



**Constitution
ReformGroup**

Towards a New Act of Union

A Discussion Paper

CONSTITUTION REFORM GROUP

TOWARDS A NEW ACT OF UNION

A DISCUSSION PAPER

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FOREWORD

This discussion paper is based on the premises that the United Kingdom as a united and effective Union—

- is under threat;
- is worth saving; and
- can be saved.

The authors of this paper believe that the four constituent parts of the United Kingdom have been inextricably intertwined for centuries, and that this has been greatly to the benefit of each of them. The nations and peoples are connected by ties of family, business, education, research, language, sport and culture and by a history of which every citizen can be proud; and they share a culture of human, social and economic rights, the rule of law, democracy and openness to the world which are conducive to human happiness and to the prosperity of our people.

In an increasingly uncertain and dangerous international environment, the multiple connections that form the country will become an ever more valuable asset economically and also in terms of defence and security. If the United Kingdom were to be broken up, we would all become immeasurably weaker in the short term, and more so with time.

Nor should the existence of a multitude of individual cultures and communities within the United Kingdom be a source of division or a reason for dismantling what has worked so well for so long. Multi-cultural and multi-ethnic states are once again a fact of life as they have been at other times in history, partly as a result of migration. The United Kingdom has been a conspicuously successful multinational and multi-ethnic state for a long time.

Recent experience in Europe and elsewhere has shown that carving up multi-national states is rarely a happy process for any of their components; apart from being increasingly impractical as a result of migration flows, it is a difficult and distressing process that impoverishes all who take part in it.

If we act now, there is no reason why the United Kingdom should be subjected to the same painful dismantling process that has caused so much misery and national impoverishment elsewhere. But inactivity will have that result: there is sufficiently general discontent with the present situation for it to be clear that if existing constitutional relationships remain unreformed that will invite the dissolution of the UK. Similarly, making only minor changes at the edges in an attempt to rebalance the UK will be ineffective at best and could be seriously counter-productive.

The purpose of this discussion paper is to prompt a conversation which will identify the basis for a new constitutional settlement that will secure the long-term strength of the Union, while respecting the rights, interests and identities of each constituent part.

We invite everyone interested in the future of the United Kingdom to take part in this vitally important debate.

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CHAPTER 1

INTRODUCTION

Overview

The purpose of this discussion paper is to inspire a broadly-based conversation designed to ensure that the relationship between the constituent parts of the United Kingdom is restated and redesigned in order to provide stability, fairness and prosperity for the foreseeable future.

This paper sets out our initial assessment of the areas and issues that will need to be included in this discussion.

The need for a new settlement

In March 2015 Lord Salisbury published an article¹ expressing a fear that the United Kingdom is in imminent danger of collapsing. The most obvious and immediate threat to stability is the likelihood of a renewed referendum on Scottish independence²; but there are other tensions and pressures, some of which we touch on in this discussion paper³.

There was a strong response to that article, from people of all political parties and of none. While the responses showed a wide range of opinions on many important matters of detail, there was a strong common denominator of agreement that the Union can and should be saved, but that urgent action is required for that purpose.

We therefore came together as a cross-party group to consider how a process might be started that would result in the identification of a new constitutional settlement⁴ that satisfies the self-determinative requirements of each nation within the United Kingdom in a manner which benefits and satisfies all its citizens.

¹ *Four Federal Parliaments, One Ancient Force For Good*, Robert Salisbury, Sunday Times, 1st March 2015; see also *David Cameron must make the Scots feel welcome – No one seems happy with the status quo, we need to reform the Union – or lose it*, Robert Salisbury, 6:15AM BST 04 May 2015 – <http://www.telegraph.co.uk/news/general-election-2015/11580674/David-Cameron-must-make-the-Scots-feel-welcome.html>

² The evidence for the likelihood of a second referendum as early as 2016 is set out in Appendix 1.

³ Campbell II, *The second report of the Home Rule and Community Rule Commission*, March 2014 summarises the various forces for active decentralisation within the United Kingdom, including City deals presently being negotiated within England.

⁴ As is discussed further in Chapter 13, the aim is to address only those parts of the Constitution that express the nature of the Union and the governance arrangements for its constituent parts and for central national functions; it is no part of the present project to codify other constitutional issues so as to produce a single written Constitution.

Purpose of this discussion paper

The governance arrangements of the United Kingdom must change at a number of levels if the Union is to be preserved and enhanced. The whole must be greater than the sum of the parts, but each part must feel that its unique contribution is formally acknowledged and appreciated, and that it is a net beneficiary from the overall arrangements.

Existing arrangements do not serve those purposes. But nor will any single set of knee-jerk reactions produce a result that improves on what we have now. What is required is a discussion that engages the interest and enthusiasm of as many citizens and groups as possible.

There can be a time in any relationship where constructive change and securing the long-term sustainability of the partnership no longer seems a viable option, and the inevitable reaction is for each party to seek to secure as much as possible of the assets in anticipation of the process of dissolution. Although the United Kingdom is not at that point, only by a process of constructive engagement now is it possible to avoid that point ever being reached.

The group

Lord Salisbury has acted as the convenor of the group which is responsible for this discussion paper. The other members are listed above⁵. We have had support and assistance from a wide range of politicians, academics and others⁶.

Future process

Following the launch of this discussion paper in September 2015, the aim is to convene teams to explore the individual issues identified in this paper in more detail, and to prepare a series of consultation papers, followed by reports based on the results of the consultations.

The aim is for those teams to include politicians of all political parties, as well as people with no party affiliations, who are committed to identifying common ground that can form the basis of a new and enduring constitutional settlement. Academic and other institutions with interest and expertise in the issues will be invited to participate, and their previous work will be reflected wherever possible.

Our ultimate product will be a White Paper that aims to set out ideas that have attracted wide-spread support, and to embody them in draft legislation⁷ which would implement those ideas effectively.

⁵ See page 4.

⁶ See Appendix 4.

⁷ This might take the form of a new Act of Union, but there is a variety of possible legislative forms; we discuss some of the primary implementation issues below in Chapter 13.

Timing

Despite the immense complexity of the issues that a new constitutional settlement needs to confront, it is clear that urgent action is imperative if we are not to be overtaken by events irreparably damaging the Union⁸. The 2016 elections to the Scottish Parliament could become a catalyst for renewed pressure for independence, and might be interpreted as a mandate for a repeat of the 2014 referendum⁹. That means that the task of convincing people in Scotland, as well as in each of the other constituent nations and regions of the Union, that there is a viable and secure alternative to independence in the form of a new and fair constitutional settlement has to be achieved over only a few months.

That poses a very considerable challenge, but one that can be met. In particular, the large number of studies by specialist political and other organisations in the last few years means that there is plentiful material on which to build. By engaging with these organisations and incorporating the results of their work into our own discussions we expect to be able to identify common ground relatively quickly.

Mechanism for constitutional change

It is often said that one of the advantages for the United Kingdom of having no codified written constitution¹⁰ is that our governance arrangements have a flexibility that allows them to be readily adapted to meet the needs of changing times.

It is certainly true that our constitution is flexible. Perhaps too flexible, in the sense that there is nothing to prevent fundamental building blocks of our country's governance from being rearranged at whim by any government that happens to have a majority in Westminster. We have no constitutional checks and balances that require majority consent of the citizens, or even methodical consultation of interests and consideration of implications. A government could choose to establish a constitutional convention or a Royal Commission before making major constitutional change¹¹: but it is not required to, and in the past 15 years or so

⁸ The urgency of the issues is explored in detail in *The Reformed Union – The UK as a Federation*, David Melding AM, Institute of Welsh Affairs, September 2013, ISBN 978 1 904773 69 6: see, in particular, *Time is Short for Unionists*, pp.10-11.

⁹ See Appendix 1.

¹⁰ Or, rather, a constitution that is written in a number of different places and that includes unwritten components.

¹¹ For discussion of the available options see *Do we need a constitutional convention for the UK?*, House of Commons Political and Constitutional Reform Committee, Fourth Report of Session 2012-13, 25th March 2013, HC 371; see also *Constitutional Conventions: Possible Options in the New Parliament*, House of Lords Library Note 20th March 2015 LLN 2015/008; see also *Will a constitutional convention democratically refound the British state?* Stuart White 29 April 2015, Our Kingdom, Open Democracy - <https://www.opendemocracy.net/ourkingdom/stuart-white/will-constitutional-convention-democratically-refound-british-state>; see also *How to design a constitutional convention for the UK*, Alan Renwick 23 September 2014 Our Kingdom, Open Democracy -

governments have chosen to make enormously significant constitutional changes without any systematic form of accountable and transparent analysis beforehand.¹²

But those responsible for government at all levels have a duty to ensure that when change is chosen it is chosen in an informed way, with full consideration of all the potential consequences and with a chance for all those affected to speak out and influence the process.

The Scottish referendum in 2014 conspicuously lacked engagement and involvement of all but the citizens of Scotland. It was a discussion of the constitutional future of the United Kingdom held only with one part of those affected, and based on entirely Scottish considerations. On that basis, it was perhaps no surprise that the result came as close as it did to amounting to a vote in favour of the dissolution of the United Kingdom. And the result has been to enhance tension between the different parts of the Union, and a general feeling of unfinished business.

One aim of the discussion inspired by this paper is to encourage the Government, or Parliament independent of Government, to establish a process to take our proposals forward and submit them to the scrutiny of, and to development by, the fullest possible range of political, social, civic and commercial interests. This might take the form of a Constitutional Convention¹³, or of a Royal Commission¹⁴, or of some other kind of inquiry or combination of kinds of inquiry¹⁵. But whatever form it takes it must be designed to build consensus around as many as possible of our proposals, and to give all citizens of the United Kingdom a feeling that they have been involved and represented in a fundamental reshaping of the Union. In particular, it is important that whatever process emerges is not seen as being entirely Westminster-based or Whitehall-based if it is to carry serious general credibility. And finally, it must happen – and conclude – soon. There is no time to waste.

<https://www.opendemocracy.net/ourkingdom/alan-renwick/how-to-design-constitutional-convention-for-uk>

¹² Including the Scotland Act 1998, the Northern Ireland Act 1998, the Government of Wales Act 1998, the Government of Wales Act 2006, and the Constitutional Reform Act 2005.

¹³ See, for example, *The Crisis of the Constitution – The General Election and the Future of the United Kingdom*, Vernon Bogdanor, The Constitution Society, 2015, pp.36-40; for references to discussions of the potential for a Constitutional Convention see footnote 11 above. Others suggest that something more in the nature of a “stock-taking convocation” is what is required: see, for example, Lord Norton of Louth, HL Deb 1 June 2015 c.233 – “I have previously made the case for a constitutional convention. Many noble Lords have also made the case for one in today’s debate. However, I would refine the terminology. Use of the term “constitutional convention” carries too much baggage; it is often taken to denote a body created to draw up a new constitution. My view is that this is potentially dangerous, given that we do not have the foundations for such a body to operate. What I favour is a body that can stand back and make sense of where we are. That must be the essential basis before we embark on any more grand constitutional measures. We need what, for want of a better name, I will call a constitutional convocation”.

¹⁴ There is precedent for the establishment of a Royal Commission to consider the constitution of the United Kingdom and the need for change – The Royal Commission on the Constitution (the Kilbrandon Commission) which reported on 31st October 1973.

¹⁵ Including, for example, a Joint Committee or Commission of both Houses of Parliament.

CHAPTER 2

CENTRAL FUNCTIONS

Introduction

Conversations about the progress and future of devolution tend for obvious reasons to be cast in terms of what powers Parliament and Government are prepared to “give away”, or what functions and responsibilities national and regional institutions want to “take” for themselves. This can turn the discussion into a form of negotiation, with the presumption being that the centre wants to reserve to itself as much as possible, and the regional legislatures and executives want to take as much as possible. There is a consequent risk that the result depends more upon relative political bargaining power from time to time than on the construction of a logical and coherent – and above all inclusive – political structure.

These issues should be approached partly from the opposite direction, by asking the citizens of each Part of the United Kingdom to consider what governance functions they would like to be exercised at a central level, so as to ensure that the United Kingdom remains a strong country of which they want to be part and from which each citizen – and each nation and region – benefits¹⁶.

Nature of central functions

The conversation which this discussion paper initiates will therefore ask stakeholders to identify what functions are most efficiently and effectively performed at a central level; and how those functions enhance the nature of a strong central Union¹⁷. We also invite the citizens of each part of the Union to consider whether there are aspects of an overarching State that are not necessarily about the performance of particular governmental functions,

¹⁶ In correspondence during the preparation of this paper Professor Arthur Aughey expressed the thought as follows: “The historical objective of central government, or Westminster, has been to secure common rights of citizenship within the shared space of the UK, where expressions of national difference need not conflict with the achievement of multi-national purpose”.

¹⁷ Although this paper talks in terms of a distinction between central functions and decentralised functions, the eventual reality could be more sophisticated than that. In particular, both the EU and Germany operate by means of an allocation of functions into three categories “central/Union”, “regional/national” and “shared”, set by reference to broad statements of categories.

but may be more about establishing a partnership for greater fairness and justice for each constituent part, as well as preserving a shared national culture and identity¹⁸.

We therefore suggest that the design of a new constitutional settlement should begin by considering the functions of central government and other aspects of the central partnership-based State. This has the added advantage that it avoids the temptation to begin by creating or accepting the existence of particular regional or local institutions and then trying to invest them with sufficient powers and duties to justify their existence. This approach may also involve the initial assumption that “default competence” or “residual competence” lies with the central body¹⁹.

Flexibility

In identifying central governance functions that should be exercised by and for the Union as a whole, there will of course be wide scope for debate and disagreement.

For that reason and others, flexibility will always be important to some extent, so that a relatively minor detail does not become a deal-breaker for any group of citizens on the grounds that it is necessarily set in stone for all time. One of the lessons to be learned from the success of Welsh devolution has been the possibility of a relatively easy-to-operate system for the adjustment of the devolution of power (although for inevitable political reasons in the context of devolution the adjustment has been, and was always likely to be, only in the direction of Welsh self-determination)²⁰.

At the same time, if the essential features of the Union are too readily able to be changed at the whim of, in particular, a particular incoming administration either at the centre or in one of the constituent parts, there is likely to be a feeling that the reconstituted United Kingdom itself lacks a sense of permanence and coherence.

The aim should therefore be to identify governmental functions which are generally agreed to define the essence of the central State and to require performance at a central level. At the same time it will be necessary to identify a secondary class of functions which may initially be right for central exercise, but as to which the correct balance may change.

¹⁸ As to which see further Chapter 5 below.

¹⁹ Unlike the EU, Germany or the US.

²⁰ See in particular the Government of Wales Act 2006 s.109 (Legislative competence: supplementary) and the Government of Wales Act 2006 (Amendment) Order 2015/204, the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2007/2143, and the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010/2968; and the Government of Wales Act 1998 s.25 (Power to make specific transfers etc) and the National Assembly for Wales (Transfer of Land) Order 2001/398, the National Assembly for Wales (Transfer of Property etc.) Order 2000/991 and the National Assembly for Wales (Transfer of Records) Order 2004/3137.

An initial settlement must therefore be capable of accommodating areas of doubt or flexibility. Some issues may be of enormous importance to individuals without being central in terms of defining the nature of the constitutional relationship between the Union, its constituent parts and individual citizens. There is no reason to believe that citizens would be unwilling to affirm the creation of a new constitutional framework that allowed for defined areas of uncertainty or flexibility, provided that—

- (a) the majority are asked to support a new constitutional settlement based on its having identified the core functions of central government and the core features that describe the Union as a whole, and
- (b) the new arrangements include robust mechanisms for determining or adjusting those matters from time to time²¹.

Identifying central functions

There are of course a small number of politicians and others who are dogmatically committed to independence at all costs, as well as those who are dogmatically opposed to any kind of constitutional localism or decentralisation. But the processes of devolution in Scotland, Wales and Northern Ireland have shown that it is generally possible to identify consensus on enough issues to allow a new constitutional framework to be developed which satisfies a majority of regional-determinative aspirations while leaving a strong Union performing an agreed class of central functions.²²

There are some policy areas which are readily identifiable as being necessarily central.

For example, nationality is by its very nature a description of belonging to a single State unit. However, that does not mean that any particular functions in relation to nationality have to be regulated or controlled at a central level. For example, the issue of passports or other documents attesting to nationality is an administrative matter that could be carried out either centrally or locally. But what matters is that those documents attest to citizenship of a single entity²³. And it is important to distinguish between nationality and other expressions of identity and community, which are perfectly compatible with it: for example, a citizen may feel strongly Welsh and strongly British and be proud of both.

Similarly, immigration concerns movement into the State from outside, and the policy of immigration therefore is one of the defining features of the Union: but, again, that does not

²¹ As has been the case for all three devolution settlements so far.

²² The draft Cornwall Devolution Deal (Kevambos Digresennans Kernow) published by HM Government on 15 July 2015 is also an interesting illustration of what can be achieved with apparent wide consensus – see

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447419/20150715_Cornwall_Devolution_Deal_-_FINAL_-_reformatted.pdf

²³ Of course, while the United Kingdom remains a Member State of the European Union, citizenship of the United Kingdom also carries with it Citizenship of the European Union.

prevent administrative issues, or certain aspects of subsidiary regulation, from being determined at a local or regional level.

There are also functions which need to have some kind of central or whole of State expression, but also must leave considerable room not just for administration at a local level but for certain aspects of policy to be determined locally or regionally.

For example, a United Kingdom requires a single currency²⁴: but that is consistent with having certain central banking functions performed by each part of the Union including, in particular, the issue of their own notes and coinage – something that has been successfully achieved within the United Kingdom for many decades.

Subject to this qualification that the identification of a central governance policy area does not prevent differential administration in the constituent countries of the Union, the following areas seem likely to command general support for inclusion in an initial list of central functions²⁵:

- (a) the Crown²⁶;
- (b) the constitutional settlement itself²⁷;
- (c) foreign affairs²⁸;
- (d) defence;
- (e) national security;

²⁴ Whether its own, as is presently the case, or accruing as a result of membership of the Eurozone.

²⁵ These areas of policy are all included in the list of Reserved Matters in Schedule 5 to the Scotland Act 1998 as in force as at July 2015 – but there are paragraphs of that Schedule not included in this list, and whose inclusion in an eventual new constitutional settlement would be open to discussion. For example, the Civil Service is reserved under the Scotland Act 1998, but it is open for consideration to what extent it should be a central function under a new constitutional settlement (although as to a central civil service as a unifying factor enhancing coherence of central and local government see further Chapter 8 below).

²⁶ The issue of whether the United Kingdom should continue to be a constitutional monarchy is of course open to debate: but identification in the list of central policy issues indicates both that the establishment of a new settlement need not itself consider the continuation of the Monarchy, and also that any consideration that might later be required should take place at a nation-wide level.

²⁷ Subject to exceptions along the lines of those contained in Part I of Schedule 5 to the Scotland Act 1998 (such as the personal property of the Sovereign, or the use of prerogative Seals).

²⁸ Reservation of international relations does not necessarily preclude the conclusion of agreements and understandings between the government of one Part of the Union with other governments or international organisations, within limits defined by reference to the other central functions.

- (f) overarching fiscal, economic and monetary policy²⁹;
- (g) currency³⁰;
- (h) immigration;
- (i) citizenship;
- (j) extradition;
- (k) emergency powers.

In identifying a final list it will be necessary to consider, as well as functions that need to be performed centrally for practical reasons, whether there are functions that should be retained with central government because of their traditional role in defining the Union in cultural or other terms. Examples of this might include cultural functions like broadcasting, but also significant financial examples like the universal state pension. This area needs consideration to recognise that the United Kingdom is not just a legal constitutional construct, but a cultural and political one.

Variation between different parts

There is not necessarily a one-size-fits-all answer to the allocation of central and local functions and features.

Indeed, one of the mistakes that can be made in discussing the future of devolution is to encourage an attitude of rivalry between the individual parts of the Union, with one part thinking along the lines of “if they have the power to do X then why don’t we?”. A discussion that focuses more on what each individual part of the Union wishes to see achieved at a central level and what functions it particularly wishes or needs to carry out entirely for itself, could in theory lead to different answers in different nations or regions, and conceivably in different regions. Provided that a process can be found to avoid this becoming inherently unwieldy and leading to a centrally unbalanced and incoherent Union, there is no reason why one part of the Union should be forced to copy the localism policy of any of the others.

For example, while fiscal, economic and monetary policy are reserved matters under Schedule 5 to the Scotland Act 1998, the nature of the exceptions and qualifications to this reservation has developed as a result of discussions specific to the political situation in Scotland. The fiscal balance between the central government of the United Kingdom and the devolved governments already varies between the different home nations, and there is no reason why that should not continue under a new constitutional settlement, save for the

²⁹ Subject to such exceptions in relation to the raising and spending of public money as may be identified; as to which see further Chapter 4.

³⁰ Subject to the qualification about local issue referred to above.

crucial qualification above that a generous share of UK resources and therefore tax revenues need to be retained at the central UK level in order to ensure a fair distribution and underpinning of common social and economic benefits and rights.

Overall, the new system should provide for as much flexibility as possible in allowing each constituent part to decide what to “draw down” from a set of available powers, while reserving a clear and well-understood list of functions for central performance.

CHAPTER 3

OPTIONS FOR ENGLAND

Introduction

One of the assumptions underpinning this discussion paper is that there is a serious frustration among large numbers of residents of England that is causing increasing dissatisfaction with the present constitutional and governance arrangements for the United Kingdom³¹.

This frustration is doubtless for some people a reflection of a desire to enjoy the same degree of self-determination as is enjoyed by the people of Scotland, Wales and Northern Ireland as a result of devolution; but for others it may simply arise from a relatively unfocused feeling of resentment at the pace and extent of devolution and at the apparently separatist aspirations of an arguably increasing and definitely vocal proportion of the residents of the other parts of the Union, and particularly Scotland. It has certainly been enhanced by the perception that while more power is being channelled towards Scotland in particular, most recently as a result of implementation of the Smith Report, there is no corresponding diminution in the influence of Scottish politicians in relation to matters that wholly or primarily concern England.

What is clear is that there is growing English disenchantment with its place within the United Kingdom which can only be ended when we have clearly defined and balanced roles for devolved institutions in England, Wales, Scotland and Northern Ireland³² and when all our citizens feel that all parts of the Kingdom have equality and fairness in our institutions of national and regional governance³³.

While this sense of frustration is common to many and growing, there is no single solution to it that has yet been identified and framed in such a way as to command consensual

³¹ For a graphic outline of the place of the “English Question” in what many perceive as an imminent constitutional crisis see *The Crisis of the Constitution – The General Election and the Future of the United Kingdom*, Vernon Bogdanor, The Constitution Society, 2015, pp.12-14.

³² “It is an asymmetrical union. Its members are different in size, wealth and constitutional development. England with 84% of the UK’s population has no devolution. This has implications for any new constitutional departure.” – *Devolution and the Future of the Union – The Constitution Unit*, School of Public Policy, University College London, April 2015 ISBN: 978-1-903903-70-4.

³³ Discontent continues to grow among the majority population in England, with a growing sense of disadvantage and disempowerment: the calls of “if they want to go, let them and good riddance” were heard among many of the disenfranchised during the 2014 referendum campaign, often from committed Unionists who had never contemplated its dissolution before, and were reacting purely from dismay at what appeared to be a unilateral surge of separatism from Scotland.

support.³⁴ In particular, although EVEL (English Votes for English Laws) was designed to address this frustration, it is increasingly apparent that a solution that is confined to adjustments of the procedural mechanisms of the House of Commons does not and cannot provide a satisfactory long term solution to fundamental questions of constitutional balance within England itself, let alone the United Kingdom.

This also reflects a political reality: Scottish, Welsh and Northern Irish devolution have been driven in part by disaffection with Westminster and Whitehall, which appear too remote and unaccountable from the real lives that people lead. The EVEL proposal can do nothing to address this sense of alienation. While English voters may well assent to the proposition if it is explained to them, the highlighting of the anomaly it seeks to address and the dispute about it in Parliament, is likely to reinforce the feeling that Westminster concentrates on its own technical matters while doing nothing to address the underlying problems.

One of the purposes of the dialogue which this discussion paper is designed to inspire is to outline the nature of options in relation to the future governance of England which will need to be refined and considered. This must include decentralisation within England as well as addressing the West Lothian question.

Each potential constitutional model for addressing the governance of England inevitably has its own strengths and weaknesses and the first challenge is to identify them and to present them in a form which enables people to compare and choose. But our long term aim is to identify or design an approach which appears to attract sufficient support to be likely to be worth giving legislative expression and, along with the other proposals which we discuss in this discussion paper, to be worth putting to the people of the United Kingdom for approval as a package of constitutional reform. The combination of addressing the constitutional position of England and the need for decentralisation within England may require a staged approach, but the constitutional framework can still be established in one step.

Although this chapter briefly discusses some of the principal issues and options, we will certainly have missed others of equal importance and we will be very pleased to hear about them in the course of reaction to this discussion paper.

Comparative size

Any discussion of the options for reshaping the Union with a view to its preservation needs to acknowledge and confront the geographical, demographic and economic realities that

³⁴ “The English Question is difficult for many different reasons. One is that no one knows confidently what the English want. It is said they want decentralisation, but to what level of government: to regions, counties, districts or parishes? Do they want two tier or unitary government? Do they want the health service devolved to regional or upper tier authorities? Do they want English votes on English laws, even if this leads to an English Parliament (which they say they don’t want)? The only data available is from opinion polls, which are shallow, unreflective responses, uninformed by expert opinion, or deliberation.” – *Devolution and the Future of the Union* – The Constitution Unit, School of Public Policy, University College London, April 2015 ISBN: 978-1-903903-70-4.

England accounts for around 85% of its population³⁵ and for a similar proportion of its economy³⁶.

These facts have some immediate and obvious implications for any constitutional settlement. To begin with, they are one of the reasons for the frustration at what some appear to see as a political combination to ignore the self-determinative aspirations of England and concentrate on those of the three other parts of the Union. From an English perspective this can come to be seen, wrongly, as allowing three geographically and demographically minor tails to wag an increasingly neglected dog. Being larger is not a reason for being allowed to dominate; but nor is it a reason for failing to make such arrangements for regional or local government for England as its citizens want in relation to matters which are devolved to other parts³⁷.

So in order to preserve a viable and self-confident Union that commands the general support of its citizens, it is necessary to offer to England (whether as a nation or through its regional components) a real element of self-governance, through one of the many available models that we discuss briefly below. This must be a solution that recognises the rights of the English people to be treated as seriously as those of any other part of the Union, and leaves it to English citizens to identify both the degree of devolution from the centre that they desire and the model that they chose for its delivery.

There is however one important qualification to be made here. Because England constitutes such a dominant part of the UK – comprising 85% of the population – it has a dual constitutional duty not shared by the hugely smaller Scotland, Wales or Northern Ireland: to ensure that English interests and identity are constitutionally recognised; and at the same time to ensure that this is not done in a manner which effectively establishes a domineering English state within the UK, so promoting separatist tendencies elsewhere.

It is therefore important in a constitutional settlement that preserves the Union to avoid the perception that England dominates simply as a result of its comparative size and wealth. One aspect of the awkwardness of the present arrangement whereby the Westminster Parliament effectively serves both as the Parliament of the United Kingdom and as the parliament for England, is that as well as leading to English frustration as a result of perceived interference by non-English politicians in purely English matters, at the same time

³⁵ Latest Office for National Statistics figures – mid-year population estimates for UK 2014 – give population proportions of: England – 84%; Scotland – 8%; Wales – 5%; and Northern Ireland – 3%.

³⁶ It is of course enormously difficult to measure relative economic costs and contributions of the different parts of the United Kingdom without courting controversy as to the accuracy and relevance of the measurements chosen; and the Office for National Statistics does not presently publish comparisons of gross revenue yields, for example. The latest ONS published statistics for GVA (Gross Value Added) shows the following proportions as at 5th June 2014: England – 84.8%; Scotland – 7.7%; Wales – 3.4.%; and Northern Ireland – 2.1% (<http://www.ons.gov.uk/ons/guide-method/compendiums/compendium-of-uk-statistics/economy/index.html> - accessed on 19th July 2015).

³⁷ And the extremes of what can be achieved are illustrated by the draft Cornwall Devolution Deal referred to above.

it perpetuates in the other parts of the Union the feeling that England somehow believes itself to be the primary and predominant part of the Union.

One aim in identifying a model for English governance should be to protect the rights and self-determinative aspirations of the three smaller parts of the Union, by identifying and ring-fencing those functions and features which ought to be exercised by and focused on England as a separate part of the Union. That is as much about ensuring that England as part of the Union cannot simply dictate to the other parts on matters of central constitutional interest as it is about ensuring that English aspirations for self-determination are properly recognised and realised.

Of course, any system of central governance that involves constituency representation will inevitably be affected by the simple fact of England's comparative size. If an English Parliament or something similar were established it would always be the case, for example, that a First Minister for England – in whatever form and by whatever name such a position might come to be constituted – would wield sufficient political power to give him or her as much influence as, and in some respects more influence than, the holder of the office of Prime Minister in relation to the United Kingdom. That will doubtless be capable of producing tensions, as has already happened to a lesser degree in relation to the Mayor of London. But at the same time the ability to ring-fence the functions and powers of the two offices should be capable of diffusing that tension and to some extent diverting it into a creative force, as has been shown in relation to London.

The English East Midlands Region, for example, has a population almost the size of Wales and Northern Ireland combined; London has a population greater than that of Scotland and Wales combined; and Greater Manchester has a population double that of Northern Ireland and almost as great as that of Wales.³⁸ Thus if there were to be devolution to English regions and or city-regions, many would be comparable to or greater in size than Scotland, Wales and Northern Ireland. That reality suggests the importance of considering alternative models to an English Parliament.

Understanding the cultural and behavioural aspects of this issue is just as vital as understanding the constitutional and legal aspects. If the UK Government is also effectively to continue as the government of England, then a change in the daily conduct of government may be required, in order for voters in Wales, Scotland or Northern Ireland to feel that the UK government is also their government.³⁹

³⁸ <http://www.citypopulation.de/UK.html> - accessed July 2015.

³⁹ There are many ways in which at present Ministers can be seen as being preoccupied by domestic policy in England. Most of Prime Minister's Questions are about England, and discussions about welfare reform, the economy or taxation can appear to assume that Scottish, Welsh and Northern Ireland voters are engaged, while no special effort is made to address the Scottish, Welsh or Northern Irish dimension of these policies. This preoccupation can also be seen as being reflected in and reinforced by the media.

Models for governance

It is important not to pre-empt decisions as to which model will be felt most appropriate for achievement of the principles discussed above. But there are some obvious choices that will have to be made and we discuss them very briefly here purely as an agenda for the further work that we propose to undertake.

The most obvious choice is in relation to the existing Westminster Parliament and how its structure might change to reflect the self-determinative aspirations of England.

As to that, there are some obviously simple solutions that may appear superficially attractive by reason of their very simplicity, and which may indeed turn out to be the most effective solutions on closer analysis. For example, the existing House of Commons could simply become the English Parliament, with the existing House of Lords becoming the Federal Parliament, National UK Parliament or whatever similarly entitled parliamentary institution was constituted for the purposes of the central governance functions of the Union⁴⁰. The membership arrangements of both Houses would have to be completely reworked to achieve this change of function; but in terms of ease of transition in many practical ways, this model has attractions.

In particular, proposals which centre around the adaptation of our existing parliamentary institutions will hopefully bring reassurance that the devolution of power in relation to England does not necessarily involve the creation of yet another expensive building housing yet another group of expensive politicians, leaving the existing institutions to continue to be financed as before and simply adding yet another layer of constitutional bureaucracy. While perhaps of relatively trivial importance in long term practical respects, and while certainly being unimportant in terms of constitutional theory, it would be unwise to underestimate the probable public distaste for proposals which appear to assume a public appetite for new buildings and new professional politicians. So while regional devolution is likely to be an important component of proposals for constitutional change – and must be resourced appropriately in order to make it effective – it should be clear from the start that simply adding another layer to our existing arrangements without any restructuring is not a plausible option.

There are of course, many variations on the broad theme of adapting the existing institutions. For example, the House of Commons could become a purely English-focused institution, with the House of Lords assuming some kind of federal or national function; but there are many other options, including allowing the House of Commons to become the Federal or National Parliament. In the latter case, there would be a wide range of options for the House of Lords, from retaining it in a revised form as a revising chamber for the Federal

⁴⁰ For a trenchant summary of the objections to an English Parliament – and a salient reminder that the issues were considered in depth by a Royal Commission a few decades ago – see *The Crisis of the Constitution – The General Election and the Future of the United Kingdom*, Vernon Bogdanor, The Constitution Society, 2015, p.16.

or National parliament⁴¹, to concluding that it is no longer necessary at all under the new arrangements. This model would either involve the creation of a separate institution to become the English parliament – with the attendant disadvantages already discussed – or it could sit alongside one of the models for English devolution that does not involve the creation of a new Parliament for the whole of England.

Those models again cover a range of potential options. In particular, not all the frustration felt in relation to lack of self-determination in relation to English matters is accompanied by the desire for the creation of a new parliamentary body for the whole of England. The localism agenda requires to be considered at the same time, based on an acknowledgment both that a trend towards political localism appears to command general support and that the Localism Act 2011 and other measures do not appear to have delivered it.

For this reason, the devolution of power in relation to English matters could wholly or partly involve the devolution of power to regions, to cities or to a combination of both⁴².

Given the relative size and population density of England compared to the other parts of the Union as already discussed, matters such as health and education which have been devolved to other parts of the Union could realistically be devolved within England to individual regions, however defined. Unitary authorities within the larger cities could also be used as the centre for administering devolved functions, with a different model being adopted for rural areas as is presently the case for local authority functions. Certainly, it is difficult to imagine that devolution to new levels of regional government outside London in England would win popular support without unitary local government.

In exploring this model it will also be necessary to recognise the regional imbalance in England itself and to adopt a model that both acknowledges areas of comparatively greater population density and revenue production while protecting and ring-fencing the rights and self-determinative aspirations of other areas and regions⁴³.

So there are many possible options, and one of the most exciting aspects of the opportunity to devise a constitutional settlement that preserves the Union is the opportunity to think

⁴¹ As a further variation on this model, it is conceivable that it would accompany the establishment of small revising Chambers for each of the devolved legislatures. For example, the Scottish Members of a Federal Parliament might be *ex officio* constituted as a Committee in Edinburgh to act as a revising Chamber in relation to proposals before the Scottish Parliament; and the same for the other constituent countries. But the establishment of arrangements of this kind would necessarily be a reflection of local interest in a revising mechanism and must not be seen as mandatory interference by the Federal institutions in the local institutions. (It is not, of course, necessarily the case that arrangements of this kind need to be established for each of the constituent parts of the Union.)

⁴² Campbell II, *The second report of the Home Rule and Community Rule Commission*, March 2014 illustrates the role of city deals as part of a general decentralisation trend within the United Kingdom.

⁴³ Including those with particularly strong self-determination aspirations – see, for example, the draft Cornwall Devolution Deal referred to above.

creatively about issues that have been necessarily dormant under our existing constitutional settlement for many decades.

In all of this work however, it will be necessary to bear in mind the two key principles mentioned above: that devolution to England must be as real, permanent and satisfying as devolution to the other parts of the Union; and that ring-fencing devolved functions for England is part of the process of protecting the influence and self-determination of the other parts of the Union in relation to other matters.

It will also be essential in formulating any proposals to ensure that England decides and is seen to decide how to apportion the functions in relation to devolved matters in the same way that Scotland, Wales and Northern Ireland have decided the central constitutional issues in relation to their own devolution.

English Parliament

The notion that the Westminster Parliament obviously and naturally performs a dual function as the national legislature and the legislature for England is taken by some as a given, from the basis of which any discussion of constitutional reform has to start⁴⁴.

English Votes for English Laws is a pragmatic attempt to resolve some of the tensions inherent in this dual role, but it seems unlikely that it can provide a satisfactory solution, at least in the long term⁴⁵. It may be that what is required for the long term is to sever the two sets of functions and features, so that each can operate within an institution that does not have inherent tensions that require to be addressed through EVEL or another system.

The conversation launched by this discussion paper will therefore consider specifically the question of what a Parliament for England might look like. Without pre-empting any part of that discussion, it will need to consider the following issues in particular.

First, one of the concerns shared by many about the notion of an English Parliament centres around the cost and complexity of the existing devolution mechanisms and a fear that an English Parliament will be another expensive building occupied by another set of expensive politicians. Any discussion about the establishment of an English Parliament needs to be sensitive to these concerns at the outset. And there are a number of ways in which they might be addressed.

In particular, it needs to be clear that we have no intention to recommend the establishment of a new body of 600 Members, to become the English Parliament, while the Westminster

⁴⁴ See, for example, “greater recognition needs to be given to the fact that Westminster is England’s parliament as well as the parliament of the United Kingdom” – Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom*, May 2015, p.28.

⁴⁵ See further Appendix 2.

Parliament continues with its existing complement in each House. Indeed, it will almost certainly be a design specification for any new English Parliament proposal that it results in and accommodates at least a corresponding reduction in the size and cost of the Westminster Parliament. That may not be easy, particularly as it would be unwise at this stage to commit to a unicameral Westminster Parliament or any of the other obviously possible ways of achieving a reduction; but the aim is both achievable and essential if the proposals for constitutional reform are to command consensus.

Secondly, consideration of the establishment of an English Parliament should focus as much on the resulting emergence of a coherent parliamentary entity for the United Kingdom as a whole, as on producing in effect a system of devolution for England. A reserved-powers model for the devolution of power to the constituent parts of the Union should begin by considering not what each part might wish to “take” for itself, but what functions and features of government are required to be performed by a central parliament in order to give coherence to the whole⁴⁶.

Regional devolution

As the Bingham Centre report recognises⁴⁷, any discussion about a new constitutional settlement needs to consider the recent trends towards localism and to ask whether regional assemblies of some kind are a more appropriate alternative to the present system than the establishment of an English Parliament⁴⁸.

As the Bingham Centre report says, devolution within England has to consider fiscal devolution in the same way as has been and is being achieved for other parts of the Union⁴⁹; and that tends to point away from the proliferation of regional assemblies. But this and other aspects of regional self-determinative aspirations need to be considered as part of the overall discussion.

The discussion about the possibilities for regional devolution will have to focus specifically on how the regions are identified, and how their “capitals” or centres of governance are to be determined. The disparity of interests between, for example, certain rural areas and certain

⁴⁶ See further Chapter 2.

⁴⁷ Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom*, May 2015, Chapter 5.

⁴⁸ Special attention will need to be given to areas with particularly strong self-determination aspirations – see, for example, the draft Cornwall Devolution Deal (Kevambos Digresennans Kernow) published by HM Government on 15 July 2015, which “sets out the terms of an agreement between Government, Cornwall Council and Cornwall and Isles of Scilly Local Enterprise Partnership to devolve a range of powers and responsibilities to Cornwall. Building on the Cornwall and Isles of Scilly Growth Deal, this Devolution Deal marks an important step in the transfer of resources, powers and accountability from central Government to Cornwall.” - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447419/20150715_Cornwall_Devolution_Deal_-_FINAL_-_reformatted.pdf

⁴⁹ Page 34.

urban areas, poses a specific challenge in determining appropriate arrangements for regional devolution.

Money

The founding assumptions of the development of governance systems for England discussed above acknowledge that it is both dominant in terms of demographics and that it accounts for the vast majority of the revenue raising capacity of the Union.

The governance model for England will need to recognise this as well as acknowledging that fiscal redistribution within the Union is one of the key features of its success and importance.

We identify some of the issues in relation to this in Chapter 4.

English Votes for English Laws (EVEL)

Our proposals are based on our view that adjusting the procedures of the House of Commons – whether through Standing Orders or by legislation⁵⁰ – cannot itself be a sufficient long-term solution to the frustrations clearly felt by, in particular, a significant number of English citizens, although they may be a necessary and appropriate short-term palliative.

We set out our analysis of the limitations of EVEL at Appendix 2.

⁵⁰ For which the Parliament Act 1911 is the obvious precedent, as a statute designed to readjust the balance of power within Parliament.

CHAPTER 4

PUBLIC FINANCE

Introduction

Establishing a general consensus around even the basic principles of taxation and public spending in a reformed Union will of course be the most challenging of the processes initiated by this discussion paper.

A working group including representatives of all the key institutions that have recently considered the economics of devolution, together with a broad spectrum of political opinion, will be supported by technical expertise in public administration and economic theory and practice.

The principal assumptions which will form the starting point for their work are set out in this Chapter.

Replacing Barnett

There is general consensus among those who have been consulted in the preparation of this discussion paper that there is a need to replace the Barnett formula as a matter of urgency⁵¹.

The House of Lords Select Committee on the Barnett Formula⁵² took broadly-based evidence and concluded that—

“There is both increasing debate on the future funding of the devolved administrations and increasing scepticism about the fairness of the Barnett Formula which may be exacerbated by any deterioration in the public finances. We have concluded that the Barnett Formula should no longer be used to determine annual increases in the block grant for the United Kingdom’s devolved administrations.”

⁵¹ See also: “This is going to be much more complicated once the devolved governments are responsible for raising some of their own revenue. In place of the single black box of the Barnett formula to calculate the annual block grant, there will be three black boxes: first, calculating what the block grant would have been; second, deducting a sum equivalent to the devolved government’s new tax capacity; and third, applying the ‘no detriment’ principle. This last seeks to compensate the UK government or devolved government from knock-on consequences of a tax change by the other, but will provide scope for endless argument about quantum.” – *Devolution and the Future of the Union* – The Constitution Unit, School of Public Policy, University College London, April 2015 ISBN: 978-1-903903-70-4.

⁵² 1st Report of Session 2008–09 *The Barnett Formula Report with Evidence* published 17 July 2009, HL Paper 139.

The Barnett formula was originally devised as a pragmatic but temporary solution, and it was not designed either to reflect complexities of differential demand or to be sufficiently flexible to reflect complex changes in economic and demographic patterns.⁵³

The Committee's Report concluded—

“Although the annual increment in funds is made on the basis of recent population figures, the baseline—accumulated over the last thirty years—does not reflect today's population in the devolved administrations. The Barnett Formula also takes no account of the relative needs of any of the devolved administrations.

A new system which allocates resources to the devolved administrations based on an explicit assessment of their relative needs should be introduced. Those devolved administrations which have greater needs should receive more funding, per head of population, than those with lesser needs. Such a system must above all be simple, clear and comprehensible. It must also be dynamic: able to be kept up to date in order to respond to changing needs across the United Kingdom.”

We endorse those conclusions and would take them as the fundamental design specifications for any replacement funding mechanism. In particular, we would expect a new system to be based on a medium-term cycle of payments to the devolved governments, perhaps using 5-year terms but subject to mechanisms for adjustment to meet unforeseen circumstances. In addition, the funding mechanism must embody the values of fairness and solidarity which we wish to characterise the Union, and which must be reflected in the daily politics of any new constitutional settlement if it is to be successful.

Fair distribution of national resources

As discussed elsewhere⁵⁴, a central feature of the Union and one of its fundamental principles is the mechanism that it provides for protecting universal rights and enhancing equality of opportunity for all citizens, regardless of their place of residence.

It follows inevitably that whatever fiscal arrangements are made, and wherever the balance is struck between central and local taxation, sufficient revenue must be retained at or made available to the national or federal level to ensure that central functions can be financed effectively. That may mean, for example, the central provision of universal pensions; or the redistribution of resources for growth and regeneration to poorer regions and areas, both between and within the constituent parts of the Union.

⁵³ HL Report *supra*, para.32 – “Lord Barnett made clear to us that the Formula was not designed as a permanent solution: “I thought it might last a year or two before a government would decide to change it. It never occurred to me for one moment that it would last this long” (Q 2). The fact that the Formula was intended originally as a short-term expedient was echoed in other evidence (p 145, p205).”

⁵⁴ See, in particular, Chapter 6.

The development of a wider range of taxes in recent years and the implicit acceptance of a degree of hypothecation at local and regional level⁵⁵ may suggest part of the mechanism for achieving an appropriate balance between central financing of central functions and local financing of local functions; but it is not likely that the mathematics will allow a simple distinction along those lines⁵⁶. Redistributive mechanisms at the national level will certainly be required and, as the Lords Committee said, they must be both generally perceived as fair at their inception and sufficiently flexible to retain a perception of fairness as conditions change. Around 40 per cent of national wealth is produced in London and the South East, yet it has less than 30 per cent of the UK's population. Those who favour devolving all fiscal responsibilities need to confront that reality.

The working assumption should be that central taxes will be distributed on a *per capita* basis, with mechanisms for adjusting distribution patterns to reflect areas of poverty or other features of particular local or regional need. It could be that this will be based on a new funding formula designed to create, as closely as possible, an equal tax base for each citizen, which automatically ensures what are effectively fiscal transfers to poorer parts of the United Kingdom⁵⁷.

This aspect of fiscal distribution is not a purely pragmatic issue: it is important to note that the question of fiscal policy goes to the heart of what many see as a principal defining benefit of the United Kingdom. The former Prime Minister Gordon Brown set out a compelling vision in rejecting Scottish independence in 2014:⁵⁸ he insisted that the issue was not about patriotism, as both pro- and anti-independence Scots could claim to be equally patriotic. Instead, the incontrovertible advantage of modern Britain is its 20th-century innovation: the pooling and sharing of risks and resources across the whole of the country to ensure common welfare and decent standards of life for all citizens, regardless of nationality or where people live.

At the heart of that pooling and sharing of resources have been a set of ground-breaking decisions throughout the 20th century – common welfare standards first introduced early in the 20th century and subsequently consolidated – ensuring common economic and social standards: common UK-wide old age pensions, common UK social insurance (sick pay,

⁵⁵ The Community Infrastructure Levy established by Part 8 of the Planning Act 2008 is one of the most extreme examples of express statutory hypothecation; and there are other recent examples of express or implied hypothecation.

⁵⁶ Although the starting point may be that different forms of expenditure are financed primarily from different forms of taxation; perhaps with income tax being primarily directed towards central or national expenditure and direct taxes (and possibly corporation tax) being used primarily for local and regional expenditure; but it will need to be remembered that many divisions that are superficially attractive become less so when one confronts the interdependence of economic issues and the reality that “even if all control of income tax were devolved to Scotland, the bulk of Holyrood’s revenue would still come from Westminster” – *The Crisis of the Constitution – The General Election and the Future of the United Kingdom*, Vernon Bogdanor, The Constitution Society, 2015, p.22.

⁵⁷ Special consideration should also be given to the possible need for transitional arrangements to ease potentially dangerous short-term impacts of any change.

⁵⁸ *My Scotland, Our Britain*, Gordon Brown, Simon & Shuster, 2014.

health insurance, unemployment insurance and labour exchanges), common UK child and family benefits, a common UK minimum wage, and a UK system of equalising resources; so that everyone irrespective of where they live has the same political, social and economic rights, and not simply equal civil and political rights. Pooling and sharing the UK's resources also enables redistribution from richer to poorer parts of the UK – whether constituent parts of a nation like the coalfield communities of the South Wales Valleys or regions of England such as the North East.

Borrowing

Effective rules for borrowing by the constituent parts of the Union will be key to establishing arrangements which preserve the economic well-being of the Union as a whole, while allowing each country the flexibility to secure investment for growth and to satisfy its own economic development aspirations.

The apportionment of pre-existing United Kingdom national debt will of course be the foundation of any negotiations at political level before separate borrowing by constituent parts could be enshrined in any new constitutional settlement. But that will be a one-off negotiation which will be of less importance to long-term economic health than developing sound rules for incurring future debts.

International experience⁵⁹ has shown that the markets are not an effective disciplinary force for keeping public borrowing to serviceable levels, particularly where they rest on assumptions about the political requirement for other States to provide economic support and rescue facilities as necessary⁶⁰.

Any rules about borrowing must therefore be accompanied by effective mechanisms – presumably including continuing monitoring and audit controls at a federal or national level – to ensure compliance.⁶¹

⁵⁹ Most notably within the past year in Greece.

⁶⁰ Within the European Union this is provided for States within the Eurozone, and to some extent for others too; within a newly constituted United Kingdom the same degree of economic inter-dependency would lead to a similar set of assumptions by international markets, irrespective of the formal constitutional arrangements.

⁶¹ But striking the appropriate balance of control and self-determination in this context would be particularly challenging – “However, there would be challenges to the machinery of government. There would need to be greater use of intergovernmental co-ordinating machinery, coupled with a realisation that devolved governments could neither be overlooked nor strong-armed. Much domestic policy would be more complex and take longer to be done, when central government could do it at all. HM Treasury would have to loosen control over fiscal aggregates and perhaps overall public sector borrowing, and manage them more loosely and at a higher level. Given its record, that is a serious challenge to both its current authority and its ways of working.” – *Devolution and the Future of the Union* – The Constitution Unit, School of Public Policy, University College London, April 2015 ISBN: 978-1-903903-70-4.

Existing arrangements for borrowing within the devolved institutions will inevitably be seen as a starting point at least in the context of political negotiation⁶²; but they will not necessarily be determinative. In the context of the work that we propose on the design of a new constitutional settlement, both the question of the extent of borrowing and the question of the mechanisms for it should be regarded as open for consideration.

Fiscal options

The various proposals for different models for the devolution of power tend to focus, for obvious reasons, on different degrees of and mechanisms for fiscal devolution⁶³.

Fiscal modelling must not be allowed to become the exclusive preserve of economists; taxation policy has to be understood as a joint enterprise of politics and national finance⁶⁴.

Administration

Separate consideration needs to be given to the establishment of some kind of independent body to administer the arrangements discussed above.

So long as HM Treasury remains a department of the federal or central government, there is a danger that it will be perceived to be acting as “judge and jury” on fiscal distribution and public spending if decisions on finance for parts and regions are effectively either made by it or subject to its veto.

Some kind of UK funding commission would therefore be required to ensure that decisions were made in a manner that was perceived to be fair and impartial, with appropriate input from all stakeholders.

The funding commission might also have a role to play in other aspects of public finance discussed above. For example, it might have the function of regulating borrowing powers with a view to preventing excessive spending and reducing the risk of the need for bailouts.

⁶² For a helpful discussion of borrowing powers in the context of Scottish devolution see the Scottish Parliament’s Financial Scrutiny Unit Briefing *Borrowing Powers*, 8 June 2011, 11/37.

⁶³ For a summary of some recent key proposals in relation to Scotland see Campbell II, *The second report of the Home Rule and Community Rule Commission*, March 2014, p.8.

⁶⁴ “Taxation and welfare need to be understood in their political context. No governments like imposing taxes. Under the original devolution settlements the devolved governments had significant legislative powers, but almost no tax raising power. But they did not necessarily want tax raising powers. The Scottish government’s power to vary income tax by up to 3 pence in the pound was designed not to be used: the economic gain was not worth the political pain. Likewise with the income tax powers proposed for the Welsh Assembly in February 2015: the Welsh government has said it does not want such powers ...” – *Devolution and the Future of the Union* – The Constitution Unit, School of Public Policy, University College London, April 2015 ISBN: 978-1-903903-70-4.

The commission might also advise, and if necessary warn, devolved governments about the consequences of tax policy: an element of “tax competition” between parts of the United Kingdom could be healthy for the economy as a whole, but too much could lead to dangerous cycles. An independent body could be well-placed to provide advice on how to avoid the dangers.

CHAPTER 5

SOCIAL AND CULTURAL ISSUES

Introduction

The benefits of a strong United Kingdom are not confined to economic and political matters. Belief in the importance and value of the Union is often founded as much on the value of cultural and social inter-change as on other considerations; an appreciation that the people, cultures and languages of each Part of the Union enrich each other and are one of the principal reasons why the sum of the parts is greater than the whole.

Because these advantages are difficult to isolate and impossible to quantify, they are easily taken for granted and can come to be overlooked and under-appreciated⁶⁵. So a key component of the conversation initiated by this discussion paper will concern the ways in which political and economic change can reflect and strengthen these social and cultural benefits.

Shared values also go beyond culture and social issues and touch upon the fundamental underpinnings of the United Kingdom, in the form of protection of minorities in all senses and the respect for and defence of fundamental rights⁶⁶. The political and economic arrangements for a new constitutional settlement must enshrine respect for fundamental rights at all levels.

This Chapter outlines some of the key issues that will fall to be considered in ensuring that these values and features of the Union are reflected in work on the future of the constitution.

Cultural links

One of the strongest features of the United Kingdom is the existence of strong family and cultural links between people in all parts of the country. Proposals for the establishment of a new constitutional settlement should aim to avoid imposing social divisions as a result of political change, so far as possible. They must recognise and reflect the importance of not

⁶⁵ “The nature and functions of the Union have been taken for granted. They need to be spelt out.” – *Devolution and the Future of the Union* – The Constitution Unit, School of Public Policy, University College London, April 2015 ISBN: 978-1-903903-70-4.

⁶⁶ We do not propose to comment on present discussions of the place in United Kingdom law of the European Convention Human Rights or the proposals to replace the Human Rights Act 1998 with some kind of a revised Bill of Rights; but we take it as a founding assumption of our work that respect for and protection of fundamental rights have been key political principles of the United Kingdom for centuries.

impeding the constant flow of people across our internal borders, particularly for reasons of employment and family life.

Recent world history provides uncomfortable examples of countries where families and communities have been divided as a fallout of political separatism. An aim of a new Act of Union or similar legislative document should be to enhance a sense of common citizenship, alongside enhanced senses of regional and local identity, that will strengthen social and cultural cohesion rather than introducing new sources of tension and division.

In essence, anything that looks like the creation of new hard national borders has a potential for imposing cultural and personal divisions. The aim should be to ensure that proposals for reform are designed to allow the desired degree of regional and local self-determination without fracturing families and communities.

Collateral costs of fragmentation

Work on enhancing local policy and legislative autonomy should be carried out alongside economic impact assessments, designed to identify and calculate the potential headline costs for businesses and consumers of the impact of fragmentation.

Data of the costs and benefits of inter-UK trade should be modelled to reflect the impact of differential local legislation on newly devolved areas, by contrast with our closest EU trade partner comparators.

Although the constitutional settlement is the most important issue for politicians to consider at a level of political theory and principle, they must be informed by the commercial communities who need to be consulted on the consumer and investor impacts of potential political change.

As well as local commercial and consumer impact, attention will need to be given to the potential investor-confidence impact of changes in the constitutional structures of the United Kingdom, both in relation to internal and inter-Part investment and in relation to inward investment from within the European Union and from elsewhere.

Having regard to the present inter-dependence of educational institutions at all levels within the United Kingdom, attention will also need to be given to the potential impact of political decentralisation⁶⁷. And similar issues arise in relation to the preservation and development of the medical and other professions⁶⁸.

⁶⁷ Much has been written, for example, about the distorting effects on the United Kingdom academic community of the differential legislative provision between Scotland and England in relation to the charging of fees for university; this will need to be extrapolated to reflect proposed more widespread changes in relation to education law.

⁶⁸ Including, for example, the potential impacts of the different parts of the Union competing, through the exercise of decentralised functions, for the same pool of professionals.

In general, it must be an aim of any new constitutional settlement that it should aim to meet local and regional aspirations⁶⁹ while minimising disruption to collaboration and symbiosis in professional and academic fields.

Similar issues will also arise in relation to broadcasting and media systems, which present particular sensitivities at a number of levels and will need particularly careful attention. As a general principle we approach broadcasting as a shared responsibility among the various parts and institutions of the United Kingdom, with the aim of ensuring that its potential is maximised as a force for integration that also respects and values cultural diversity.

If the BBC is to continue with a Royal Charter to provide UK wide public broadcasting it should continue as a national organisation. Its World Service is something of which British citizens can still be justifiably proud.

⁶⁹ Including the strongest kinds of community affiliation – see the draft Cornwall Devolution Deal referred to above.

CHAPTER 6

HUMAN RIGHTS, EQUALITY AND DIVERSITY

Introduction

For many people, one of the most important features of the United Kingdom politically, socially and culturally is respect for diversity, equality of opportunity and the protection of the rights of the individual.

Long before the passage of the Human Rights Act 1998, fundamental rights have been at the heart of the law of the United Kingdom⁷⁰ and have been recognised and protected by the political process in a variety of ways⁷¹. The United Kingdom has been culturally diverse for centuries: it has developed due to migration over many centuries and become culturally enriched.

Diversity, tolerance and respect are therefore core values which need to be taken forward in all the constituent parts; and the emerging constitutional settlement should be capable of protecting the rights of all citizens and citizen groupings and allowing them to develop in diverse ways within a strong over-arching culture⁷².

Diversity, equality and human rights implications

Human rights are already cemented into each of the devolution settlements, because Convention compliance is an express component of the definition of legislative competence for each of the devolved legislatures⁷³. Whether or not that mechanism survives in the arrangements for local legislation under a new constitutional settlement, protection for human rights must remain at the heart of legislative and executive power within each Part of

⁷⁰ See *Craies on Legislation*, 10th Edition, 2012, D Greenberg, Chapter 11, Section 3.

⁷¹ Of course, further work will need to address the fact that the individual's access to the courts for redress of breaches of fundamental rights has been enhanced by the Human Rights Act 1998, to an extent which appears excessive to some commentators, and which some people consider goes beyond what most people would regard as "fundamental human rights".

⁷² In the same way that the resolution of the English Question should be about finding a way to protect the smaller parts of the Union from the potentially damaging consequences of English dominance, while respecting the equality of England as a partner in the Union.

⁷³ Government of Wales Act 2006 s.108(6)(c), Scotland Act 1998 s.29(2)(d) and Northern Ireland Act 1998 s.6(2)(c).

the Union as well as in relation to the exercise of central functions at federal or national level.⁷⁴

In the same way, whatever arrangements are made for each constituent Part of the Union to make, for example, its own employment law, the guarantees presently provided by legislation for the protection of the rights of minorities, and for securing equality of opportunity for persons with protected characteristics⁷⁵ must be preserved throughout the Union, as part of the fundamental principles that underpin it.

Generally, cultural, ethnic and other forms of diversity within the United Kingdom are central to the nature and value of the Union. The United Kingdom's heritage and history provide models of successful diversity and integration from ancient history to very recent times, and a new constitutional settlement must strengthen that, and avoid putting it at risk as a result of any kind of separatism. Recent successes in preserving and enhancing cultural identities within the United Kingdom⁷⁶ must be consolidated and extended.

There are too many modern European and Asian examples of ethnic and religious tensions being exacerbated by political separatism and disintegration, and it must be made clear from the outset that strengthened arrangements for regional and local autonomy are designed to strengthen the central coherence of the Union and not to cause or encourage divisive tensions. There are already strands of concern in the United Kingdom today about the strains imposed by ethnic and religious diversity, and any constitutional change must be careful to address those issues and not inflame them.

Economic implications of equality

Fundamental rights and equality of opportunity flow naturally into aspects of social and economic policy (for example, in relation to pension rights, the guaranteed minimum wage and TUPE protection) which need to operate at a UK-wide level to ensure universality of rights and opportunities within the Union. Whatever arrangements may be made for regional or local administration, these rights themselves must continue to be universal under any new constitutional arrangements.

⁷⁴ This issue is independent of the separate question whether the European Convention on Human Rights should continue to be incorporated into the law of the United Kingdom in the manner provided for by the Human Rights Act 1998.

⁷⁵ The concept of protected characteristic derives from the Equality Act 2010 and includes a range of criteria including, in particular, gender, sexual orientation, disability, age, race and religion.

⁷⁶ For example, the Welsh Language (Wales) Measure 2011 and the Scottish Register of Tartans Act 2008.

CHAPTER 7

LAW AND ORDER

Introduction

Work on models for a possible future constitutional settlement must take account of the existing legal mechanisms of the United Kingdom, and ensure that they will continue to be as effective, or more effective, under whatever new arrangements may be imposed.

Work on the future of the Union must also recognise at the outset that effective mechanisms for law and order are fundamental to the constitution, and that interaction between the different legal orders within the Union, and efficient management of cross-border legal issues, must be guaranteed in any new constitutional arrangements.

This Chapter outlines some of the principal constitutional issues that relate to the legal mechanisms of the Union.

Complementary legal traditions

Arguably one of the most successful features of institutional diversity within the United Kingdom is that for centuries it has successfully accommodated a combination of separate legal jurisdictions within an over-arching legal order.

Although this is true to some extent in relation to each of the constituent parts of the Union, it is particularly true of Scotland, which has the most widespread and entrenched separate legal jurisdiction within the United Kingdom.

In part, this is attributable to the long-standing existence of a separate Scots common law which has in many ways been hermetically sealed, both in its development and its application, from the common law of England and Wales. But as statute law has become more important and has come to occupy and dominate an increasing number of areas of the law, even before devolution a strong tradition emerged within the United Kingdom of legislating separately for Scotland, so as to reflect local legal systems and other local conditions⁷⁷.

⁷⁷ Whether this took the form of separate sections and Parts for Scotland within UK-wide Acts, or separate Acts passed by the Westminster Parliament for Scotland, the law for Scotland was, long before devolution, developed separately by officials responsible to the Secretary of State for Scotland, and drafted by Scottish drafters.

This has allowed the combination of a strong Scottish common law tradition and locally designed statute law, together with effective integration into a UK-wide adjudication and enforcement process⁷⁸.

Similar arrangements have operated in Northern Ireland, but with at least a less-pronounced separation of common law (but with an even stronger tradition of separate legislation pre-devolution; and the devolution of justice and policing in 2010 has to some extent added to the distinctive character of the law of Northern Ireland).

Arrangements for Wales have been similar in the sense of having an increasing degree of separate legislation, but with little or no concept in recent history of a separate common law development⁷⁹. In particular, justice and policing arrangements have been shared with England.

In developing new constitutional arrangements it will be important to ensure that the traditions of separate legal arrangements continue, and are enhanced by the greater freedom for the constituent parts of the Union to preserve and develop their own cultural traditions and institutions.

Cross-border enforcement

The present legal system of the United Kingdom ensures seamless implementation of the law in cross-border cases between the constituent countries of the Union.

Any new constitutional settlement must avoid creating barriers which cause unnecessary complications in the implementation of the legal system. It is well known that the most intractable legal problems arise when private international law is required to attempt to make

⁷⁸ In particular, the only non-locally constituted court in the law of Scotland is the senior appellate court, the House of Lords in its judicial capacity until the establishment of the Supreme Court; and arrangements have always been made informally within the House of Lords and the Supreme Court to ensure that cases with a Scottish legal or other component or context are heard wholly or partly by judges with expertise and experience in Scots law and of political and other conditions in Scotland.

⁷⁹ England and Wales presently form a single legal jurisdiction, with “English law” being a commonly accepted designation; political pressures within Wales for the development of an identifiably separate legal jurisdiction have already created certain tensions, exacerbated by the fact that statute law increasingly differentiates between England and Wales, and an increasing proportion of statute law has different texts for England and Wales as a result of amendment or replacement by Acts of the National Assembly for Wales. At present, progress towards a separate Welsh jurisdiction is purely informal, and may or may not result eventually in general recognition that a separate jurisdiction has emerged; but it is gathering momentum, and has significantly accelerated as a result of the movement from Measures of the Assembly to Acts of the Assembly as a result of the Government of Wales Act 2006. Work on a new constitutional settlement should be capable of considering whether something more formal can and should be used to satisfy Welsh aspirations for a separate legal jurisdiction within the over-arching framework of the courts of the United Kingdom, as is the case for Scotland now.

law work across hard national boundaries: parental child abduction and people trafficking are two of the best-known examples, but there is no area of commercial or social law that does not have international complications. So far as possible, a new constitutional settlement that maximises self-determination and operational independence for the four constituent parts of the Union must build on our existing traditions of seamless or near-seamless cross-border cooperation and avoids creating new order difficulties that would undermine the key benefits of the Union.

European Union legal implications

The potential implications for and of European Union law need to be examined at each stage of devising a new constitutional settlement.

Apart from avoiding the extreme of being seen as a matter of EU law as having created four new State entities that would have to apply for EU membership from the beginning, there is the need to ensure that nothing about the internal fiscal and public finance arrangements raise issues of state aid or other market distortion from an EU legal perspective; and other structural issues of EU law are likely to arise⁸⁰.

In political terms, the settlement will need to ensure that everything about the revised constitution of the United Kingdom supports, and avoids interfering with, maximising trade with EU partners⁸¹.

Individual jurisdictional development

In devising a new settlement that involves (or may involve) the creation or recognition of four distinct legal jurisdictions within the United Kingdom⁸², the aim should be to ensure that each Part of the Union is able to develop its own legal system to meet its own needs and aspirations, subject to the requirements of seamless cooperation discussed above.

That will require examination of some key areas of law to identify the potential for separate development.

For example, the field of competition law is an area of policy that should be considered in detail as part of developing plans for a new constitutional settlement.

As an area of policy and law reserved entirely to the centre and legislated for entirely at federal or national level, this could be seen as providing strength and utility for consumers by

⁸⁰ For example, the *Marleasing* conforming construction implications of having separate national courts able to make direct references to the European Court of Justice, conceivably on the same issue arising in different jurisdictions within the United Kingdom.

⁸¹ And, potentially, with EU States after the United Kingdom has left the European Union, that being one option that is expected to be put to UK citizens in a referendum.

⁸² As to the position of Wales see footnote 79 above.

providing an over-arching jurisdiction that by being super-imposed on effective regional commercial legislation ensures overall coherence (and ensures compliance with EU and other international obligations of the United Kingdom). But there may be aspects of competition policy that can be delegated or devolved to local or regional level, and it may be that the consequent flexibility for businesses would benefit local consumers.

A specialist working party will need to examine this and similar legal issues to identify what potential if any there is for localisation within a new legal system and what the advantages and disadvantages would be⁸³; the results of that work will then be able to influence the wider political considerations that will determine where the balance between central and regional functions lies in these legal areas.

In carrying out this analysis, it will be important to ensure that the movements towards localism, deregulation, subsidiarity and proportionality are reflected as effectively in the development of the new legal jurisdictions as in the development of wider questions of policy.

Courts

It is reasonable to expect that each Part of a newly constituted Union will wish to have its own courts, applying its own statute and other law in a way that fits regional and local commercial, social and other circumstances⁸⁴.

In particular, particular consideration will have to be given to the development of national or regional judiciary, able to apply local and regional laws with knowledge of their particular political and social policy background in the light of local and regional conditions and languages⁸⁵.

As to the court and tribunal structure, there may be regional aspirations for a locally-centred highest court of appeal, at least for non-constitutional or non-administrative law matters; and

⁸³ Including the headline costs for businesses of the impact of new competition laws and regimes within individual jurisdictions, set against the compliance costs of a single and therefore relatively inflexible national regime.

⁸⁴ Scotland already has this to a very considerable extent, as described above; and, also as described above, there are already pressures within Wales for the identification and development of a separate legal jurisdiction, which can be expected to increase as a result of a revised Union respecting the aspirations of each of the home nations.

⁸⁵ There are also linguistic considerations in the case of Wales as a result of the development of dual-language legislation passed in a bilingual legislature, with the legislative intent being evidenced in a mixture of dual-language and single-language documents; heavy reliance on translation is likely to be unsatisfactory as a long-term solution for a variety of reasons.

the feasibility of this will have to be considered⁸⁶. As a result of the existing use of different courts or sub-divisions within different parts of the United Kingdom, and the increasing use in recent years of local sittings of courts and tribunals, it may be that this is a trend that could be accommodated within the present structure with relatively minor modifications. Certainly, a considerable degree of legal localism can be accommodated by expanding the existing model of local sittings and court-centres, regardless of the economic constraints.

The move from the House of Lords to the Supreme Court as the highest court in the United Kingdom, which appears to be regarded by most as having been impressively seamless and commanding general respect, suggests that the United Kingdom legal order is capable of accepting significant modification without altering the fundamental principles of its operation.

⁸⁶ For example, the present informal arrangements within the Supreme Court designed to ensure that Scottish judges sit on Scottish cases, for example, might be made more formal – which might or might not mean a legislative foundation – and perhaps taken towards different Chambers or Divisions of the Supreme Court sitting locally. But there are complicated implications of this for the development of United Kingdom law as a whole that would need to be considered with care.

CHAPTER 8

RELATIONSHIPS WITHIN THE UNION

Introduction

A fundamental principle of a strengthened and revived United Kingdom is that each of the four component parts should have a mutually beneficial relationship both with the central mechanisms of the state and with each of the other four parts. The proposition that the Union together is stronger than the sum of each of its component parts focuses in part on the idea that each part brings a unique cultural and political contribution to the whole, and benefits from the contributions of the other parts and from the central mechanisms.

For this reason, ensuring effective relationships between the component parts at all levels, must be at the core of any proposals for constitutional reform.⁸⁷ This Chapter outlines some of the key issues to be considered⁸⁸.

Present system

The present approach to the relationships between different parts of the United Kingdom is informal and administrative. As the Bingham Centre report says—

“Inter-governmental relations in the United Kingdom are characterised by informality and, to the extent to which they are regulated at all, are regulated by convention, concordat, memorandums of understanding, and guidance notes.”⁸⁹

⁸⁷ “A second chamber representing the nations and regions of the UK would be unlikely to bind the Union together. Federal second chambers in other countries tend to be party chambers first, and federal institutions second. To bind the Union together, the machinery of intergovernmental relations is far more important than the design of the second chamber.” - *Devolution and the Future of the Union* – The Constitution Unit, School of Public Policy, University College London, April 2015 ISBN: 978-1-903903-70-4.

⁸⁸ This Chapter necessarily adopts a superficial view of a number of aspects of the present operation of governmental institutions in the UK: for a recent rigorous analysis that demonstrates the present strengths and weaknesses see *Governing in an Ever Looser Union How the four governments of the UK co-operate, negotiate and compete* Akash Paun and Robyn Munro, Institute for Government, 19 February 2015 – <http://www.instituteforgovernment.org.uk/sites/default/files/publications/Governing%20in%20an%20ever%20looser%20union%20-%20final.pdf>

⁸⁹ Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom*, May 2015, p.9.

Civil Service

The establishment as part of the process of devolution of three territorial civil services each with a degree of hermetic sealing from the others has turned out to be a retrograde step in a number of ways.

Although Northern Ireland had a long tradition of a relatively separate administration for a number of practical and political reasons, Scotland and Wales in particular had been well-used to exercising strong influence on the development of UK policy generally through effective and relatively seamless interaction between the Scottish office and Welsh office respectively and the non-territorial departments of Whitehall. Virtually every proposal to be submitted to a cabinet policy committee or to legislation committee was cleared with both of those offices, which provided at least one and often two formal opportunities for influence and caution. But of course, those formal opportunities necessarily created an effective train of informal opportunities for discussion and consultation between the relevant departments at all administrative levels.

Although it is important not to overstate the point, this degree of interaction has necessarily changed since devolution, in part because of an understandable perception or potential perception by officials in Cardiff, Edinburgh and Belfast that they owe a primary loyalty⁹⁰ to their devolved administration or legislature, which might be compromised by too free an exchange of views and information with Whitehall. And, of course, that situation is exacerbated at times when the power in the relevant devolved legislature is held by a party other than that forming HM Government. There has also been a growing tendency within Whitehall to marginalise the devolved governments, whether out of suspicion, simple inadvertence or for other reasons⁹¹.

Undoubtedly these are real concerns that must be addressed; but at the same time it should be possible to structure the executive arrangements under a new constitutional settlement so that the civil service can continue to serve as a form of glue for the constitution, allowing effective cross-fertilisation of ideas in policy development and providing an effective channel of communication at all levels⁹².

⁹⁰ And in some respects this goes beyond perception and is a reflection of the law, now set out in statutory Codes under the Constitutional Reform and Governance Act 2010, s.5.

⁹¹ “Too many officials and departments tend to treat the devolved governments as an afterthought, or like any other Whitehall department. Devolution issues should be addressed in every policy submission, to remind Whitehall of potential spillover effects. For intergovernmental relations to work, Whitehall must be less dominant. With further devolution there will be more and more policy fields where responsibility is shared, and effective policy making requires co-operation across the reserved/devolved divide. Even to achieve its own policy goals, Whitehall needs to treat the devolved governments as equal partners.” – *Devolution and the Future of the Union* – The Constitution Unit, School of Public Policy, University College London, April 2015 ISBN: 978-1-903903-70-4.

⁹² See further *Bingham Centre for the Rule of Law, A Constitutional Crossroads: Ways Forward for the United Kingdom*, May 2015, Chapter 2.2.

That this is possible at least to a considerable extent has been apparent from the fact that the civil service in Wales is part of the Home Civil Service, enjoying similar conditions of employment and career opportunities. This has helped to provide those Welsh officials who have served for periods in Whitehall Departments a broader experience and perspective than can be gained by remaining in Wales, enabling added value when they return and insulating them from some of the effects of the prejudices and concerns outlined above. The same is true in reverse for Whitehall officials who have been seconded to Wales.

Without wishing to imply that everything in relation to the present operation of the civil service is perfect, or to deny that it has encountered a number of strategic challenges and tensions in recent years, overall, it can fairly be said that the systems and traditions of the civil service are a major asset of the United Kingdom's machinery of government, prized at home and admired from abroad. Devolution has at least to a small degree risked damaging the effectiveness of the civil service as a whole for the reasons described above; and any new constitutional settlement must set out to preserve and enhance the civil service as a world-class governance mechanism and as a powerful unifying force within the public administrations of the component parts of the United Kingdom.

CHAPTER 9

FOREIGN AFFAIRS

Introduction

The relationships between the United Kingdom and the rest of the world are not simply incidental consequences. For many, they are a key feature of the purpose and effect of the United Kingdom today, one of its strengths and one of the reasons why people can be proud of belonging to it.

As a medium-sized global power, the United Kingdom is able to exert considerable influence through its membership of the United Nations Security Council (as one of the five Permanent Members), the European Union (as one of the largest, most influential countries), NATO, the World Bank and IMF Executives, as well as other important international organisations. And the constituent parts of the United Kingdom enjoy opportunities to influence those international bodies by virtue of the influence of the United Kingdom as a whole.

This Chapter sets out some of the key relationships that will fall to be considered in more detail in further work, and flags up some specific issues that would need to be considered as part of any decision by one or more countries to leave the United Kingdom and thereby bring an end to the Union.

This Chapter also touches briefly on other aspects of international relations again simply to set markers for further work.

Commonwealth

Our membership of the Commonwealth is arguably one of the most understated and unappreciated aspects of the nature of the United Kingdom today. Apart from the preservation of historical, cultural and family links, the Commonwealth family provides a wide range of educational and cultural opportunities for students and others.

A new constitutional settlement must include examination of the role of the United Kingdom within the Commonwealth, and be designed to ensure that we preserve and enhance both the benefits that we gain from membership and the benefits that we share with other members.

Overseas territories

The overseas territories of the United Kingdom are home to some of the people who most keenly appreciate the value and benefits of the Union. The results of the Falkland Islands

referendum in 2013⁹³ form a sharp contrast with the results of the referendum on Scottish independence in 2014. The Falkland Islands, while cherishing a long-standing tradition of effective self-determination and operational independence, clearly value highly their partnership with the nations and regions of the United Kingdom.

It would be a sad irony if a mere three years after demonstrating such strong confidence in the United Kingdom and an almost universal desire to retain links with it, the Falkland Islands were to find that there was no longer a Union to be an overseas territory of⁹⁴.

The overseas territories should be brought into any conversation that emerges from this discussion paper, and should be encouraged to contribute their vision for the future. They know as much as anyone about how to combine effective self-determination with proud connections to a sovereign State, and we can learn from their articulation of what that means to them and how it enhances them culturally and in other ways.

European Union

The European Commission warned clearly in 2014⁹⁵ that a breakaway nation from the United Kingdom would not be able to assume that it simply stepped automatically into membership of the European Union on equal terms with other Member States. Although the Scottish National Party chose officially to regard that⁹⁶ as political posturing rather than as a considered position statement, and although it is certainly possible that a component of a former Member State would be accorded some privileges or exemptions in the process of acquiring separate membership, there is no reason to believe that other Member States would allow that process to be a mere formality⁹⁷.

⁹³ *Results of the referendum on the Political Status of the Falkland Islands*, Monday 11th March 2013, Keith Padgett, Chief Referendum Officer – <http://www.falklands.gov.fk/results-of-the-referendum-on-the-political-status-of-the-falkland-islands/>.

⁹⁴ In the same way that the European Union has warned that breakaway nations should not assume that they can step into membership of the European Union (see further below), it should not be assumed that overseas territories either could or would maintain their present form of relationship with any one part of the former United Kingdom following dissolution.

⁹⁵ The issues are helpfully explored, along with the different arguments on the point, in *Report on the Scottish Government's proposals for an independent Scotland: membership of the European Union*, Scottish Parliament, European and External Relations Committee, 2nd Report, 2014 (Session 4): - SP Paper 530; EU/S4/14/R2 - <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/76844.aspx>; see also *Could an independent Scotland join the European Union?*, Graham Avery European Policy Centre, Policy Brief, 28 May 2014 - http://www.epc.eu/documents/uploads/pub_4487_scotland_and_the_eu.pdf

⁹⁶ See, for example, *Alex Salmond insists independent Scotland would remain in EU*, Ian Traynor, The Guardian, Monday 28 April 2014 15.44 BST - <http://www.theguardian.com/politics/2014/apr/28/alex-salmond-independent-scotland-remain-european-union>

⁹⁷ Particularly, of course, but not only, if the intention of the new nation were to join the Eurozone.

Reasserting the nature and importance of the United Kingdom need not, of course, imply a particular attitude to membership of the European Union. There is a debate taking place within the United Kingdom about the terms of its membership of the European Union, with a significant group advocating leaving the EU altogether. The benefits of continued strong membership of the European Union are, however, one factor to be considered in the context of devising a new constitutional settlement; and the potential implications for our membership of the European Union are arguably not the least significant of the consequences of dissolution of the United Kingdom, a result which the discussion inspired by this paper is designed to avoid.

International organisations, Conventions and Treaties

Membership of and participation in proceedings of the World Health Organisation, for example, and many other international organisations of similar importance, are one of the intangible but considerable benefits of the strength of the United Kingdom's influence on the world stage. In the design and composition of a new constitutional settlement it will be important to consider at what levels and in what ways we can continue to participate in and benefit from those organisations in a fully effective way.

Similarly, it will be important to remember the importance of preserving membership of, and effective participation in, the many international Conventions and Treaties to which the United Kingdom is party, without the need for renegotiation of membership⁹⁸.

⁹⁸ Again, as for the European Union, it is not to be assumed that other State Parties to international Treaties and Conventions signed by the United Kingdom would simply acquiesce in any arrangements that duplicated membership for the different parts of the UK on automatic terms of equality with other States.

CHAPTER 10

DEFENCE AND NATIONAL SECURITY

Introduction

Issues of defence and national security are of course inextricably linked to wider aspects of foreign affairs discussed in the previous Chapter. But they are also sufficiently important issues to require separate treatment in the work to follow this discussion paper. This Chapter identifies the two principal areas that will need to be considered separately as we move forward, as well as being relevant to and influencing our wider foreign affairs work.

Defence

Defence has already been identified⁹⁹ as one of the most obvious and important functions that requires to be performed at a central level. It is one of the areas where we are most obviously stronger as a single country, and where the dangers inherent in fragmentation are particularly pronounced.

The discussion inspired by this paper will need to consider the effectiveness of central defence policy-making and operational control, to ensure that a new constitutional settlement guarantees the proper performance of this key State function, while ensuring that the constituent nations and regions are able to exert an appropriate influence on defence policy and operations to the extent that they have particular local impact or implications.

The issues to be considered in this context include technical and financial issues of defence procurement, as well as other issues of local influence on central defence policy. The armed forces need combat support including engineering and communications technology as well as a wide range of combat support services to provide and maintain the technology: these services are presently organised on a UK-wide basis, and issues of potential local and regional influence will need to be examined with care.

Being a member of NATO, and benefiting from solidarity between European Union Member States, remain key to the physical defence of the United Kingdom from traditional forms of aggression: any new constitutional settlement must ensure continued effective cooperation with NATO and other allies.

National security

Apart from traditional defence matters, particular consideration needs to be given to issues of defence in its modern aspects, including defence against internal terrorism, and national security and intelligence issues in their widest sense.

⁹⁹ Chapter 10.

Sir David Omand has already drawn public attention to national security issues that arise when one contemplates the fragmentation of the United Kingdom¹⁰⁰.

He and others look at the issues of national security today from a wide perspective, aimed at securing public confidence that traditional and emerging risks are being managed so that citizens can go about their normal lives freely and with confidence. This includes threats from terrorism and serious crime, but it also includes major natural hazards such as space weather, crashing satellites, oil pollution, and hurricanes.

Whatever arrangements are devised for the governance of the United Kingdom so as to maximise localism must also be compatible with maintaining effective national security from this wide perspective. Security doubts arising from perceptions of weak control in one part of the United Kingdom would quickly become, in terms of international perception, doubts about the security of the United Kingdom as a whole. Our overall security arrangements must continue to be sufficient to justify, for example, intelligence exchanges with friendly countries, as well as more minor matters of individual convenience such as eligibility for the Visa waiver programme for the US.

Many aspects of personal security in individual parts of the United Kingdom must continue to be managed as United Kingdom national policy issues, because of the international roots of terrorists and international criminal gangs trafficking in narcotics, people, pornography and false identities. Our systems for managing the whole range of security threats – from cyber-crime including internet and consumer fraud to the spread of jihadist terrorism – are managed on a national basis for that reason.

¹⁰⁰ See, in particular, “Scotland 'more vulnerable' after independence under Alex Salmond's security plans”, The Telegraph 5:57AM GMT 13 Mar 2014 <http://www.telegraph.co.uk/news/uknews/scottish-independence/10694022/Scotland-more-vulnerable-after-independence-under-Alex-Salmonds-security-plans.html>, Sir David Omand, GCB (former Director of GCHQ, Permanent Secretary at the Home Office, and Security and Intelligence Co-ordinator in the Cabinet Office).

CHAPTER 11

WIDER CONSTITUTIONAL REFORM

Written constitution

The discussion initiated by this paper will inevitably be influenced by, and influence, discussions about the possibility of a new written constitution for the United Kingdom.

It is important to keep this discussion focused on the nature of the constitutional settlement between the different constituent Part of the Union, and not to allow it to become diffused throughout other constitutional issues.

Indeed, so much is working well in the written and unwritten constitutional mechanisms of the United Kingdom that it is important not to break what is not broken, or to seek to reinvent parts of the machinery that are working to the satisfaction of all.

By way of a key example, the courts of the Union provide a judicial system that works more than satisfactorily for all parts of the Union and all its citizens.

In particular, we have an administrative law structure that is more robust and more accessible than anything we would be likely to be able to put in its place as a reinvention, and which serves as effectively to guard the principles of the constitution and the fundamental freedoms on which it is based as any constitutional court that could be established by a written constitution.

Of course, the court system continues to develop both in formal and informal ways. The emergence of the Supreme Court as the replacement for the House of Lords was in formal terms a major constitutional change, and has yet been managed in such a way as to effect a seamless transition that appears to have caused little or no disruption.

In terms of informal changes, the aspirations of the people of Wales for a jurisdiction of Welsh law that is as distinct as the common law of Scotland and as custom-built as the statute law of Northern Ireland, will doubtless be realised with the gradual development of a Welsh jurisdiction as a result of devolution, without the necessity for the creation of a new institution.

Avoiding new layers of governmental bureaucracy

There is another thought that underpins the reluctance to reinvent parts of the machinery that are already working perfectly well.

Citizens do not want to see is a change which adds new and expensive layers of politicians to what is already seen by many as something of an expensive encumbrance.

It is therefore an assumption underpinning the discussions in this paper that a new settlement must emerge without the necessity for constructing new and expensive buildings or increasing overall the number of public servants, whether political or official¹⁰¹.

That points in the direction of restructuring, rather than preserving existing arrangements and institutions and simply adding new layers.

Key constitutional documents

In this 800th year of Magna Carta its importance as a practical constitutional document has been reasserted on a number of occasions. Similarly, the Bill of Rights 1688 is regularly cited in judgments of the higher courts as having profound continuing legal effect, in relation to Parliamentary privilege and other matters¹⁰².

Any new constitutional settlement must ensure that the principles embodied in these documents are preserved; that could be achieved either by ensuring that the new settlement leaves the principles untouched, or by ensuring that the principles are consolidated or replicated in the new arrangements.

The role of judicial review

Administrative law has developed beyond recognition in the last 70 years, and is now a constant presence in relation to executive action; it has also been accepted as a constant constraint in relation to legislation, within the devolved legislatures generally and even in relation to Westminster to a limited extent¹⁰³.

Within the devolved legislatures, judicial control of legislative competence first through the Privy Council and now through the Supreme Court has been accepted from the beginning.

It is possible that in order to create four truly equal legislative assemblies within a strengthened Union, it may be necessary to consider the nature and extent of judicial

¹⁰¹ See, in particular, Chapter 3.

¹⁰² See, for example, *Baron Mereworth v Ministry of Justice* [2011] EWHC 1589 (Ch); *R v Chaytor* [2010] UKSC 52; and *Makudi v Triesman* [2014] EWCA Civ 179.

¹⁰³ Primarily in relation to European Union law and human rights.

oversight, so as to combine a proper degree of deference for and immunity of parliamentary proceedings in each of the home countries, with effective judicial oversight of the constitutional settlement.

Lords Reform

As touched on in passing in relation to the options for English governance¹⁰⁴, some of the options that will fall to be considered are likely to adopt reform of the House of Lords as part of their methodology.

But there is a case for considering the question of Lords reform as a separate and integral part of work on a new settlement for the Union.

In part, this is because issues of relative regional and local representation within the national or federal legislature cannot be settled without considering both Chambers. Achieving an acceptable balance within the House of Commons while leaving the possibility for manipulation or accidental imbalance in the Lords would be an unsatisfactory and probably unstable result.

More positively, Lords reform requires to be considered as part of the work on the new settlement because of the possibilities it provides for a strengthening and cohesive influence. It is possible to devise radically different methods for incorporating the Lords into new settlement arrangements: everything from leaving the House as it is now and simply giving it federal or national responsibilities as a kind of Senate¹⁰⁵, to abolishing the appointed Chamber and replacing it with a second elected Chamber to perform federal or national functions (including the option of being wholly or partly directly elected so that its composition gives expression to national interests and to regional interests within England). And there is an infinite range of other possible options.

Without anticipating what might emerge as a favoured option, it is clearly important that at all stages of considering the nature of a new constitutional settlement for the Union, the possible challenges posed by the Lords in their present form and the possible opportunities for a reformed Chamber contributing positively to the coherence of the new arrangements, must be borne in mind.

¹⁰⁴ See Chapter 3.

¹⁰⁵ And with the optional possibility of members of the Senate being constituted as revising Committees in the regional legislatures.

CHAPTER 12

DEVOLUTION

Without doubt there is much that can be learned, both positive and negative, from the experiences with devolution in the different parts of the United Kingdom since 1997. While some may see recent expanded devolution plans for Scotland as something of a “death by a thousand cuts” for the Union, others will see them as creative proposals on which a new constitutional settlement can build.

The danger is that in the absence of an alternative form of progress on reshaping the constitution to meet regional aspirations, devolution has become a ratcheting process that fuels the frustrations of many for whom it is simply not an effective answer; to say nothing of creating and exacerbating tensions within England and a feeling that English citizens are being increasingly left out of modern localism.

There is also a feeling that increasing tranches of devolution excite nationalists in Scotland, Wales and Northern Ireland, many of whom see devolution as nothing more than evidence of weakness on the part of the central Westminster government, and a proof that if they continue to demand more and more, sooner or later they will achieve full independence, whether as an acknowledged final severing of ties or simply by slipping imperceptibly into *de facto* independence.

A “one-size-fits-all” devolution attitude can lead to suggesting as the answer to the inevitable tensions and frustrations created within England simply to toy with versions of mini-devolution on a regional scale. And there is no doubt that devolution of some kinds and along some models commends itself to some people as a way of rebalancing the United Kingdom and satisfactorily resolving the “English Question”. But we also need to be alive to the dangers of being seen simply to multiply expensive strata of political bureaucracy, at a time when politics and politicians have rarely been lower in the public esteem. If arrangements for regional decentralisation or the strengthening of local government within England are to be suggested as part of a new constitutional settlement, there must be evidence that they will provide a more permanently satisfying solution than devolution has to the three constituent parts of the Union.

What is necessary is to bring to Devomax and regional devolution or decentralisation solutions an additional overall coherence of thought about the ultimate shape of the United Kingdom as a whole. Not to attempt to limit the self-determinative aspirations of any Part of the United Kingdom, but to take a step back from the ever-increasing slices of devolution and to take a holistic look at the political and governance institutions of the United Kingdom and ask how can they better serve all its citizens.¹⁰⁶

¹⁰⁶ “Whitehall lacks capacity to think about the Union because it has relegated it to issues of devolution on the fringes. This is exacerbated by the fragmentation in Whitehall, with six centres for devolution policy. This will not change so long as there are three relatively junior

Those who believe in the importance of devolution want to avoid its becoming perceived as having started as an experiment in local empowerment but having become a tool for the politics of desperation. Rather than being seen increasingly as a precursor to the inevitable dissolution of the Union, the institutions of devolved government and the legislatures to which they answer must be seen as important tools for an appropriate degree of self-determination within an effective and robust Union. To be that, they must be seen and delivered as part of an overall solution that works at all levels, for all parts of the Union.

territorial Secretaries of State with separate offices, a hangover from pre-devolution days. There needs to be a single senior Cabinet Minister responsible for devolution and the Union, supported by territorial Ministers of State. Similarly in Parliament there should be a single Devolution Committee, which could be a Joint Committee of both Houses; and which could have territorial sub-committees. Devolution policy making has become rushed to the point of recklessness. In future, changes should be implemented and allowed time to bed in before the next round of policy is embarked upon.” - *Devolution and the Future of the Union* – The Constitution Unit, School of Public Policy, University College London, April 2015 ISBN: 978-1-903903-70-4.

CHAPTER 13

IMPLEMENTATION

Introduction

As stated in the introduction¹⁰⁷, the conversation to be inspired by this discussion paper will have to take place under the shadow of the imminent danger of irreversible damage to the Union, as soon as 2016.

For this reason, any process that is confined to political theorising will not achieve the objective: it is necessary to show citizens of all parts of the United Kingdom, including those who will vote in next year's elections in Scotland, Wales and Northern Ireland, that there is a pragmatic and viable alternative to the status quo and to the breakdown of the Union.

Ideally, a new constitutional settlement would be forged over many years, and probably embodied in a series of complementary legislative measures. That luxury being unavailable, it will be necessary to conflate the work into a small number of months, and to produce at least a robust and operational skeleton of a new governance structure for the United Kingdom.

What will necessarily be lacking in terms of fine operational detail, will have to be compensated for by building flexibility into the new system to react to changing circumstances and to reflect the light of experience gained as the system begins to work.

This Chapter briefly sets out how a settlement might be implemented in an effective way.

A new Act of Union

The ultimate result of the process begun by this discussion paper will be a single piece of legislation, passed by Parliament (in its present form) and ushering in a new balance of governmental power along the lines of one of the models discussed above, or a variation.

There may be much to be said for that piece of legislation taking the form and title of a new Act of Union. But that is a detail that can be left to be decided once the content of the legislation is clearer.

Whether called an Act of Union, Unifying Act or something else, the key to the legislation must be that it takes four existing countries or territories which are presently the constituent parts of the United Kingdom, and re-unites them within a modified structure that is sufficiently robust to meet majority aspirations and to last for the foreseeable future.

¹⁰⁷ See Chapter 1.

As one part of making a settlement robust, it must be expressed in an accessible form, easily taught by non-experts, in the same manner as school children can be taught about Magna Carta. The advantage of a new Act would be that it could be such a document, with special constitutional status accorded by the Courts (as in the case of Magna Carta, the 1689 Bill of Rights, the European Communities Act 1972 and the Human Rights Act 1998¹⁰⁸). It would also be an advantage if this new single statute could be expressed in accessible vernacular terms, rather than in the technical language usually adopted for modern statutes. A single statute could also be endorsed by referendum.

Theoretical status of implementing Act

Theoretical questions will arise about the nature and authority of an Act of Parliament by which Parliament itself is dissolved or restructured, and by which the Royal Assent is given to an Act which modifies the basis upon which the authority of Parliament is founded.

These are questions of considerable theoretical interest, similar to questions which have arisen in relation to other constitutional statutes before (including, of course, the Parliament Acts 1911 and 1949). Much useful theory has already been propounded on which practical solutions can be based¹⁰⁹. But pragmatic politics have tended to prevail over theoretical difficulties and have produced robust solutions that command general support¹¹⁰.

What matters to us in considering how our constitutional settlement might be implemented is that we should find a method that commands a clear consensus of respect within political, social, commercial, media and other circles.

We have no doubt that in practice an Act that is passed by Parliament and that sets clear parameters for a new kind of constitutional settlement will be given effect by the courts and by other public authorities¹¹¹. There might be academic and theoretical issues about whether what emerged from an implementing Act of Parliament was in fact a revolution by a new order displacing the old, or whether it was a legitimate constitutional development within the existing concept of the Sovereignty of Parliament. Those issues could be discussed – as

¹⁰⁸ See *Craies on Legislation*, 10th Edition, 2012, D Greenberg, Chapter 1, Section 5.

¹⁰⁹ For a penetrating analysis of the theoretical issues and their relationship with practical politics see *Constitutional Change and Parliamentary Sovereignty – the Impossible Dialectic*, Richard Gordon QC, *The British Constitution: Continuity and Change: A Festschrift for Vernon Bogdanor*, Bloomsbury Publishing, 2 Aug 2013.

¹¹⁰ The most obvious recent example is the Succession to the Crown Act 2013, although there are also others.

¹¹¹ A detail remaining to be decided is whether the judges should, in some form or another, be invited to express an opinion about the legitimacy of a resulting act of parliament and the requirement for the courts to follow it before its enactment. There are arguments by the way, including questions over whether the judges would be prepared to cooperate. But it is an idea that provisionally attracts us.

they have been, for example, in relation to the Parliament Act 1949 – without distracting from its effective implementation¹¹².

Reversibility

In the same way that people have debated whether the European Communities Act 1972 is repealable like any other Act or has become politically entrenched in a way that makes it legally irreversible, questions will doubtless be asked about whether our implementing Act is capable of being repealed, if the political and parliamentary order under which it was passed no longer exists.

We regard this, as in the case of the European Communities Act, as a question where the legal principles are simple and as a matter of principle follow the political reality. Like membership of the European Union, the establishment of a new political and legislative order within the United Kingdom has to be seen as a single “take it or leave it” process, which one either implements or not. It is not possible to implement the settlement in a partial way.

If it were desired at any stage in the future to remove the arrangements we are putting in place and to restore those that presently exist or to impose a new political order, it would be open to those implementing that development to determine whether and in what form to operate on our implementing legislation. More would be determined by practical requirements and the needs of political perception than by constitutional legal theory.

It is possible to regard the Act of Parliament implementing our arrangements as a single trigger which becomes spent once brought into force. One can see the existing political order including Parliament in its present form as effectively *functus officio* once having secured its demise by the establishment of a replacement order. Equally one can regard the new arrangements as being constantly predicated upon and underpinned by an “always speaking” Act of the present political order. To some extent the legal theory will depend on the precise content and indeed form of the implementing Act¹¹³ but more will depend on the political reality of precisely what our Act ends up achieving¹¹³.

So the precise position of the existing constitutional arrangement and therefore their ability to repeal or vary the new arrangements as depending on the details of what emerges from our

¹¹² We note that when the legitimacy of the Act was finally questioned formally in *Jackson v Attorney General* the courts expressly and avowedly adopted a pragmatic approach in determining its validity rather than being drawn into beguiling issues of theoretical interests such as whether a person can pull themselves up by their own boot straps. We would expect a similar pragmatism to emerge in this case and that is one of the reasons why we consider in the footnote above engaging and expressing it in advance of the enactment of our implementing Bill.

¹¹³ The importance of irreversibility as a key political requirement for a devolution process that is seen as credible features in Campbell II, *The second report of the Home Rule and Community Rule Commission*, March 2014, p.6.

further considerations; but this is not an issue of fundamental theoretical importance that requires to be determined at the outset.

In essence, the main theoretical question will be whether the implementing Act is in essence, an Act of Parliament as presently constituted or a statement that brings into force an entirely new order. Beyond saying that there is no reason to invent a new enactment formula until such time as the proposals become clearer and it is possible to determine whether or not that is clearly called for, this is an issue which can safely be left to be considered later.

No move to a wholly written constitution

Although some who argue for a written constitution for the United Kingdom may see this an opportunity to produce one, and may even argue that our constitutional changes cannot legitimately be effected without becoming part of a new written constitution, the issues discussed in this paper can be addressed fully without attempting to rewrite every aspect of the constitution; and there are considerable practical and other disadvantages in making that attempt¹¹⁴.

The changes to be considered are of course as fundamental as any that could be framed in a full written constitution. But they are not exhaustive; there are many matters that could properly be left to the existing constitutional arrangements, both those parts of them that are already enshrined in legislation and those that rely on common law or the prerogative.

The implementing legislation should therefore make provision for everything that is required to give effect to changes recommended to meet the issues addressed in this paper; where a change is neither desired nor necessitated as a consequence of those issues, there should be no legislation about it¹¹⁵.

Repeal requiring referendum

In order to give certainty to whatever constitutional forms emerge from this process, it will be as important to ensure that they cannot be reversed without a referendum as it will be to ensure that a referendum is required before they are implemented.

Citizens need to know that the fundamental constitutional shape of the United Kingdom will not come and go at the whim of each newly elected Government, and that the reward for

¹¹⁴ The most obvious of which is that there is little enough time to develop satisfactory answers to the central questions of governance structure, without seeking to mend parts of the constitution that do not appear either broken or under threat of being broken.

¹¹⁵ It is possible that consideration of how much of the constitution remains unwritten or scattered should be something that should be monitored as proposals develop, in case at some point the codification or consolidation of parts of the constitution becomes obviously advantageous.

enduring a considerable amount of constitutional change in the next few years is an enduring period of stability afterwards.

The precise form and method of achieving this guarantee of stability remains to be considered, but it is not without precedent in the United Kingdom¹¹⁶.

Status of Present Acts

One purely transitional matter deserves to be mentioned at this stage, in order to show the practicability of what we say above about not requiring to re-enact the entirety of our constitution in a new single documentary form.

Whether or not the new arrangements amount to the creation of a new parliamentary body in place of the existing Parliament, it would certainly be appropriate to include a transitional provision preserving the effect of all laws passed by, or dependent on delegated authority of, the present arrangements. A simple transitional mechanism would be able to preserve all parts of the status quo that were not altered expressly (or, possibly, by necessary implication) by the implementing Act.

Referendum

A constitutional settlement of the kind discussed in this paper could not be implemented with credibility and legitimacy without the backing of a referendum¹¹⁷. While as a matter of constitutional theory it is possible to debate whether a referendum is or is not required for a constitutional change of this kind, any such debate would be arid in the face of political reality.

There are, however, a number of questions about a referendum that will require consideration. Thinking about some of them at this stage is important as part of developing a credible approach to implementing a new settlement and encouraging people to engage

¹¹⁶ The most obvious example being section 1 of the Northern Ireland Act 1998 (which reflects earlier legislation to the same effect): “1.— **Status of Northern Ireland.**

(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.”

¹¹⁷ In accordance with the discussion above about the identification of central powers including constitutional matters, referendums about constitutional changes would be reserved for arrangement by central government Ministers, presumably the Home Secretary acting with the Secretary of State for Scotland, Wales or Northern Ireland.

with developing thoughts and process, in the knowledge that any changes can and will be implemented in a manner that commands respect and allegiance.

The franchise is a matter that caused considerable discussion in relation to the recent referendum in Scotland over independence. In particular, the inclusion of 16 and 17 year olds was controversial, with some arguing that it was designed to skew the result in a particular direction and others arguing that it produced the most legitimate expression of national will in any United Kingdom national vote. This is not an issue of sufficient structural importance to the constitutional process to attempt to settle it now: but inclusivity will be key to ensuring a result that is consistent with respect for the rule of law on the part of as many citizens as possible; and the franchise and other details should be determined with the aim of enhancing the inclusivity of the overall process, insofar as that is consistent with ensuring that people engage with it on a basis of genuine understanding and knowledge. Some may feel that 16 and 17 year olds could not be excluded from the franchise, having regard to social trends, without significant risks to the perceived credibility of the result; while others may feel that the Parliamentary election model should naturally be carried across to a referendum of this kind. This is an issue that would have to be considered and consulted on carefully in preparing the referendum process.

As to the choice of timing for the referendum, in essence the choice is whether to have a referendum followed by legislation or the other way around. There are precedents for both approaches in the United Kingdom and elsewhere. It is not appropriate to express an opinion about which approach is better in the abstract; indeed, it is likely that this is a matter on which no single solution is necessarily the most apt for all circumstances. In this case, however, legislation followed by referendum seems the preferable approach.

The danger of having a referendum first, on an issue of such multiple layers of complexity as the constitutional settlement discussed in this report, is that not only will many people not know what they are voting about, but the legitimacy of the vote itself will rapidly become questioned on the grounds that misinformation about the details or inaccurate assumptions about what details would emerge underpinned people's voting patterns.

A precedent for a post-legislative referendum on constitutional matters is most recently provided by section 103 of the Government of Wales Act 2006¹¹⁸. That model involves legislating for a complete solution, but linking commencement of the legislation to a referendum; so that the provisions cannot be brought into force without a referendum mandating it, and must be brought into force (or automatically come into force) upon a favourable result of the referendum.

It is, of course, arguable that parliamentary time will be wasted by debating provisions that are never commenced; and that the preparation of the legislation will absorb an enormous amount of civil service time that, again, would be wasted. So a pre-legislation referendum, in order to have any chance of being treated as decisive and legitimate would have to be accompanied by detailed plans for the resulting settlement. That would absorb the same

¹¹⁸ By virtue of which the National Assembly for Wales became entitled to pass Acts of the Assembly, in place of the previous hybrid form of Measure.

amount of civil service time; and since the referendum would require to be based on an Act, and it is not likely that parliamentarians would be content to pass the Act for a referendum without knowing the details of what would emerge from a positive result of the referendum, in the same way there should be no difference in the amount of parliamentary time involved.

There is also a feeling that it may be more tempting to “fudge” details of the constitutional settlement to follow a favourable result of the referendum if the details are encapsulated only in policy papers accompanying the referendum; whereas the necessity of drafting effective legislation, that will be commenced automatically upon a favourable result, should focus minds and ensure that the details are thoroughly thought through.

One of the advantages of the recommendation in relation to the timing of the referendum is that the issue of what question should be put in the referendum becomes easy: the question would simply be whether or not the provisions set out in the relevant Act of Parliament should be commenced.

Details of the referendum arrangements will need to be considered with great care; but at this stage it is important to note that it is hard to see that they could be seen as credible if there were no facility for electronic participation.¹¹⁹

Detailed questions will arise in due course in relation to the design of the referendum in such a way as to maximise informed participation in its process and general confidence in its results. These questions include, for example, whether a simple majority should be regarded as determinative of the answer and, if not, what majority should be regarded as sufficient. A related question is whether there should be a minimum percentage turnout required to make the result legally valid. It is far too early to answer these and other similar questions; but they are of enormous importance and will deserve separate position papers in due course.

Whatever the answer to those questions, it is essential that, whatever majority is required, it should be achieved separately in each of the four constituent parts of the United Kingdom. A new settlement which one Part of the country can represent as having been forced on them against the wishes of a majority on the grounds of a majority in the country as a whole will lack an essential component of legitimacy and credibility from the outset.

¹¹⁹ See further the Report of the Speaker’s Commission on Digital Democracy, 26 Jan 2015 - <http://www.digitaldemocracy.parliament.uk/>

CHAPTER 14

WHAT NEXT FOR THE CONSTITUTION REFORM GROUP?

The next steps

The aim over the next few months is to develop the issues discussed in this paper into a set of refined policy proposals, reflected in draft legislation.

We will achieve this aim by separating the work into a number of workstreams, each to be taken forward by a working party chaired by someone with significant expertise in the field. The products of these working parties will be policy papers, hopefully accompanied by a sketch of implementing legislation.

Our hope is that this work will encourage citizens of all parts of the United Kingdom to resist pressure for fragmentation, in the knowledge that there is an alternative that builds on what we already have and preserves the United Kingdom, but makes it more effective for all its citizens.

We also hope that this initiative will attract sufficiently broad support from all political, academic, commercial and civil society interests to persuade the Government to establish a mechanism for further refining our ideas and implementing them through legislation.

How to participate

At the end of this discussion paper you will find a form¹²⁰ which you can use to send us your reactions and ideas; or simply to register your interest in becoming involved in the continuing discussion. The same form is available on our website – www.constitutionreformgroup.co.uk

We hope that if you support the broad premise of this discussion paper – that the United Kingdom is under threat, is worth saving and can be saved – that you will want to work with us to achieve the aims described above. Whether what you have to offer is general ideas and support, or whether you would like to be involved in one of the working groups taking the ideas in this paper forward and adding detail, we will be delighted to have you on board.

We enthusiastically welcome the interest and involvement of all citizens of the United Kingdom¹²¹, irrespective of political or other affiliations.

¹²⁰ See Appendix 5.

¹²¹ And indeed we will be grateful for ideas from those outside the United Kingdom who believe they have something to contribute.

APPENDIX 1

PROSPECT OF SECOND REFERENDUM ON SCOTTISH INDEPENDENCE

1. Following the narrow decision against independence in the 2014 Referendum, it is likely that a strong Scottish National Party victory in the Scottish Parliamentary Elections in 2016 would be followed by a new referendum, although the timing is unclear.
2. The rhetoric from the Scottish National Party on this point has been clear and, since the first referendum, consistent.
3. See, for example—

“Mr Sillars became the first major SNP figure in the campaign to declare the party will propose a rerun of the independence vote next year. ‘I would anticipate that a lot of people will be looking to next year’s election, 2016 for the Scottish Parliament, to have a commitment for a mandate to hold a referendum when it suits us,” Mr Sillars said”¹²².

4. Even a narrow majority in favour of independence in that referendum might be interpreted as a sufficient mandate to end the United Kingdom unilaterally¹²³.
5. Apart from statements to the media, the Scottish National Party Members of Parliament have been running a Parliamentary campaign to prepare the British public for the inevitability of a second referendum. See, in particular, the following two House of Commons Parliamentary Questions asked by Margaret Ferrier (Rutherglen and Hamilton West)—

To ask the Secretary of State for Scotland, what assessment he has made of the implications for his policy on a further referendum on Scottish independence of the Scottish Parliament election in 2016 delivering a majority for political parties committed to the holding of such a referendum.¹²⁴

¹²² Daily Telegraph 30th April 2015 –

<http://www.telegraph.co.uk/news/politics/SNP/11563422/SNP-will-propose-new-independence-vote-next-year-former-deputy-leader-says.html>

¹²³ See also Second independence referendum 'inevitable' says Salmond – 26th July 2015 – <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-33668002>

¹²⁴ 17 July 2015, 7765; Answered: “Throughout the independence referendum leading members of the Yes campaign repeatedly asserted that it would be a ‘once in a generation’ or a ‘once in a lifetime’ event. For example, in September 2013, Nicola Sturgeon described the independence referendum on BBC television as a ‘once in a lifetime opportunity for Scotland’ and in November 2013, the Scottish Government’s white paper, Scotland’s Future:

To ask the Secretary of State for Scotland, what contingency plans his Department has prepared for the possibility of a further referendum on Scottish independence being the policy of the Scottish Government after the Scottish Parliament election in 2016.¹²⁵

Your Guide to an Independent Scotland, which was produced at taxpayers' expense and made freely available to anyone in Scotland, called the referendum 'a once in a generation opportunity to follow a different path'. In the context of these and other assurances, and following extensive debate, in September 2014 people in Scotland voted decisively, by a majority of over ten per cent, to reject independence and to keep our family of nations together. We await with interest the publication of the parties' election manifestos.

¹²⁵ 17 July 2015, 7766; Answered: "Given the clear and repeated commitments of leading Yes campaigners, not least the First Minister herself, during the independence referendum campaign that the vote was a 'once in a generation' or 'once in a lifetime' event, and given that a clear majority of Scots voted No in that referendum, my Department has not prepared contingency plans for the possibility of a further referendum being the policy of the Scottish Government after the Scottish Parliament election in 2016.

APPENDIX 2

ENGLISH VOTES FOR ENGLISH LAWS (EVEL)

Introduction

The primary response to the English frustrations mentioned in Chapter 3, in the run-up to the 2015 election and in discussions since then, has centred around proposals for a system of English votes for English laws (“EVEL”) in the House of Commons.

The proposals announced on 2nd July 2015 were based on the McKay Commission recommendations and on the Hague proposals¹²⁶ for their implementation¹²⁷.

There are, of course, a number of sub-options within the EVEL envelope, and following the controversy surrounding the first set of published options, the Government returned with a recast set of proposals for amending Standing Orders designed to meet the immediate criticisms made of the first set¹²⁸.

Although the EVEL proposals have much to commend them as an immediate palliative for English frustration, they cannot be a foundation for a long-term political solution that will cement the future of the Union.

Limitations of EVEL

However creative the Government might be in relation to EVEL, and whatever consultation they might carry out within Westminster, there are inevitable limitations to any EVEL approach.

In particular, what it cannot do is provide a logical solution to an issue of self-perception facing the Westminster Parliament today.

Clearly, Parliament is the Parliament of the United Kingdom; but even that proposition requires increasingly to be qualified when one considers the calls for the recognition of devolution as an entrenched and irreversible process¹²⁹. The Devolution Acts recognise that the devolved legislatures derive their power and competence from the Westminster Parliament and expressly, therefore, reserve to that Parliament the right to make laws for any part of the United Kingdom on any matter whatsoever. This potential affront to the self-

¹²⁶ *The Implications of Devolution for England*, Presented to Parliament by the First Secretary of State and Leader of the House of Commons, December 2014 Cm 8969.

¹²⁷ See *English Votes for English Laws: Proposed Changes to the Standing Orders of the House of Commons and Explanatory Memorandum*, Cabinet Office 2nd July 2015.

¹²⁸ *Same*, reissued, 14th July

¹²⁹ The importance of irreversibility as a key political requirement for a devolution process that is seen as credible features in Campbell II, *The second report of the Home Rule and Community Rule Commission*, March 2014, p.6.

determinative logic of devolution was immediately assuaged by the creation of a constitutional Convention – the Sewel Convention – according to which except in extremis the Westminster Parliament would not legislate for the devolved territories in devolved matters without consent of the devolved legislature. That Convention, however, is not law: and it increasingly fails to realise the reality and aspirations of the three devolution settlements.

At present, the Westminster Parliament clearly has features both of a United Kingdom parliament and of a Parliament for England. The premise of EVEL is that it is possible to isolate the latter features and to devise a mechanism whereby they can be addressed without the involvement of Members representing the non-English constituent parts. But there are three principal reasons why this attempt is unlikely to be successful—

- First, it would be difficult to manufacture a process that resulted in English laws being completely hermetically sealed from the involvement of non-English members, and we note that none of the parties have yet produced plans that even purport to achieve that¹³⁰. But so long as EVEL fails to achieve that kind of hermetic seal, the frustration that found expression in the West Lothian question will have been addressed only partly: so long as Scottish Members continue to exercise legislative influence in relation to matters in England on which English MPs have no say in relation to Scotland, there will continue to be a perceived imbalance.
- Secondly, the separation of the House of Lords into English and non-English members is of course impossible while peers continue not to serve in a representative capacity. Again, having Bills on English matters passing through a House in which influence can be exerted by politicians whose political and other interests all relate to another part of the United Kingdom has the potential to contribute to the perception of unequal governance.
- Thirdly, Bills are not the only issue. Those who aspire to a fully representative English Parliament – and they may not necessarily be a majority within England – would presumably wish to include arrangements that related to Parliamentary Questions and other matters of equal importance within the political accountability mechanism. In its function of holding the Executive to account, some may see as much a need to address the West Lothian Question as in relation to legislation. As yet, no Party has proposed an EVEL system that extends beyond legislation; and it would be difficult or impossible to do so.

For these reasons and others, an EVEL system will not be sufficient to address the fundamental issues which people throughout the United Kingdom wish to see addressed.

¹³⁰ Apart from anything else, providing for committee stages of bills to be taken with the participation only of members for English constituencies in the House of Commons, does not prevent non-English members from voting on, and indeed vetoing, matters solely concerning England at other stages of a Bill: and it is difficult to see how that could be achieved, and it might not be possible to achieve that lawfully within the constraints of European Union law and possibly Human Rights law in relation to at least certain matters.

APPENDIX 3

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<https://www.opendemocracy.net/ourkingdom/stuart-white/will-constitutional-convention-democratically-refound-british-state>

APPENDIX 4

LIST OF CORRESPONDENTS

We have had helpful comments, advice and encouragement from a wide range of politicians, academics and others. We are very grateful to all of them for their interest in and contribution to this early stage of our work, and we look forward to collaborating with them and others as our work progresses.

We are grateful to everybody who has commented, but wish to thank the following in particular for taking the time to think about our opening discussion paper. This paper has benefited very significantly from changes made to reflect correspondents' comments. For the sake of clarity, however, we emphasise that the content of this paper is our sole responsibility, and that inclusion in the list below does not imply agreement on any aspect of our work.

Professor Arthur Aughey, Ulster University
Professor John Bell, Cambridge University
Graham Brady MP
The Lord Carlile of Berriew QC
Hon Jan Cheek MLA, Falkland Islands Legislative Assembly
The Rt Hon The Lord Forsyth of Drumlean
Sir John Gieve KCB
The Lord Hennessy of Nympsfield
Professor Gerald Holtham, Cardiff Business School
Bernard Jenkin MP, Chairman, Public Administration and Constitutional Affairs Select Committee
The Rt Hon The Lord Kirkwood
The Rt Hon The Lord Mackay of Clashfern KT PC QC
Ferdinand Mount
Professor Richard Rawlings, University College London
Sir David Omand GCB
Gisela Stuart MP
Professor Thomas Glyn Watkin, Cardiff Law School
Baroness Wheatcroft

APPENDIX 5

CONSULTATION REGISTRATION FORM¹³¹

We very much welcome involvement from all those with something to add to the debate and discussion that we are hoping to have over the next few months.

You can register on our website – or, if you prefer, use these pages and send them to:

Caroline Roberts
Constitution Reform Group
19 Dacre Street
London SW1H ODJ
info@constitutionreformgroup.co.uk

Name:

Address:

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Email:

Area of interest:

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How would you like to be involved in the work of the CRG?:

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Comments :

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¹³¹ This form is available online at www.constitutionreformgroup.co.uk