution and independence in the United Kingdom: the case of Scotland", in 11 *REAF* (2010), 56-82, at 67-68.

[105] *Ibid*., 68. It is interesting to see that support for an independent Scotland stood at 31 per cent in 2007, 41 per cent in 2008 and in 2009 58 per cent of Scots were in favour of a referendum on independence as planned by the SNP.

[106] The Scottish Parliament already had extensive powers over wide areas of domentic policy but lacked substantial fiscal powers. See: Keating, the Scottish Independence Referendum …, 75.

the proof that the Scots took into consideration the possibility of an independent Scotland.[107]

After ten years of devolution, there were two main options about Scotland's future: on the one hand the Unionist option which involved further devolved powers, on the other hand a pro-independence plan led by the SNP.[108] Thanks to the Calman Commission (established by the Unionist Parties: Conservative, Labour and Liberal Democrat), the Scotland Act 2012 was finally approved in May 2012: it provided for extra financial and fiscal powers for the Scottish Parliament and tried to avoid the possibility of a referendum on independence. As a consequence, Salmond's nationalist Party tried to find a quick agreement with Westminster: in October 2012 the Edinburgh Agreement was signed on the terms for the Scottish independence referendum 2014. The SNP was then allowed to hold a referendum on Scottish independence before the end of 2014. In this way the Scottish Parliament was given the possibility to legislate for the referendum, devolving a matter that actually belonged to Westminster.[109]

The question of the referendum was: "Should Scotland be an independent country?".[110] Obviously, the SNP supported independence with its "YES Scotland" campaign, whereas the slogan "Better Together" belonged to the opposition, the Unionist Parties.[111]

However, the final vote of the Scottish referendum on 18 September 2014 was 45 per cent in favour and 55 per cent against independence: this represented a clear victory for 'No'.[112]

[107] Parolari, Il regionalismo inglese …, 19.
[108] Guibernau, Devolution and independence …, 73.
[109] See: Murkens, Jo Eric Khushal; Jones, Peter; Keating, Michael; *Scottish Independence: A Practical Guide*, (Edinburgh University Press, Edinburgh, 2002).
[110] Mainardi, Il referendum in Scozia …, 20.
[111] *Ibid.*, 21.
[112] Politically, however, it seemed more a victory for 'Yes': the losers behaved like winners, whereas the winners behaved like losers. The pro-independence Greens and the SNP expanded massively within a few weeks, while the leader of the Scottish Labour Party Salmond decided to resign, succeeded then by Nicola Sturgeon, the current First Minister of Scotland and leader of the SNP. For more details, see: Keating, the Scottish Independence Referendum …, 88.

3.6 Further devolved powers and a look at the future of the UK

The victory for 'No' did not mean that Scottish people wanted to maintain the status quo, on the contrary it was a vote for a change within the UK.[113] In fact, following the referendum, the Unionist parties had to keep their promise for more devolved powers: the Smith Commission had the aim of finding an agreement among the leaders of the main political parties (also the SNP was included) on the new powers that should be devolved to the Scottish Parliament. As a result, the Scotland Bill 2015 was later introduced to Parliament: it represented the first step towards Scottish "devo-more".[114] The Bill then became the Scotland Act 2016, when it received Royal assent in March 2016.[115] In this way, the Scottish Parliament obtained a range of new powers: it is claimed that, after the Scotland Act 2016, the Scottish Parliament became "one of the most powerful devolved administrations in the world."[116]

What is certain nowadays is that the future of Scotland is not certain at all.[117] Although Scotland voted 'No' in the September 2014 referendum on independence, the issue is still a key one.[118] When, in June 2016, British people decided to leave the European Union, things became even more complicated. The majority in Scotland was pro-Remain (62 per cent of votes), but the UK voted to leave the EU by 52 per cent to 48 per cent.[119] Yet it is unclear which role the devolved administrations will have after Brexit. However, Nicola Sturgeon[120] said, "she will make her judgement on whether to call for a second vote [for a second independence referendum] after the terms of the EU exit deal are clearer".[121] In fact, Scotland voted to Remain in the EU during the Brexit

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[113] Parolari, Sara, "Il futuro costituzionale del Regno Unito: il primo passo verso la devo-more in Scozia", *Forumcostituzionale.it* (2015), 3, at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2015/10/parolari.pdf

[114] *Ibid.*, 3-4.
See also: Keating, Michael, "Rethinking Sovereignty. Independence-Lite, Devolution-Max and National Accomodation", *16 Revista d'Estudis Autonòmics i Federals* (2012), 9–29.

[115] https://civilservice.blog.gov.uk/2016/05/06/devolution-and-you-the-scotland-act-2016-and-the-fiscal-framework/

[116] As UK government's Scottish Secretary David Mundell said. See: *http://www.bbc.com/news/uk-scotland-scotland-politics-36353498*

[117] See also: Goldoni, Marco; Martinico, Giuseppe, "Il ritiro della marea? Alcune considerazioni giuridico-costituzionali sul c.d. Brexit", *18 Federalismi.it* (2016), 1-25.

[118] See website: http://www.theweek.co.uk/88307/scottish-devolution-at-20-hooray-for-holyrood

[119] See BBC News online: http://www.bbc.com/news/politics/eu_referendum/results

[120] Nicola Sturgeon is the current Prime Minister of Scotland and leader of the Scottish National Party, in office since 2014.

[121] Mortimer, Caroline, "Nicola Sturgeon says she will decide on second independence referendum after Brexit details", *Independent.co.uk* (2018), at

referendum and the SNP doesn't want to be taken out of the Union against its will. While the UK wants to exit from the EU, Scotland will probably exit from the UK: today it is not only needed to speak of 'Brexit' but also of 'Scoxit'.[122] It seems a paradox: in 2014 Scottish people voted 'No' during the independence referendum; one of the main reasons for this decision was that if Scotland had become independent, it would have needed to reapply for EU membership. Now it is the whole United Kingdom that is exiting from the EU, and Scotland wants to exit from the UK in order to be able to remain in the Union or to reapply soon. "From Brexit and Britain exit to Scoxit and Scotland exit."[123] [124]

4. The case study of Scottish higher education system

4.1 Scottish higher education system as an example of a devolved matter

After having analysed devolution in its historical development, it is interesting to see how devolution is actually applied in Scotland. Therefore, the choice of the case study of Scottish higher education system[125], in contrast to the English one, also because

https://www.independent.co.uk/news/uk/politics/nicola-sturgeon-says-she-wait-for-brexit-deal-to-decide-on-indyref2-a8159046.html

[122] See: Franceschini, Enrico, "Dalla Brexit alla Scoxit: la Scozia approva referendum bis per l'indipendenza dal Regno Unito. No di Londra", *Repubblica.it* (2017), at http://www.repubblica.it/esteri/2017/03/28/news/brexit_la_scozia_chiede_referendum_bis_su_indipendenza-161645435/

[123] As written in: Franceschini, Dalla Brexit alla Scoxit.

[124] For further information about Brexit and Scotland see:
Leyland, Peter, "Brexit and the UK: Charting the Constitutional and Legal Obstacles", *n° speciale Istituzioni del federalismo – Brexit: la fine dell'Europa o la fine del Regno Unito?* (2016), 41-68.
Frosini, Justin Orlando, "Was it an Act of Self-Dissolution? Brexit and the Future of the United Kingdom", *n° speciale Istituzioni del federalismo – Brexit: la fine dell'Europa o la fine del Regno Unito?* (2016), 21-40.
Frosini, Justin Orlando, "Il referendum sulla Brexit: verso la dissoluzione del Regno Unito?, 3 Diritto Pubblico Comparato ed Europeo (2016), 831-836.
Frosini, Justin Orlando, "L'Indipendenza della Scozia: l'uscita da due unioni?", 2 Quaderni Costituzionali (2016), 442-445.
Frosini, Justin Orlando, "Una doppia secessione? Il futuro del Regno Unito dopo la Brexit", in Martinelli, Claudio (ed.), *Il Referendum Brexit e le sue ricadute costituzionali* (Maggioli Editore, Santarcangelo di Romagna, 2017).
Martinelli, Claudio (ed.), *Il Referendum Brexit e le sue ricadute costituzionali* (Maggioli Editore, Santarcangelo di Romagna, 2017).

[125] For a focus on another devolved matter (health), see: Greer, Scott L.; Trench, Alan, "Intergovernmental relations and health in Great Britain after devolution", *38 (4) Policy and Politics* (2010), 509-529; Greer, Scott L., "The territorial bases of health policymaking in the UK after devolution", *15 (4) Regional & Federal Studies* (2006), 501–518.

education is one of the institutions that mark the distinctive cultural and social life of Scotland.[126]

As we have already seen in the previous sections, education is a devolved matter since 1998, the very beginning of devolution.

It is claimed that education in Scotland is one of the three elements (together with the law and the Church) which distinguish Scotland from the rest of the UK, shaping Scottish national identity.[127] In fact, the Scottish education system has always been distinct from the rest of the United Kingdom: after the Union with England in 1707, the Scots preserved some institutions such as the Education Act 1696, which regulated Scottish education system, preserving in this way its distinctiveness.[128] Moreover, a separate provision for Scottish education existed since 1872, when the Scotch Education Department was created and later, administrative responsibility for education was devolved to the Scottish Office.[129] However, the main difference consists in the fact that Scotland has always had a system based on broad education, where integrity, flexibility and creativity play an important role.[130] Not only that: "Education for all" is one of the most important principles expressed in *A Guide to Education and Training in Scotland*,[131] in fact Scotland provides free compulsory schooling for children from 5 to 16 years old and we'll see that also the system of higher education (universities) goes in that direction. It is important to highlight the fact that the Scottish Parliament has decided to legislate on provision on public services differently than in the rest of the UK: it is possible only thanks to the powers which have been devolved to Scotland. If, on the one hand, Scottish higher education is free at point of use, on the other hand, fees are paid in the rest of the UK. We'll see it in detail in the following paragraphs.

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[126] Haydecker, Rachel, "Public policy in Scotland after devolution: convergence or divergence", 3 *POLIS Journal online* (2010), 18, at http://www.polis.leeds.ac.uk/assets/files/students/student-journal/ug-summer-10/rachel-heydecker-summer-10.pdf

[127] Arnott, Margaret; Menter, Ian, "The same but different? Post-devolution regulation and control in education in Scotland and England", 6 *European Educational Research Journal* (2007), 250-265, at 253.

[128] Torre, Scozia: devolution …, 155.

[129] Haydecker, Public policy in Scotland …, 18.

[130] See website: http://www.gov.scot/Publications/2003/03/16743/19914

[131] *A Guide to Education and Training in Scotland* is available at the official website of the Scottish Government: http://www.gov.scot/Publications/2003/03/16743/19914

As reported in the Guide, all this is possible because some organisations support and improve the system: Education (Scotland) Acts following devolution have been characterised by partnerships between central and local governments, parents and the business community. The Scottish Government has the role to guide the system and to oversee funding of higher education.[132] On the other hand, English education system is likely to receive less public support and confidence.[133]

Throughout the years a "Scottish myth" was created, based on the fact that Scottish education was more democratic than the other systems; this myth was also used during the 1980s to show that Scottish society was more egalitarian than the English one.[134]

Today the Scottish and English systems of higher education are quite different, however it is interesting to see the developments of these systems and the related policies, because in the twentieth century there was a convergence of the two systems, whereas after devolution they have been characterised by divergence. As Michael Keating claimed: "English policy is based on differentiation and competition, while Scotland has favoured integration and more egalitarianism."[135] We will now see how and why it is possible.

4.2 Scotland and England between convergence and divergence

Among the institutions which Scotland preserved after the Union in 1707 tare Scotland's four historic universities: St Andrews, Glasgow, Aberdeen (founded under papal bulls) and Edinburgh (founded by municipal initiative), whose pedagogical tradition until the nineteenth century was mostly based on logic, philosophy and disputation, in contrast to the English universities (Oxford and Cambridge) which were based on classics and followed a more elitist model.[136] It is argued that Scotland, in the nineteenth century, possessed enough autonomy which allowed her to make its own policy, but then things changed in the twentieth century with the rise of the welfare state, which was a threat to the informal arrangements of Scottish domestic policy that existed before.

[132] See website: http://www.gov.scot/Publications/2003/03/16743/19919
[133] Arnott, Menter, The same but different? …, 254.
[134] *Ibid.*, 253.
[135] Michael, Keating, "Higher Education in Scotland and England after Devolution", 15 *Regional and Federal Studies* (2005), 423-435, at 423.
[136] *Ibid.*, pp. 423-424.

Governments started investing in public services and so there was the need of central accountability.[137] It was in this period that the process of convergence between Scottish and English systems of higher education started: between 1919 and 1989 universities across the UK (also the Scottish universities) came under the University Grants Committee[138] which allocated student numbers and funds.[139] This resulted in a unitary higher education system in the UK, funded by a single body. Some argue that Scottish tradition was partially lost under the dominance of the UGC and of a London-based education department, in fact policy in the twentieth century was British and largely uniform. Others argue that even if higher education policy was mainly determined by Westminster in the twentieth century, Scottish universities were able to maintain their distinctive features and traditions.[140]

The process of convergence was characterised by some relevant events. In the 1960s and in the 1970s higher education, both in Scotland and England, was expanded to widen access and improve economic competitiveness, moreover a new type of institutions (such as the polytechnics) was recognised.[141] In the 1970s, when devolution was proposed for the first time in Scotland, Scottish Universities did not really agree with this initiative because they thought that a detachment from the UK would lead to the decline of their high standards. In the 1980s, the Conservative government imposed severe cuts on Scottish and English universities because they thought that it was dangerous to educate the masses; it was after these funding cuts that Scottish universities changed their view about devolution and came out in favour of a Scottish Parliament that could protect them.[142] However, ten years later the Conservative government changed tack and there was an increase in student numbers.[143] What is important to underline is that all these decisions were applied both to England and to Scotland, and even if Scottish higher education did maintain some of its distinctive

[137] *Ibid.,* p. 424.
[138] The UGC, made of academics, was a British agency under the Department of Education in London.
[139] Riddel, Sheila; Minty, Sarah; Weedon, Elisabet; Hunter Blackburn, Lucy, "Higher education and the referendum on Scottish independence", 86 *Political Quarterly* (2015), 2, at https://onlinelibrary.wiley.com/doi/pdf/10.1111/1467-923X.12164
[140] Haydecker, Public policy in Scotland …, 18.
[141] Keating, Higher Education in Scotland and England …, 425.
[142] Haydecker, Public policy in Scotland …, 18.
[143] Keating, Higher Education in Scotland and England …, 425.

features (such as the four-year honours degree instead of the English three-year degree), it was still part of a British system that was judged on the same criteria as English universities. Therefore, it is said that the twentieth century was characterised by a convergence of the Scottish and English systems of higher education.

The 1980s and 1990s saw the need to make universities state institutions: to nationalize them because a considerable amount of public money was being spent by universities without direct government control. First of all, the University Grants Committee (UGC), which was composed of academics, was abolished and replaced with the University Funding Council, which had a more direct government control and consisted mainly of business people. Hierarchical structures and professional managers were introduced to manage universities and teaching was controlled through inspections made by the Teaching Quality assessment.[144] All these actions were directed both to Scotland and England.

The first step towards policy differences emerged in 1992, following administrative devolution in Scotland, when the Scottish education system came under the Scottish Office and separate Higher Education Funding Councils were established in England, Scotland and Wales.[145]

Much more evident were the differences that emerged between England and Scotland, following political devolution and the establishment of the Scottish Parliament in 1999. Under the Scotland Act 1998, the Scottish Parliament was given all those tasks that had previously belonged to the Scottish Office: as a consequence, universities were completely devolved and became part of a broader Scottish education system. Interestingly, in the UK there are no state-wide laws governing universities such as in Germany and Spain. However, Scottish universities are part of a UK policy community: Universities UK, the representative body for universities, includes Universities Scotland, which is the Scottish body. In addition, there is regular contact between the responsible departments in England and Scotland.[146]

[144] *Ibid.*, 425-426.
[145] *Ibid.*, 426.
[146] *Ibid.*, 427.

Before analysing the different approaches in student funding that have emerged between England and Scotland after devolution, other general features and differences of Scottish and English universities need to be seen. This is the proof of the fact that Scotland, despite the decades of assimilation into the British system, did maintain its distinctive feature in higher education system.

First of all, an important structural feature that makes Scotland's higher education different from the rest of the UK is the existence of a four-year Honours degree. It means that in the first and second year students deal with a wide range of subjects and then specialise in the third and fourth year. It also means that after three years, a student in Scotland can obtain a General or Ordinary degree (without completing all four years of university) or he/she can continue to a fourth and final year of study, obtaining then an Honours degree. In England the structure is different: Honours degrees are usually three years, courses are more specialised from the beginning and an Ordinary degree is obtained only if a student has not achieved sufficient marks for an Honours degree.[147] Another difference concerns the attitude towards higher education: Keating stated that the English approach emphasises "management, regulation, differentiation and competition", whereas the Scottish one stresses "professional autonomy, consensus, egalitarianism and policy learning."[148] In Scotland, change has emerged from professional networks; in fact, the Scottish government has taken public sector professionals into partnership with the aim of consulting and working with interest groups and stakeholders in the society. Indeed, universities in Scotland are seen as part of the local community. On the contrary, change in England has been more politically driven. In addition, it can be argued that Scots are more inclined to prefer the "traditional social democratic strategy for universal provision, equality"[149] and collectivism: private health and private schools are less used than in England, this happens because in Scotland there is a "public service ethos"[150] which is part of Scottish tradition and society.[151]

[147] Haydecker, Public policy in Scotland …, 19.
[148] Keating, Higher Education in Scotland and England …, 430.
[149] *Ibid.*, 429.
[150] *Ibid.*, 429.
[151] Inclusion and equality are among the five National Priorities approved by the Scottish Parliament in December 2000. See: Arnott, Menter, The same but different? …, 257.

4.3 Devolved Scotland: a different tuition fee policy

The most significant difference in Scottish higher education policy regard tuition fees for students: it was after devolution that the Scottish Executive decided to abolish up-front tuition fees in Scotland, while fees were not abolished in England. It is interesting, at this point, to understand how student funding system has changed before and after devolution, in Scotland and in England.

Tuition fees were first introduced across the UK in 1998 under the Labour government[152] both for undergraduate and postgraduate students (with exemptions for those from poorer families), who were required to pay up to £1000 a year for tuition, at the same time the government decided to reduce students grants, which were completely abolished the following year.[153] However, after the establishment of a devolved national administration in Scotland, things changed. This change was possible, mostly, because Scottish situation was very different from the English one: whereas England had to manage a complex system of some 138 institutions, Scotland had a smaller and more manageable system of about twenty institutions; moreover, reform was less politically driven but emerged from discussion among the Scottish government, the Scottish Higher Education Funding Council, the universities and other interested parties.[154] Nevertheless, political parties played an important role after devolution: during the first Scottish elections at Holyrood, all Scottish political parties apart from Labour party were against the introduction of tuition fees in Scotland and wanted to abolish them.

As the Labour did not agree with the other parties, the decision was not simple to take, therefore the involvement of an independent commission, the Cubie Commission, which recommended to charge no fees while students are at university, but to charge a Graduate Endowment after university.[155] The Scottish Executive accepted these recommendations and so abolished tuition fees in Scotland for Scottish domiciled and

[152] This decision was based on the report of the Dearing Committee, which allowed the introduction of fees, only if grants were maintained for poorer students. However, the government decided to introduce tuition fees, without maintaining grants. See: Keating, Higher Education in Scotland and England …, 430.
[153] Riddel, Minty, Weedon, Hunter Blackburn, Higher education …, 3.
[154] Keating, Higher Education in Scotland and England …, 430-431.
[155] *Ibid.,* 431.

EU students (but not for students from England, Wales and Northern Ireland who wanted to study in Scotland), while the £1000 fee continued to apply to all other students in the UK. The Graduate Endowment fee (£2000), used to fund bursaries for poorer students, was a post-graduation payment that had to be paid when students finished their degree. Even though this fee was introduced, it is argued that the abolition of tuition fees in Scotland continued the tradition of equitable access to Scottish higher education and made Scottish system even more different than before from the English one.[156]

In 2003, other initiatives contained in the White Paper on Higher Education were applied only to England: the paper proposed a differentiated system characterised by "a few elite universities at the top and a mass of institutions at the bottom."[157] Students who wanted to attend elite universities were charged an additional top-up fee of up to £3000, obtaining a higher standard of education. The Scottish executive decided not to follow the English model, therefore, no top-up fees were introduced in Scotland.

Further changes in the system of support for university students in Scotland arrived under the SNP Government in 2007. The Executive introduced the Graduate Endowment Abolition (Scotland) Bill with the purpose of abolishing the Graduate Endowment fee, which was seen as a factor that had discouraged some students from entering higher education.

Once again, the Scottish executive and legislative followed the principle of having "free higher education for all."[158] The then First Minister Alex Salmond said: "The rocks will melt with the sun before I allow tuition fees to be imposed on Scotland's students"[159], and again "the biggest achievement by this Government has been the abolition of tuition fees. This one action has restored Scotland's long tradition of education being based on ability to learn – not the ability to pay."[160] Afterwards, Nicola Sturgeon also

[156] Haydecker, Public policy in Scotland …, 20.
[157] Keating, Higher Education in Scotland and England …, 430.
[158] As cited in Haydecker, Public policy in Scotland …, 21.
[159] The commemorative rock with this quote can be found on the campus of Heriot-Watt University in Edinburgh and was installed in November 2014.
[160] Johnson, Simon, "Alex Salmond unveils tuition fees tribute as he resigns", *Telegraph.co.uk* (2014), at https://www.telegraph.co.uk/news/politics/SNP/11238554/Alex-Salmond-unveils-tuition-fees-tribute-as-he-resigns.html

supported the continuation of free tuition fees, claiming: "For as long as I am First Minister, there will be no tuition fees in Scotland."[161]

What is important to underline is that Scottish students obtained free university tuition but students from other parts of the UK (England, Wales and Northern Ireland) did not and they are charged tuition fees if they want to attend Scottish universities[162]. On the contrary, EU students who study in Scotland are not charged tuition fees because under European law, students from other EU member states have to be treated the same as Scottish students and do not pay.[163]

Since 2007, tuition fees in England have risen continually: from £3000 to £9000 per year; however, university education continued to be free while studying, thanks to loans that have to be repaid only after graduation, when a particular income threshold is reached.[164]

It is argued that free university study for Scottish and EU students has become one of Scotland's most distinctive policies since the beginning of devolution. Thanks to this policy, Scottish students have saved more than £1 billion in fee payments compared with English students who have to pay £9000 a year.[165]

4.4 Some considerations on Scottish free-tuition policy and its future

Even if the Scottish policy[166] seems to have only positive aspects, there is actually a strong debate about it: academics claim that "free university education has not benefited the poor and has led to existing social inequalities becoming more

[161] Green, Chris, "Free university tuition in Scotland has not benefited the poor, say academics", *Independent.co.uk* (2015), at https://www.independent.co.uk/news/education/education-news/free-university-tuition-in-scotland-has-not-benefited-the-poor-say-academics-a6757546.html

[162] The annual fees these students have to pay are similar to fees charged by universities in England, Wales and Northern Ireland. However, it can be more expensive for an English student to study in Scotland because a Scottish degree usually takes four years rather than three, as in England. Moreover, it is interesting to highlight that if Scotland had become and independent country after the 2014 Referendum and a EU separate member, students from the rest of the UK would have had to be treated in the same way as students from other EU countries. See: BBC News, "Analysis: University tuition fees in Scotland", *bbc.com* (2013), at http://www.bbc.com/news/uk-scotland-23279868

[163] *Ibid.*

[164] Riddel, Minty, Weedon, Hunter Blackburn, Higher education …, 5.

[165] Havergal, Chris, "Can Scotland carry on with its free-tuition policy?", *Times Higher Education.com* (2016), at https://www.timeshighereducation.com/features/can-scottish-higher-education-carry-on-with-its-free-tuition-policy#survey-answer

[166] Sà, Filipa, "The Effect of Tuition Fees on University Applications: Evidence from the UK", *8364 IZA Discussion Paper* (2014).

entrenched."[167] It is argued that the Scottish Parliament has prioritised universities at the expense of schools and colleges: public money that is invested in universities should be redirected to schools because inequalities, where existing, have become stronger. The book *Higher Education in Scotland and the UK*[168], edited by three education specialists at the University of Edinburgh, stated that there have been important cuts in school budgets and this has not had positive effects in the most deprived neighbourhoods. Moreover, if Scotland's aim is that more students from the poorest backgrounds attend universities, the best way of doing this is to direct more resources to schools rather than to universities. Therefore, they suggested that "a progressive graduate tax, as well as means-tested student support, might be a more effective way of promoting social equality in higher education"[169] rather than free university tuition. Another study, led by academics at the London School of Economics (LSE), claimed that devolution "has failed to substantially improve Scotland's education system"[170] as the Scottish system has not progressed at the same rate as the English system since 1999: it is argued that the rate of change in Scotland has been very stable, while in England it has increased during the same period. The study compared exams results in the different universities as well as the results of each country in international comparison exercises.[171]

Despite these results, it is noteworthy to highlight that the University of St Andrews, the oldest and most prestigious university in Scotland, has been ranked the best university in Scotland and third in the UK behind Cambridge (in first place) and Oxford, according to the *Guardian University Guide 2019*.[172] Not only that: St Andrews also occupies the top UK spot in five subjects (International Relations, Psychology, Physics,

[167] Green, Free university tuition in Scotland …
[168] Riddell, Sheila; Weedon, Elisabet; Minty, Sarah (eds), *Higher Education in Scotland and the UK: Diverging or Converging Systems?* (Edinburgh University Press, Edinburgh, 2015).
[169] Green, Free university tuition in Scotland …
[170] Marshall, Chris, "Education 'has failed to improve with devolution'", *Scotsman.com* (2013), at https://www.scotsman.com/news/education/education-has-failed-to-improve-with-devolution-1-3046489
[171] Ibid.
[172] The Guide was published on May 29, 2018 and presents a higher education league table which considers several aspects: spending per student, the student/staff ratio, graduate career prospects, how satisfied final year students are with their courses etc. See: https://www.st-andrews.ac.uk/news/archive/2018/title,2145226,en.php

Computer Science and Information Systems, and Biosciences).[173] The results of the ELS study wanted to show that devolution has not been able to improve Scotland's education system: it must be true for some aspects but it is also true that Scotland offers high quality education, as the Guide 2019 demonstrates.

However, the debate on free university tuition in devolved Scotland is much more complex than this and these proposed here are only some of the opinions about the topic.[174] We will not go into details, as this section only wants to underline the differences that have emerged after devolution in Scottish and English education systems.

Another relevant point is about Scotland's future: what will happen to Scottish education system after the exit of the UK from the European Union? Will EU students have to pay tuition fees in order to study at Scottish universities? These aspects are very interesting, because the situation in Scotland could change drastically after Brexit. It is known that Scotland firmly believes in the EU and therefore does not want to lose the international character of its universities. What seems to be sure, at the moment, is that the Scottish government has guaranteed free tuition for EU students starting their study in the 2018/2019 academic year until the end of their course (until 2022); the fee status during these years will not be affected by the outcome of Brexit negotiations.[175] Deputy first minister John Swinney said: "I am proud that Scotland is a destination of choice for EU students" and again "EU students are of huge importance to Scotland and its universities: educationally, culturally, economically and as a core part of many important courses. It's right that the Scottish government have given clarity for students who will be thinking about choosing Scotland to learn, study and contribute."[176]

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[173] Data taken from the official website of St Andrews University: https://www.st-andrews.ac.uk/news/archive/2018/title,2145226,en.php

[174] For more details about the topic, see these articles:
Chris, Can Scotland carry on with its free-tuition policy …
McKenna, Kevin, "Scottish higher education should be for all, not the gilded few", *Theguardian.com* (2017), at https://www.theguardian.com/education/commentisfree/2017/jan/29/scottish-higher-education-for-all-not-gilded-few

[175] Custer, Sara, "Scotland assures EU fee status for 2018/19 intake", *Thepienews.com* (2017), at https://thepienews.com/news/scotland-assures-eu-fee-status-for-201819/

[176] as cited in Custer, Scotland assures EU fee status for 2018/19 intake …

What will happen after 2022 remains an open question, also because Scotland's future within the UK could be at risk if first minister Nicola Sturgeon calls for a second Scottish independence referendum.[177]

5. Concluding remarks

5.1 Devolution in a Brexit perspective

Before concluding, it is important to tackle other relevant aspects of British devolution today, in order to understand what devolution actually means for Scotland nowadays, in a context where Brexit is the future for the UK.

Twenty years ago, when the Scotland Act 1998 was finally approved and the Scottish Parliament was established, Donald Dewar, at the inaugural meeting of Holyrood, claimed that that one was "the day when democracy was renewed in Scotland."[178] Dewar's Labour party had worked hard in order to achieve devolution, alongside the SNP, the Lib Dems and the Greens: they campaigned together in order to deliver the 'Yes' in the Referendum and to bring devolution into being.[179] All this helps understand what is happening today.

Twenty years after the Scottish Parliament was inaugurated, precisely on May 15th 2018, every party at Holyrood (SNP, Labour, Liberal Democrats and Scottish Greens) except the Conservatives voted to reject the EU Withdrawal Bill[180], all agreeing that "it would

[177] See section 3.6

[178] Wishart, Ruth, "Scotland had to reject the EU withdrawal bill. It was a power grab", *Theguardian.com* (2018), at https://www.theguardian.com/commentisfree/2018/may/16/eu-withdrawal-bill-scotland-reject-holyrood-brexit

[179] Wishart, Scotland had to reject the EU withdrawal bill, …

[180] The EU Withdrawal Bill is the formal title of the Brexit Bill. It is a Bill of the Parliament of the UK whose aim is to implement the exit of the UK from the European Union. This piece of legislation will repeal the 1972 European Communities Act (through which the UK became part of the then European Community which would later become the EU), moreover it will copy part of EU law into UK law. In order to create legal continuity, this will create a new category of domestic law for the UK. All this regards the UK, it means also the devolved administrations.
For more details see: Wright, Ben, "EU withdrawal bill: What challenges await the government?", *BBC News online* (2018), at https://www.bbc.com/news/uk-politics-44383019
The Bill was defeated 15 times in the House of Lords and has been returned to the House of Commons with amendments on 12th and 13th June 2018. For latest news on the topic, see the website: https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html

strike at the heart of the devolution settlement."[181] By voting against Theresa May's key piece of Brexit legislation, the Scottish Parliament paved the way for a constitutional crisis, but it had a strong reason to do it: the SNP, in fact, claimed that "the Bill is a Westminster power grab that could reverse progress towards greater devolution."[182]

Holyrood rejected the UK government's Brexit legislation by a large margin (93 votes to 30) because it decided to oppose the proposals on "post-Brexit power sharing" set out in Clause 11 of the Bill.[183] Actually, the Scots have opposed the Bill since its publication in July 2017: the main problem concerns the repatriation to the UK of powers currently held in Brussels, powers in areas that are theoretically devolved but are in practice limited by EU law.[184] Therefore, the main dispute is about who will decide about issues that were previously EU competences (such as fishing quotas, data protection, internet security, energy labelling etc.).[185]

Clause 11 of the EU Withdrawal Bill states that the power to amend "retained EU law" in these areas would be transferred from Brussels to Westminster, rather than to Edinburgh, Cardiff and Belfast. The devolved governments rejected this idea because seen as a "power grab"[186] from Westminster, and argued that the powers in these areas[187] should be devolved in full. Without the agreement of Scottish (and Welsh) government for the EU Withdrawal Bill, Westminster would not respect the Sewel Convention, which states that the UK Parliament does "not normally legislate with regard to devolved matters without the consent" of the devolved parliaments.[188] These are the main reasons why the Scottish parliament has voted against May's Brexit

[181] Wishart, Scotland had to reject the EU withdrawal bill, …
[182] Watts, Joe, "Brexit: Scottish parliament refuses to grant consent to the EU Withdrawal Bill, risking a constitutional crisis", *Independent.co.uk* (2018), at https://www.independent.co.uk/news/uk/politics/scottish-parliament-brexit-theresa-may-legislation-eu-withdrawal-bill-constitutional-crisis-a8353076.html
[183] Carrel, Severin, "Scottish parliament decisively rejects EU withdrawal bill", *Theguardian.com* (2018), at https://www.theguardian.com/politics/2018/may/15/scottish-parliament-decisively-reject-eu-withdrawal-bill-brexit
[184] See: "EU Withdrawal Bill: Clause 11 and the devolution deadlock", *Institute for Government* (2018), at https://www.instituteforgovernment.org.uk/explainers/eu-withdrawal-bill-clause-11-devolution
[185] Editorial, "The Guardian view on Brexit and devolution: wanted – joined-up thinking", *Theguardian.com* (2018), at https://www.theguardian.com/commentisfree/2018/may/15/the-guardian-view-on-brexit-and-devolution-wanted-joined-up-thinking
[186] See: "EU Withdrawal Bill: Clause 11 and the devolution deadlock", …
[187] For further information about these powers see: "EU Withdrawal Bill: Clause 11 and the devolution deadlock", ...
[188] As cited in "EU Withdrawal Bill: Clause 11 and the devolution deadlock", …

legislation, however it must be underlined that this vote is not legally binding: nevertheless, Theresa May must be very careful on the decision she will take.[189] On the one hand Westminster has the possibility to impose those power-sharing plans on Scotland, on the other hand it can make further concessions to the Scottish executive in order to avoid a crisis.[190] Should the first choice win, Nicola Sturgeon will call for a second independence referendum.[191] The vote on May 15th 2018 was not to take more power for Scotland; it was "to prevent Westminster stripping Holyrood of its existing powers."[192]

At this point, we should consider some of the aspects already expressed in Chapter 2, regarding a possible second Scottish independence referendum. During the 2014 Independence referendum campaign, the Scots were told that the only way to protect EU membership was to vote 'No' in that referendum, and this is what happened. Two years later there was another problem to face: Brexit referendum. Again, Scotland's aim was not to lose its position within the European Union,[193] that is why the majority of the Scots voted to remain in the EU. This demonstrated a clear political divide between UK countries: 'Remain' won in Scotland by 62% to 38%, whereas England voted for 'Leave'.[194] The problem now is that Scotland belongs to a country that wants to leave the EU, when the Scots have explicitly expressed their will to remain in the EU. Therefore, the real possibility of a second Scottish independence referendum, reinforced by all the issues related to Clause 11 of the EU Withdrawal Bill. However, on 23 January 2019, Theresa May claimed: "The last thing we want is a second independence referendum. The United Kingdom should be pulling together, and should not be being driven apart."[195]

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[189] This paper was written in February 2019, when Theresa May was still the Prime Minister of the UK.
[190] Carrel, Scottish parliament decisively rejects EU withdrawal bill, …
[191] See section 3.6
[192] As cited in Wishart, Scotland had to reject the EU withdrawal bill, …
[193] A potential damage of Brexit for Scottish interests regarded its powers in agriculture, fishing, financial services, biotechnology, exports of whisky etc. We will not deepen this topic, for further information see: Wishart, Scotland had to reject the EU withdrawal bill, …
[194] Holmes, Matthew and Guardian readers, "'I'm not hoping for independence': Scottish readers on Brexit", *Theguardian.com* (2016), at https://www.theguardian.com/politics/2016/jun/24/rest-of-uk-spoken-for-us-scottish-readers-brexit-independence
[195] As cited in BBC News online, "Sturgeon and May clash over indyref2 ahead of Brexit talks", *bbc.com* (2019), at https://www.bbc.com/news/uk-scotland-scotland-politics-46961172

Scotland's future seems to be very unclear at the moment, therefore everything just said remains an open question.

5.2 Final overview

After having seen the position of Scotland today between devolution and Brexit, we should come to some final considerations. The aim of this work was to understand the meaning and the role of devolution within the United Kingdom, taking Scotland as an example of devolved nation, for a deeper analysis of all the steps that throughout the years led to the achievement of devolution, symbolised by the establishment of the Scottish Parliament.

Each one of the three sections has put the stress on a different aspect. The aim of the first section was to answer to the question: why is Scotland different from the rest of the UK? The second one focused on why Scotland wanted to be a devolved nation within the UK and how it obtained devolved powers. The third section has taken one devolved matter as an example for a case study: Scottish higher education system in contrast to the English one.

Giving a definition, "the very essence of devolution is the transfer of power from Westminster to governing institutions responsible for distinct geographical areas within the United Kingdom, in such a way that the devolved decision-makers are primarily answerable to their local electorate."[196]

In conclusion, it could be claimed that Scotland's future as a devolved nation seems very unclear in a Brexit perspective, therefore the need to underline again that "political devolution is very much an ongoing process rather than a 'one-off' event."[197] In this way, this paper ends in the same way as it started: "Devolution is a process not an event."[198]

[196] Cornes, Richard, "Devolution and England: What is on Offer?", in Bamforth, Nicholas; Leyland, Peter (eds.), *Public Law in a Multi-layered Constitution* (Hart publishing, Oxford, Portland, 2003), 103-132, at 109.
[197] Arnott, Menter, The same but different? …, 254.
[198] Towers, "Devolution is a process not an event" …

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