



A Constitutional Crossroads: Ways Forward for the United Kingdom

Report of an Independent Commission



British Institute of
International and
Comparative Law

A Constitutional Crossroads

Ways Forward for the United Kingdom

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THIS REVIEW WAS UNDERTAKEN BETWEEN DECEMBER 2014 AND MAY 2015 BY A COMMISSION* CONSISTING OF:

PROFESSOR SIR JEFFREY JOWELL KCMG QC (*Chair*), Director of the Bingham Centre for the Rule of Law

PROFESSOR LINDA COLLEY, Shelby MC Davis 1958 Professor of History at Princeton University

GERALD HOLTHAM, Managing Partner at Cadwyn Capital LLP. Cardiff Business School

PROFESSOR JOHN KAY, Visiting Fellow, Nuffield College, Oxford

SIR MAURICE KAY, Former Vice President of the Civil Division of the Court of Appeal

PROFESSOR MONICA McWILLIAMS, Professor, Transitional Justice Institute, University of Ulster

PROFESSOR EMERITA ELIZABETH MEEHAN, Professor at the School of Politics and International Relations at University College, Dublin

PHILIP STEPHENS, Chief political commentator, Financial Times

PROFESSOR ADAM TOMKINS, (*Rapporteur*) Professor of Public Law at the University of Glasgow

PROFESSOR TONY TRAVERS, Director of British Government at the London School of Economics

ALAN TRENCH, (*Advisor*) Devolution expert, author of 'Devolution Matters' blog

Committee Secretary: SANDRA HOMEWOOD

Assistance is acknowledged from conversations with: Toby Fenwick, Professor Robert Hazell, Lord Lester QC, Lord Lexden and Professor Richard Rawlings. And for administrative assistance from Charlotte Lazarus.

* For fuller biographies see Chapter 8.

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FOREWORD

The United Kingdom has reached a constitutional crossroads. Scotland's vote last September to remain part of the Union was made in the light of an offer by political leaders of an unprecedented degree of home rule. Much greater transfer of power to the Scottish Parliament will transform relationships between the four parts or nations¹ of the Union. The urgent task of the new United Kingdom government is to craft a renewed settlement that at once meets the pledges made to Scotland; maintains the essential fabric of the Union; and is fair to all nations of the Union in a spirit of mutual respect. To say this will be not be easy is an understatement.

The informal, asymmetric nature of the UK constitution does not lend itself to balanced, neat adjustments. Nor does England's preponderance within the Union. Any new settlement will necessarily be complex. It will be impossible to banish all inconsistencies and anomalies. The Union has great advantages for reasons of security, economic efficiency and social solidarity as well as shared history and culture. Yet there are also great virtues in decentralised sources of governance.

This review seeks to assist the mapping of a path to a new settlement for the UK government. Although the devolution arrangements are often referred to as a 'settlement', this is far from the case and there is now a growing sense of unease that the Union is at risk of becoming unstuck. Indeed, in 2014, the United Kingdom was on the verge of breaking up on the authority of an inter-government arrangement without the proper underpinning of parliamentary enactment or the consent of the other constituent nations. Contrast the position in most federal countries, where a written constitution provides with clarity that transfers of power can be achieved, if at all, only with unanimity or a high threshold of popular

support. A settlement is therefore urgent to create a sense of security among our own citizens, who need to comprehend the basic rules of our domestic territorial arrangements and to know that they are "coherent, stable and workable".² A settlement is urgent too because the present lack of clarity conveys an impression of instability which can harm our dealings with the outside world.

The late Lord Bingham, commenting on our lack of a codified constitution, said that "constitutionally speaking, we now find ourselves in a trackless desert without map or compass". He was therefore attracted to the notion of a sparsely drawn constitution, dealing with a few governing principles regarded as fundamental and indispensable. This would enable "any citizen to ascertain the cardinal rules regulating the government of the state of which he or she is a member" and also inculcate a constitutional awareness which is particularly important in the increasingly polyglot, multi-cultural, religiously diverse, plural society that this country has become³.

We believe that in the context of devolution, a written constitution would most securely provide the advantage of clear ground-rules to serve as a framework for our territorial arrangements and to secure their permanence. Its realisation however, will, rightly, take time. In the meantime, because the issue is urgent, we suggest that we would benefit now from a Charter of Union which would lay down the underlying principles of the UK's territorial constitution and of devolution within it, from which flow a number of changes to existing institutional arrangements and practices, including financial arrangements under the existing 'Barnett formula' (from which, we suggest too, we should progressively depart).

¹ We know that there are reservations in some quarters about describing each of England, Scotland, Wales and Northern Ireland as 'nations' but, for ease, this is the nomenclature we adopt throughout this review.

² The words of Lord Hope, Deputy President of the UK Supreme Court, in *Imperial Tobacco v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153, at [13].

³ Tom Bingham, *Lives in the Law* (OUP, 2011), chap.6.

This review (carried out over five months, and inevitably selective) examines devolution, the UK's union state, and our territorial constitution in the context of the United Kingdom as a whole. UK devolution has been undertaken in a piecemeal fashion and has only occasionally been viewed in the round – both in the light of the UK's fundamental constitutional values (such as the rule of law, the protection of individual liberties and human rights, and representative government) and in the light of how each constituent nation relates constitutionally to each other and to the centre, and the interacting points of influence between them. The House of Lords Constitution Committee stated in a report published in March 2015 that they were “astonished that the UK Government do [sic] not appear to have considered the wider implications for the United Kingdom of the proposals” agreed in November 2014 for further devolution for Scotland.⁴ The Institute for Government said in a recently published report that “the overall impression is of upheaval at a rapid pace, without a great deal of consideration about how the various proposed changes relate to one another, or how they should be implemented... Insufficient attention is paid to the big picture”.⁵

Chapter 1 of this review describes how devolution has been separately developed in Scotland, Wales and Northern Ireland. The chapter includes an assessment of the recent Smith Report for Scotland, and of the constitutional implications of its recommendations that (for example) the Scottish Parliament and Government should be stated in legislation to be ‘permanent institutions’.

In Chapter 2, we consider the architecture of the union state, the provision made in the United Kingdom for inter-governmental machinery and the implications of devolution for Whitehall, the organisation of the UK Government, and the civil service. We note here how the present inter-governmental arrangements strikingly lack transparency and in some ways offend the rule of law.

⁴ House of Lords Constitution Committee, *Proposals for the Devolution of Further Powers to Scotland* (10th report, 2014–15, HL 145), para 22.

⁵ Institute for Government, *Governing in an Ever Closer Union* (London, 2015) p 8.

In Chapter 3, we set devolution in the United Kingdom in the context of an understanding of federalism. We explore the similarities between devolution and federalism and we note where they may be contrasted with one another. We note that any degree of permanence of our devolved structure requires a written constitution and propose other ways to enhance a combination of ‘shared rule’ and ‘home rule’.

In Chapter 4, we identify the constitutional principles which, we argue, should shape our understanding of the UK's territorial state. We examine the idea of union and ask what animates it: from a range of sources we identify a series of ‘principles of union constitutionalism’ which, we argue, should now be codified in a new Charter of Union to help us understand the state of the union and its likely future. Although not possessing the entrenched framework of a written constitution, the Charter of Union would guide future legislation and would shape future discussion about the development of devolution, but it would also identify judicially enforceable principles of UK constitutional law. The enforcement of such principles is a task for which, in our view, the UK Supreme Court is ably equipped.

In Chapter 5, we turn our attention to England. We look first at the vexed issue of ‘English votes for English laws’. How can the fact best be brought out that the Westminster Parliament is England's legislature as well as the legislature for the whole of the United Kingdom? We look also at governance within England, focusing in particular on decentralisation and localism as manifested through City Deals and the empowerment of new city-regions. Is the ‘northern powerhouse’ merely about the economic regeneration of the north-west, or should it be seen more overtly as a *constitutional* reform?

Chapter 6 addresses the all-important question of how devolution and the union state are financed. We examine the Barnett formula and the idea of social solidarity that should govern the funding of devolved government. We consider the implications of fiscal devolution and of the ‘no detriment’ principle.

We add as an appendix to this review, an analysis of the courts' devolution case-law to date, from

which we have drawn a number of our principles of union constitutionalism.

We hope that our review will guide policy-makers and commentators alike as the United Kingdom continues to evolve and to reform its territorial

governance. Constitutional reform generally, and developing the UK's territorial constitution in particular, are not exercises undertaken merely for their own sakes. They are vital components of national harmony, regional and local identity, and effective governance.

EXECUTIVE SUMMARY OF MAIN RECOMMENDATIONS

1. The UK should enact a Charter of the Union setting down the powers and underlying principles governing the relationship between the four nations of the Union. The Charter would codify shared commitments to democracy, the rule of law and personal liberty alongside the rights of each nation to a government best suited to its needs.

Passage by the UK parliament of the Charter would embed into constitutional law the guiding principles of solidarity and subsidiarity. The Charter would be interpreted and enforced by the courts. It would set the framework for an urgent revision of the constitutional architecture and inter-governmental machinery of the Union.

The Charter would be a significant first step on the path to a written constitution which, to quote the late Lord Bingham, would “enable any citizen to ascertain the cardinal rules regulating the government of the state of which he or she is a member”.

2. The UK should remain a fully integrated single market with a single currency and common macro-economic framework in which citizens are free to live, to work, to trade and to retire without legal impediment. Collective responsibility for defence and security should remain with the UK. The report warns about different human rights regimes in different parts of the UK.

3. Fiscal devolution has been approached on a piecemeal and ad hoc basis. It should rest on a clearer balance between social solidarity across the Union and the autonomy of devolved parliaments.

The present Barnett formula governing funding arrangements for the devolved governments does

not deliver equity between the various parts of the UK. It is not appropriate for the Union’s decentralised constitution. The way forward is a grant mechanism based on clear criteria such as relative need with a discount for devolved tax-raising powers and subject to periodic reviews.

The machinery for devolved finance can no longer be left to the discretion of HM Treasury.

4. The machinery governing the UK’s relationship with constituent nations should be overhauled to reflect the constitutional principles of transparency, accountability and effective parliamentary scrutiny (which are presently lacking). There is a powerful case for rolling the three territorial departments of state – Scotland, Northern Ireland and Wales – into a single Department for the Union. The operation of the civil service should be reformed to reflect the new architecture of the Union.

5. Secession referendums should be held no more than once in a generation. For these purposes a generation should be considered at least 15 years.

6. Greater recognition should be given to the fact that Westminster is England’s parliament as well as the parliament of the UK. Decisions taken at Westminster with a separate and distinct effect for England (or England and Wales) should be taken only with the consent of a majority of MPs from England (or England and Wales).

7. Devolution in the other nations of the Union should be accompanied by decentralisation in England. This requires significant fiscal devolution to restore a much larger share of revenue and spending decisions to cities and to other local authorities.

CHAPTER 1 – INTRODUCTION: THE DEVELOPMENT OF DEVOLUTION

The United Kingdom is not an old state. In its present form it dates only from 1922.⁶ But it is a state comprising ancient nations. The legal union of England and Wales dates from 1536. The union of the Crowns of Scotland and England dates from 1603. And the political union of Scotland with England and Wales dates from 1707. There was a further Act of Union, with Ireland, in 1800.

The United Kingdom is not an easy state to understand. Each of the three nations is different in legal and political character. Wales is distinct from England in some respects but not in others. Wales and England share a legal system and there is therefore no discrete body of Welsh law, although there are particular laws that have effect only in Wales (not only those passed by the National Assembly for Wales). The border between England and Wales is crossed about 130,000 times each day, whereas the border between England and Scotland is crossed about 30,000 times each day. Forty-eight per cent of the Welsh population lives within 25 miles of the border with England; only 3.7% of the Scottish population lives within 25 miles of England. Northern Ireland has no land border with any other part of the United Kingdom, but it has an international border with Ireland. Scotland and Northern Ireland have separate legal systems, although there is a common UK Supreme Court whose Justices come from the legal professions of England and Wales, Scotland, and Northern Ireland.

These differences mean that what is right for one of the home nations may not be right for the others, and they, as well a range of other factors, help to explain why the governing arrangements of each of the UK's four home nations have developed differently. To give two contemporary examples: the ability to set a lower rate of corporation tax may be more pressing in Belfast (in order to compete with

Dublin) than it is in either Edinburgh or Cardiff.⁷ The differences between the Anglo-Welsh border and the Anglo-Scottish border may make tax competition a more likely threat (or opportunity) were income tax rates to vary in Wales than were they to do so in Scotland.

The four nations, of course, are of very different sizes. England has 84% of the UK's population (53.5 million out of 63.7 million). Of the 650 MPs in the House of Commons, 533 represent seats in England. Scotland has 8.5% of the UK's population (5.3 million) and 59 seats in the House of Commons. Yet Scotland comprises nearly one third of the UK's land mass and has nearly 60% of the UK's coastline. Wales has a population of 3.1 million (nearly 5% of the UK total) and 40 seats in the House of Commons. Northern Ireland has a population of 1.8 million (under 3% of the UK total) and 18 seats in the House of Commons.

It is important at the outset to stress that the devolution schemes enacted for Scotland, Wales and Northern Ireland in 1998 did not create the differences between the ways the four nations are governed. But those schemes did make the differences greater. A Scottish Office was set up in Whitehall in the 1880s and a Secretary of State for Scotland has sat in the UK Cabinet since the 1920s. A Welsh Office and Secretary of State were created in the 1960s. There is a Secretary of State for Northern Ireland and a separate Northern Ireland Office with junior ministers attached but there is no 'English Office' nor a Secretary of State for England.

1.1 Scotland

Devolution in Scotland has developed in three stages: the Scotland Act 1998, the Scotland Act 2012, and the Smith Commission Agreement (a Scotland Bill to implement the Agreement will be

⁶ The creation in that year of the Irish Free State led to the United Kingdom of Great Britain and Ireland becoming the United Kingdom of Great Britain and Northern Ireland.

⁷ See now the Corporation Tax (Northern Ireland) Act 2015.

Tax Devolution under the Scotland Act 2012

Under the 1998 Act, the Scottish Parliament had the power to vary the basic rate of income tax up or down by up to three pence in the pound. But this power was never used and it was allowed to lapse after 2007. The 2012 Act replaced this power with a new regime. From 2016, the basic and higher and additional rates of income tax will be set at 10 percentage points lower for Scottish taxpayers than for taxpayers in the rest of the United Kingdom. It will then be for the Scottish Parliament to set a Scottish rate of income tax ('SRIT') in that tax space. This rate could be 10 per cent (in which case basic and upper rates of income tax will be the same in Scotland as in the rest of the UK). It could be higher than that, or it could be lower. Under the 2012 Act, only one SRIT may be set, meaning that Holyrood may not set different rates for the basic and upper bands of income tax. A SRIT of 9% would see the rates set at 19% and 39%; a SRIT of 11% would see them set at 21% and 41%. What Holyrood cannot do under this scheme is to set, for example, a 9% rate for the basic rate and an 11% rate for the upper rate. This is known as the 'lock-step'.

Additionally, under the Scotland Act 2012, two smaller UK taxes were discontinued for Scotland, and the Scottish Parliament given the power to replace them with new devolved taxes. Thus, from April 2015, stamp duty land tax was replaced with a Land and Buildings Transaction Tax and landfill duty was replaced with a Scottish Landfill Tax. The Scottish Parliament also has the power to introduce new taxes, with the consent of HM Treasury.

Reductions are to be made from the block grant calculated using the Barnett formula to allow for the revenues that the devolved taxes would create, if they were maintained at the same level as in the rest of the UK.

The UK-wide body, HM Revenue and Customs (HMRC), will be responsible for collecting and administering the SRIT. However, the Scottish Parliament has established a new body, Revenue Scotland, which will be responsible for collecting and administering the Land and Buildings Transaction Tax and the Scottish Landfill Tax and advising it on tax matters.

included in the first Queen's Speech after the general election).⁸ The Scotland Act 1998 created the Scottish Parliament and the Scottish Government.⁹ In general terms, the powers it conferred upon these institutions were those formally exercised by the Scottish Office and the Secretary of State for Scotland. The structure of the Scotland Act 1998 is to list the powers reserved to Westminster. Everything else is devolved. Thus, there is no list of devolved powers – if a power is not found in the list of reservations in Schedules 4 and 5 to the Scotland Act, it is devolved. The core areas of devolved competence are health, education, justice, agriculture, arts and culture and most areas of transport. Under the powers conferred by the Act,

the Scottish Parliament is responsible for about two-thirds of identifiable public expenditure in Scotland; Westminster is responsible for about one-third. Westminster remains responsible for defence and foreign policy as regards the whole of the UK (including Scotland), currency and the macro-economy, and most aspects of economic regulation. By far the largest slice of domestic expenditure in Scotland for which Westminster is responsible is social security, including the state pension. Thus, devolution as provided for under the Scotland Act 1998 is principally service devolution: that is to say, devolution of responsibility for the delivery of public services in Scotland.

The Scotland Act 2012 extended devolved competence¹⁰ but far more significant was the

⁸ In January 2015, the UK Government published draft clauses of the forthcoming Scotland Bill: see *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8890). We consider a number of the draft clauses below.

⁹ Formally named the 'Scottish Executive' from 1998–2012.

¹⁰ Extensions to devolved functions included the administration of elections, airguns, speed limits, drink-drive limits and a handful of other matters.

fiscal devolution it started. Under the 1998 Act, while the Scottish Parliament was responsible for spending a great deal of public money, it was not responsible for raising very much of that money. Almost all of it came to Holyrood via the block grant from Westminster. The Scotland Act 2012 sought to begin to close this 'fiscal gap' or 'vertical fiscal imbalance' (ie, the contrast between what Holyrood spends and what Holyrood is responsible for raising) in a limited way.

The Smith Commission Agreement

The Smith Commission Agreement was published in November 2014 to outline the next stage of Scottish devolution. It was agreed by all five parties represented in the Scottish Parliament, including the SNP, although that party has since distanced itself from the package, arguing that it is insufficient. The Smith Commission Agreement comprises four core elements:

- it extends fiscal devolution beyond the Scotland Act 2012;
- it introduces a degree of welfare devolution;
- it extends various other competences of the Scottish Parliament;
- and it seeks to embed some of the features of Scottish devolution in UK statute.

Tax

Under Smith, the Scottish Parliament will become responsible for setting all the rates and bands of income tax on earned income for Scottish taxpayers. The UK Government will set the personal allowance (ie, the point at which earnings begin to be taxable), other exemptions and reliefs, collection and anti-avoidance arrangements and UK legislation will define 'income' for tax purposes and will define 'Scottish taxpayer'. The UK will continue to levy income tax on savings and dividends¹¹. Beyond these, income tax in Scotland will become the responsibility of the Scottish Parliament. There will be no lock-step: Scottish Ministers will be free to decide how many bands of income tax there

should be, what the thresholds between them should be, and at what rate income should be taxed for each band.

Additionally, two further taxes are to be devolved in full: Air Passenger Duty and the Aggregates Levy¹².

To add to this, the revenue from the first 10 percentage points of VAT raised in Scotland will be assigned to the Scottish Parliament. In federal systems it is common to find sales taxes falling under the responsibility of state/provincial/regional governments. This is however unlawful in the EU, where each Member State must set a single rate of VAT. While VAT cannot be devolved for as long as the UK remains a Member State, its revenues can be assigned and this will enable the Scottish Parliament to benefit from general economic growth in Scotland.

National insurance, capital taxes, corporation tax and excise duties will remain reserved to Westminster. Taken together, this package of devolved and assigned tax powers means that about 60% of the money the Scottish Parliament spends will flow directly to it.

Welfare

The Smith Commission Agreement proposed significantly greater devolution in the area of welfare. While there is nominal devolution of welfare provision to Northern Ireland, the reality is that Belfast implements British welfare policy and, indeed, is fined by London if it does not do so. The Smith Commission agreed that real welfare devolution was called for in Scotland: that is to say, that the Scottish Ministers should have the flexibility to develop their own priorities for welfare spending, albeit within limits, and that these priorities should not be tied to those set by UK Ministers in London. The matter is difficult, however, for two reasons. First, because there is a shortage of official expertise in DWP about how it might work, and secondly because there are limits to how far Scotland can depart from a different sort of social welfare to that in the rest of the UK while still pooling and sharing risks and resources

¹¹ The Calman Commission had recommended assignment of half these revenues to the Scottish Parliament, without any power to set rates.

¹² Devolution of these was recommended by the Calman Commission but not implemented by the Scotland Act 2012.

across the UK as a whole. The principle of solidarity or parity tempers the extent to which the principle of autonomy can be realised in the field of welfare. These issues are discussed further in Chapter 6.

The result provides for the state pension to be reserved to Westminster, as are tax credits, child benefit and (largely) universal credit (UC).¹³ Benefits relating to those unable to look after themselves – such as attendance allowance and carers allowance – and to disability (particularly Disability Living Allowance and Personal Independence Payments), are to be devolved to Holyrood. There should also be a power for the Scottish Ministers to make additional discretionary payments or introduce new welfare benefits that relate to devolved responsibilities.

Other competences

The Smith Commission agreed that a range of further powers be devolved to the Scottish Parliament and/or the Scottish Ministers, including in the following areas: broadcasting, the regulation of telecommunications, transport, energy regulation, the management and operation of tribunals, energy efficiency and fuel poverty, consumer advocacy and advice, and onshore oil and gas extraction (ie, fracking). In the main, these build on competences already devolved under Scotland Acts 1998 and 2012.

Constitutional features

The Smith Commission agreed that UK legislation should provide that the Scottish Parliament and Scottish Government are 'permanent institutions' and that the Sewel convention should be placed on a statutory footing. Under the doctrine of the sovereignty of parliament, Westminster retains the legal power to make laws for Scotland on devolved matters: this is confirmed by section 28(7) of the Scotland Act 1998.¹⁴ However, under the Sewel convention, Westminster will not normally exercise this power without the consent

of the Scottish Parliament. Such consent is often given: there are many occasions when it is more convenient for Westminster legislation to extend to Scotland (even on a devolved matter) than it is for Holyrood to legislate afresh. The Scottish Parliament's consent is indicated by the passing of a legislative consent motion ('LCM'). To date, 148 LCMs have been passed by the Scottish Parliament, including 71 since the SNP took office.

As noted above, the Smith Commission Agreement is to be taken forward in a new Scotland Bill to be introduced in the first session of the 2015 parliament. In January 2015, the Government published clauses of this bill in draft, enabling them to be the subject of pre-legislative scrutiny.¹⁵ Draft clause 1 provides that after section 1 of the Scotland Act 1998 will be inserted: "A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements". Draft clause 2 provides that after section 28(7) of the Scotland Act will be added the words: "But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament". We consider these draft clauses in detail below (section 1.4).

In addition, the Scottish Parliament will gain the power to legislate for Scottish Parliament elections (subject to certain limitations), and regarding the operation of the Scottish Parliament and Government, including the electoral system to be used and the size of the Scottish Parliament. Use of these powers will require a two-thirds majority in the Scottish Parliament, not a simple majority.

1.2 Wales

Devolution in Wales has been in constant flux since 1998. Approval for the principle of devolution in the September 1997 referendum was by the narrowest of margins.

¹³ While Universal Credit is largely reserved under the Smith Commission Agreement, its housing element was agreed to be devolved.

¹⁴ This provides that "This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland".

¹⁵ See above, n 2. Such pre-legislative scrutiny has been undertaken by the House of Commons Political and Constitutional Reform Committee, the House of Lords Constitution Committee and, in the Scottish Parliament, by the Devolution (Further Powers) Committee.

The form of devolution enacted in the Government of Wales Act 1998 was limited. As in Scotland, the 'National Assembly' created then largely inherited the functions of the former Secretary of State for Wales and Welsh Office, but these had only existed since 1964 and were more limited than devolved administrative functions were in Scotland. Institutionally, the National Assembly was more like a local authority, constituting a single legal body corporate with a 'first secretary' and 'assembly secretaries' responsible for general administration, but working mainly through committees of which assembly secretaries were also members. This was found rapidly not to work. Perhaps the most important change made by the Government of Wales Act 2006 was to divide the institution of the National Assembly into two, creating a deliberative and legislative Assembly and a separate executive, accountable to the Assembly, called the Welsh Assembly Government, recognising in law a change already made in practice.

The second key change made by the 2006 Act was to provide for the Assembly to exercise law-making powers. The model for legislative devolution enacted by the Government of Wales Act 2006 involved two distinct approaches. Initially, powers were conferred on the Assembly incrementally, on a case-by-case basis. Such powers would relate to specific 'matters' within the 20 'fields' of policy set out in Schedule 5 to the Act. Conferral of legislative powers could take place in two ways. If the Assembly sought powers, it could seek a 'legislative competence order' ('LCO'), a form of secondary legislation that required the assent of both Houses of Parliament (and the Assembly). Alternatively, powers could be conferred by Act of Parliament, with an assumption that devolution of legislative powers would be considered whenever legislation was proposed at Westminster. The working of the LCO system gave rise to a protracted legislative procedure and great inconsistency. It was controversial and unpopular and survived only until 2011.

In March 2011, a referendum was held in which it was decided to move to the 2006 Act's second approach to legislative devolution. This is the approach currently in force. It enables the Assembly to exercise primary law-making powers over 20 'subjects', as listed in Schedule 7 to the Act.

The emergence of an Assembly with broad law-making powers has not ended debate about Welsh devolution. One reason for this is finance. While the block grant arrangements using the Barnett formula treat Scotland and Northern Ireland generously, that is not the case for Wales. The 2007 'One Wales' coalition agreement between Labour and Plaid Cymru provided for the establishment of an expert commission on financial matters, to establish whether and how far Wales was 'under-funded'. The commission, chaired by Gerald Holtham, published its final report in 2009, and argued that Wales was indeed under-funded relative to England, given the level of demonstrable need in Wales.¹⁶ It recommended a relatively simple approach to assessing relative need.¹⁷ The question of 'fair funding' has remained a recurrent theme in debates about further devolution since the Holtham Commission reported. On taking office, the Conservative-Lib Dem Coalition proposed the establishment of a further commission if there were support for further legislative devolution in the referendum held in March 2011.

The resulting commission, known as the Silk Commission, had a broad remit and resulted in two reports: one on finance, published in November 2012 and one on legislative issues, published in March 2014.¹⁸ The former led to the Wales Act 2014, which parallels the tax provisions of the Scotland Act 2012 and alters electoral arrangements for the Assembly, and formally renamed the Welsh Assembly Government as the 'Welsh Government'. Like the Scotland Act 2012, the Wales Act 2014 was enacted with the consent of the National Assembly. Before these provisions may come into force, however, a further referendum will have to be held in Wales. The Silk Commission's second report led to a yet further process of cross-party debate, initiated in November 2014 and known as the St David's Day process. It agreed the following:

¹⁶ Independent Commission on Funding and Finance for Wales, *Fairness and Accountability: a new funding settlement for Wales* (Cardiff, 2010).

¹⁷ Such an approach had earlier been endorsed in principle by the House of Lords Select Committee on the Barnett formula in its report *The Barnett Formula* (2008–9, 1st report, HL 139).

¹⁸ Commission on Devolution in Wales, *Empowerment and Responsibility: Financial powers to strengthen Wales* (Cardiff, 2012); idem, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (Cardiff, 2014).

- the introduction of a 'reserved powers' model for Welsh devolution,¹⁹ as is already the case in Scotland and Northern Ireland.
- the devolution to the National Assembly of the power to determine its own size, electoral arrangements and other operational matters, including its name, along with putting the Sewel convention into statute and recognising the Assembly's permanence (as in Scotland), along with removal of the current rights of the Secretary of State to take part in Assembly proceedings.
- the establishment of a 'Welsh Inter-governmental Committee' to improve co-ordination between the two governments.
- devolution of a number of additional functions, including planning approval for certain energy schemes, speed limits, bus and taxi regulation, rail franchising and functions in relation to water and sewerage.
- an agreement on a 'Barnett floor' to underpin the Assembly's block grant, without saying what this might be or how it would work.

Implementation of the St David's Day process will require further legislation after the 2015 general election.²⁰ Once implemented it will – quite astonishingly – be the fifth iteration of devolution in Wales since 1998.

1.3 Northern Ireland

Devolved government in Northern Ireland is different from that in Great Britain in a number of respects. The legacy of the political conflict is key to this. Unlike Scotland or Wales, the underpinning of devolution in Northern Ireland is through a multi-party peace agreement, the 1998 Belfast Agreement (also known as the Good Friday Agreement). The Belfast Agreement is not just between the political parties in Northern Ireland,

but also the UK and government of Ireland. Devolution forms one of its three 'strands', the others being a set of North-South relations within Ireland – the North South Ministerial Council and a range of cross-border bodies – and a set of east-west arrangements including the UK and Irish Governments, of which the best known is the British-Irish Council.²¹

The Northern Ireland Act 1998, which implements the Belfast Agreement, contains a number of distinctive provisions. One is the scheme of legislative devolution. This resembles the Scottish model in permitting the Northern Ireland Assembly to legislate for all matters save those expressly excluded from its powers. A second is the way those exclusions are framed: some powers are 'excepted', others are 'reserved'. Excepted matters are wholly beyond the Assembly's powers. Reserved powers may, however, be devolved by secondary legislation (an order made by the Secretary of State). With the Secretary of State's consent, the Assembly may also legislate for reserved matters.²² Reserved matters may therefore be regarded as a category of 'devolvable' matters; policing and the justice system (which were on that list) have been devolved. A third distinction is the way the devolved institutions embody power-sharing. This means that a number of key decisions taken by the Assembly, including the budget and the programme for government, require cross-community approval, so that they have a majority of members identifying with both unionist and nationalist communities and not a simple majority in the Assembly as a whole. It also means that ministers are not chosen because of agreement between their parties or majority support, but because of the strength of their party's performance in elections to the Assembly. The Northern Ireland Executive is therefore based on power-sharing through a coalition. A fourth distinction follows: the office of First Minister is in

¹⁹ At present the legislative competences of the Welsh Assembly are listed in Schedule 7 to the 2006 Act. In Scotland, by contrast, the powers reserved to Westminster are listed in the Scotland Act, with all other powers devolved. The Scottish reserved powers model is deemed preferable to the Welsh conferred powers model for a variety of reasons, not least that the latter seems to result in more litigation.

²⁰ See HM Government, *Power for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020).

²¹ The British-Irish Council's members include the UK and Irish governments (sovereign states), the three devolved administrations of Scotland, Wales and Northern Ireland, and three of the UK's Crown Dependencies (Jersey, Guernsey and the Isle of Man).

²² Excepted matters are set out in Schedule 2 to the 1998 Act and include the Crown and Parliament, international relations, defence and national security, nuclear matter, National Insurance, taxation and coinage. Reserved matters are set out in Schedule 3 and include such matters as aviation and navigation, the Post Office, social security, competition law, and formerly policing, the courts and the criminal law.

effect shared between the First and Deputy First Ministers, who are chosen as representatives of the largest parties of each community and whose formal role is shared. The Deputy First Minister is not a subordinate of the First Minister, let alone his appointee, but holds office in his own right and exercises functions jointly with the First Minister.

The course of devolution has not been smooth. Unionist demands to the IRA to decommission its weapons led to several short suspensions of devolution in 2001 and 2002, and a lengthy suspension between 2002 and 2007. During these periods, the Assembly continued to exist (and elections were held in November 2003), but government functions were exercised by UK Government ministers as they had during the period of direct rule between 1969 and 1999. Devolution was restored in 2007, following the 2006 St Andrews Agreement. Since then, the process has encountered some difficulties, with relations between the various parties represented in the Executive being tested.

Nonetheless, in December 2014, a further Stormont House Agreement was reached. This agreement covers certain conflict-related legacy issues and reforms to the finances of the Northern Ireland Executive (including the implementation of welfare reform). It paved the way for legislation to devolve the power to set the rate of corporation tax in Northern Ireland which was enacted in the form of the Corporation Tax (Northern Ireland) Act 2015.

1.4 Implementing the new proposals

The various constitutional processes that have been underway in Scotland, Wales and Northern Ireland are different from each other, both in the nature of devolution as applied there and the processes that established and continue to develop it.

Some aspects of the proposed changes give rise to constitutional concerns. Some of these centre on the 'draft legislative clauses' to implement the Smith Commission's recommendations, which are also agreed to be applied to Wales as a result of the St David's Day process.²³ Draft clause 1, which provides that the Scottish Parliament and

Government are permanent parts of the UK's constitutional arrangements, is intended to recognise in law that which is already the case in fact. Were Westminster to pass a law abolishing the Scottish Parliament, the union would be at an effective end. For as long as the Scottish people wish to have a parliament in Edinburgh, Westminster lacks the political authority to close it down, even if the UK Parliament retains that right in legal theory. The Scottish Parliament was established by statute only after a referendum in which the Scottish voted by 74% to 26% that there should be one. The reality is that Westminster could not disestablish the Scottish Parliament without the consent of the Scottish people being similarly expressed. At least, Westminster could not act in this way without risking some sort of Scottish unilateral declaration of independence: as David Mundell MP (Minister of State for Scotland in the 2010–15 coalition government) has said, the continued existence of the Scottish Parliament is "a prerequisite of our United Kingdom".²⁴ The Scotland Office informed the House of Commons Political and Constitutional Reform Committee in 2015 that "there has never been any question in the past 16 years that the Scottish Parliament and Scottish Government are anything other than permanent".²⁵ As the House of Lords Constitution Committee has observed, the clause as drafted is "designed to be a political and symbolic affirmation of the permanence of the Scottish Parliament", which is exactly what the Smith Commission intended.²⁶ Similar considerations apply in Wales.

Draft clause 2, regarding the Sewel convention, is similar. It does not turn the Sewel convention into a judicially enforceable rule of law, but rather, it recognises in statute that the Sewel convention is a politically binding rule governing the way in which the UK Parliament will exercise its legal powers. There is, however, a potential problem with draft clause 2. As originally articulated by Lord Sewel²⁷

²⁴ See House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (9th report, 2014–15, HC 1022), para 33.

²⁵ *Ibid*, para 19.

²⁶ House of Lords Constitution Committee, *Proposals for the Devolution of Further Powers to Scotland* (10th report, 2014–15, HL 145), para 64.

²⁷ Minister of State in the Scottish Office when the Scotland Bill was being taken through Parliament in 1997–98: see HL Deb, 21 July 1998, col 791.

²³ *Scotland in the United Kingdom: An enduring settlement*, Cm 8990, Annex A; *Powers For A Purpose* Cm 9020, section 2.2.

and as set out in the Memorandum of Understanding²⁸ the convention applies to Westminster legislation “with regard to devolved matters”. Its scope is generally understood to have been extended, however, also to cover Westminster legislation that alters the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers.²⁹ Thus, the Sewel convention was triggered by the passage of the bill that became the Scotland Act 2012, which was not enacted until after a legislative consent motion had been passed by the Scottish Parliament. As drafted therefore, draft clause 2 would not cover all legislation currently understood to be within the scope of the Sewel convention. Again, the same issues in principle apply to Wales, where the working of the Sewel convention has been less smooth than in Scotland, and Northern Ireland.

It is possible that this may have significant constitutional consequences. The Conservative party, for example, is pledged to repeal the Human Rights Act 1998 and to replace it with a British Bill of Rights, based on the European Convention on Human Rights but giving the courts fewer powers, it seems, than those which they currently possess under the 1998 Act. The Scotland Act 1998 provides that Convention rights, *as defined in the Human Rights Act*, limit both the legislative competence of the Scottish Parliament and the executive competence of the Scottish ministers. Similar

provisions appear in the Government of Wales Act 2006 and Northern Ireland Act 1998. A bill to repeal and replace the Human Rights Act might therefore be one which could be said to alter the competences of the devolved institutions in Scotland, Wales and Northern Ireland. Were this to be the case, it would trigger the Sewel convention. If the Scottish Parliament declined to pass a legislative consent motion, this would raise the argument that the United Kingdom would be acting unconstitutionally were it to press ahead with legislation repealing the Human Rights Act – or that it would leave in place two sets of regimes regarding human rights applying in Scotland, with the Human Rights Act ceasing to apply to reserved matters, but the Convention rights continuing to apply to devolved (non-reserved) ones.

It is not clear why draft clause 2 understands the Sewel convention only in its narrower formulation. The Command Paper *Scotland's Future in the United Kingdom* accompanying the draft clauses states that “it is expected that the practice [of legislating to alter the competences of the devolved institutions only with their consent] will continue” but that the practice “has no legal effect”.³⁰ However, given the importance of the principle of consent to the effective working of devolution, this approach perpetuates the notion that devolved institutions are subordinates of Westminster, not partners with it in the governance of the United Kingdom.

²⁸ Memorandum of Understanding Between the UK Government and the Devolved Administrations (2013), para 14.

²⁹ See, eg, the UK Government's *Devolution Guidance Note 10* (2011), para 4.

³⁰ HM Government, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8890), para 1.2.2. The Government has stated that the draft clauses 1 and 2 should apply equally with regard to the devolved institutions in Wales (on which see below): see HM Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020), paras 2.2.4 and 2.3.10. It is not clear that they should apply also to Northern Ireland. As we note below, devolution was suspended in Northern Ireland from 2002–07. Were legislation to provide that “it is recognised that the Northern Ireland Assembly is a permanent institution”, it may be that there would be doubt as to whether this could happen again, even if it were deemed necessary for pressing reasons of national security.

CHAPTER 2 – THE ARCHITECTURE OF THE UNION STATE

Devolution in the United Kingdom has been delivered with minimal disruption to the established conduct of business in Whitehall and Westminster. On one level, this was a laudable attempt to absorb devolution as smoothly and seamlessly as possible into the patterns and processes of British government decision-making, understanding that reforms cutting with the constitutional grain are more likely to stick in the longer term than those that cut too aggressively against it. On the other hand, however, **that Whitehall has changed so little as a result of devolution gives the unfortunate impression that the centre has not fully caught up with the magnitude of the changes to the state that devolution has triggered.**

2.1 Inter-governmental machinery

Every review of devolution has concluded that the centre needs to be reformed to take account of the implications of devolution and, in particular, that the UK's inter-governmental machinery is not fit for purpose. This has been the view of the House of Commons Justice Committee,³¹ the House of Commons Welsh Affairs Committee,³² the House of Commons Scottish Affairs Committee,³³ the Calman Commission,³⁴ the Silk Commission³⁵ and the Smith Commission.³⁶ It is also the view of the Institute for Government³⁷ and of the House of Lords Constitution Committee.³⁸

³¹ House of Commons Justice Committee, *Devolution: A Decade On* (5th report, 2008–09, HC 529).

³² House of Commons Welsh Affairs Committee, *Wales and Whitehall* (11th report, 2009–10, HC 246).

³³ House of Commons Scottish Affairs Committee, *Scotland and the UK: Co-operation and Communication Between Governments* (4th report, 2009–10, HC 256).

³⁴ Commission on Scottish Devolution, *Serving Scotland Better* (2009).

³⁵ Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014).

³⁶ Smith Commission Agreement (2014).

³⁷ Institute for Government, *Governing in an Ever Looser Union* (2015).

³⁸ House of Lords Constitution Committee, *Inter-governmental Relations in the United Kingdom* (11th report,

The Calman Commission was particularly concerned that, while the UK's inter-governmental machinery is poor, the UK's inter-parliamentary machinery is non-existent.³⁹ There are no established links, for example, between the Scottish and Welsh Affairs Committees of the House of Commons and the committees of the Scottish Parliament and Welsh Assembly. The legislatures of the United Kingdom do not work jointly in seeking to hold the governments of the United Kingdom to account. Nor is there any joint scrutiny of legislation that affects both reserved and devolved matters.

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. The most important document is the *Memorandum of Understanding and Supplementary Agreements*, which was first drawn up in 1999 and the most recent version of which dates from 2013. The *Memorandum of Understanding (MoU)* has no statutory base. There is no requirement that it be laid before the legislatures of the United Kingdom. To the extent that it is subject to parliamentary scrutiny at all, this is *post hoc*, sporadic and of only peripheral effect. The MoU establishes a Joint Ministerial Committee (JMC), which now meets annually in plenary session⁴⁰ and more frequently on a functional (sector-specific) basis and at official level. The most frequent JMC meetings are of the European 'format' or sub-committee, which meets about five times each year ahead of European Council meetings so that, to quote from the MoU, the devolved administrations may be "involved in the discussions within the UK

2014–15, HL 146). The same committee had made similar criticisms more than a decade previously: see House of Lords Constitution Committee, *Devolution: Inter-Institutional Relations in the United Kingdom*, 2nd report, 2002–03, HL 28).

³⁹ Calman Commission, *op cit*, pp 143–7.

⁴⁰ Plenary meetings of the JMC were not held between 2003 and 2007. Since 2007 they have been held in London.

Government about the formulation of the UK's policy position on all issues which touch on matters which fall within the responsibility of the devolved administrations".⁴¹ The 'domestic' format of the JMC, established in 2008 to deal with policy issues, now meets only once a year and has proved to have limited value.

There are also a number of bilateral forums. There are 'Joint Exchequer Committees' of the UK Government with the Scottish and now Welsh Governments, to discuss issues of fiscal devolution. (A similar 'working group' has addressed corporation tax issues for Northern Ireland.) Following the work of the Silk Commission and the St David's Day process, a Welsh Inter-governmental Committee is to be established.⁴²

Much of the MoU is concerned with dispute resolution. Few disputes between the governments of the United Kingdom have been taken to court (see the appendix for an account of the relevant case law), and some may not be susceptible to legal resolution in any event. Most are resolved at official level, and on a bilateral basis. Where this cannot be achieved, the MoU provides that the matter may be formally referred to the JMC secretariat. Again there will be an attempt to resolve the matter at official level. If this cannot be done, a meeting of the JMC's disputes panel (chaired by a UK minister) will be convened to decide the matter. On the only occasion such a meeting has been called, the outcome was a stand-off. The UK Government department involved (HM Treasury) refused to make any concessions to the devolved governments, and so the status quo was maintained. The devolved governments are likely to be in the position of supplicants, asking the UK Government to change its mind with the assistance of a UK Minister, through such a process.

Dispute resolution is only one function of effective inter-governmental relations. The Institute for

⁴¹ MoU (2013), para B4.3. The MoU provides that "the UK Government will... provide the devolved administrations with full and comprehensive information, as early as possible, on all business within the framework of the European Union which appears likely to be of interest to the devolved administrations" (para B4.1).

⁴² *Powers For A Purpose* Cm 9020 op cit, section 2.3.

Government has identified 10 such functions.⁴³ In our view, these boil down to five core issues, as follows:

- Political summitry, where few decisions are taken but having a high profile and of symbolic value; useful also for sharing best practice and lesson learning; can be used also to agree constitutional change.⁴⁴
- Dispute resolution.
- Fiscal and financial governance (see Chapter 5).
- Negotiating and managing UK policy positions with regard to the EU.
- Managing policy and public service issues, either where there are overlaps between devolved functions and those reserved to the UK, or where decisions made regarding 'devolved' matters in one part of the UK have an effect on what happens in another.

Given the significance of these issues, it is plainly important that inter-governmental arrangements are effective and robust. **The MoU is based on the right sentiments but the machinery it establishes is too weak to ensure that the sentiments find their way into practice.** For example, the MoU states that "all four administrations are committed to the principle of good communication with each other"⁴⁵ and that they "want to work together... on matters of mutual interest".⁴⁶ But, as the House of Lords Constitution Committee noted in its recent report on inter-governmental relations, **the MoU makes "no provision for joint policy-making by participants"**.⁴⁷

Nor does the MoU make any provision for the effective accountability or parliamentary scrutiny of the JMC's activities, meetings or decisions. The communiqués issued following a plenary meeting of the JMC are terse, bordering on the opaque. The model adopted is of international relations, where negotiations between governments of sovereign states take place behind closed doors and are

⁴³ Institute for Government, *Governing in an Ever Looser Union*, op cit, p 15.

⁴⁴ As in, for example, the decision taken at the JMC plenary meeting in December 2014 to accelerate the extension of the franchise to 16- and 17-year-olds in time for the 2016 Scottish parliamentary elections.

⁴⁵ MoU, op cit, para 4.

⁴⁶ *Ibid*, para 8.

⁴⁷ Op cit, para 64.

subject to minimal parliamentary oversight. Similarly, inter-governmental matters are exempt from disclosure under section 28 of the Freedom of Information Act 2000. **This is inappropriate. The constitutional principles of transparency, openness, accountability and effective parliamentary scrutiny should govern the UK's inter-governmental arrangements.** That they do not do so at the moment is a constitutional failing which should be remedied.

While these defects could be remedied without recourse to primary legislation, it may be that the Charter of Union we recommend in this report should incorporate provisions on inter-governmental machinery, which could reshape the UK's arrangements in the light of the constitutional principles we have just listed. Such legislation could, at the same time, amend the JMC machinery so that the UK government is less dominant within it – making the arrangements more of a partnership, and less of a hierarchy.

A reconstituted second chamber (see 3.5 below) might also provide a more effective binding together of the constituent nations at the political centre of the Union.

2.2 Whitehall and the civil service

In addition to inter-governmental machinery, two other aspects of the architecture of the union state merit consideration: the territorial departments of state and the civil service. **Before devolution there was a Scottish Office, a Welsh Office and the Northern Irish Office, each headed by a Secretary of State in the Cabinet. After devolution, this remains the case. But it is not clear that it should.** The argument in favour of retaining this model is that each of Scotland, Wales and Northern Ireland has a distinct voice around the Cabinet table. However, when so much of the former workload of these government departments is now undertaken by ministers in Edinburgh, Cardiff and Belfast, it is not self-evident that there continues to be a justification for three separate departments of state. In 2009, the House of Commons Justice Committee found that “what is lacking is any one department which is clearly charged with taking a holistic view of the infrastructure of government across the United Kingdom and the constitutional

and policy issues involved”.⁴⁸ In 2015, the House of Lords Constitution Committee recorded its “deep concern” at the “lack of central co-ordination and oversight of the devolution settlements and of the minimal consideration given to the effect of devolution in one area of the UK on other areas, and on the Union as a whole”.⁴⁹

Consideration should therefore be given to improving the central co-ordination of the devolution settlements – perhaps by rolling the three departments into a single Department for the Union – in which there would be a single secretary of state (in the Cabinet) and three ministers of state, one for each of Scotland, Wales and Northern Ireland.⁵⁰

Devolution to Scotland and Wales has not altered the fact that in Great Britain there is a single home civil service (Northern Ireland has its own civil service, an arrangement dating back to the Government of Ireland Act 1920). While the Scottish and Welsh Ministers have autonomy over staffing, promotions and grading, and pay settlements, their officials are members of the ‘civil service of the State’.⁵¹ The civil service is a reserved matter under the Scotland Act 1998⁵² and it is not a devolved matter under the Government of Wales Act 2006. These arrangements have placed the civil service under considerable strain, not least during the Scottish independence referendum campaign. That campaign saw two of the governments within the United Kingdom on opposing sides of an existential argument: the United Kingdom Government wanted a ‘No’ vote and the Scottish Government wanted a ‘Yes’ vote.

In its recent report the House of Commons Public Administration Select Committee (‘PASC’) found

⁴⁸ House of Commons Justice Committee, *Devolution: A Decade On* (5th report, 2008–09, HC 529), para 63.

⁴⁹ House of Lords Constitution Committee, *Inter-governmental Relations in the United Kingdom* (11th report, 2014–15, HL 146), para 133).

⁵⁰ This case has been made by Jim Gallagher in his paper *The Day after Judgement*, available here: <http://policyscotland.gla.ac.uk/wp-content/uploads/2014/09/THE-DAY-AFTER-JUDGEMENT-final.pdf>.

⁵¹ Scotland Act 1998, section 51; Government of Wales Act 2006, section 52 (as amended by the Constitutional Reform and Governance Act 2010, which placed the civil service on a statutory footing).

⁵² Scotland Act 1998, Schedule 5, Part I, para 8.

that these strains had caused mistakes to be made on both sides, resulting in constitutionally inappropriate politicisation of the senior civil service (in both London and in Edinburgh).⁵³ This is a serious and worrying indictment. PASC was told in evidence that the rationale for maintaining a unified home civil service at the outset of devolution was the perception that it facilitated a more informal form of inter-governmental relations⁵⁴ but that it has become “more and more of a constitutional fiction that there is a single unified civil service”.⁵⁵ However, evidence to PASC that Scotland should have its own public service

separate from the UK civil service was rejected by the committee. PASC concluded that “the advantages that flow from having a single Home Civil Service justify the retention of a single UK Civil Service”.

While the committee’s report is a useful description of the problems, it is less valuable as a blueprint for what should be done to resolve them. **We identify reform of the civil service as a further aspect of the issues pertaining to the architecture of the union state which will require to be addressed in the light of devolution.**

⁵³ House of Commons Public Administration Select Committee, *Lessons for Civil Service Impartiality from the Scottish Independence Referendum* (5th report, 2014–15, HC 111).

⁵⁴ *Ibid*, para 18.

⁵⁵ *Ibid*, para 20 (evidence of Akash Paun, Fellow at the Institute for Government).

CHAPTER 3 – DEVOLUTION AND FEDERALISM

A unitary constitution is generally considered to be one where political power is exercised by one central authority. Power can be devolved within that unitary constitution. But it is granted by the central authority and can also be withdrawn, at least as a matter of law. The powers of the devolved authorities are therefore not entrenched. The central parliament is sovereign subject only to any conventions, and of course to the vicissitudes of political reality. Under a federal constitution, by contrast, the powers granted to the devolved authorities (normally states, provinces or regions) are guaranteed by the constitution. Such constitutional status does not permit those powers to be altered or removed by simple legislation. The notion of federalism does not, however, mean that the two tiers of government – central and devolved – act entirely independently of each other.

Federalism has been variously defined. For KC Wheare, writing in the 1940s, federal government entailed having co-ordinate and independent spheres of government, co-equally supreme, as in the United States of America.⁵⁶ Others have seen federalism more in terms of a 'marble cake' than mutually distinct spheres.⁵⁷ More recently, Daniel Elazar defined federalism simply as "self-rule plus shared-rule".⁵⁸ And for William Riker, federalism is marked by three features: that there are two levels of government over the same territory, that each level is at least partly autonomous, and that there is a constitutional guarantee of such autonomy.⁵⁹ Ronald Watts,⁶⁰ a Canadian scholar, defines a federal system as having five features:

- Two tiers of government, each acting directly with the people;

⁵⁶ KC Wheare, *Federal Government* (Oxford University Press, 1946).

⁵⁷ Morton Grodzins, *The American System: A New View of the Government of the United States* (New York, 1966).

⁵⁸ Daniel Elazar, *Exploring Federalism* (University of Alabama Press, 1987).

⁵⁹ William Riker, *Federalism: Origin, Operation, Significance* (Little, Brown, 1964).

⁶⁰ Ronald Watts, *Comparing Federal Systems* (McGill-Queens University Press, 2008).

- A written, supreme constitution, with a division of powers which, because it is deemed to be a covenant or contract with the people, cannot be changed unilaterally;
- Representation of the devolved authority at the centre (normally in the upper house of parliament);
- An 'umpire' to resolve disputes (normally a constitutional court), and
- Mechanisms to facilitate inter-governmental co-operation (because federalism requires shared power).

The United Kingdom constitution has some of these characteristics, but not all of them. Clearly, in at least Scotland, Wales and Northern Ireland, there is "self-rule plus shared-rule". Moreover, there is a degree to which the different levels of government are autonomous, at least in practice. But, notwithstanding the Smith Commission's agreement that the Scottish Parliament and Government be recognised as permanent institutions, there is no legal guarantee. Westminster cannot legally be constrained from abolishing the devolved institutions because, as a matter of law, parliament may make or un-make any law.

However, as is well known, this is only part of the picture. The UK's constitution is not, and never has been, purely a matter of law. While it may be legally possible for Westminster to abolish the Scottish Parliament at Holyrood, the practical reality is that the United Kingdom Parliament could not legislate for the abolition of the Scottish Parliament or Government and expect the United Kingdom to survive intact. This is because our uncodified constitution combines a subtle, albeit unclear, mix of law and practical political reality.

The features of federalism outlined by Watts raise the question of whether there is a point where the extent or degree of devolution (eg, extensive taxing powers, or a 'permanent' devolution, as proposed by Smith) necessitates those features of a federal

system which are presently lacking in our devolution settlements (in particular, a written constitution and representatives of the devolved bodies at the centre).

Several lucid accounts exist of why the United Kingdom should embrace federalism and become a fully federal state⁶¹. Arguments in favour of viewing the United Kingdom in federal terms include the following:

- that the content and degree of the enhanced devolution proposed by the Smith Commission Agreement tips the balance from devolution into federalism;
- that the principle of the sovereignty of parliament cannot make the present devolution arrangements secure from the will of a future parliament, and that a federal constitution would secure devolution by entrenching it;
- that a federal constitution would provide an opportunity to reform the House of Lords so that it could provide formal political representation at the centre for the nations and regions of the United Kingdom;
- That a federal constitution would provide a map, direction of travel and coherent framework for our territorial arrangements.

Arguments against moving to full federalism in the United Kingdom include the following:

- that there is no appetite for such a radical change to our constitutional arrangements;
- that the UK has always been capable of acting without a codified constitution;
- that in the area of devolution a mix of legislation and convention provides a workable substitute for a fully federal constitution;
- that representation at the centre is now sufficiently provided by individual members from the devolved nations in both Houses of Parliament.

⁶¹ See for example, David Torrance, *Britain Rebooted: Scotland in a Federal Union*, Edinburgh, Luath Press, 2014. See also, David Melding AM's e-book published by the Institute of Welsh Affairs, *The Reformed Union: The UK as a Federation*.

3.1 Permanence

We agree with the Smith Commission that the devolution of power to the nations should now be permanent. However, under English constitutional theory at least, it is still the case that parliament may make or un-make any law whatever and that no-one may override or set aside parliament's legislation⁶². Various judges have suggested that the common law may impose limits on the freedom of parliament to legislate.⁶³ And some statutes, including the devolution settlements, have been described as "constitutional statutes".⁶⁴ But such a status protects them only from implied repeal. It does not protect them from express repeal. In other words, a later 'ordinary' statute which contradicts a devolution statute will be held to have that effect only if the words in the later statute clearly so intend; ambiguity will not suffice.⁶⁵

There has yet to be a case in which an Act of Parliament has been held to have transgressed any common law rule although the EU and human rights contexts condition the ways in which parliament may exercise its legislative supremacy. This will remain true for as long as the UK continues to be a Member State of the European Union and for as long as the Human Rights Act 1998 (or similar enactment) remains in force.

It may be possible to impose some degree of permanence upon a statute by requiring it to be endorsed by a referendum, or where it has been endorsed by a post-enactment referendum, as in

⁶² Although in *MacCormick v Lord Advocate* 1953 SC 396 Lord President Cooper doubted whether the sovereignty of parliament was part of Scots law. Earlier authorities in Scots law did not appear to share these doubts: see, eg, *Edinburgh and Dalkeith Railways v Wauchope* (1842) 8 Cl & F 710 and *Mortensen v Peters* (1906) 8 F (J) 93. In *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 the Scottish law lord, Lord Hope of Craighead, referred to "the English principle of the absolute sovereignty of parliament" (para 104, emphasis added).

⁶³ See, eg, *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, *AXA General Insurance v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868, and *Moochan v Lord Advocate* [2014] UKSC 67, [2015] 2 WLR 141.

⁶⁴ A notion put forward by Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151, at [62]–[63]. For discussion see David Feldman, 'The Nature and Significance of "Constitutional" Legislation' [2013] 129 LQR 343.

⁶⁵ See *BH v Lord Advocate* [2012] UKSC 24, 2012 SC (UKSC) 308, at [30].

the example of the European Communities Act 1972. As noted in Chapter 1, the devolution legislation passed in 1998 was, in each instance, preceded by a referendum. In some countries, certain laws are regarded as having 'organic status', as in France where they must be passed by a special majority, or in Spain, where organic laws, including Statutes of Autonomy, must be passed by an absolute majority of members of the Congress of Deputies. In Israel, the Knesset may pass a 'basic law' which has constitutional significance simply because it is said to be such, regardless of its content. However, the only permanent arrangement is one that is provided by a written constitution⁶⁶.

3.2 Secession

The second issue relates to the procedures for seceding from the Union. It is worth noting that United Kingdom law does recognise the political sovereignty of at least one of the component nations of the UK. Section 1 of the Northern Ireland Act 1998 provides that "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...". There is no equivalent provision of law for Scotland, Wales or England, although the Scottish Claim of Right in 1988 did speak of "the sovereign right of the Scottish people to determine the form of Government best suited to their needs". In the 2014 independence referendum, the United Kingdom government recognised that a 'Yes' vote would determine – ie, would decide without question – that Scotland would secede from the UK and become a new state in international law. The franchise for the referendum was the electorate in Scotland: not the electorate of the United Kingdom generally. The referendum was therefore an exercise in self-determination, and the Scottish people determined to remain part of the United Kingdom.

In contrast, the states of the USA do not possess a constitutional right of self-determination and

⁶⁶ Although most written constitutions provide for an amendment of their constitutions for all or many of its provisions by special majority and/or referendum.

secession. The US Supreme Court ruled in *Texas v White* in 1868 that when a State becomes one of the United States it enters into an "indissoluble relation" and that there is "no place for reconsideration or revocation, except through revolution or through the consent of the States".⁶⁷ In the *Quebec Secession Reference* in 1998, the Supreme Court of Canada ruled that Quebec does not enjoy a unilateral right to secede from Canada. An act of secession, the Court noted, "would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements".⁶⁸ A "clear expression of the desire to pursue secession," the Court said, would give rise to a "reciprocal obligation" on all parties to "negotiate constitutional changes to respond to that desire" but the mere fact of a 'Yes' vote in a referendum in a single province could not, of itself, trigger secession. It could trigger only negotiations which may (or may not) lead to secession.⁶⁹ The Court explicitly rejected the proposition that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province – even if that province had clearly manifested its desire to secede.⁷⁰ The Court described this as an "absolutist proposition".⁷¹

Moving towards a more federal, codified constitutional arrangement for the UK would therefore establish 'permanent' devolution on the basis of more clearly defined principles and rules. As with all written constitutions, it would be open to amendment, such as to allow secession, on the basis of an established measure of consensus.

3.3 Judicial review

In respect of the provision in federal systems for an impartial umpire on matters of competence, that is provided in the United Kingdom by the Supreme Court. In the appendix to this report, we present a detailed analysis of the case law on devolution. We show that, despite some inconsistencies in the approaches taken in the cases, a number of valuable constitutional

⁶⁷ *Texas v White* [1868] 74 US 700.

⁶⁸ *Quebec Secession Reference* [1998] 2 SCR 217, para 84.

⁶⁹ *Ibid*, para 88.

⁷⁰ *Ibid*, para 90.

⁷¹ *Ibid*.

principles of devolution law can be distilled. We argue that these should be made more transparent and accessible so that they may shape both our understanding of devolution to date and the argument about future reforms of devolution and the union state. Without repeating here the legal analysis that readers can find set out in full in the appendix, the key principles to be taken from the case law are as follows:

- that devolution exists in order to strengthen and improve the governance arrangements of the United Kingdom as a whole;
- that devolution is intended to be a system of government for the UK that is coherent, stable and workable;
- that, while there are differences of detail between the three devolution regimes, they are nonetheless best seen as a single body of legislative reform for the United Kingdom, accompanied by a single body of case law;
- that the devolved legislatures enjoy plenary law-making powers. They are not akin to local authorities but are parliaments or assemblies that enact primary legislation. Within the limits of their competence as set by Westminster, they possess a generous grant of legislative authority.

We saw in the previous chapter that the UK's inter-governmental machinery is founded on non-legal sources such as Memorandums of Understanding, concordats and convention, and we noted the rule of law concerns to which this gives rise, owing to their lack of formality, transparency and accountability. Thus far, the UK's informal system of inter-governmental relations has scarcely featured at all in the Supreme Court's devolution case law. However, this is a feature of our public law that would develop were judicial review to extend not only to the question of what powers each government and parliament has, but also to the question of how those governments and parliaments ought constitutionally to relate to one another.

In anticipation of the Supreme Court playing a larger part in the adjudication of our territorial system, **we recommend that legislation (preferably under the Charter of Union which we propose in Chapter 4 below), set out principles to guide judicial interpretation of**

the extent of the devolved authorities' powers as plenary law-makers.

We also recommend that the Supreme Court give careful consideration to whether devolution appeals should ordinarily be heard by enlarged panels of seven or nine Justices, to include judges from Scotland, from Northern Ireland, from England and Wales and, as Welsh law may increasingly diverge from English law, from Wales.

3.4 Shared rule and solidarity

Another matter that needs consideration is the extent to which, under a federal system, there is an expectation that the component parts contribute to the interests of the whole: the notion of 'shared rule', or 'solidarity'.

A clear articulation of this idea is found in section 41 of the South African Constitution. In South Africa there are three 'spheres' of government: national, provincial and local. Section 41 provides that "all spheres of government must preserve... national unity and the indivisibility of the Republic... [and] be loyal to the Constitution, the Republic and its people". All spheres of government must "respect the constitutional status, institutions, powers and functions of government in the other spheres" and must "co-operate with one another in mutual trust and good faith...". **We recommend that a similar constitutional provision of solidarity be enacted in the United Kingdom.**⁷²

In the European Union, Article 10 EC (formerly, article 5 EEC) provided as follows: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from

⁷² See further Chapter 4, below. A similar principle, known as "*bundestreue*" is central to the operation of German federalism and requires both the Lander and the federal government to consider and respect the constitutional interests of the other. See DP Kommers and RM Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke Univ Press, 2012), chapter 3; J-F Gaudreault-DesBiens, 'Co-operative federalism in search of a normative justification: considering the principle of federal loyalty' (2014) 23(4) *Constitutional Forum* 1.

any measure which could jeopardise the attainment of the objectives of this Treaty”.

There is no direct equivalent of article 10 EC in the Lisbon Treaty (either in the TEU or in the TFEU), but its principles continue to inform EU law and the case law of the Court of Justice.⁷³

The UK devolution settlement has, perhaps inevitably, concentrated on what powers should be divested from the centre and conferred on the nations, but it should also be recognised that there is great mutual benefit in principles and mechanisms that permit sharing, interaction and concern with the mutual interests of a union constitution, which a federal systems seek to attain.

3.5 A reformed Upper House

A feature of many federal systems which is designed to bind the centre with the component parts is that of a body – normally the Upper House of parliament, which consists wholly or partially of representatives of the regions within the state. We have not in this review had the time to analyse the extent to which the present House of Lords fulfils that role or to consider the question of Lords reform in any detail. However, in 2.1 above we discussed the present inadequacy of political co-ordination of policy affecting the nations. **We regard it as important to have political as well as official participation at the centre, so as to emphasise the nature of ‘shared rule’ as well as ‘self rule’ in the devolution settlements. To this end, we recommend serious consideration of a reformed House of Lords formally representing in Westminster the nations and regions of the United Kingdom.** Given the present function of the House of Lords as a body chiefly devoted to the scrutiny of legislation, this has to be thought about carefully. Another challenge would be presented if England were to be treated on a regional basis, for reasons now to be discussed.

⁷³ Before Lisbon, article 10 EC and its equivalent in predecessor treaties was central to the Court’s case law on remedies. The ‘duty of fidelity’ also helped to influence the substantive law of the internal market, especially regarding the free movement of goods.

3.6 England

Whatever the merits of a move in the direction of federalism, as we believe, the rock on which federal-type proposals for the UK usually founder is England. England shows no desire to be broken into regions. Yet, taken as a whole, she accounts for 85% of the United Kingdom. The most imbalanced federation in the world is Canada, in which Ontario has 35% of the Canadian population (and is responsible for about the same share of Canadian GDP). Of course, there are great disparities between the sizes and wealth of the American states (compare California or New York with Wyoming or Rhode Island, for example) but there are 50 such states (whereas in the UK there are only four home nations) and, in any case, the US situation is different. The problem with England is not its size vis-a-vis the other nations of the UK: the problem with England is its size vis-a-vis the UK as a whole. California may dwarf Vermont, but it has only 12% of the US population and accounts for only 13% of US GDP.

An English parliament with similar powers to those enjoyed by Holyrood would rival the UK parliament. And an English First Minister with powers similar to those enjoyed by the Scottish First Minister would rival the authority of the UK’s Prime Minister. We note that none of the main UK parties proposes to establish an English parliament. Neither do any of them propose to revisit the creation of new elected regional assemblies in England.

The conclusions reached more than 40 years ago by the Royal Commission on the Constitution (the Kilbrandon Commission) still hold: “no advocate of federalism in the United Kingdom has succeeded in producing a federal scheme satisfactorily tailored to fit the circumstances of England”;⁷⁴ and “there is no satisfactory way of fitting England into a fully federal system”.⁷⁵

It is possible that this may change in the future if more devolutionary structures are created in England – such as city-regions – discussed in more detail in 5.2 below.

⁷⁴ Royal Commission on the Constitution, *Report* (Cmd 5460, 1973), para 531.

⁷⁵ *Ibid*, para 534.

3.7 The content of devolution and the extent of diversity

Finally, there is the question of the content of devolution. Not everything can be devolved: on this there is no dispute. But what are the limits of devolution? The most extensive proposal for devolution is that put forward by the Scottish National Party in the wake of their defeat in the 2014 independence referendum: “devo-max”.⁷⁶ This would see the devolution to Edinburgh of everything save for: “aspects of the constitution of the UK as a whole, such as the monarchy and the Westminster Parliament; monetary policy, including the currency and the Bank of England; aspects of citizenship, including nationality and passports; defence; intelligence and security, including borders; and many aspects of foreign policy”. There is no country anywhere in the world run along lines such as these. Under the SNP’s proposal, all revenue raised in Scotland would go to the Scottish Government, who would write the United Kingdom a cheque for the services it rendered in, and for, Scotland as regards monetary policy, defence, security and foreign affairs. This was the proposal which the SNP put to the Smith Commission.

Such an extreme form of devolution would seem designed not to preserve the Union with the rest of the United Kingdom, but to break it. Such a relationship would certainly be incompatible with any sort of continuing social union. For that reason, it was rejected by the other parties to the Smith Commission process and, as we have seen, the model of enhanced devolution agreed by the Smith Commission is very different from the SNP’s vision of devo-max.

As noted in Chapter 1, the Northern Ireland Act divides powers into three categories: those which are *transferred* to the Assembly, those which are *excepted* (and may not be transferred), and those which are *reserved* (ie, not yet transferred). Could it be that the list of excepted powers (in Schedule 2 to the Northern Ireland Act 1998) offers a guide as to the matters which could not be devolved, on the assumption that all others could be, even if they are not devolved yet? The excepted powers are as

follows: the Crown; the Westminster Parliament, including the franchise for elections to that parliament; international relations, including as regards the European Union; defence; weapons of mass destruction; titles and honours; treason; nationality, immigration and asylum; taxes and duties applying to the UK as a whole; national insurance contributions; judicial appointments; the currency; national security; nuclear energy and nuclear installations; certain aspects of fishing; and regulation of activities in outer space.

To consider lists such as these is one way of approaching the question. However, another approach is to ask how much diversity the country can accommodate from the practical point of view. For example, the recent extension of devolved powers to Wales may result in a different set of landlord and tenant laws in Wales from England. Yet the systems of law in England and Wales are integrated. Will judges in England have to become experts in Welsh law? If so, how might this be done? To give another example, the Defamation Act 2013 passed by the UK Parliament has not been extended to Northern Ireland. Yet the world is becoming more connected, no more so than as regards online media. Is it practical, and right, that an alleged defamation be judged under the 2013 Act in England and Wales, but under the common law in Northern Ireland?

Further, as was discussed in the previous chapter, it is questionable whether Westminster could repeal the Human Rights Act without first obtaining the consent of the devolved legislatures. Or whether Scotland could effectively veto any UK decision to withdraw from the European Union.

The issue of the extent of diversity raises matters both of efficiency (who can best deliver the relevant services?) and of convenience (can we really permit different defamation laws in different parts of the UK?). Above all, however, it raises the question of constitutional principle. Are there principles that should guide, in a union state, relations between the centre and the devolved nations; between shared rule and self rule? In the next Chapter we propose such principles for consideration.

⁷⁶ Scottish Government, *More Powers for the Scottish Parliament: Scottish Government Proposals* (Edinburgh, 2014).

CHAPTER 4 – A CHARTER OF UNION

As we have said, we believe that more clarity is required about the principles and aims of our devolution settlement. We can no longer allow the basic structure of the country to evolve in a haphazard fashion, through deals behind closed doors and unenforceable promises blown by the prevailing political wind in one part of the country or another. The rule of law requires certainty and predictability in our government decision-making structures. To attain that certainty and permanence, we believe there is no alternative to a written constitution which, since it deals with a number of different issues, of which only some have to do with devolved institutions, would take time to devise and agree. However, since the matter is urgent, **we recommend that a new Charter of Union be enacted as soon as possible.**

As with all such documents, it must start with a set of guiding principles. We have examined a range of sources to identify a series of principles of union constitutionalism, which we set out in this chapter. Among the sources we have found most useful are: the arguments used during the Scottish independence referendum campaign; the work of the Royal Commission on the Constitution (the Kilbrandon Commission), which sat from 1969–73; the decision of the Supreme Court of Canada in the *Quebec Secession Reference*; and the devolution case law of our own courts. We referred to this last source in the previous chapter, in which we listed the key principles that emerge from the cases. A fuller analysis of the case law may be found in the appendix to this report.

Principles advocated during the Scottish independence referendum campaign

During the course of the long independence referendum campaign in Scotland, unionists were forced for the first time in decades to articulate reasons why they supported the Union of Scotland with the rest of the United Kingdom. As Colin Kidd has pointed out in the leading

intellectual history of Scottish unionism⁷⁷ for much of the period since the Scottish Enlightenment, unionism in Scotland was “banal”: a default position that was so dominant it never needed to be demonstrative.⁷⁸ By the turn of the millennium, unionism in Scotland was characterised by extreme complacency. Devolution, in the words of the Labour politician George Robertson, “will kill nationalism stone dead”.⁷⁹ Yet, while unionists were sleeping, the ingredients that had combined to form the glue of Union gradually dissolved. As Michael Keating has argued⁸⁰, Empire, monarchy, class politics, the NHS and the BBC each played a key role in maintaining Union in post-war Britain, and each has since diminished considerably in significance. Only the barest remnants of Empire remain. The monarchy can be seen as distinct Scottish and English institutions as much as a single British one. The politics of class has been overtaken by the politics of nation (at least in Scotland). The NHS has always been organised differently in Scotland and, since 1999, has been fully devolved. And the BBC that most folk watch in Scotland is BBC Scotland, with the news broadcast from Pacific Quay in Glasgow, not New Broadcasting House in London.

The core case for the Union may be said to comprise three strands: common security, economic integration and social solidarity. The Union makes everyone who lives here more secure. It is easier to defend a united island than it would be if there were two separate countries sharing it and to spread the costs of defence arrangements. There is a safety in numbers, and the combined defence and security forces of the United Kingdom are greater in effectiveness than

⁷⁷ Colin Kidd, *Union and Unionisms: Political Thought in Scotland 1500–2000* (Cambridge, Cambridge UP, 2008).

⁷⁸ *Ibid.*, p. 23.

⁷⁹ When he said this in 1995, Mr Robertson was Labour’s Shadow Secretary of State for Scotland. He became Secretary of State for Defence in Tony Blair’s first government and is now a Labour peer.

⁸⁰ *The Independence of Scotland: Self-Government and the Shifting Politics of Union*, Oxford, Oxford UP, 2009.

would be the case were they to be separated.⁸¹ As for trade and the economy, the United Kingdom is of course a fully integrated single market, with completely free movement of goods and persons. The Union gives the Scottish people a domestic market 10 times the size of Scotland to live in, to work in, to trade with, and to retire to. The solidarity that underpins the UK can be described as “the pooling and sharing of risks and resources”. A Glaswegian’s jobseeker’s allowance is paid by tax receipts from workers in Glamorgan and Gateshead (and vice versa). The state pension – uniform across the whole of the UK – is a pot to which taxpayers from across the whole of the UK contribute. And there are of course less instrumental reasons for the union, arising out of longstanding personal and cultural interconnections, mutual job sharing, language, common habits and so on.

It is important that these values – the values of Union – are borne in mind when developing proposals for constitutional reform in the UK, particularly as they were endorsed by a majority of the votes in the 2014 referendum.

Values articulated by The Royal Commission on the Constitution

When in the 1970s the Kilbrandon Commission was considering questions of “government in relation to the several countries, nations and regions of the United Kingdom” (to quote from its terms of reference), it identified the following ‘general principles’: (1) the need to preserve unity, while recognising that unity does not necessarily mean uniformity and can embrace considerable diversity;⁸² (2) that the principle of democracy must be preserved and fostered;⁸³ (3) that proposals for constitutional reform should respect our strong traditions of personal liberty;⁸⁴ (4) that constitutional arrangements, no matter how attractive in theory, cannot be imposed against the will of the people;⁸⁵ (5) that flexibility is

desirable;⁸⁶ and (6) that good communication between government and people is essential.⁸⁷

The Quebec Secession Reference

When in the 1990s the Supreme Court of Canada was asked to consider the lawfulness and constitutionality of Quebec secession it ruled that “the evolution of our constitutional arrangements has been characterised by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that government adhere to constitutional conduct and a desire for continuity and stability”.⁸⁸ The Court identified four “general constitutional principles”, underlying the written text of the Canadian constitution. These are: federalism, democracy, constitutionalism and the rule of law, and protection of minorities. In the Court’s view, these principles function together: no one principle trumps the operation of any other. So it is with the principles of union constitutionalism we identify for the United Kingdom.

4.1 Principles of union constitutionalism

Building on these sources, we would identify the following as the key principles of the United Kingdom’s union constitutionalism:

<p style="text-align: center;">Consent</p> <p>The United Kingdom is a voluntary union of four component nations.</p> <p style="text-align: center;">Respect for democracy</p> <p>It is for each nation of the United Kingdom to determine the form of government best suited to its needs. Devolution and devolved institutions such as a parliament or a government cannot be imposed on any nation that does not want it.</p>

⁸¹ For data supporting these arguments, see HM Government, *Scotland Analysis: Defence* [Cm 8714, 2013] and HM Government, *Scotland Analysis: Security* [Cm 8741, 2013].

⁸² Op cit, para 417.

⁸³ Ibid, para 418.

⁸⁴ Ibid.

⁸⁵ Ibid, para 419.

⁸⁶ Ibid, para 420.

⁸⁷ Ibid.

⁸⁸ *Quebec Secession Reference*, op cit, para 48.

Respect for the rule of law

The United Kingdom as a whole, and each of its component nations, respects the rule of law. The rule of law governs processes of governance, inter-governmental relations and also any processes of self-determination.

Shared commitment to personal liberty and human rights

The United Kingdom as a whole, and each of the legal systems in force within it, is committed to the protection of personal liberty and human rights.

Social solidarity

The nations of the United Kingdom pool and share their risks and resources.

Common security and defence

The nations of the United Kingdom take collective responsibility for the defence and security of all the people who live here.

Common economic framework

The United Kingdom is a fully integrated single market, with a single currency and common macro-economic framework, in which citizens are free to live, to work, to trade and to retire without legal impediment.

Autonomy

Each nation of the United Kingdom enjoys autonomy in the exercise of their lawful powers, just as the UK as a whole enjoys autonomy in the exercise of its lawful powers.

Subsidiarity

The purpose of devolution is that the body best able to respond to the wishes of the

people and provide a particular service should be the body that carries out that task. The principle of subsidiarity underlines the need for optimal responsiveness and effectiveness on the part of our governing institutions.

Accountability

The Government of the United Kingdom is constitutionally responsible to the UK Parliament, just as ministers in Scotland, Wales and Northern Ireland are responsible to their parliaments or assemblies.

Comity, trust and fair dealing

All governments within the United Kingdom should be loyal to their obligations to each other under the constitution and shall cooperate with one another in mutual trust and good faith.

The time has come for these constitutional values of the union state to be clearly and authoritatively expressed in law. To this end, we consider that the United Kingdom Parliament should pass by statute a Charter of Union designed, among other matters, to embed these principles into our constitutional law. The values and principles that underscore our territorial constitution have lain undeclared for too long. It is time to shine light on them and to allow them in turn to illuminate our constitutional future.

How permanent can such a charter be? We have seen that in our system, any ordinary statute – even if called a charter – is unlikely to survive any express amendment or repeal by subsequent legislation. However, some degree of constitutional status can be conferred on such a law. In order to seek to secure such status, **we propose that the Charter of Union should provide that the Scotland Act, the Government of Wales Act and the Northern Ireland Act “shall be construed and have effect subject to” the Charter.** This echoes the language of the European Communities Act 1972 and would serve to show the fundamental constitutional status of the Charter.

As an Act of Parliament **the Charter of Union will be interpreted and enforced in the courts** – a matter we have addressed in 3.3 above.

However, the constitutional statute the Charter of Union would also have other consequences, such as providing a benchmark against which Bills and other legislative proposals may be assessed. Committees such as the House of Lords Constitution Committee, or the Commons devolution committee proposed by the McKay Commission, could scrutinise legislation with reference to the Charter, in the same way as the Joint Committee on Human Rights considers legislation in relation to the Human Rights Act 1998 and other human rights instruments. **The Charter should also play a role in the scrutiny of legislation in the UK’s devolved legislatures.**

The Charter of Union should embody not only the principles of union constitutionalism, but should also provide in law for the United Kingdom’s inter-governmental machinery, as outlined in Chapter 2 above, and deal with issues such as secession or other referendums, to which we now turn.

4.2 The principle of consent and secession referendums

The principle of consent is of cardinal importance. The United Kingdom is a voluntary union of nations. The means by which each nation may express what the Scottish Claim of Right called the “sovereign will” of its people is, in the modern era, the referendum. Devolution was delivered in Scotland, Wales and Northern Ireland only after referendums were held there in which the electorate signalled its support for devolution. Moreover, the Northern Ireland Act 1998 provides, in section 1, that the means whereby the people of Northern Ireland may indicate that they no longer wish Northern Ireland to remain part of the United Kingdom is “a poll held... in accordance with Schedule 1”: that is to say, a referendum.

Yet, the Northern Ireland Act notwithstanding, the use of the referendum in the United Kingdom is ad hoc. There are few general powers to hold a referendum in the United Kingdom.⁸⁹ Rather, most

⁸⁹ Examples may be found in the European Union Act 2011 and, for certain local government referendums, in the Localism Act 2011.

referendums require their own bespoke legislative authority.⁹⁰ There is no constitutional rule governing when a referendum should be held. Thus, while it was thought necessary in 2011 to hold a referendum before the first-past-the-post electoral system used for the House of Commons could be abandoned in favour of an alternative system, it was thought in 2012 that the House of Lords could be reformed into a largely elected chamber without any referendum.⁹¹ The Human Rights Act 1998 was passed without any referendum. So too was the European Communities Act 1972, although there was a referendum in 1975 on whether the United Kingdom should remain a Member State of what was then the EEC (now the European Union).

The House of Lords Constitution Committee conducted an inquiry into the use of referendums in the United Kingdom. It found that they are often used not out of principle but as a tactical device. The committee cautioned that there are “significant drawbacks to the use of referendums” and recommended that “where possible, cross-party agreement should be sought as to the circumstances in which it is appropriate for referendums to be held”.⁹² The committee further noted that, if referendums are to be used, they are most appropriately used in relation to what it called “fundamental constitutional issues”.⁹³ The committee offered no definition of this term, but gave the following illustrative examples: “any proposal to abolish the monarchy, to leave the European Union, for any of the nations of the UK to secede from the Union, to abolish either House of Parliament, to change the electoral system for the House of Commons, to adopt a written constitution, or to change the UK’s system of currency”.⁹⁴

The Political Parties, Elections and Referendums Act 2000 (‘PPERA’) contains rules governing campaign finance and the conduct of referendum campaigns (as well as rules concerning electoral

⁹⁰ See, for example, the Referendums (Scotland and Wales) Act 1997; the Parliamentary Voting System and Constituencies Act 2011, section 1; the Scottish Independence Referendum Act 2013, section 1; and the Wales Act 2014, section 12.

⁹¹ See the (abandoned) House of Lords Reform Bill 2012–13.

⁹² House of Lords Constitution Committee, *Referendums in the United Kingdom* (12th report, 2009–10, HL 99), para 62.

⁹³ *Ibid.*, para 94.

⁹⁴ *Ibid.*

campaigns). The Electoral Commission, established by PPERA, has the statutory function of considering the 'intelligibility' of referendum questions.⁹⁵ It may make recommendations that the wording be changed in order to improve intelligibility. These matters are important, but there are other equally significant matters that are not regulated by PPERA, including the franchise for referendums, the timing (and, in particular, the frequency) of referendums, and whether referendums should be subject to any minimum or special threshold. The franchise for each referendum is set by the legislation authorising that particular referendum. In the context of the Scottish independence referendum, it was contested in some quarters that, whereas the result could affect the whole of the United Kingdom, the franchise extended only to people on the electoral register in Scotland. There are 800,000 people born in Scotland but living elsewhere in the United Kingdom. They were not permitted to vote in the referendum (unless they relocated back to Scotland and registered to vote there).

There was a referendum in Scotland in 1979 on devolution. The Scotland Act 1978 stipulated that for that Act to be commenced it would require the support in a referendum of 40% of electorate. While a majority of those who voted supported devolution, the 40% threshold was not met and, as a result, the Act was repealed. There had been no such threshold requirement in the 1975 EEC referendum. In the devolution referendums held since 1997, there have been no threshold requirements and nor was there any such requirement in the 2014 Scottish independence referendum. In its report on referendums, the House of Lords Constitution Committee was of the view that "there should be a general presumption against the use of voter turnout thresholds and super-majorities". The committee added, however, that there may be "exceptional circumstances in which they may be deemed appropriate".⁹⁶

A pressing question as to the frequency of referendums is whether there can be another referendum on Scottish independence and, if so, when. The First Minister of Scotland, Alex Salmond

MSP, said at the time of the 2014 referendum that it was "a once in a generation, perhaps even a once in a lifetime" event. His successor Nicola Sturgeon MSP said likewise that it was "a once in a generation" opportunity. Nonetheless, all that was required to occur for the 2014 referendum to take place was that the SNP made a manifesto commitment to introduce a Referendum Bill into the Scottish Parliament and, on the basis of that manifesto, won an overall majority of seats at Holyrood. Were a similar commitment to be made in their 2016 manifesto, and were a similar electoral result to occur, would a second independence referendum have to follow? There is no clear answer to this as a matter of law or constitutional practice. But there is a pointer in the Northern Ireland Act that might suggest a longer period should properly elapse before any 'indyref2'. That Act provides that the Secretary of State may not make arrangements for a poll to be held under section 1 of that Act earlier than seven years after the holding of a previous poll under that section.⁹⁷ In Quebec, 15 years elapsed between the first secession referendum (in 1980) and the second (in 1995). In Scotland, 18 years elapsed between the devolution referendums held in 1979 and 1997. If there is an in/out EU referendum in 2017, as the Conservative party has proposed, it will take place 42 years after the 1975 referendum on the EEC.

It is important that referendums do not become 'neverendums' in which the same question is repeatedly put to the electorate until the 'correct' answer is returned. Referendums are not opinion polls, but legally authorised means of deciding constitutional questions. In the *Quebec Secession Reference* the Supreme Court of Canada noted that the principle of democracy needs to operate and to be understood in the context and in the light of the rule of law: democratic institutions and decisions "must rest, ultimately, on a legal foundation".⁹⁸ **In the UK, we need an instrument such as our proposed Charter of Union to extend the way the rule of law governs and conditions the use of constitutional referendums.**

And on the basis of the precedents noted above, **we recommend that a 'generation', for the purpose of a repeat referendum, is at least 15 years, subject**

⁹⁵ PPERA, section 104.

⁹⁶ Op cit, para 189.

⁹⁷ Northern Ireland Act 1998, Schedule 1, para 3.

⁹⁸ *Quebec Secession Reference*, op cit, at [67].

to compatibility with any obligation arising from the Northern Ireland Act 1998.

A number of our principles of union constitutionalism show that there are – and ought to be – limits to what can be devolved within a single state. Human rights law should be uniform across the whole of the United Kingdom. Social solidarity constrains what can be devolved in terms

of minimum standards of welfare and pensions. Security, defence and a common economic framework are not merely matters that have not been devolved yet, but are core attributes of the state that cannot be devolved at all (without breaking up the state). There is a strong case for setting this out in a Charter, which also recognises the rights of each nation to determine the form of government best suited to its needs.

CHAPTER 5 – THE ENGLISH QUESTION

At dawn on the day after the Scottish independence referendum, the Prime Minister made a statement from outside No 10 Downing Street welcoming the result and undertaking that more devolution would be delivered for Scotland, as had been promised during the referendum campaign. He then said this: “Just as the people of Scotland will have more powers over their affairs, so it follows that the people of England, Wales and Northern Ireland must have a bigger say over theirs... [A] new and fair settlement for Scotland should be accompanied by a new and fair settlement that applies to all parts of our United Kingdom... I have long believed that a crucial part missing from this national discussion is England... The question of English votes for English laws – the so-called West Lothian question – requires a decisive answer”.⁹⁹

First Secretary of State William Hague MP was asked by the Prime Minister to chair a new Devolution Committee of the Cabinet to explore what a “new and fair settlement for England” should comprise. This committee undertook its work at the same time as the Smith Commission was meeting in Scotland. Initially, the Prime Minister had stated that this work should all happen “in tandem”, but in October 2014, Mr Hague clarified that “the proposals for Scotland are not tied to our deliberations on other parts of the United Kingdom in the sense that they are conditional on them... the vow [to Scotland] is unconditional...”.¹⁰⁰ The Smith Commission likewise resolved at the beginning of its work that its agreement would “not be conditional on the conclusions of other political negotiations elsewhere in the UK”.¹⁰¹

In December 2014, Mr Hague’s committee produced a Command Paper, *The Implications of Devolution for England*.¹⁰² The paper summarised aspects of “decentralisation and localism in England”¹⁰³ and of the impact on Westminster of devolution in Scotland, Wales and Northern Ireland. It then set out – separately – Conservative and Liberal Democrat party proposals both on further decentralisation and on the West Lothian question. No Government proposals were contained in the paper: each party to the coalition set out its own. Nor did this embody any wider consensus; while the Labour party had been invited by the Government to participate in the process, it declined to do so. The Labour leadership was furious that the Prime Minister had raised the spectre of “English votes for English laws”, perceiving it to be what Gordon Brown MP called a “Tory trap” that “will in time threaten the very existence of the United Kingdom” because, in raising it, “the Government are [sic] deliberately driving a wedge between Scotland and England”.¹⁰⁴

Despite the controversy over David Cameron’s announcement about English votes for English laws (‘EVEL’), academic research into ‘the new English politics’ shows that he “ha[d] a point”.¹⁰⁵ The Future of England Survey 2014 found further evidence, to augment that found in the equivalent surveys for 2012 and 2013, that “England has a distinctive politics that combines a politicisation of English national identity with an increasingly clear political prospectus”.¹⁰⁶ “The rallying point is an English desire for self-government,” defined by “a continuing sense that Scotland has privileges that are uniquely denied to England” and “a perceived loss of political control due to European integration”.¹⁰⁷ Moreover, the authors of the

⁹⁹ The West Lothian question focuses on the following problem: MPs representing seats in England cannot vote on matters devolved to Scotland (because such matters are the responsibility of the Scottish Parliament, not the House of Commons) but MPs representing seats in Scotland can vote on such ‘devolved matters’ when they apply to England (eg, on English education or the health service in England).

¹⁰⁰ HC Deb, 14 Oct 2014, col 171.

¹⁰¹ Smith Commission Agreement, op cit, para 7(4).

¹⁰² Cm 8969.

¹⁰³ Ibid, p. 7.

¹⁰⁴ HC Deb, 4 Feb 2015, col 391.

¹⁰⁵ C Jeffery, R Wyn Jones, A Henderson, R Scully and G Lodge, *Taking England Seriously: The New English Politics* (The Future of England Survey 2014), p. 3.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

Future of England Survey found that “people in England are not just reacting against their ‘others’ in Scotland and the EU. They are also searching more positively for an institutional recognition of England that can express their concerns better than the current political system, which submerges the representation of England with the wider UK’s institutions in Westminster and Whitehall”.

These powerful findings deserve to be taken seriously. Along with the equivalent surveys in 2012 and 2013 they show: first, that there is “deep dissatisfaction among people in England with the way England is governed” and secondly, that there is “strong devo-anxiety” – that is to say, a perception that devolution has conferred advantages on Scotland and the other devolved nations that are unfair to England.¹⁰⁸ In short, “people in England see a democratic deficit” and are looking for a remedy “in the form of self-government”, although there is little clarity about what form such stronger self-government might take.¹⁰⁹

In this chapter we consider both main aspects of “the English question”: that is to say, the matter of England’s voice and representation in the United Kingdom parliament, and the issue of devolution (or decentralisation) within England and the reform of English local government.¹¹⁰

5.1 Representation: English votes for English laws?

The most authoritative examination of the West Lothian question is the report of the McKay Commission. This independent (non-party) commission was established by the Coalition government in early 2012 and reported in March 2013.¹¹¹ Very similarly to the Future of England Surveys, it found that “people in England do not

perceive themselves as predominant, but rather as disadvantaged and lacking a voice under current arrangements”.¹¹² Accordingly, McKay’s starting point was that “now is the right time to enable a fuller, clearer and positive expression of a voice for England in the UK’s political system”.¹¹³ The Commission quickly rejected options that would see England divided into regions or the creation of a new English Parliament: neither approach commanded sufficient public support. Rather, the solution lay in transforming the procedures of the House of Commons so that Westminster could more manifestly and transparently become both England’s legislature and the legislature for the United Kingdom as a whole. The McKay Commission formulated a core principle upon which its recommendations would be based: “decisions at the United Kingdom level having a *separate and distinct* effect for a component part of the United Kingdom should *normally* be taken only with the consent of a majority of the elected representatives for that part of the United Kingdom”.¹¹⁴ This principle, McKay argued, was already expressed for the devolved nations of the UK through the Sewel convention and the operation of legislative consent motions.¹¹⁵ What now needed to happen, in McKay’s view, was to find a means of extending the principle also to England.

To this end, McKay identified a number of options. The commission’s preference was for legislative procedure in the House of Commons to be amended in two main ways. The first was that a new ‘legislative consent’ procedure be added before second reading so that a Bill could proceed only with the consent of a majority of the MPs representing seats in the part(s) of the UK affected by the Bill. The second was that the committee stage of a Bill should be undertaken only by MPs representing seats in the part(s) of the UK affected by the Bill.

Disappointingly, the Government never published a direct response to the McKay Commission’s report (presumably because the two parties to the coalition disagreed as to what that response should be). However, the parties’ proposals outlined in the December 2014 Command Paper,

¹⁰⁸ Ibid, p. 5.

¹⁰⁹ Ibid, p. 6. For the 2012 and 2013 surveys, see *The Dog that Finally Barked: England as an Emerging Political Community* (IPPR, 2012) and *England and its Two Unions: The Anatomy of a Nation and its Discontents* (IPPR, 2013).

¹¹⁰ To be clear, we regard these as two different issues. In particular, we do not consider that devolution with England is any kind of answer to the West Lothian question.

¹¹¹ McKay Commission, *Report on Consequences of Devolution for the House of Commons* (2013).

¹¹² Ibid, para 65.

¹¹³ Ibid, para 66.

¹¹⁴ Ibid, para 109 (emphasis in the original).

¹¹⁵ We describe in Chap 1.

The Implications of Devolution for England, built on McKay's work.¹¹⁶

The Conservative party's position was as follows:

- Westminster is and should remain England's law-making body.
- Westminster elections and elections for local government in England should continue to use the first-past-the-post electoral system, but there should at the same time be greater direct democracy for local communities, such as through the use of local referendums.
- There should be more bespoke Growth Deals, including metropolitan mayors where locally supported: "we will champion England's long-standing towns, boroughs, cities and counties and will continue to oppose the imposition of artificial regional structures".¹¹⁷
- While localism and decentralisation are crucial, they do not and cannot answer the West Lothian question: "introducing English votes for English laws is crucial and cannot be ignored any longer".¹¹⁸
- In particular, "on legislation relating to England only or to England and Wales only, we must enhance the role of MPs from English constituencies, or English and Welsh constituencies. This must be done in parallel to the implementation of the Smith Commission in Scotland: as a matter of fairness and for the long-term good of the Union".¹¹⁹
- The Conservatives support the guiding principle set out in the McKay report, that "decisions at the United Kingdom level with a separate and distinct effect for England, or for England and Wales, should normally be taken only with the consent of a majority of MPs for constituencies for England, or for England and Wales". The Conservatives add: "we believe that all parties should adopt the McKay principles as a minimum basis for implementing English votes for English laws".¹²⁰
- The Conservatives see the McKay principle and EVEL as being on a par with the Sewel

convention: they say that, as Sewel is to be put on a statutory footing, so too should the arrangements for England (or England and Wales), even if they are implemented in the first instance through changes to the Standing Orders of the House of Commons.

- The implementation of EVEL should be "clear, decisive and effective"; changes should not significantly increase either the complexity of the legislative process or the time taken to pass legislation; the changes "must have the effect of helping to bind together the United Kingdom for the long term".¹²¹
- The Conservatives are not in favour of creating an English Parliament; nor are they in favour of reducing the number of Scottish MPs at Westminster (although they remain committed to reducing the overall size of the House of Commons).

The Conservatives then put forward three options for implementing EVEL. The first, based on recommendations made in 2000 by a committee chaired by Lord Norton, is that:

- Bills on English matters that are devolved to the other nations would proceed through an entirely English-only process (ie, second reading, committee stage, report stage and third reading).
- Option 2, based on recommendations made in 2008 by a Conservative Party 'task force' chaired by Ken Clarke MP, is that Bills on English matters would have their second and third readings as normal (with all MPs eligible to take part) but that their amending stages (committee and report) would be taken only by MPs from England (or, as the case may be, England and Wales).
- Option 3, based on the McKay report, is more complex: second reading would be taken by all MPs; committee stage would be taken by England (or England and Wales) MPs; report stage would be taken by all MPs; an English Grand Committee would then vote on a legislative consent motion ('LCM') and only if that motion is passed would the Bill proceed to third reading, which would be for all MPs. As noted above, McKay had suggested an

¹¹⁶ Op cit.

¹¹⁷ Ibid, p. 23.

¹¹⁸ Ibid.

¹¹⁹ Ibid, p. 24.

¹²⁰ Ibid.

¹²¹ Ibid.

English Grand Committee LCM stage before second reading: for the Conservatives the advantage of moving this stage so that it would take place after report is that it would mean English (or English and Welsh) MPs have the decisive say on whether legislation that applies to England (or England and Wales) should be passed.

In February 2015, the Conservatives indicated their support for the third of these options.¹²² This was confirmed in the party's 2015 general election manifesto.¹²³

The Liberal Democrats' position, as set out in the December 2014 Command Paper, is as follows:

- There should be legislative and fiscal devolution within England (significantly reducing the policy areas in which the West Lothian question would apply).
- This should be 'devolution on demand', delivered through an enabling Bill, which would permit areas of England to demand from Westminster and Whitehall powers from a menu of options.¹²⁴
- Even thereafter, the Liberal Democrats recognise that the West Lothian question would continue to arise: in their view it "can no longer go unanswered". English MPs "should have a stronger voice and a stronger veto over purely English" matters.¹²⁵
- This should be achieved by inserting a new parliamentary procedure before third reading so that a committee "composed of MPs proportionately representing the votes cast in England" could determine whether a Bill "which unambiguously affect[s] England only" should proceed further. This would mean that "any legislation affecting England only would be subject to a 'double lock' – it would need approval by both a majority of UK MPs and by English MPs representing a majority of the English vote at the last general election".¹²⁶
- The Liberal Democrats support the establishment of a Constitutional Convention

"to discuss the relationship between the constituent parts of the United Kingdom and also to explore the values and principles which bind us together".¹²⁷

- As noted above, the Labour party was invited to participate in the process that led to the publication of the Command Paper, but declined to do so. In the House of Lords, Baroness Royall said the following from the Opposition front bench: "In England, cities and towns are demanding a greater say in the running of their affairs. Labour has responded to these demands, committing to introduce an English devolution Act in our first Queen's Speech. This will involve skills, transport and economic development... It is right that we look at how parliament works... and yes, we do need to consider ways in which English MPs, or English and Welsh MPs, can have a greater say over legislation that affects only England, or only England and Wales".¹²⁸ Beyond that, Baroness Royall said only that Labour would look further at the McKay report and would study the options presented in the Command Paper.¹²⁹ Labour's 2015 election manifesto states as follows: "It is also time to consider how English MPs can have a greater role in the scrutiny of legislation that only affects England. This includes the option put forward by Sir William McKay, of a committee stage made up of English-only MPs. These ideas must now be considered as part of the Constitutional Convention process."¹³⁰

Conclusions and recommendations

For as long as England shows no appetite to be broken into regions this should not happen.

Devolution in Scotland, Wales and Northern Ireland has been demand-led: governance in England should be according to the same principle.

However, **greater recognition needs to be given to the fact that Westminster is England's parliament as well as the parliament of the United Kingdom.**

¹²² See <http://www.bbc.co.uk/news/uk-politics-31099106>.

¹²³ Conservative Party Manifesto 2015, p. 70.

¹²⁴ Op cit, p. 28.

¹²⁵ Ibid, p. 30.

¹²⁶ Ibid, p. 31.

¹²⁷ Ibid.

¹²⁸ HL Deb, 16 Dec 2014, col 113.

¹²⁹ Sadiq Khan MP said the same in the House of Commons: HC Deb, 16 Dec 2014, cols 1268–9.

¹³⁰ Labour Party Manifesto 2015, p. 64.

The McKay report identified the correct principle: “decisions at the UK level with a separate and distinct effect for England (or for England and Wales) should normally be taken only with the consent of a majority of MPs from England (or England and Wales)”. All political parties should endorse this as a matter of principle (to date the Conservatives have done so expressly; the Lib Dems have done so implicitly; and the Labour party has not done so, although some Labour commentators have suggested that the party should do so).

We endorse the McKay idea that the best means of giving force to this principle is to borrow from the Sewel convention, such that bills, or provisions of bills, with a separate and distinct effect for England (or England and Wales) are not passed by the Commons without the consent of a majority of MPs from England (or England and Wales). Implementation should be through amending the Standing Orders of the House of Commons, not through statute: this is not a matter that should attract litigation in the courts of law.

5.2 Making English votes for English laws work

However, it is one thing to identify the right principle and institutional reform: it is another to know how the principle should be implemented in practice.¹³¹ In particular, it is notoriously difficult to understand what ‘separate and distinct’ should mean and who should decide whether a Bill, or a provision, has such an effect. While Bills routinely specify their ‘territorial extent’, the effects of a Bill are often not the same as its formal extent. A Bill may extend to Northern Ireland or Scotland, for example, only technically: some Bills which extend to the whole of the United Kingdom have effects only in one part of it. The Wales Act 2014 is a good example – this legislation extends to the whole of the UK but its main effects will be in Wales only.

The converse may also apply: a Bill may extend only to England and Wales but may nonetheless have consequential effects also in Scotland and

Northern Ireland. Some commentators have suggested that this will be the case for any England-and-Wales Bill that affects public spending. As we explain in the next chapter the ‘block grant’ system used to fund devolved government relies on a formula – the Barnett formula – that calculates Scottish, Welsh and Northern Ireland budgets in relation to English budgets. If public spending is cut in England, there may be consequential cuts in the devolved nations, even if the original government cut applies only in England.¹³² However, for others this is a red herring. Professor Jim Gallagher, writing in 2012, pointed out forcefully that even where substantive legislation has (indirect) financial consequences, it does not change the budget provision voted by parliament.¹³³ In parliamentary terms, the latter is controlled by appropriation procedures, in which all MPs have a vote. On this view, there are no ‘Barnett consequential’ of a measure (for example) such as the Health and Social Care Act 2012 (which reformed aspects of the health service in England). The substantive matter of health service reform in England, on Professor Gallagher’s analysis, needs to be distinguished from subsequent decisions as to supply. The former may require the formal consent of a majority of English MPs, even if the latter is a matter for the House as a whole.

It is rare that a government does not enjoy a majority of English seats in the House of Commons (as well as a majority of seats overall). Indeed, this has happened only twice since the Second World War: from 1964–66 and from February–October 1974. For this reason it is unusual to see legislation affecting England being passed in the Commons despite a majority of MPs from England voting against it. The two best-known examples of this occurring are the Health and Social Care (Community and Standards) Act 2003 (concerning foundation hospitals) and the Higher Education Act

¹³¹ There is also the question of who should implement it. The Speaker seems an obvious choice, using a scheme of certification akin to that relating to Money Bills under the Parliament Acts 1911–49. There is a risk, however, that this would further politicise the office of Speaker.

¹³² There are some who take the view that there really are no such things as ‘English laws’ which MPs representing seats in the rest of the UK have no legitimate interest in. Research published in November 2014 by the House of Commons Library found that in the 2010–15 parliament there had been only four such bills passed: the Mobile Homes Act 2013, the Water Industry (Financial Assistance) Act 2012, the Academies Act 2010 and the Local Government Act 2010: see House of Commons Library, *The English Question* (Standard Note SN/PC/7027, November 2014).

¹³³ J Gallagher, *England and the Union: How and Why to Answer the West Lothian Question* (London, IPPR, 2012), p. 23.

2004 (concerning 'top-up' university tuition fees). On both occasions, sizeable rebellions among Labour MPs representing seats in England were 'cancelled out' by the votes of (mainly) Labour MPs representing seats in other parts of the UK, despite the fact that neither piece of legislation extended to Scotland (both the health service and higher education being devolved there). Further research by the House of Commons Library suggests that in more than 3,600 divisions in the Commons between 2001 and 2014, the outcomes of only 22 would have been different had Scotland's MPs not taken part.¹³⁴ Of these 22, about nine were concerned with issues that are devolved in Scotland, the remainder being on reserved/non-devolved subject-matter. "English votes for English laws" may, on this view, be a solution in search of a problem.

Be that as it may, the problem of effective English voice and representation in the House of Commons may become more acute in the near future. As we saw in chapter 1, the Smith Commission Agreement provides that decisions about the rates and bands of income tax for Scottish taxpayers should be made by Scottish Ministers in Edinburgh, not by the Chancellor of the Exchequer in London. Were some form of McKay-style EVEL reform to be implemented, this would imply that decisions about the rates and bands of income tax for taxpayers in the rest of the UK should be taken only by MPs representing seats in the rest of the UK (and not by Scottish MPs). If there were to be a government in the future that did not enjoy majority support in England (as happened in 1964–66 and 1974), would this raise the prospect of the United Kingdom having a government that might not be able to get key provisions of its Budget through the House of Commons? The prospect of imminent and substantial fiscal devolution makes answering the West Lothian question all the more pressing.

Building on the basis of the principled work of the McKay Commission, consideration should be given to the following: (1) establishing a more structured approach to the framing and drafting of legislation, so that Bills containing 'distinct and separate' provisions with for England (or England

¹³⁴ House of Commons Library, *England, Scotland, Wales: MPs and Voting in the House of Commons* (Standard Note SN07048, December 2014), pp 10–11.

and Wales) do not also contain provisions for other parts of the UK, or non-devolved matters; and (2) separating decisions about policy from those about finance. Parliament's consideration of the process of supply is poorly understood and attracts little interest from most MPs, although it is vital to the operation of the state and historically has been central to the ensuring the supremacy of parliament over the executive. A greater focus on supply would have two advantages as far as devolution is concerned: it would clarify financial arrangements, which – as chapter 6 argues – are opaque at present, and likely to become even more so as fiscal devolution proceeds. Additionally, it would enable a distinction to be drawn between policy applying only in England (or England and Wales), and the financial implications of that policy.¹³⁵ All MPs would remain able to vote on financial allocations through the Supply and Appropriations bill since those relate to the UK as a whole, but this would limit voting on *non-financial* matters such as the organisation of the health service in England or policing in England and Wales to English or English and Welsh MPs.

Key to this will be to identify Bills, or provisions within Bills, which have a distinct and separate effect for England and Wales, and to establish who will be responsible for applying that test. This test must relate not only to the territorial impact of the Bill but also its wider effect, particularly its necessary financial implications.

Whether a Bill, or provisions within one, has a 'distinct and separate' effect or not is a matter that needs to be determined as part of the process of introducing the Bill into Parliament, and particularly the House of Commons where this rule will apply. No doubt the legislative drafter will have regard to this question, and the minister responsible for the Bill may wish to make his/her views known. But ultimately, this is a matter for the Parliamentary authorities, and the determination needs to be made within Parliament. **This role would seem best suited to**

¹³⁵ This would mean that the legislation to reorganise the NHS in England, for example, could proceed with consideration under an EVEL procedure, as any consequential financial effects would be dealt with through the separate supply process, in which all MPs would take part. Thus, English MPs alone would be able to determine what happened to the health service, but all MPs would be involved when it came to financial implications which affect the devolved parts of the UK as well.

the Speaker of the House of Commons. In some cases, that determination will be controversial, but if EVEL is to work at all such a determination needs to be made.

Some legislative changes that might be made for England only would have such substantial effects on devolved parts of the UK that it would be untenable to say they had a distinct and separate effect for England, even if they only applied there. The standing orders addressing how EVEL might work will need to make this issue clear. For example, a Bill to abolish the NHS entirely, or to alter its funding so it was paid for by individual insurance accounts rather than out of general tax revenues, would be so far-reaching in its financial implications for devolved governments that it would be impossible to separate the policy from issues of supply. Understandably this is more likely to apply to Bills that reduce public spending rather than increase it.

5.3 Devolution within England

The Coalition Government in office from 2010–15 sought to make a number of reforms to local government in England. The Localism Act 2011, section 1, confers a new ‘general power of competence’ on local authorities. Regional Development Agencies were abolished and replaced by Local Enterprise Partnerships. Fifteen authorities now have directly elected Mayors. There are plans for a new Metropolitan Mayor for Greater Manchester in 2017: the Chancellor George Osborne has spoken of a “northern powerhouse”. The Regional Growth Fund, Growth Deals and the Growing Places Fund are designed to provide bespoke deals and packages for local areas. The Localism Act 2011 has made provision for local referendums and for a Community Right to Challenge.

Despite all of this, the House of Commons Political and Constitutional Reform Committee was on safe ground when it concluded in a report published at the very end of the 2010–15 parliament that “England remains the nation of the Union where devolution has had the least impact”.¹³⁶ The Committee found that, despite

¹³⁶ House of Commons Political and Constitutional Reform Committee, *The Future of Devolution after the Scottish Referendum* (11th report, 2014–15, HC 700), para 60.

the progress towards decentralisation that had been made, it remained the case that central government “micro-managed” the process, the practicalities being that local government is “a puppet” with central government “holding all the strings”.¹³⁷

In July 2014, another House of Commons select committee – the Communities and Local Government Committee – published a lengthy and detailed report on *Devolution in England*.¹³⁸ It noted – and welcomed – the fact that the argument that “local authorities should have greater powers to raise, retain and spend money locally” was back on the political agenda, citing in particular the City Deals, which “have given England’s large urban authorities new opportunities to stimulate economic growth and decide how public money is spent locally”.¹³⁹ The committee identified two factors driving this change: that central government had put localism on its agenda and, echoing the Future of England Surveys cited above, that devolution elsewhere in the UK had brought into question how England is governed.

However, the committee also noted that by international standards the UK and, especially, England, have a very highly centralised system of taxation and expenditure: “As of 2011, the proportion of tax set at a sub-national... level was at most 2.5% of GDP. This compared with 15.9% in Sweden; 15.3% in Canada; 10.9% in Germany; and 5.8% in France”.¹⁴⁰ The committee noted that local authorities in England have power over only one “out-of-date, declining and centrally controlled tax, the council tax” whose “only and most recent valuation was in 1991”.¹⁴¹ The committee concluded that “England is still firmly in the fiscal grip of central Government”¹⁴² and that, therefore, if devolution is to be meaningful and effective it must include fiscal devolution: “without it, local authorities will be agencies of central Government”.¹⁴³

¹³⁷ Ibid, paras 68–9 (citing evidence from the RSA City Growth Commission and the Chair of the County Councils Network).

¹³⁸ House of Commons Communities and Local Government Committee, *Devolution in England: The Case for Local Government* (1st report, 2014–15, HC 503).

¹³⁹ Ibid, para 1.

¹⁴⁰ Ibid, para 5.

¹⁴¹ Ibid.

¹⁴² Ibid, para 15.

¹⁴³ Ibid, para 25.

A limited step in this direction was taken in the Local Government Finance Act 2012, under which local authorities may keep half their business rates yield. The committee welcomed this as “a system which balances equalisation and incentives for local growth”¹⁴⁴ but it is only a small step towards meaningful fiscal devolution for local authorities in England. Of greater potential, in the committee’s view, is the City Deals programme. This decentralises spending powers through economic investment funds, localised skills funding and youth contracts and local transport funding. Moreover, some of the receipts generated through local investment are kept by local authorities rather than returned to the Treasury, via an “Earn Back” or “Gain Share” scheme.¹⁴⁵

This kind of city-based or city-region based devolution in England has been advocated for by a range of bodies, including the RSA City Growth Commission¹⁴⁶ and the think tank ResPublica¹⁴⁷. The City Growth Commission noted in its final report that “internationally, growth is increasingly driven by cities. But very few in the UK are at the forefront of the nation’s economy and all are overly dependent on top-down funding. It is clear that our centralised political economy is not fit for purpose. UK cities compete within a global economy, in which the drivers of urbanisation and connectivity are evolving together, and fast”.¹⁴⁸

Importantly, the City Growth Commission expressly argued against a top-down blanket policy of devolution for cities in England and in favour of what it called “a process through which the UK’s major metros can benefit from new powers and flexibilities that match their capability and ambition”.¹⁴⁹ One of the aspects of the City Deals programme is that it accepts the asymmetry already present in the United Kingdom’s

constitutional and governance arrangements. What is best for Manchester might not work for Bristol; the ways in which Newcastle may wish to grow may differ from the priorities preferred in Liverpool; the needs of Leeds and West Yorkshire may be distinct from those of Sheffield and South Yorkshire; and so on. Each City Deal is negotiated and agreed separately: each is bespoke, and this is one of the core features of the programme,¹⁵⁰ as is the drive for economic development, under the assumption that excessive centralisation is inhibiting such development. However, the case for devolution is not purely economic, “it is also about better democracy, better governance and more cost-effective service delivery”.¹⁵¹ As policy in this area developed between 2010 and 2015, argument continued as to how greater devolution should be accompanied by democratic reform and greater accountability. One focal point was whether an elected mayor had to be part of the process. In evidence to the Commons Local Government Committee in March 2014 the responsible minister, Greg Clark MP, said that in his view “it helps to have a directly elected mayor” but that he would not make it a “red line” issue.¹⁵² But as the biggest and most important city-region devolution package yet agreed was put together in the later part of 2014, Chancellor of the Exchequer George Osborne MP insisted upon it and, as a result, it features prominently in the Greater Manchester Devolution Agreement, to which we now turn.

The Greater Manchester Combined Authority (‘GMCA’) has been at the forefront of developments in city-region devolution in England. It is not the only combined authority in England,¹⁵³ but it is the biggest and, with very strong personal and political support from George Osborne, whose role has been instrumental, it has gone furthest towards realising the sorts of aspirations set out by the City Growth Commission and others. The GMCA Devolution Agreement was signed in November

¹⁴⁴ Ibid, para 45.

¹⁴⁵ See *ibid*, para 10.

¹⁴⁶ Their final report, *Unleashing Metro Growth*, was published in October 2014.

¹⁴⁷ See for example, their *Devo Max-Devo Manc: Place-Based Public Services* (2014) and *resoring Britain’s City States: Devolution, Public Service reform and Local Economic Growth* (2015).

¹⁴⁸ *Ibid*, p. 2. ResPublica reported in 2015 that in the UK, cities take up 9% of the land mass but account for 58% of jobs, 60% of the economy and 72% of high-skilled workers: *Restoring Britain’s City States: Devolution, Public Service Reform and Local Economic Growth* (2015), p. 7.

¹⁴⁹ *Unleashing Metro Growth*, *op cit*, p. 32.

¹⁵⁰ We should note that the City Deal programme is not exclusive to England. A City Deal for Glasgow and the Clyde Valley was agreed in 2014, for example.

¹⁵¹ ResPublica, *Restoring Britain’s City States: Devolution, Public Service Reform and Local Economic Growth*, *op cit*, p. 8.

¹⁵² House of Commons Local Government Committee, *op cit*, para 75.

¹⁵³ Of the eight English core cities, five have now formed combined authorities: see ResPublica, *Restoring Britain’s City States: Devolution, Public Service Reform and Local Economic Growth*, *op cit*, p. 11.

2014, with a follow-up Memorandum of Understanding on Health and Social Care agreed in February 2015.¹⁵⁴ The GMCA comprises Manchester City Council, Salford City Council and the Metropolitan Borough Councils of Bolton, Bury, Oldham, Rochdale, Stockport, Tameside, Trafford, and Wigan. The GMCA Devolution Agreement was signed by the leaders of these 10 local authorities and, for the UK Government, by the Chancellor of the Exchequer George Osborne MP. Under the agreement, a new directly elected Mayor of Greater Manchester will have powers over a devolved and consolidated transport budget; powers over strategic planning; and control of a new £300 million Housing Investment Fund. He or she will also become the Police and Crime Commissioner for Greater Manchester. At the same time the GMCA – that is, the leaders of the 10 local authorities acting together – will have responsibility for business support budgets; control of the apprenticeship grant for employers; the opportunity jointly to commission (with the Department of Work and Pensions) the next phase of the Work Programme (concerned with returning the long-term unemployed to employment); and powers to develop an integrated plan for health and social care with all the Clinical Commissioning Groups in Greater Manchester. In addition, “further powers may be agreed over time and included in future legislation”.¹⁵⁵ City-region devolution, it seems, is also a process rather than a one-off event.

The GMCA Devolution Agreement records that “strengthened governance is an essential pre-requisite to any further devolution of powers to any city region” – without a directly elected mayor, in other words, the deal is off. The mayor will be accountable not to a freshly elected assembly (as is the case in London) but to the GMCA – that is, to the leaders of the 10 local authorities in Greater Manchester.

The influence of the thinking underpinning the City Growth Commission and others is obvious. The focus is sharply on economic development and its key drivers: transport, planning, skills and

housing, with a supporting role being played by integrated health and social care. This is not legislative devolution such as we have in Scotland, Wales and Northern Ireland: the GMCA will not be enacting Mancunian law. The model owes more to London than to Scotland, Wales or Northern Ireland.

While aspects of the GMCA Devolution Agreement may be welcomed, reservations remain that it goes nothing like far enough in terms of fiscal devolution. While it is notably cross-party (most of the local authorities concerned are controlled by the Labour party) it reflects a backroom deal rather than the outcome of a deliberative process. From a rule of law or constitutional perspective, however, the agreement is rather more troubling. While its future implementation will require fresh legislation in parliament, its development was shrouded in secrecy. Certainly there has been no equivalent in the north-west of England of anything resembling Scotland’s constitutional convention from the 1990s. Worse, there has not even been the equivalent of a Calman or Silk Commission process, with the public gathering of evidence and public engagement that such Commissions embody. When the GMCA agreement was signed, there was not even a ministerial statement in parliament. For a while, the most authoritative source one could cite on the matter was a report of the agreement on the BBC website.¹⁵⁶ Before the Mayor of London and Greater London Authority were created there was a referendum in which London’s voters were asked whether they were in favour of the institutions being established.¹⁵⁷ In a 2012 referendum, voters in the City of Manchester (only part of the GMCA area) voted to reject an elected mayor. It is not clear whether the implementation of the GMCA Devolution Agreement will be subject to a similar referendum.

In evidence to the House of Commons Political and Constitutional Reform Committee in March 2015, the responsible minister, Greg Clark MP said that: “We have been pursuing the decentralisation of

¹⁵⁴ Both documents are available online: see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/369858/Greater_Manchester_Agreement_i.pdf and <http://www.nhshistory.net/mou%20%281%29.pdf>.

¹⁵⁵ GMCA Devolution Agreement, op cit, p. 1.

¹⁵⁶ See S Jenkins. “The Secret Negotiations to Restore Manchester to Greatness”, *Guardian* online, 12 Feb 2015, available here: <http://www.theguardian.com/uk-news/2015/feb/12/secret-negotiations-restore-manchester-greatness>.

¹⁵⁷ The result, on a 34% turnout, was 72% Yes and 28% No.

powers, first to cities and then beyond, throughout the whole of this parliament. The way that we have pursued it has been different from in Scotland and Wales. There it has proceeded from a constitutional debate... My concern was that to do that in England would be to get it bogged down... [so we have instead been] more pragmatic...".¹⁵⁸

These remarks speak volumes about how far England still has to travel in terms of understanding its own constitutional status and reform.

Conclusions and recommendations

The last Government's preference for bespoke deals rather than one-size-fits-all, top-down reorganisation is to be welcomed. It seems that this policy will be continued as the Labour party manifesto featured an English Devolution Act¹⁵⁹ under which both funding and powers would be transferred to "city and county regions". The Conservative and Liberal Democrat manifestos likewise spoke of "building on the success of City Deals and Growth Deals".¹⁶⁰ **However, for devolution within England to meet its potential, it has to include significant fiscal devolution: meaningful decentralisation is impossible without it.**

It is important that rural areas are not overlooked in the focus on cities and city-regions: while cities are 'economic engines', counties cover nearly 50% of the population of England and have the highest rate of private-sector job creation in the country.

The focus of City Deals and devolution to city-regions has been economic development and regeneration: the question remains open whether they may have a broader constitutional dimension (and if so, to what extent). Even if they extend a degree of subsidiarity and enhance local accountability, it is not clear that they contribute to a strengthening or safeguarding of the Union.

The process of negotiating City Deals and city-region devolution needs to be made more transparent.

Finally, we note that decentralisation is an issue not only in England, but also in Scotland and Wales; a concern in both Scotland and Wales is that all the emphasis has been on devolution from London to Edinburgh/Cardiff, and that further devolution (or 'double devolution') from Holyrood and Cardiff Bay to local authorities and other communities within Scotland and Wales has been minimal or, in some cases, even reversed.

¹⁵⁸ House of Commons Political and Constitutional Reform Committee, *The Future of Devolution after the Scottish Referendum* (11th report, 2014–15, HC 700), para 65.

¹⁵⁹ Labour Party Manifesto 2015, p. 64.

¹⁶⁰ Liberal Democrat Manifesto 2015, p. 26.

CHAPTER 6 – FUNDING DEVOLVED GOVERNMENTS: FISCAL DEVOLUTION, PUBLIC SERVICES AND THE 'SOCIAL UNION'

This chapter is concerned with issues of how devolved governments are funded: with questions of fiscal devolution, the funding of devolved public services, and the implications choices about those questions have for the UK as a 'social union'. These are not conventionally considered to be constitutional questions, but they directly affect the lives of people as much as laws do, and they need to be reflected in a constitutional system and share their values and ways of working. They therefore cannot be treated in isolation from matters that are traditionally understood to be part of the formal constitution and will need to be reflected in the Charter of the Union.

6.1 Social solidarity in the Union

A Union is not founded simply on constitutional arrangements, political institutions and a shared citizenship. It is also underpinned by a set of financial and welfare arrangements, which manifest a practical experience of shared citizenship and which express a form of solidarity between the people living in it. These are clearly related; welfare services are expensive and how the costs of paying for them are distributed is central to how a state functions. The UK has one of the oldest welfare states in the world, dating in its modern form to the introduction of old-age pensions and National Insurance before the First World War. It has experienced a range of such welfare arrangements – from the minimalist and localised welfare state at the turn of the twentieth century, through its expansion into old-age pensions and unemployment insurance under the Liberal governments of the 1900s, the expansion of National Assistance in the 1920s, and the expansion, after 1945, to create a welfare state providing health care, education and social support from 'cradle to grave'. The traditional British welfare state has been based on the idea that all citizens should enjoy access to similar services –

whether health care, education, pensions, housing or other forms of social security – wherever in the UK they live. The entitlements of people living in the Western Isles would be the same as people living on Canvey Island; if they had a similar level of need, they would receive similar help. Organisation of these services might vary across the UK, but the services themselves would be the same.

Devolution has already led to considerable differentiation in welfare matters. NHS prescriptions are free for all patients in Scotland, Wales and Northern Ireland, while prescription charges remain for some in England. Long-term care for the elderly is provided without charge in Scotland, and there are no university tuition fees there, while there are lower university fees in Wales and more generous support for students from poorer families there. The organisation of the health service varies considerably across the UK, to the point where it is inappropriate to talk of 'the' NHS, as there are four distinct systems. However, the evidence suggests limited difference in health outcomes, for all the political criticism directed at the Welsh NHS.¹⁶¹ This differentiation has led to a fragmentation of that shared 'social citizenship', even if the differences in policy areas remain limited at present.¹⁶²

As matters stand, the UK has found itself in a situation where social rights have been fragmented following devolution, in a way that may fuel senses of injustice even if they are not well-founded.

Finance and public services are intricately linked. Key to these are welfare functions. Including distributive services like health and education as well as pensions and social security, these account

¹⁶¹ See G Bevan et al *The four health systems of the United Kingdom: how do they compare?* (London: The Health Foundation and the Nuffield Trust, 2014).

¹⁶² See further SL Greer (ed.) *Devolution and Citizenship Rights in the United Kingdom* (Bristol: Policy Press, 2009).

for about two-thirds of the UK's total public spending. The question of what levels of welfare there are is connected to how those benefits and services are paid for, and who pays for them – how that burden is located in society between rich and poor people, richer and poorer areas, and between generations. Pensions, in particular, create transfers not just between people living in different areas, but across people's lifetimes, and between generations.

The 2010s bring two challenges. One is the retrenchment and restructuring of the welfare state, triggered by financial austerity following the global financial crisis of 2007–8 but also embracing the new Universal Credit, which is predicated not so much on financial constraint but on the elements of the new credit being the same across the UK. The other is welfare devolution, which clearly has support from Scottish voters and is a key element of the proposals made by the Smith Commission. Nor is devolving welfare simply a Scottish issue, as exemplified by the controversies in Northern Ireland about welfare reform there.¹⁶³ Carrying out retrenchment and devolution at the same time is a considerable practical undertaking, especially as the first is the subject of considerable political disagreement and the second is questioned by the SNP, though supported by the three pro-UK parties in Scotland. Moreover, lurking behind them are other policy issues, such as the role the contributory principle should play in the welfare state, and how that is brought into operation through the National Insurance system.

The impact of devolution is such that a single big choice now needs to be made: how much the UK as a whole wishes to be bound together by a shared form of social solidarity, and what the UK-wide social union means. The choice of what level of support, relating to what aspects of life, the Union should assure as a matter of Union-wide social citizenship, is a constitutional choice. From this choice a range of institutional choices and options flow.

¹⁶³ It is worth noting that the welfare system did not form part of devolution for Scotland or Wales in 1998, or subsequently. For Northern Ireland, devolution with the 'parity principle' was required by the Good Friday Agreement.

A variety of instruments exists, and are used in other systems, to assure different forms of social solidarity. Some of these would be highly politically contentious in the UK, to the point of being unworkable: the sort of conditional grants used in Australia or the US, for example. (Conditional grants are grants tied to applying specific policies or achieving outcomes required by the federal/central government which provides them.) A relationship that provides scope for central government to set specific priorities for sub-national governments indicates a degree of subordination that would be highly contentious. Similar problems might apply to the use of framework legislation setting out key elements of services to be provided, at least at a minimum. (To be effective, framework legislation needs to be supported by grants conditional on the framework being respected.) But broader statements of the sort of 'life chances' which all UK citizens were, collectively and as a minimum, entitled to expect are an option that might be pursued. Such guarantees of life chances would not, by their generalised nature, be legally enforceable, especially as they would need to apply at a collective level as, to the extent they are 'rights', they apply within a society more generally and not to individuals.¹⁶⁴ Despite that, a statement of standards rooted in Union-wide life chances would have considerable political, and even moral, authority.

6.2 Principles for funding devolution

Any understanding of UK-wide equity needs to take into account both fiscal devolution and grant funding. Three options are available to fund devolved government:

1. Matching tax revenues to devolved services, so that devolved services are funded solely by tax revenues of the devolved government concerned;
2. Reliance on a mixed system of funding, through devolved tax revenues and a grant designed to secure equalisation on the basis of tax capacity – which would ensure equality in relation to the tax resources available to devolved governments;

¹⁶⁴ Cf R Dahrendorf *Life Chances: Approaches to social and political theory* (Chicago: University of Chicago Press, 1979).

3. Reliance on a mixed system of devolved tax revenues and a grant designed to deliver equalisation on the basis of spending need rather than fiscal capacity (or fiscal capacity alone).

The first approach is relatively good for those territories with 'average' or above-average tax bases. It assumes that it is both possible and desirable to match revenues with expenditures, in a way that also makes sense in fiscal terms. The Scottish Government's proposals for 'full fiscal autonomy' are a variant of this, as they also assume extended expenditure devolution. Such approaches are based on the principle that sub-state governments will not share their resources with other regions, and that there is either limited shared social solidarity or that expressing such social solidarity is entirely a matter for the federal/central government.

The second and third approaches entail the sort of mixed system that is common in federal and regionalised systems around the world, including Canada, Switzerland, Australia and Spain. The key difference is whether equalisation only relates to tax-raising capacity – as is the case in Canada or Switzerland – or spending capacity, as in Australia or Spain (or, by a different route, Germany). The former approach is sometimes called 'fiscal equalisation', the latter 'resource' or 'revenue equalisation'. Both approaches share a use of a vertical fiscal imbalance (the difference between the tax bases available to a government and its spending obligations) to address horizontal inequalities (inequalities between regions). In other words, they use the wider tax base (in both geographical and economic senses) of a federal or central government to address differences between the revenue-raising abilities of sub-state governments and deliver more equitable outcomes. In many cases, these are underpinned by constitutional commitments.

Constitutional and legal bases for equalisation grants

Most federal and decentralised countries have formal constitutional bases for operating equalisation systems.

In **Switzerland**, it is Article 135 of the 1999 Constitution, headed 'Equalization of Financial Resources and Burdens', which provides:

- (1) The Federation issues regulations on the equitable equalisation of financial resources and burdens between the Federation and the Cantons as well as among the Cantons.
- (2) The equalisation of financial resources and burdens is intended in particular to:
 - a. reduce the differences in financial capacity among the Cantons;
 - b. guarantee the Cantons a minimum level of financial resources;
 - c. compensate for excessive financial burdens on individual Cantons due to geographical or socio-demographic factors;
 - d. encourage intercantonal co-operation on burden equalisation;
 - e. maintain the tax competitiveness of the Cantons by national and international comparison.
- (3) The funds for the equalisation of financial resources are provided by those Cantons with a higher level of resources and by the Federation. The payments made by those Cantons with a higher level of resources amount to a minimum of two-thirds, and a maximum of 80 per cent, of the payments made by the Federation.

The **Canadian** principle is set out in section 36(2) of the Constitution Act 1982, which provides

Parliament and the government of Canada are committed to the principle of making equalisation payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

Germany takes this a stage further, by empowering the federal parliament to act in various areas of Land competence 'if and to the extent that the establishment of equivalent living conditions [are similar] throughout the federal territory' (Basic Law, Article 72(2)). It also mandates that a federal law 'shall ensure a reasonable equalisation of the disparate financial capacities of the Länder' (including municipalities) (Basic Law, Article 107(2)).

Spain has operated a system of fiscal equalisation since 2009, based on Article 158 of the 1978 Constitution and an 'Organic Law on the Finance of the Autonomous Communities' first enacted in 1980 (though the evidence is that it works highly imperfectly)¹⁶⁵. Article 158 provides for

an allocation may be made to the Autonomous Communities in proportion to the volume of State services and activities for which they have assumed responsibility and to their guarantee to provide a minimum level of basic public services throughout Spanish territory.

It also provides for the establishing of a 'clearing fund' for investment expenditure 'with the object of correcting inter-territorial economic imbalances and implementing the principle of solidarity'.

The **Australian** principle is more categorical but non-constitutional in nature. Constitutionally, it rests on the power of the federal (Commonwealth) government to make financial payments to the States under section 96 of the Commonwealth of Australia Constitution Act. In operation, its basis is currently the 2009 Inter-governmental Agreement on Federal Financial Relations and (for the federal government) the Federal Financial Relations Act 2009). This is the latest iteration of a system which dates back to 1933. In making grants, the federal government acts on the advice of the Commonwealth Grants Commission (CGC) and is bound to apply the principle of 'horizontal fiscal equalisation'; the CGC describes this as meaning that

State governments should receive funding from the pool of [Goods and Services Tax] revenue such that, after allowing for material factors affecting revenues and expenditures, each would have the fiscal capacity to provide services and the associated infrastructure at the same standard, if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency.¹⁶⁶

As it happens, all three devolved parts of the UK have lower-than-average fiscal capacity and higher-than-average costs of providing services and levels of need compared to England. The differences are limited in the case of Scotland, and significantly greater for both Wales and Northern Ireland.¹⁶⁷ There are also very considerable variations within England, and particularly between London and the south east and areas further from London in the north or west. A resource equalisation approach would therefore be to the financial benefit of all three

devolved parts of the UK, though incurring a measure of additional costs for taxpayers from England. Fiscal equalisation systems are easier to operationalise and implement, however. Resource-based approaches need estimates not merely of fiscal capacity (which can themselves be difficult and contentious), but also of what 'spending need' is. By definition, need is impossible to quantify objectively, and to become an operational concept has to be understood in relative needs – needs 'relative' to something. In the case of the UK, the necessary reference point for those relative needs is spending on similar functions in England. It is necessary for the practical reason that any system will be driven by the choices made for England, and by the political one that it is inappropriate to ask English taxpayers to pay for services that are inherently better than those which they could enjoy themselves. This presents a range of problems,

¹⁶⁵ See for example, CM Gray 'Smoke and Mirrors: How regional finances complicate Spanish-Catalan relations', *International Journal of Iberian Studies* vol 27(10), 2014, pp. 21–2.

¹⁶⁶ Commonwealth Grants Commission *Annual Report 2013–14* (Canberra, 2014), paragraph 4.

¹⁶⁷ See A Trench, *Funding Devo More: Fiscal options for strengthening the Union* (London: Institute for public Policy Research, 2013), chapter 5.

both conceptual and practical, though these are also capable of solution, as the Holtham Commission set up by the Welsh Government showed.¹⁶⁸ (This approach was also endorsed by the Lords Select Committee on the Barnett Formula, which reported in 2009.¹⁶⁹)

Comparatively speaking, federal and decentralised countries vary a good deal in the extent of welfare devolution, or more accurately in the extent to which welfare functions are divided between different tiers of government. Again, however, there are substantial commonalities. Health, education and social housing are commonly functions of lower tiers of government, closer to the citizen and provided at a more local level; social security and pensions are often in the hands of higher tiers of government. There are good practical reasons for this, but also reasons of principle, and the distinction between the two classes of functions reflects a number of other distinctions. The first is between public services that both have a distributive welfare function and can be regarded as public goods, and those that are redistributive in character and are essentially ways of managing social and economic risks. Services like health and education are needed and used by all when need arises, and public provision of them both means that economics of scale can be realised and that negative externalities (such as an ill-educated workforce or a population without collective immunity to preventable contagious diseases) can be avoided. Services like pensions and social security more generally redistribute money from richer to poorer people, and can be regarded as ways of sharing and managing risks. The nature of risk is such that the wider the geographical area and tax base that can be used to manage the risk the better, as it will be more able to respond to challenges that affect affordability. There are strong arguments of both economic efficiency and financial effectiveness for a central government to take on such responsibilities.

¹⁶⁸ Independent Commission on Funding and Finance for Wales. *Final report: Fairness and accountability: a new funding settlement for Wales* (Cardiff, 2010).

¹⁶⁹ House of Lords Select Committee on the Barnett Formula *The Barnett Formula* 1st Report of Session 2008–09, HL Paper 139 (London, 2009).

Looking around the world, such patterns can be seen in many systems. Education and health care (as well as transport and environmental services) are regional or sub-state government functions in almost all systems, though often partly funded by grants or transfers from the federal/central government. This is the case in Spain, Canada and Switzerland. In the US, public funding of health care for poor people (Medicaid) is federally funded but administered at state level; the insurance exchanges for working people are run by some states, and the federal government where states have not chosen to establish an exchange, while Medicare (health care for those over 65) is a federal programme. Australian health care is funded partly by the federal government (the Medicare programme that provides primary care through general practitioners) while hospital care is a state matter. By contrast, social security and pension schemes are almost invariably a state matter, the chief exception being Canada (where there are two old-age pension schemes, one in Quebec and another for the rest of Canada, and distinct arrangements for Employment Insurance that have different conditions of eligibility in Atlantic Canada to reflect seasonal patterns of employment.)

Many states also allow variation in their welfare state between different sub-state governments. Sometimes this is simply the consequence of such functions being in the hands of sub-state governments, sometimes it is managed by instruments such as 'framework laws' giving a state-wide underpinning to the overall working of the policy. Sub-state governments are also often able to take policy initiatives, which may then be taken up more widely. Perhaps the most famous such innovation was the Canadian province of Saskatchewan's introduction of a system of publicly funded health care in the early 1960s, leading to the federal introduction of a Canada-wide scheme.

The UK's distribution of functions between devolved and non-devolved tiers of government already largely parallels this approach. The main issue is welfare devolution, where Scotland has ambitions – reflected in both the Smith Commission recommendation and proposals by the Scottish Government – to take on a greater role.

How the Barnett formula works

The Barnett formula is an incremental formula; it allocates funding to the devolved governments as changes are made for England, according to the extent to which these are considered to be comparable and the proportion of the population living there compared to England or England and Wales. Thus, the formula works by multiplying the change in spending for England (whether an increase or reduction in spending) by two factors: a population share and a 'comparability percentage', which reflects the extent to which the work of a Whitehall department is devolved. Departments like Education or Health are almost entirely devolved, while others like Transport are more mixed. The formula therefore works like this:

Change in spending on function in England X comparability percentage X population percentage

Once devolved funds reach devolved governments, they are free to allocate those funds as they see fit. The grant is wholly unconditional; it is not connected to spending on particular functions, or on achieving any specified standards or policy goals. If a devolved government wishes to spend a consequential payment triggered by spending on education in England on health or transport, it can do so. Equally, there is no constitutional or other formal requirement to have a national health service, provide free schooling to the age of 18, or any other policy outcome.

The formula has a number of curious features. One is the extent to which it drives, or should drive, convergence on English levels of spending, assuming increases in spending, over time. In practice, it has done this to only a limited extent. The reasons for this failure are not clear, as it is evidently an arithmetical property of the formula. One reason appears to concern the population numbers used, particularly for Scotland. As these remained wholly unchanged between 1976 and 1992, despite significant falls in the Scottish population during that time, they served to increase the amount available on a per capita basis. A second reason appears to be, simply, that the formula does not in fact work as the description of it suggests, but that the numbers are distorted by other factors. This is partially borne out by the one detailed examination of how it works that has been done.¹⁷⁰

6.3 The block grant and the working of the Barnett formula

As well as issues regarding social solidarity and the welfare state, there are major problems with the present arrangements for funding existing devolved governments. Since 1999, these have been mostly funded using the Barnett formula, which was also used before then to allocate funding to the Scottish and Welsh Offices and Northern Ireland Office. Originally introduced in the late 1970s, the Barnett formula is widely considered to have long outlived its usefulness.¹⁷¹

¹⁷⁰ D Heald and A McLeod 'Embeddedness of UK Devolution Finance within the Public Expenditure System', *Regional Studies* (2005), vol 39:4, pp 495–518.

¹⁷¹ For example: I Maclean *The Fiscal Crisis of the United Kingdom* (Basingstoke: Palgrave Macmillan, 2005); House of Lords Select Committee on the Barnett Formula *The Barnett Formula* 1st Report of Session 2008–09, HL Paper 139 (London,

The Barnett formula system has a number of advantages. It is simple to operate, and offers predictability and stability to the devolved governments in planning their spending and setting it from year to year. The untied nature of the grant – the power of devolved governments to move spending freely between their responsibilities – grants a good deal of autonomy to devolved governments. It has the further advantages of familiarity, and of strong political support from Scotland.

However, there are two sets of problems with the Barnett formula. One is amounts it allocates. For all three devolved parts of the UK, these are greater on a per capita basis than the amounts

2009); Independent Commission on Funding and Finance for Wales. *Final report: Fairness and accountability: a new funding settlement for Wales* (Cardiff, 2010).

that are allocated to England (taken as a whole). However, they do not relate to the relative need of those parts of the UK. The only assessment of relative need that has been done was in the late 1970s, and was never brought into effect.¹⁷² It is widely believed – and supported by data assembled by such bodies as the Holtham Commission in Wales – that Scotland and Northern Ireland are 'over funded' by the standard of relative need, and Wales is funded at or a little below its level of relative need. There are also problems with how funding is allocated within England, which are further complicated by the effect of such factors as housing costs. **Whatever the Barnett formula's other merits, it does not deliver equity between the various parts of the UK.**

The second set of problems arises from the status of the Barnett formula and how it works. It is set out in a document that has no constitutional standing at all – it is 'merely a statement of funding policy', not even a White Paper, let alone legislation.¹⁷³ Funding is then allocated through the mechanism of parliamentary supply, via each year's Appropriation Act. Even then, it is not allocated directly to the devolved governments, but to the Secretary of State for Scotland, Wales or Northern Ireland, who remits the block grant to the devolved Consolidated Fund after deducting the costs of running the Scotland, Wales or Northern Ireland Office (as the case may be). Thus, the grant has to cover not just the costs of providing devolved public services, the administration that delivers those, and the devolved legislature to which the administration is accountable, but also the costs of the UK Government's relations with that administration. When it comes to the drafting and working of the *Statement of Funding Policy*, the Treasury makes all the key decisions; deciding what changes in spending will trigger a consequential adjustment to the block grant and the amount of that, what the 'comparability percentages' are, and how any disagreements are resolved. Similarly, HM Treasury controls decisions about whether, and how much, underspent money may be carried over from year to year (formerly

called 'end-year flexibility', now called 'budget exchange') and access to the UK Reserve for unexpected contingencies. While there is some consultation with devolved governments about revisions of the Statement of Funding Policy, these are wholly informal, and approval for it comes from the territorial Secretaries of State, not devolved governments themselves. While disagreements can be referred to the 'disputes resolution panel' of the Joint Ministerial Committee, this only applies to the application of the *Statement of Funding Policy* and not to changes made when it is revised. In any case, this has only happened on one occasion and, as the Treasury refused to change its position on the issue in question, the devolved governments were left dissatisfied by the outcome but unable to alter it, and have not made further use of this mechanism.¹⁷⁴ **In this respect, the present arrangements fall short of our principles of consent and respect for the rule of law.**

The Barnett formula arrangements may have been appropriate for administrative devolution to territorial departments within a single government, as was the case when the system was introduced. They are not appropriate for the sort of decentralised constitution that the UK now has.

They mean that devolved governments are in effect spending agencies, responsible for distributing public services but not funding them and with significant constraints on how they manage the funds available to them. Moreover, the definition of what the devolved model of public services should be is dependent on what the UK Government does for England. Such a narrow vision of the role of devolved governments is clearly no longer in accord with their constitutional role.

6.4 Tax devolution and its implications

Tax devolution to date has been approached in a variable and ad hoc way. Only in Scotland did any question of tax powers form part of the original proposal for devolution in 1997. There, a second question was part of the referendum about whether the Scottish Parliament should have a power to vary income tax. This power was very limited; a power to vary only the standard rate of

¹⁷² HM Treasury *Needs Assessment Study – Report* (London: The Treasury, December 1979).

¹⁷³ The most recent version is HM Treasury *Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: A Statement of Funding Policy*, sixth edition (London, 2010).

¹⁷⁴ See further A Trench *Inter-governmental Relations and Better Devolution*, UK's Changing Union project, December 2014.

income tax, by up to three pence in the pound. It would have raised very little money if used (around £250–300 million per additional penny of tax, compared to a devolved budget of £20–30 billion), and depended on HM Revenue and Customs maintaining a list of 'Scottish taxpayers' subject to the Scottish rate. That list was prepared in 1998–9 but not maintained very accurately, until it ceased to be maintained at all in 2007 following a change in computer systems.

For Wales and Northern Ireland, there was no tax power as part of the initial devolution arrangements.

All three governments did have control over local taxation. However, these arrangements were also limited. The *Statement of Funding Policy* contained provisions for HM Treasury to reduce the block grant if it considered increases in local taxation to be excessive.¹⁷⁵ While Non Domestic Rate was wholly devolved in Scotland and different arrangements applied in Northern Ireland, a pooling arrangement existed for Wales that also reduce devolved control of NDR. Only Wales sought to use its powers in relation to Council Tax, with a revaluation in the early 2000s and the introduction of a new band for higher-valued properties. Proposals to introduce a nationally determined 'local income tax' in Scotland were made by the SNP Government in 2007, but abandoned after it became clear that HM Revenue & Customs would not collect the tax and that its introduction would also result in Scotland forfeiting around £300 million per year in Council Tax Benefits.

Since 2007, there have been proposals for tax devolution for all three governments. For Scotland, the Calman Commission recommendations for devolution of 10 'points' of income tax on earned income, as a 'Scottish rate of income tax', plus other measures of fiscal devolution were implemented by the Scotland Act 2012. (These proposals were discussed in Chapter 1.)

The Scottish proposals have been extended following the independence referendum, and the various proposals for further devolution made by

¹⁷⁵ HM Treasury *Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly* op cit, chapter 6.

the pro-UK parties, and the Smith Commission. The UK Government has set out proposals for implementing these.¹⁷⁶ (See further Chapter 1.)

This form of fiscal devolution will mean that between 47 and 60 per cent of Scottish devolved spending comes from taxes either assigned to the Scottish Government, or under its control. However, this also provides only limited scope for the Scottish Government to raise significantly greater revenue than the present arrangements, even if it were to increase tax rates significantly. Our calculations are that such steps as raising the higher rate of tax from 40 per cent to 45 per cent, lowering the income level at which the higher rate starts from the current £41,865 to £35,000 or increasing the basic rate by 1 per cent to 21 per cent would each raise around £500 million. By the same token, a 0 per cent starting rate on the first £1,000 of taxable income (in effect, increasing the personal allowance for Scottish taxpayers by £1,000) would cost around £500 million. These changes are probably the outer limit of what Scotland could realistically do without becoming hopelessly unattractive relative to the rest of the UK in fiscal terms – an implication of economic reality rather than the constraints of what is devolved.

Following the work of the Holtham and Silk Commissions (though not implementing their recommendations), the UK Government proposed a similar approach to tax devolution for Wales as was enacted in Scotland.¹⁷⁷ As for Scotland, the rates of income tax would be reduced by 10 points, the block grant reduced, and stamp duty land tax and landfill tax devolved. There would also be a power to introduce new taxes. The power to set part of income tax would only come into effect after a referendum, which would need to be initiated by the Welsh Government and the support

¹⁷⁶ The Smith Commission *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, November 2014; HM Government *Scotland in the United Kingdom: An enduring settlement* Cm 8990.

¹⁷⁷ Independent Commission on Funding and Finance in Wales op cit (the Holtham Commission); Commission on Devolution in Wales *Empowerment and Responsibility: Financial Powers to Strengthen Wales*, (Cardiff., 2010 (the Silk Commission); HM Treasury and Wales Office *Empowerment and responsibility: devolving financial powers to Wales*, November 2013 and Wales Office *Draft Wales Bill* Cm 8773, December 2013; HM Government *Wales Bill: Financial Empowerment and Accountability* Cm 8838, March 2014.

of two-thirds of the National Assembly. While the proposals were similar to those in Scotland, issues which were uncontroversial in Scotland became controversial in Wales. One was ensuring that the block grant was adjusted to reflect relative need and so deliver 'fair funding', before income tax devolution would take place or a referendum called (a condition of the Welsh Government). Another was the 'lock-step', the requirement to set devolved tax rates at the same level across all bands, which had not been recommended by either the Holtham or Silk Commissions. After much discussion, this requirement was removed in autumn 2014, and the Wales Act 2014 as passed enables the National Assembly to set different rates on all bands – unlike Scotland. The conclusion of the St David's Day process included an agreement that there should be a 'Barnett floor' to deliver 'fair funding' by preventing convergence from happening in future, but without specifying what this would be or how it would work, and it was promptly said to be vague and insufficient basis on which to call a referendum by the Welsh Government.¹⁷⁸

For Northern Ireland, following extensive preparatory work since it figured in the Conservative 2010 general election manifesto, there is now legislation providing for devolution of corporation tax on trading profits (the Corporation Tax (Northern Ireland) Act 2015).¹⁷⁹ Devolution is expected to take effect from April 2017. The lower rate of corporation tax in the Republic of Ireland, the land border with it, and the very weak condition of the private sector and the need to rebalance the North's economy are considered to justify the move, which has broad support from all the parties there and all the major parties at Westminster. Corporation tax devolution has been discussed in Scottish and Welsh contexts, but dismissed, and has support from none of the pro-UK parties. However, this treatment of one part of the UK inevitably raises the question of just how 'exceptional' Northern Ireland is.

In each case, fiscal devolution has been approached on a piecemeal and ad hoc basis. Quite apart from problems that arise from the operation of the

¹⁷⁸ HM Government *Powers for A Purpose: Towards a lasting devolution settlement for Wales*, Cm 9020, February 2015.

¹⁷⁹ Devolution is conditional on the delivery of permanently sustainable finances for the Assembly and welfare reform; see *Stormont House Agreement – Financial Annex*, December 2014.

Barnett formula and the block grant. The upshot is a system that cannot be readily understood or explained for the UK as a whole.

There are clearly limits to how far fiscal devolution can go without undermining the economic or social unions that underpin the United Kingdom. We have noted the difficulties that 'devo max' would cause for these in chapter 3. Ironically, more extensive fiscal devolution might be possible if there were also limits on the ways devolved taxes might vary, broadening the tax base to which devolved governments had access while minimising the risks of harmful tax competition. Whether this would be an acceptable approach remains an open question.

A further issue, which we have not addressed in detail, is the question of borrowing by devolved governments. Clearly, governments which are responsible for raising substantial amounts of their own spending need to be able to borrow to manage their revenues as well as for capital investment. This implies significant powers to borrow money. How that should be done, from whom and subject to what constraints from the UK Government are major questions which will need to be resolved in order to create a sustainable basis for devolved finances.

6.5 The block grant and fiscal devolution

The difficulties that the Barnett formula poses at present will be aggravated by the way that further fiscal devolution will be implemented. The general principle of all the current proposals is simple: that the Barnett formula will remain the underpinning of funding for devolved governments, but the block grant will be reduced to allow for devolved taxes, where these are established. That reduction is intended to relate to the tax capacity transferred to the devolved government.

The difficulty comes in calculating the amount of the reduction, particularly after the first year. (The initial reduction should be relatively straightforward, since the amount of tax foregone can easily be calculated. The difficulty arises in second and subsequent years.) The deduction from the block grant will need to grow over time, as the economy, tax revenues and/or public spending grow.

The first consideration is to use the correct approach. The Holtham Commission subjected this issue to a detailed analysis, and recommended a model known as the 'indexed deduction' approach for the partial devolution of income tax it recommended.¹⁸⁰ The indexed deduction approach takes the proportion of the UK's overall income tax base that is devolved, and makes a reduction by an amount that is adjusted to reflect that change; so if the UK income tax base grows by three per cent, so does the amount of the reduction in the block grant. Central to the choice of approach is not administrative simplicity but transferring the appropriate degree of risk. The indexed deduction approach means that the UK Exchequer bears risks relating to the overall UK economy and tax base, but the devolved government will bear risks relating to the tax decisions it makes.¹⁸¹

The indexed deduction approach has been adopted in principle as the basis for reducing the block grant for both Scotland and Wales, to reflect the partial devolution of income tax set out in the Scotland Act 2012 and the Wales Act 2014. The Smith Commission recommended that changes to the block grant for devolved taxation should be 'indexed appropriately', and the UK Government notes that this needs to be done 'dynamically and mechanically'.¹⁸² By 'mechanical' we understand that the government intend to operate on a formula basis, rather than case by case or by the unilateral decision of one government.

Use of the indexed deduction approach is appropriate for income tax devolution, but not necessarily for other taxes. The nature of the risks transferred needs to be taken into account when considering which approach to use. The indexed deduction approach was formulated with the partial devolution of income tax in mind, and the bulk of the risks involved remaining with the UK Government. Other approaches may be appropriate where other taxes such as corporation tax, air passenger duty or VAT are to be devolved.

¹⁸⁰ Independent Commission on Funding and Finance in Wales op cit, chapter 5.

¹⁸¹ See further Independent Commission on Funding and Finance in Wales op cit, Table 5.1, p. 54.

¹⁸² Smith Commission, para. 95; HM Government *Scotland in the United Kingdom: An enduring settlement* Cm 8990, para. 2.4.7.

These adjustments will be comparatively easy to make in the first few years of a new system, though they will inevitably be contentious. However, as time goes by, they will become more and more notional, and at increasing risk of being out of step with the changes in tax bases in the real world. Moreover, tax policy changes made by the UK Government for taxes remaining wholly under its control may well have a dynamic impact, which would not be wholly reflected by that grant-adjustment mechanism. Even choosing the 'right' approach to reductions in the block grant will leave a significant area where there can be argument and debate. It will be very hard to make such changes 'mechanically', particularly given the likely behavioural consequences of tax devolution. Some UK decisions – whether on spending or tax – may increase devolved resources; others may reduce them. In the case of decisions that reduce devolved revenues, whether from tax income or the block grant, this may in turn mean more borrowing by a devolved government.

Another difficulty for the block grant arises from the way reductions from it are made and relates both to the introduction of a 'no detriment' principle relating to post-devolution policy decisions. This is stated by the Smith Commission as

Where either the UK or the Scottish Governments (sic) makes policy decisions that affect the tax receipts or expenditure of the other, the decision-making will either reimburse the other if there is an additional cost, or receive a transfer from the other if there is a saving... Changes to taxes in the rest of the UK, for which responsibility in Scotland has been devolved should only affect public spending in the rest of the UK. Changes to devolved tax in Scotland should only affect public spending in Scotland.¹⁸³

Apart from a reference to a 'shared understanding of the evidence to support any adjustments', it is hard to see how such decisions might be made, and *Scotland in the United Kingdom* offers little clarity about this but illustrates the complexity of such issues.¹⁸⁴ There will therefore need to be yet further adjustments made to the block grant to reflect the 'no detriment' principle, made in a variable and ad hoc way, with few principles to

¹⁸³ Smith Commission, para 95 (4).

¹⁸⁴ *Scotland in the United Kingdom*, paras 2.4.13–2.4.17.

guide them. It will be impossible for such changes to be made 'mechanically'; they will be highly subjective and controversial. In effect, the way the UK Government proposes to implement the Smith proposals in *Scotland in the United Kingdom* turns the existing arrangements from using one 'black box' (the Barnett formula) into using three: the Barnett formula itself, which will become increasingly notional, the adjustments made to allow for devolved tax capacity (and the 'Barnett floor' in Wales), and then to implement the 'no detriment' principle. The existing system may be opaque but it is simple. The new system will be both more opaque and more complex.

We endorse the principle that changes to the grant element of funding in consequence of fiscal devolution should be made as 'mechanically' as possible. However, we do not believe that the UK government's existing proposals will achieve that.

Indeed, it is hard to see how such a system can last for more than a very few years, and in that time it will result in a sequence of ongoing, potentially acrimonious inter-governmental negotiations which may well produce outcomes that are unsatisfactory for all parties. This is an impractical approach for any suitable or sustainable financial system, and action is urgently needed to resolve the problems this will cause.

A yet further approach is being taken for the devolution of corporation tax to Northern Ireland, provided for by the Corporation Tax (Northern Ireland) Act 2015. As part of that process, and to satisfy not just HM Treasury but also the European Union's rules on state aids, a reduction in the block grant must be made – but the amount of that reduction remains unclear, partly as the current yield of corporation tax there is still unknown. However, the First Minister has asserted that agreement with the Treasury about the amount of such a reduction, and that it is a modest one (between £100 and £150 million; most estimates suggest the yield of the tax there is nearer to £300 million).¹⁸⁵ It is unclear how that figure has been calculated or will be adjusted in future years,

despite a long period of discussion between the UK Government and Northern Ireland Executive about corporation tax devolution, nor is it clear what discussion there has been with the European Commission, and whether a state aids consent is being sought or, if not, how such a modest reduction does not constitute a state aid.

We have already noted how existing arrangements for managing the block grant fall short of our principles of Union constitutionalism. The changes made to these arrangements for tax devolution compound the problem and make it all the more pressing that appropriate, robust arrangements are made to address them. Such arrangements must not only balance the interests of both devolved and UK Government, but also be adequately transparent and rule-driven to ensure that autonomy, accountability, democracy and the rule of law are respected.

6.6 England within the Union: the implications of English choices for the rest of the UK

England is by far the largest of the four constituent nations of the UK, with 85 per cent of the population. Inevitably, it will serve as a reference point for financial arrangements that shape the whole country. Sometimes this is by design; a grant structured like the Barnett formula block grant allocates changes in spending depending on what happens for England. Devolved parts of the UK therefore have an interest in such decisions. Sometimes this is an effect of tax or other decisions having spill-over effects for other parts of the UK, which is central to the structure of the Barnett formula arrangements.

This has implications not just for financial matters but for more clearly constitutional ones, such as 'English votes for English laws'. While there may be little constitutional reason for devolved governments or MPs from devolved parts of the UK to be involved in decisions which only affect England, the financial impact cannot be overlooked. One way of addressing this might be to separate parliamentary votes about the financial aspects of such policies – the question of supply – from those about the provision and organisation of public services. Such a mechanism would require the exercise of considerable discretion in determining whether a Bill's legislative framework

¹⁸⁵ 'Corporation tax more affordable than first thought, says Northern Ireland First Minister Peter Robinson', *Belfast Telegraph* 17 February 2015. Available at <http://www.belfasttelegraph.co.uk/business/news/corporation-tax-more-affordable-than-first-thought-says-northern-ireland-first-minister-peter-robinson-30997729.html>

itself was of such a magnitude that it mean the Bill necessary had an effect for the whole UK and not just a separate and distinct effect for England.

While England – in the aggregate – serves as a reference point for devolved services, the processes of decentralisation within England make it harder to understand how funding is distributed within England. The use of needs-based formulas for allocating funding to schools and for general local government purposes have collapsed, with the increasing number of free schools and academies in the former case, and the increasing retention of both council tax and non-domestic rates, and the use of funds obtained by bidding exercises such as the City Deals, in the latter. (Health care reforms also make it much harder to track the allocation of funding within the English NHS.) In this case, decentralisation has come not just at the expense of equity, but also the data with which to understand how equitable the system is.

6.7 How to reform the system

It is clear that the approach the UK has taken to raising revenue and funding services is not just disjointed and inconsistent, but falls short of a number of our criteria for the Union constitution. It does not assure social solidarity in any systematic or consistent way. It does not provide effectively for autonomy of either devolved or UK governments, given how entangled the arrangements are. It is not effective at ensuring accountability, and therefore respecting democracy or the rule of law.

We do not have a blueprint for a complete new system, but would identify a number of key features that a new system should have:

1. *The relationship between equity and autonomy*

The decision about the relationship between equity or social solidarity and autonomy – the extent to which the Union assures particular social rights, and looks to devolved governments and legislatures to deliver these – is a political one. However, it is one which politicians need to address, and about which they need to reach agreement. It cannot be allowed to develop in an unconsidered way, reflecting political bargains struck at one moment of time without

consideration either for its wider implications for the UK as a whole, or how durable it might be. In any constitutional convention or other deliberative process, this needs to form part of the agenda.

There may also be a case not merely for devolving specific programmes to devolved governments, but for allowing them to opt out of programmes in their part of the UK but making a compensatory transfer to them in respect. This approach raises a number of questions: ones of principle about the nature of the social union, and ones of practice about how such a compensatory payment would be calculated and whether it might be subject to conditions.

2. *The relationship between grant funding and devolved taxes*

The problems of the working of the block grant, discussed above, suggest that simply calculating a discount from the block grant to allow for devolved tax powers is a short-term pragmatic expedient not a long-term basis for constitutional or fiscal stability. The relationship between grants and fiscal devolution needs to be considered holistically, and to have machinery for periodic reviews – say every five to seven years. A grant based on clear criteria such as relative need, with a discount for devolved tax capacity, offers a simple way forward.¹⁸⁶

There needs to be a more structured and consistent process to consider fiscal devolution as it develops, as well as any conditions on the exercise of devolved tax powers, to take into account their impact on the UK as a whole and to limit the scope of any 'no detriment' principle.

3. *A revised block grant*

The Barnett formula needs to be replaced, both as a way of distributing resources to devolved governments and because of the amount of resources it allocates. It should be replaced by a grant calculated on the basis of relative needs, reflecting principles common to federal and decentralised countries. The criteria for the grant need to be clear and determined in advance,

¹⁸⁶ For discussion of this approach see Trench *Funding Devo* More op cit, chapter 6.

reviewed every five to seven years, and administered impartially.

Such a replacement for Barnett could not, and should not, be introduced immediately. While administrative arrangements and the structure of a new grant should come in straight away, adjustments to the amounts paid to devolved governments which reduce their grant should be phased in over a number of years.

4. *Decision-making and the machinery of devolution finance*

The machinery for administering devolution finance can no longer be left to the sole discretion of HM Treasury, with some consultation with devolved governments. These arrangements must not only balance the interests of both devolved and UK Government, but also be adequately transparent and rule-driven to ensure that autonomy, accountability democracy and the rule of law are respected. A replacement **will need to include:**

1. **An independent body to advise HM Treasury about devolution finance, perhaps to be called the UK Finance Commission, and particularly about grant matters. The structural model of the Australian Commonwealth Grants Commission has much to commend it.**

2. **Scope for external review and audit of the amounts of block grant, of any reductions from it to allow for devolved tax capacity, and of changes in the fiscal capacity relating to devolved taxes.** This may be an appropriate task for the National Audit Office, the Office of Budgetary Responsibility, or a new body established for this specific purpose.
3. **An independent body to adjudicate in the event of any disputes between governments that they cannot resolve between themselves.** This might be the UK Finance Commission or some other body. **Clear and robust arrangements for accountability are needed where UK-wide agencies also act on behalf of devolved governments – in particular, for HM Revenue & Customs if that continues to collect devolved taxes on behalf of devolved governments.**
4. **At the same time, the machinery of putting grant funding into the hands of devolved governments needs to be changed and to be underpinned by statute.** The mechanism of calculating the grant needs to have devolved consent, and a more robust legal form – an inter-governmental agreement if not underpinned by statute – and to lead to a transfer from the UK Exchequer to the devolved government's consolidated fund, not via a Secretary of State. The costs of UK

The Australian Commonwealth Grants Commission

Australia's Commonwealth Grants Commission is an advisory body to the federal (Commonwealth) government with terms of reference framed by the Commonwealth Treasurer, after consultation with the states and territories. Presently, it has four members in addition to the chairman. The backgrounds of three of the present members of the commission and the chairman include experience as civil servants working for state or federal governments (or both), and one is an academic. None are or have been elected politicians. In practice, the 'advice' the Commission offers the Commonwealth government has always been accepted, promptly and without demur. Its impartiality is accepted by the States and territories, even when they have concerns about the implications of the system overall.

The calculations of state relativities are carried out annually, and there are periodic reviews (every five years or so) of the overall methodology used by the Commission. The next is due in 2015.

The CGC employed 40 staff (as full-time equivalents) in 2013–14, in addition to the part-time chairman and commissioners. Its total running costs were about \$AU6.3 million (about £3.2 million at the current exchange rate).

Government departments concerned with devolution should clearly form part of the UK Government's running costs.

Ironically, given our misgivings about the workability of the 'no detriment' principle, that principle increases the need for impartial machinery for the operation of the block grant. HM Treasury cannot be left to have sole control of how that principle is applied, so long and so far as 'no detriment' forms part of the UK's fiscal architecture. Similar considerations apply while decisions about spending or tax policy applying in England continue to have such profound effects on resources available to devolved governments.

5. *Focusing the attention of the UK Parliament on supply*

The problems of 'English votes for English laws' are discussed in chapter 5 above. It is clear that a significant element of these relate to the financial implications for devolved governments

of policy decisions taken for England – even if devolved parts of the UK have limited interest in the immediate subject-matter such as the organisation of the NHS or schools in England.

As matters stand, parliamentary procedure focuses much more attention on such legislation and relatively little on the issue of finance and supply, central though this is to parliament's historic role and the relationship between the legislature and the executive. The adoption of parliamentary procedures that focused more clearly on financial issues, where all MPs have an interest, would enable greater clarity about the role of English MPs when it came to 'ordinary' legislation. This would represent a considerable upheaval in parliament, but might have benefits as well.

Implementing this will require a degree of judgment and discretion on the part of the Speaker or whoever determines that a provision's separate and distinct effect for England is such that a vote limited only to English MPs is appropriate.

CHAPTER 7 – CHRONOLOGICAL SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Chapter 2

The architecture of the union state

1. That Whitehall has changed so little as a result of devolution gives the unfortunate impression that the centre has not fully caught up with the magnitude of the changes to the state that devolution has triggered. Every review of devolution has concluded that the centre needs to be reformed to take account of the implications of devolution and, in particular, that the UK's inter-governmental machinery is not fit for purpose.
2. 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. The most important document is the *Memorandum of Understanding*, but this has no statutory base. There is no requirement that it be laid before the legislatures of the United Kingdom. To the extent that it is subject to parliamentary scrutiny at all, this is *post hoc*, sporadic and of only peripheral effect. It makes no provision for joint policy-making by participants. Nor does the MoU make any provision for the effective accountability or parliamentary scrutiny of the JMC's activities, meetings or decisions. This is inappropriate. The constitutional principles of transparency, openness, accountability and effective parliamentary scrutiny should govern the UK's inter-governmental arrangements.
3. Before devolution, there was a Scottish Office, a Welsh Office and the Northern Irish Office, each headed by a secretary of state in the Cabinet. After devolution, this remains the case. But it is not clear that it should. Consideration should be given to

rolling the three departments into a single Department for the Union, in which there would be a single secretary of state (in the Cabinet) and three junior ministers of state, one for each of Scotland, Wales and Northern Ireland.

4. Reform of the civil service is a further aspect of the issues pertaining to the architecture of the union state which requires to be addressed in the light of devolution.

Chapter 3

Devolution and federalism

5. We agree with the Smith Commission that devolution to the nations should now be permanent.
6. Moving towards a more federal, codified constitutional arrangement for the UK would therefore establish 'permanent' devolution on the basis of more clearly defined principles and rules. As with all written constitutions, it would be open to amendment, such as to allow secession, on the basis of an established measure of consensus.
7. We recommend that legislation (preferably under the Charter of Union which we propose in Chapter 4 below), set out principles to guide judicial interpretation of the extent of the devolved authorities' powers as plenary law makers.
8. The United Kingdom Supreme Court should give careful consideration to whether devolution appeals should ordinarily be heard by enlarged panels of seven or nine Justices, to include judges from Scotland, from Northern Ireland and from England and Wales and, as Welsh law may increasingly diverge from English law, from Wales.

CHRONOLOGICAL SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

9. We recommend that a constitutional provision of solidarity (or loyalty) be enacted in United Kingdom statute.
10. We regard it as important to have political as well as official participation at the centre, so as to emphasise the nature of 'shared rule' as well as 'self rule' in the devolution settlements. To this end, we recommend serious consideration of a reformed House of Lords, formally representing in Westminster the nations and regions of the United Kingdom.
11. The conclusions reached more than 40 years ago by the Royal Commission on the Constitution (the Kilbrandon Commission) still hold: "no advocate of federalism in the United Kingdom has succeeded in producing a federal scheme satisfactorily tailored to fit the circumstances of England"; and "there is no satisfactory way of fitting England into a fully federal system".

Chapter 4

A Charter of Union

12. The time has come for the constitutional values of the union state to be clearly and authoritatively expressed in law. To this end, we consider that the United Kingdom Parliament should pass by statute a Charter of Union designed, among other matters to embed these principles into our constitutional law.
13. The Charter of Union should provide that the Scotland Act, the Government of Wales Act and the Northern Ireland Act "shall be construed and have effect subject to" the Charter.
14. As an Act of Parliament, the Charter of Union will be interpreted and enforced by the courts.
15. As a constitutional statute, the Charter of Union will also be a benchmark against which Bills and other legislative proposals may be assessed. Committees such as the House of Lords Constitution Committee could scrutinise legislation by reference to the Charter. The Charter should also play a role in the scrutiny of legislation in the UK's devolved legislatures.
16. The Charter of Union should embody not only the principles of union constitutionalism, but should also provide in law for the United Kingdom's inter-governmental machinery.

Secession referendums

17. In the UK, we need an instrument such as our proposed Charter of Union to extend the way the rule of law governs and conditions the use of constitutional referendums.
18. A secession referendum should be held no more than once in a generation. We consider that, for this purpose, a generation is at least 15 years, subject to compatibility with any obligation arising from The Northern Ireland Act 1998.

Chapter 5

The English question: representation

19. For as long as England shows no appetite to be broken into regions this should not happen. Devolution in Scotland, Wales and Northern Ireland has been demand-led: governance in England should be according to the same principle.
20. Greater recognition needs to be given to the fact that Westminster is England's parliament as well as the parliament of the United Kingdom.
21. The McKay report identified the correct principle: "decisions at the UK level with a separate and distinct effect for England (or for England and Wales) should normally be taken only with the consent of a majority of MPs from England (or England and Wales)". All political parties should endorse this as a matter of constitutional principle.
22. We endorse the McKay idea that the best means of giving force to this principle is to borrow from the Sewel convention, such that Bills, or provisions of Bills, with a separate and distinct effect for England (or England and Wales) are not passed by the Commons without the consent of a majority of MPs

from England (or England and Wales). Implementation should be through amending the Standing Orders of the House of Commons, not through statute: this is not a matter that should attract litigation in the courts of law.

23. Building on the basis of the principled work of the McKay Commission, consideration should be given to the following: (1) establishing a more structured approach to the framing and drafting of legislation, so that Bills containing 'distinct and separate' provisions for England (or England and Wales) do not also contain provisions for other parts of the UK, or non-devolved matters; and (2) separating decisions about policy from those about finance. Key to this will be to identify bills, or provisions within bills, which have a distinct and separate effect for England and Wales, and to establish who will be responsible for applying that test. This would appear to be a role best suited to the Speaker of the House of Commons.

The English question: devolution

24. For devolution within England to meet its potential it has to include significant fiscal devolution: meaningful decentralisation is impossible without it.
25. It is important that rural areas are not overlooked in the focus on cities and city-regions: while cities are 'economic engines', counties cover nearly 50% of the population of England and have the highest rate of private-sector job creation in the country.
26. The focus of City Deals and devolution to city-regions has been economic development and regeneration: the question remains open whether (and if so to what extent) they have a deeper constitutional dimension. Even if they extend a degree of subsidiarity and enhance local accountability, it is not clear that they contribute to a strengthening or safeguarding of the Union.
27. The process of negotiating City Deals and city-region devolution needs to be made more transparent.

28. We note that decentralisation is an issue not only in England, but also in Scotland and Wales.

Chapter 6

Funding devolved governments: fiscal devolution, public services and the 'social union'

29. The impact of devolution is such that a single big choice now needs to be made: how much the UK as a whole wishes to be bound together by a shared form of social solidarity, and what the UK-wide social union means. The choice of what level of support, relating to what aspects of life, the Union should assure as a matter of Union-wide social citizenship, is a constitutional choice. From this choice a range of institutional choices and options flow.
30. Whatever the Barnett formula's other merits, it does not deliver equity between the various parts of the UK. In this respect, the present arrangements fall short of our principles of consent and respect for the rule of law.
31. The Barnett formula arrangements may have been appropriate for administrative devolution to territorial departments within a single government, as was the case when the system was introduced. They are not appropriate for the sort of decentralised constitution that the UK now has.
32. Fiscal devolution has been approached on a piecemeal and ad hoc basis. Quite apart from problems that arise from the operation of the Barnett formula and the block grant. The upshot is a system that cannot be readily understood or explained for the UK as a whole.
33. We endorse the principle that changes to the grant element of funding in consequence of fiscal devolution should be made as 'mechanically' as possible. However, we do not believe that the UK Government's existing proposals will achieve that.
34. It is clear that the approach the UK has taken to raising revenue and funding services is not

just disjointed and inconsistent, but falls short of a number of our criteria for the Union constitution. It does not assure social solidarity in any systematic or consistent way. It does not provide effectively for autonomy of either devolved or UK governments, given how entangled the arrangements are. It is not effective at ensuring accountability, and therefore respecting democracy or the rule of law.

35. The decision about the relationship between equity or social solidarity and autonomy – the extent to which the Union assures particular social rights, and looks to devolved governments and legislatures to deliver these – is a political one. However, it is one which politicians need to address, and about which they need to reach agreement. It cannot be allowed to develop in an unconsidered way, reflecting political bargains struck at one moment of time without consideration either for its wider implications for the UK as a whole, or how durable it might be.
36. The problems of the working of the block grant suggest that simply calculating a discount from the block grant to allow for devolved tax powers is a short-term pragmatic expedient not a long-term basis for constitutional or fiscal stability. The relationship between grants and fiscal devolution needs to be considered holistically, and to have machinery for periodic reviews – say every five to seven years. A grant based on clear criteria such as relative need, with a discount for devolved tax capacity, offers a simple way forward.
37. There needs to be a more structured and consistent approach to consider fiscal devolution as it develops, as well as any conditions on the exercise of devolved tax powers, to take into account their impact on the UK as a whole and to limit the scope of any ‘no detriment’ principle.
38. The Barnett formula needs to be replaced, both as a way of distributing resources to devolved governments and because of the amount of resources it allocates. It should be replaced by a grant calculated on the basis of relative needs, reflecting principles

common to federal and decentralised countries. The criteria for the grant need to be clear and determined in advance, reviewed every five to seven years, and administered impartially.

39. Such a replacement for Barnett could not, and should not, be introduced immediately but phased in over a number of years.
40. The machinery for administering devolution finance can no longer be left to the sole discretion of HM Treasury. Its replacement will need to include:
 1. We recommend an independent, impartial body to advise HM Treasury about devolution finance, and particularly about grant matters, perhaps to be called the UK Finance Commission. The structural model of the Australian Commonwealth Grants Commission has much to commend it.
 2. Scope for external review and audit of the amounts of block grant, of any reductions from it to allow for devolved tax capacity, and of changes in the fiscal capacity relating to devolved taxes.
 3. An independent body to adjudicate in the event of any disputes between governments that they cannot resolve between themselves. This might be the UK Finance Commission or some other body. Clear and robust arrangements for accountability are needed where UK-wide agencies also act on behalf of devolved governments – in particular, for HM Revenue & Customs if that continues to collect devolved taxes on behalf of devolved governments.
 4. At the same time, the machinery of putting grant funding into the hands of devolved governments needs to be changed and to be underpinned by statute.
41. As matters stand, parliamentary procedure focuses much more attention on such legislation and relatively little on the issue of finance and supply, central though this is to parliament’s historic role and the relationship between the legislature and the executive. The adoption of parliamentary procedures

CHRONOLOGICAL SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

that are focused more clearly on financial issues, where all MPs have an interest, would enable greater clarity about the role of English MPs when it came to 'ordinary' legislation. Implementing this will require a

degree of judgment and discretion on the part of the Speaker or whoever determines that a provision's separate and distinct effect for England is such that a vote limited only to English MPs is appropriate.

CHAPTER 8 – BIOGRAPHIES OF COMMISSION MEMBERS

Professor Sir Jeffrey Jowell QC (Chair)

Jeffrey Jowell is the Director of the Bingham Centre for the Rule of Law a London-based international body. He is also a practising barrister at Blackstone Chambers. He is Emeritus Professor of Public Law at University College London (where he was twice Dean of the Law Faculty and a Vice Provost). He was knighted (KCMG) in the Queen's Honours List 2011 "for services to human rights, democracy and the rule of law".

One of the UK's leading public law scholars, he has authored numerous publications in the area of public law. He has honorary Degrees from the Universities of Cape Town, Ritsumeikan, UCL, Athens and the University of Paris 2. He has served on the Boards of public bodies in the UK and elsewhere.

He assisted with a number of national constitutions and acted as constitutional advisor to a number of governments in the Commonwealth, Asia and in the Middle East. From 2000–2011 he served as the UK's member on the Council of Europe's Commission for Democracy through Law (known as the 'Venice Commission') where he assisted with the constitutions and public law of a number of Central and East European countries.

Professor Linda Colley

Linda Colley is a historian who specialises in post-1700 British history, a focus which has led her into studies of nationalism, Empire and global history. She is author of a number of critically-acclaimed books. They include *In Defiance of Oligarchy: The Tory Party 1714–1760* (1982), *Namier* (1988), *Britons: Forging the Nation 1707–1837* (1992) which won the Wolfson Prize, *Captives: Britain, Empire and the World 1600–1850* (2002) and *The Ordeal of Elizabeth Marsh* (2007), which was named by *The New York Times* as one of the 10 best books of the year.

In 2014, Linda Colley was listed by Sunday Times as one of the 100 most influential Britons.

Her most recent work is *Acts of Union and Disunion*, a 15-part BBC Radio 4 series and book about what has held the United Kingdom together – and what might drive it apart. She also writes regularly on history, politics and art for newspapers and magazines; including *The Guardian*, *London Review of Books*, *New York Review of Books* and *New Republic*. She has served on the Board of the British Library, the Council of Tate Gallery of British Art, the Advisory Board of the Yale Center of British Art and been a Trustee of Princeton University Press.

She is currently the Shelby MC Davis 1958 Professor of History at Princeton University in the United States.

Gerald Holtham

Gerald Holtham chaired the Independent Commission on Finance and Funding for Wales. He is the managing partner of Cadwyn Capital LLP, visiting professor at Cardiff Business School and a Fellow of the Learned Society of Wales.

He is a former Head of the General Economics Division, OECD; Visiting Fellow, the Brookings Institution, Washington DC; Chief Economist at Lehman Brothers, Europe; Director, Institute for Public Policy Research; Chief Investment Officer, Morley Fund Management (Aviva Investors). He has advised several governments on economics and finance, published several books and articles in learned journals and written numerous articles in press and periodicals on public policy issues and investment topics.

Professor John Kay

John Kay is one of Britain's leading economists. His interests focus on the relationships between economics and business. His career has spanned academic work and think tanks, business schools,

company directorships, consultancies and investment companies.

John Kay chaired the Review of UK Equity Markets and Long-Term Decision-Making which reported to the Secretary of State for Business, Innovation and Skills on 23 July 2012. He is a visiting Professor of Economics at the London School of Economics, and a Fellow of St John's College, Oxford. He is a Fellow of the British Academy, and a Fellow of the Royal Society of Edinburgh. He is a director of several public companies and contributes a weekly column to the *Financial Times*. He is the author of many books, including *The Truth about Markets* (2003) and *The Long and the Short of It: finance and investment for normally intelligent people who are not in the industry* (2009) and his latest book, *Obliquity* was published by Profile Books in March 2010. Some of his most influential, recent work has been on banking regulation.

Sir Maurice Kay

Sir Maurice Kay was called to the bar in 1975 following a period in academia. During his career at the bar, Sir Maurice embraced a wide-ranging practice which included sitting as an Arbitrator overseas. He was appointed a High Court Judge (Queen's Bench Division) in 1995. He also held the following positions: Judge of Employment Appeal Tribunal (1995–2003); Judge of Administrative Court (1997–2003); Judge in Charge of the Administrative Court (2002–2003); and Presiding Judge of Wales and Chester Circuit (1996–1999).

In 2004, he was appointed a Lord Justice of Appeal, in which capacity he sat until 2014. Sir Maurice was also Vice President of the Court of Appeal (Civil Division) for five of those years. During his time in the Court of Appeal, Sir Maurice sat on some of the country's most significant appeals.

Sir Maurice now accepts appointments as an Arbitrator for both domestic and international arbitrations whether independently or as a member of arbitral panels.

Professor Emerita Elizabeth Meehan

After a spell in the Foreign and Commonwealth Office, Elizabeth Meehan graduated from the

universities of Sussex and Oxford and went on to teach politics at Bath University and Queen's University Belfast (QUB). Prior to retirement, she was the founding Director of QUB's interdisciplinary Institute of Governance and Public Policy.

She has held research fellowships at the universities of Manchester and Edinburgh as well as Trinity College Dublin. In addition to having an emeritus chair at QUB (School of Law), she is a visiting professor in the School of Politics and International Relations at University College Dublin where she is involved in the work of its Institute for British Studies.

Her research and publications cover laws and policies on equality for women in employment in the United Kingdom, United States and European Union (EU); citizenship and the EU; and the territorial politics of Ireland and Britain. The last of these is based on the EU context behind changing relationships amongst the islands of Ireland and Britain and its role in aspects of the peace process within Northern Ireland. It also includes a study of the Common Travel Area and the Irish choice to prioritise it over the Schengen free movement arrangements. These British-Irish and EU matters were the basis of her responsibilities as a partner in a long-running funded programme on monitoring devolution throughout the UK. In 2007 she returned to live in Scotland.

Professor Monica McWilliams

Monica McWilliams is Professor of Women's Studies at the University of Ulster, based in the Transitional Justice Institute at the University of Ulster.

Monica McWilliams was the Chief Commissioner of the Northern Ireland Human Rights Commission from 2005–2011 and responsible for delivering the advice on a Bill of Rights for Northern Ireland. She was the co-founder of the Northern Ireland Women's Coalition political party and was elected to a seat at the Multi-Party Peace Negotiations, which led to the Belfast (Good Friday) Peace Agreement in 1998. She served as a member of the Northern Ireland Legislative Assembly from 1998–2003 and the Northern Ireland Forum for Dialogue and Understanding from 1996–1998.

Her published work focuses on domestic violence, human security and the role of women in peace processes. She was the Distinguished Lecturer at the 2010 Women Peace Makers Conference at the University of San Diego's Institute for Peace and Justice. She is the recipient of two honorary doctorates and a special Profile in Courage Award from the John F Kennedy Library Foundation. She is a graduate of Queen's University, Belfast and the University of Michigan, Ann Arbor.

Philip Stephens

Philip Stephens is Chief Political Commentator and Associate Editor at the *Financial Times*, where he is also a member of the Editorial Board. He is Vice Chair of the Council of the Ditchley Foundation, a member of steering group of the Anglo French Colloque and a member of the advisory board of the Institute for Public Policy Research.

He is a frequent speaker and moderator at international conferences on European, Transatlantic and global affairs, and offers analysis and advice to business leaders on geopolitical risk. He has won the three main prizes in British political journalism, being named successively as winner of the David Watt prize for Outstanding Political Journalism, as Political Journalist of the Year by the UK Political Studies Association, and as Political Journalist of the Year in the British Press Awards. He is the author of *Politics and the Pound*, a study of British economic and European policy, and of a biography of former prime minister Tony Blair. He is a frequent broadcaster. Philip Stephens was educated at Wimbledon College and Oxford University, where he took an honours degree in modern history.

Professor Adam Tomkins (rapporteur)

Professor Adam Tomkins has held the John Millar Chair of Public Law at the University of Glasgow since 2003, having previously taught at St Catherine's College, Oxford (2000–03) and King's College London (1991–2000). He specialises in constitutional law and has research interests in British, EU and comparative constitutional law.

Since 2009, he has been a legal advisor to the House of Lords Select Committee on the

Constitution. He was a leading commentator for the Better Together campaign in the Scottish independence referendum; he was an advisor to the Strathclyde Commission on *Future Governance in Scotland* and was appointed in 2014 to the Smith Commission on *Further Devolution for Scotland*.

He has lectured throughout the United Kingdom, as well as in Australia, Canada, France, Germany, Israel, Italy, Malaysia, New Zealand and the United States. He was a founding member of the Scottish Public Law Group, and he maintains close connections with public law practitioners at the Faculty of Advocates and at the English bar. He was elected a Fellow of the Royal Society of Edinburgh in 2014.

Professor Tony Travers

Tony Travers is Director of British Government @ LSE, a programme at the London School of Economics. He is also a professor in the LSE's Government Department and co-director of LSE London. His key research interests include public finance, local/regional government and London government. He has recently been an advisor to the House of Commons Education Select Committee and also the Communities and Local Government Select Committee. He has also advised House of Lords committees.

He was a Senior Associate of the Kings Fund from 1999 to 2004, and also a member of the Arts Council's Touring Panel during the late 1990s. From 1992 to 1997, he was a member of the Audit Commission. He was a member of the Urban Task Force Working Group on Finance.

He is a research board member of the Centre for Cities and a board member of the New Local Government Network. He is an Honorary Member of the Chartered Institute of Public Finance & Accountancy. In 2012–13, he chaired the London Finance Commission and was a member of the City Growth Commission in 2013–14. He was a member of the CIPFA/LGA Independent Commission on Local Government Finance in 2014–15.

He has published a number of books on cities and government, including *Failure in British Government The Politics of the Poll Tax* (with

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David Butler and Andrew Adonis), *Paying for Health, Education and Housing: How does the Centre Pull the Purse Strings* (with Howard Glennerster and John Hills) and *The Politics of London: Governing the Ungovernable City*.

He also broadcasts and writes for the national press.

Alan Trench (advisor)

Alan Trench is an academic, associated with the University of Ulster where he is Professor of Politics, the University of Edinburgh, where he is an honorary fellow in the School of Social and Political Science and the Constitution Unit at University College London, where he is an honorary senior research associate. He is a solicitor admitted in England and Wales, now non-practising.

His work on devolution has concentrated on inter-governmental relations and how devolution affects the UK state at the centre, though he has also done a good deal of work on Wales and its developing constitution, and on financial issues.

He has published numerous papers and book chapters on various aspects of devolution, and edited several books, including recently *Devolution and Power in the United Kingdom* and *The State of the Nations 2008*. He's written for papers such as *The Herald*, *The Scotsman*, the *Western Mail* and the *Guardian's* Comment is Free blog, and made broadcast appearances on various radio and TV programmes in Scotland, Wales and across the UK.

He contributed sections on inter-governmental relations to the *Devolution Monitoring Reports* for Scotland and Wales co-ordinated by the Constitution Unit at UCL from 2005 until they ended in 2009.

APPENDIX: THE CASE LAW ON DEVOLUTION

The courts' case law on devolution contains a number of principles which may be used to shape a deeper understanding of devolution and the union state. As we shall see, the courts' devolution jurisprudence has not been entirely consistent. Nonetheless, a careful reading of the case law reveals that a number of important constitutional principles may be distilled from it.

Minimalist beginnings

The first case in which the Scottish courts considered the workings of the newly established Scottish Parliament was *Whaley v Watson*.¹⁸⁷ Individuals connected with hunting in Scotland wished to prevent a backbench MSP (Lord Watson of Invergowrie) from presenting a Bill to ban hunting with dogs. The petitioners argued that were the MSP to present the Bill, he would be acting contrary to article 6 of the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999, which prohibits a Member of the Scottish Parliament from doing anything in his capacity as an MSP which relates to the affairs or interests of, or which seeks to confer a benefit upon, any person from whom the Member has received or expects to receive remuneration. In the Court of Session, the First Division of the Inner House held by a majority of two-to-one that while the matter fell within the jurisdiction of the Court, article 6 of the 1999 Order was not intended to confer on members of the public a right to secure that an MSP complied with its terms. Lord Watson had argued that article 6 of the Order was for the Parliament's standards committee to oversee (and he noted that the committee had concluded that he had not breached article 6 in seeking to present his Bill to the Parliament).

At first instance, the Lord Ordinary ruled that the Court was incompetent to grant the remedy sought, as doing so would achieve by a back-door route that which is prohibited by section 40(4) of the Scotland Act 1998, which provides that in proceedings

against a member of the Parliament the Court shall not make an order if the effect of doing so would be to give relief against the Parliament. For the Lord Ordinary it was for the Parliament itself to decide whether or not the member was entitled to present the Bill: it was not a question for the Court.

In the Inner House, the Lord President (Lord Rodger) took a markedly different view. He warned that "the Lord Ordinary gives insufficient weight to the fundamental character of the Parliament as a body which – however important its role – has been created by statute and derives its powers from statute". As such, Lord Rodger said, "it is a body which, *like any other statutory body*, must work within the scope of those powers".¹⁸⁸ Amplifying the point, Lord Rodger added that "the Parliament, like any other body set up by law, is subject to the law and to the courts which exist to uphold that law". Subject to section 40 of the Scotland Act 1998, Lord Rodger said, "the Court has the same powers over the Parliament as it would have over any other statutory body and might, for instance, in an appropriate case grant a decree against it for the payment of damages". Lord Rodger noted that it had been suggested by counsel in the case that the courts should exercise a "self-denying ordinance in relation to interfering with the proceedings" of the Scottish Parliament. But the Lord President ruled this out, declaring that he could see "no basis upon which this Court can properly adopt a self-denying ordinance which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members". Lord Prosser agreed. He said that counsel's argument:

"seemed to rest upon some broad view that since the Scottish Parliament was a Parliament, rather than for example a local authority, the jurisdiction of the courts much be seen as excluded, as an unacceptable intrusion upon the legislative function which belonged to Parliament alone. A variant of this argument seemed to be that if the Court's jurisdiction was not excluded as a matter of law, the Court should

¹⁸⁷ *Whaley v Watson* 2000 SC 340.

¹⁸⁸ Emphasis added.

nonetheless be slow or hesitant or reluctant or unwilling to use the jurisdiction which it had, in order to avoid an undesirable intrusion on Parliament's freedom in relation to legislation. Both forms of argument appear to me to be entirely without foundation... [I]nsofar as a Parliament and its powers have been defined, and thus limited, by law, it is in my opinion self-evident that the courts have jurisdiction in relation to these legal definitions and limits, *just as they would have for any other body created by law*.¹⁸⁹ If anything, the need for such a jurisdiction is in my opinion all the greater where a body has very wide powers, as the Scottish Parliament has: the greater the powers, the greater the need to ensure that they are not exceeded."

A more expansionist re-reading

The line taken by the Court in *Whaley v Watson* that the Scottish Parliament (and, by extension, the other devolved legislatures) is a public body "like any other statutory body" is sharply at odds with the majority decision of the law lords in *Robinson v Secretary of State for Northern Ireland*¹⁹⁰ and with the unanimous Supreme Court decision in *AXA General Insurance v Lord Advocate*.¹⁹¹ *Robinson* remains an extraordinary decision, in which by the narrowest of margins the House of Lords ruled that an unlawful election was lawful, in order to keep Northern Irish devolution afloat and so as to prevent the DUP and Sinn Fein from obtaining office. Lords Bingham and Hoffmann suggested that the Northern Ireland Act 1998 is "in effect a constitution" (rather than an ordinary statute) which should be interpreted "generously and purposively" rather than in accordance with the common law's normal standards of statutory interpretation.¹⁹² Lord Hutton, dissenting strongly from this approach, reminded the judges that "the Northern Ireland Assembly is a body created by a Westminster statute and it has no powers other than those given to it by statute".¹⁹³ The dissenting opinions of Lords Hutton and Hobhouse saw the Northern Ireland Act as the Inner House had seen the Scotland Act in *Whaley v Watson*. The majority in the House of Lords saw the legislation in strikingly different terms. The reasoning of the majority in *Robinson* has not been followed in

subsequent Supreme Court case law and, while the decision has not been overruled, it is perhaps best understood as having been confined to its facts.¹⁹⁴

Much of *AXA* focused on the meaning and application of the right to property in Article 1 of Protocol 1 to the European Convention on Human Rights ('A1P1') but the constitutionally interesting dimension of the case lies elsewhere, in the Supreme Court's analysis of the question whether Acts of the Scottish Parliament ('ASPs') may be subject to common law judicial review. We know that section 29 of the Scotland Act 1998 limits the legislative competence of the Scottish Parliament.¹⁹⁵ but is section 29 an exhaustive list of the grounds on which an ASP may be challenged, or could a petitioner also argue that an Act of the Scottish Parliament is unreasonable or irrational? The Supreme Court ruled that an ASP could not be challenged as if it were the decision of an ordinary public body (thus, ordinary common law judicial review would not apply to an ASP) but that if an ASP was violative of the rule of law, the

¹⁹⁴ *Robinson* was a difficult case and a word explaining the background is in order. At the time of the case it was felt, in London as well as in Dublin, that devolution's best chance of survival in Northern Ireland was under a power-sharing agreement between the UUP and the SDLP. It was the election of the leaders of these parties as First Minister and Deputy First Minister that Peter Robinson, the leader of the DUP, challenged in the litigation. He wanted their election as FM and DFM annulled on the basis that it had not been achieved conformably with the law as then set out section 16 of the Northern Ireland Act 1998 (since repealed). Had he been successful, this would have led to fresh elections for the Assembly, which, had they taken place, may well have seen the DUP replace the UUP as the largest unionist party, and Sinn Fein replace the SDLP as the largest nationalist party. Dublin and London both considered a DUP/Sinn Fein power-sharing agreement to be unworkable. In *Robinson* the law lords effectively interpreted the 1998 Act so as to prevent fresh elections and maintain the UUP and SDLP in power. In the event, the arrangement did not last long: devolution and the Assembly were suspended in October 2002 until May 2007. Upon their re-establishment the DUP and Sinn Fein did indeed become larger parties than the UUP and SDLP; they have been in a power-sharing agreement since 2007, with Mr Robinson as First Minister since 2008.

¹⁹⁵ Section 29 provides that an Act of the Scottish Parliament is not law if it is outside the legislative competence of the Parliament. A provision is outside legislative competence if: (a) it would form part of the law of a country or territory other than Scotland, (b) it relates to reserved matters, (c) it is in breach of the restrictions in Schedule 4, or (d) it is incompatible with a Convention right or with EU law. Reserved matters are listed in Schedule 5 to the Scotland Act. Schedule 4 lists enactments (such as certain provisions of the Act of Union and the Human Rights Act 1998) which the Scottish Parliament may not modify.

¹⁸⁹ Emphasis added.

¹⁹⁰ [2002] UKHL 32.

¹⁹¹ [2011] UKSC 46, [2012] 1 AC 868.

¹⁹² *Robinson*, op cit, at [11].

¹⁹³ *Ibid*, at [54].

courts would step in to rule it unlawful (even if was otherwise within competence under section 29). Lord Hope arrived at this conclusion via an analysis which in certain respects placed Holyrood legislation and Westminster statutes on the same constitutional plane, describing the Scottish Parliament as “self-standing” and ruling that ASPs within competence enjoy “the highest legal authority”.¹⁹⁶ Lord Hope cited no authority for these propositions.

Lord Reed arrived at the same conclusion but via a different route. First, he noted that while section 29 sets limits to the legislative competence of the Scottish Parliament, within those limits “its power to legislate is as ample as it could possibly be: there is no indication in the Scotland Act of any specific purposes which are to guide it in its law-making or of any specific matters to which it is to have regard”.¹⁹⁷ In these circumstances, the ordinary common law grounds of judicial review based on improper purpose or failure to take into account relevant considerations could not apply to the judicial review of an Act of the Scottish Parliament: “its powers are plenary”, Lord Reed said, meaning that “they do not require to be exercised for any specific purpose or with regard to any specific considerations”.¹⁹⁸ For the exercise of its powers within section 29, the Scottish Parliament is accountable not to the courts but to the electorate, Lord Reed observed. As for judicial review on grounds of irrationality (rather than improper purpose or relevancy of considerations) Lord Reed said that “considerations of justiciability lead to the same conclusion”:¹⁹⁹

“Law-making by a democratically elected legislature is the paradigm of a political activity, and the reasonableness of the resultant decisions is inevitably a matter of political judgment. In my opinion it would not be constitutionally appropriate for the courts to review such decisions on the ground of irrationality. Such review would fail to recognise that courts and legislatures each have their own particular role to play in our constitution, and that each must be careful to respect the sphere of action of the other”.

However, none of this meant for Lord Reed that the courts possess no powers to intervene on grounds

other than those in section 29. In “exceptional circumstances”, such as if for example it could be shown that legislation “offended against fundamental rights or the rule of law”, the courts could intervene.²⁰⁰ Lord Reed based this conclusion on the principle of legality as set out by Lord Hoffmann in *Simms*.²⁰¹ As Lord Reed put it, “the principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so”.²⁰² The Scotland Act, Lord Reed concluded, is to be interpreted bearing in mind the values which the constitutional provisions are intended to embody: “Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law”.²⁰³

The basis of the challenge in *AXA* to the Damages (Asbestos-related Conditions) (Scotland) Act 2009 was twofold: that the legislation was a disproportionate interference with the petitioners’ right to property under article 1 of the first protocol to the European Convention, and that it was “an unreasonable, irrational and arbitrary exercise of... legislative authority”.²⁰⁴ Both challenges failed. What is important about *AXA* is what the Supreme Court says about the constitutional status of the Scottish Parliament and, indeed, of Acts of the Scottish Parliament. In the Court of Session in *AXA* there had been several days of argument about whether an ASP is primary legislation (like an Act of Parliament) and therefore not subject to common law judicial review or whether it is secondary legislation (like an Order in Council or statutory instrument) and therefore judicially reviewable. In the Supreme Court Lord Hope cut straight through this argument and said “we are in uncharted territory”.²⁰⁵ The issue, he said, was “not answered in the authorities” but had to be addressed “as one of principle”. He then said this:

²⁰⁰ *Ibid*, at [149].

²⁰¹ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115.

²⁰² *AXA*, op cit, at [152].

²⁰³ *Ibid*, at [153].

²⁰⁴ *Ibid*, at [17].

²⁰⁵ *Ibid*, at [48].

¹⁹⁶ *AXA*, op cit, at [46].

¹⁹⁷ *Ibid*, at [146].

¹⁹⁸ *Ibid*, at [147].

¹⁹⁹ *Ibid*, at [148].

“The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strengths from the electorate. While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a legislature of this kind are best placed to judge what is in the country’s best interests as a whole”.²⁰⁶

A parliament, Lord Hope continued, has “the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances”.²⁰⁷

Clearly, the views of the Supreme Court in *AXA* are very different from those expressed by Lords Rodger and Prosser in the Inner House in *Whaley v Watson*. For the Supreme Court, the Scottish Parliament is plainly not an ordinary public body “like any other”, but a legislature, democratically elected, with plenary powers, which produces legislation that the courts may review on common law grounds only in the most exceptional circumstances. In our view, this is precisely how the Scottish Parliament – and indeed all the UK’s devolved legislatures – should be understood.

Between minimalism and expansionism: a middle way

Nonetheless, if the Inner House was too restrictive in *Whaley v Watson*, there are some dicta in *Robinson* and *AXA* that may go further than was necessary. Most of the case law since *AXA* has sought to maintain the general approach to devolution set out in that case while, at the same time, expressing that approach in a more considered tone. This can be seen, for example, in *Imperial Tobacco* (both in the Inner House²⁰⁸ and in the Supreme Court²⁰⁹), in the Welsh *Local Government Byelaws Reference*²¹⁰ and in the Welsh *Agricultural Wages Reference*.²¹¹

In *Imperial Tobacco* the petitioners argued that two provisions of the Tobacco and Primary Medical Services (Scotland) Act 2010 were outside the legislative competence of the Scottish Parliament. Section 1 of that Act banned the display of tobacco products at the point of sale, and section 9 of the Act prohibited the sale of tobacco products in vending machines. The petitioners’ principal argument was that the provisions in question related to the reserved matters of consumer protection and product standards and safety. The Scottish Ministers argued that the Act related principally to public health and that it therefore fell within the legislative competence of the Scottish Parliament. The petitioners were unsuccessful in both the Inner House and the Supreme Court, both Courts unanimously upholding the lawfulness of the ASP.

In the Inner House, Lords Reed and Brodie sought to distance judicial interpretation of the Scotland Act 1998 from what Lords Bingham and Hoffmann had said about the Northern Ireland Act in *Robinson*: the Scotland Act is “not a constitution”, they each ruled, but an Act of Parliament.²¹² There was no authority for the Scotland Act to be interpreted any more generously or purposively than any other statute: there was no international agreement such as the Belfast Agreement underlying the Scotland Act, and what was said in *Robinson* about constitutional statutes and the like was “not readily applicable” in the case of Scotland.²¹³ Even though section 101(2) of the Scotland Act provides that an ASP “is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly” Lord Brodie ruled that there is “no basis for suggesting that the Scotland Act should be construed with a view to finding that a provision which has been enacted by the Scottish Parliament is within competence rather than outside of it”.²¹⁴ These dicta are welcome.

In the Supreme Court, Lord Hope, for a unanimous Court, set out three rules governing the interpretation of Acts of the Scottish Parliament, as follows. First, the question of competence must

²⁰⁶ Ibid, at [49].

²⁰⁷ Ibid.

²⁰⁸ [2012] CSIH 9, 2012 SC 297.

²⁰⁹ [2012] UKSC 61, 2013 SC (UKSC) 153.

²¹⁰ [2012] UKSC 53, [2013] 1 AC 792.

²¹¹ [2014] UKSC 43, [2014] 1 WLR 2622.

²¹² *Imperial Tobacco* (Inner House), op cit, at [71] (Lord Reed) and [181] (Lord Brodie).

²¹³ Ibid, at [182] (Lord Brodie); see also the Lord President (Hamilton) at [14].

²¹⁴ Ibid, at [183].

be determined in each case according to the particular rules contained in the devolution legislation; Parliament defined these rules “while itself continuing as the sovereign legislature of the United Kingdom”.²¹⁵ Secondly, “those rules must be interpreted in the same way as any other rules that are found in a UK statute”.²¹⁶ The devolution legislation, said Lord Hope, was designed to create a system that is “coherent, stable and workable”.²¹⁷ The best way of ensuring this is to adopt an approach to interpretation that is “constant and predictable”.²¹⁸ Thus, the Court will take the same approach whether the subject-matter of the legislation is the sale of tobacco or a referendum on independence. Thirdly, Lord Hope said, “the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation”.²¹⁹ Like Lord Brodie (but without citing section 101(2)) Lord Hope said that there is no “presumption in favour of competence” and concluded that the Scotland Act “was intended, within carefully defined limits, to be a generous grant of legislative authority”.²²⁰

The core devolution case law from Scotland has come from challenges brought by private parties, such as AXA General Insurance, Imperial Tobacco, the Scotch Whisky Association,²²¹ Moohan,²²² and, most recently, the Christian Institute and the Family Education Trust.²²³ This is not the case in Wales. The United Kingdom Government has referred to the Supreme Court two Bills passed by the National

Assembly. Both challenges failed.²²⁴ In the former (the *Local Government Byelaws Reference*), the Supreme Court ruled that the principles governing the interpretation of ASPs set out in *Imperial Tobacco* apply equally to the interpretation Bills passed by the Welsh Assembly.²²⁵

The second reference concerned a Bill that made provision for agricultural wages. The Attorney General argued this was outwith competence as it related to remuneration for employment, which he said was a matter reserved to Westminster. The Counsel General (on behalf of the Welsh Ministers) argued that the Bill was within competence, as it concerned agriculture, which under the Government of Wales Act 2006 is devolved to the Assembly. The Supreme Court ruled that the Bill could be characterised in either way. Under the Government of Wales Act 2006, section 108, a Bill is within competence if it relates to one or more of the subjects listed in Schedule 7. As agriculture is one such subject, the Bill in question was held to be lawful and within competence: the Court noted that section 108 does not provide that a Bill is within competence if it relates to a devolved matter *only* and cannot be characterised as relating also to a reserved matter.²²⁶

The Government of Wales Act 2006 lists those powers devolved to the Assembly (everything else being reserved), whereas the Scotland Act 1998 lists the powers reserved to Westminster (everything else being devolved). The latter approach is generally preferred to the former. The Silk Commission on Devolution in Wales recommended in 2014 that Welsh devolution should move to the Scottish model – ie, abandoned the “conferred powers” model used in the 2006 Act in favour of the “reserved powers” model used in Scotland.²²⁷ In a Command Paper published in February 2015, the Government accepted this recommendation: its

²¹⁵ *Imperial Tobacco* (Supreme Court), op cit, at [13].

²¹⁶ *Ibid*, at [14].

²¹⁷ *Ibid*.

²¹⁸ *Ibid*.

²¹⁹ *Ibid*, at [15].

²²⁰ *Ibid*. This is reminiscent of Lord Reed’s description in *AXA* of the “plenary” powers of the Scottish Parliament.

²²¹ *Scotch Whisky Association v Lord Advocate* [2013] CSOH 70, [2013] 3 CMLR 34 (challenge on grounds of EU law and on grounds of incompatibility with the Act of Union to Scottish legislation on alcohol minimum pricing; the challenge failed in the Outer House).

²²² *Moohan v Lord Advocate* [2014] UKSC 67, [2015] 2 WLR 141 (challenge on grounds of incompatibility with Convention rights to the exclusion from the franchise for the Scottish independence referendum of prisoners serving terms of imprisonment; the challenge failed in the Court of Session and in the Supreme Court).

²²³ *Christian Institute v Lord Advocate* [2015] CSOH 7, 2015 SLT 72 (challenge principally on grounds of incompatibility with Convention rights to Scottish legislation providing for a “named person” to be appointed as a guardian for every child in Scotland; the challenge failed in the Outer House; a reclaiming motion (ie, appeal) is liable to be made to the Inner House).

²²⁴ *Local Government Byelaws Reference* [2012] UKSC 53, [2013] 1 AC 792 and *Agricultural Wages Reference* [2014] UKSC 43, [2014] 1 WLR 2622.

²²⁵ *Local Government Byelaws Reference*, *ibid*, at [79]–[81].

²²⁶ In reaching this conclusion, the Court cited section 154(2) of the Government of Wales Act 2006, which provides that a provision of an Act of the Assembly “is to be read as narrowly as is required for it to be within competence..., if such a reading is possible”. We noted above that the equivalent provision in the Scotland Act 1998 (section 101(2)) was not cited by the Supreme Court in *Imperial Tobacco*. See further on section 154(2) below.

²²⁷ Silk Commission, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (March 2014).

implementation will require fresh legislation following the May 2015 general election.²²⁸ In the *Agricultural Wages Reference*, however, the fact that Wales has a conferred powers model was what the Court relied upon to rule that the legislation in question was within the Assembly's competence: the legislation related to a devolved matter listed in Schedule 7 and was therefore within competence. Had the Schedule listed reserved matters, the logic of the Court's position is that the legislation would have been declared to be incompetent: the Court stated that the Attorney General was not wrong to argue that the bill related to employment and industrial relations.

A backwards step?

The Supreme Court's most recent ruling on the law of devolution was handed down on 9 February 2015: the *Medical Costs for Asbestos Reference*.²²⁹ The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill was referred to the Supreme Court by the Counsel General: not because he thought it was outwith competence (he argued that it was within competence) but because he knew that the vires of the Bill was in any event going to be challenged by insurance companies. Rather than endure years of litigation going up through the judicial system, he referred the matter directly to the Supreme Court for a ruling.

The Bill made employers liable to the Welsh Ministers for the costs to the Welsh NHS of treating their employees' asbestos-related diseases (where the exposure to asbestos had occurred during the course of employment). The Bill additionally required employers' insurance contracts to be read as if they covered such liability. In other words, the Bill transferred the costs of medical treatment for certain industrial diseases to be transferred from the taxpayer (ie, from the Welsh NHS) to employers and their insurers. Section 2 of the Bill concerned employers; section 14 concerned insurers. Lord Thomas (with whom Lady Hale agreed) would have held that section 2 was within competence and was compatible with the right to property in A1P1, but that section 14 was drafted with unnecessary breadth that made it incompatible with A1P1.

Lord Mance (with whom Lords Neuberger and Hodge agreed) ruled that the Bill was outwith competence in that it did not relate to devolved matters and that both sections 2 and 14 were incompatible with the right to property in A1P1.

It is convenient to consider the dissent first. Under section 108 of the Government of Wales Act 2006 the Assembly has competence to legislate if a Bill relates to one or more of the subjects listed in Schedule 7. The "organisation and funding" of the NHS in Wales is listed in Schedule 7. Lord Thomas noted that 'funding' could mean the raising of funds or the mere allocation of funds. He ruled that it meant the former and that, accordingly, the Assembly has in principle the "competence to enact legislation that makes provision for charging for services by way of the treatment and long-term care of those with asbestos-related diseases provided that the moneys [sic] so raised are used exclusively for the Welsh NHS".²³⁰

As for A1P1, Lord Thomas ruled that there were two questions arising: did the legislation pursue a legitimate aim, and was a fair balance struck between the demands of the general interest of the community and the protection of the right to property. This second question, he said, "can properly be described as the issue of proportionality".²³¹ On the first question, Lord Thomas stated that making the wrongdoer (ie, the employer) pay, rather than the public as a whole "is clearly an objective on which different views can reasonably be held" but that it was "in every respect pre-eminently a political judgment in relation to social and economic policy on which it is for the legislative branch of the State to reach a judgment".²³² On the question of proportionality, Lord Thomas stated that "great weight" should be accorded to the judgment of the legislature,²³³ just as would be the case were the Court considering an Act of the UK Parliament. Lord Thomas gave considerable emphasis to this last point, concluding that each of the democratically elected assemblies and parliaments of the United Kingdom "must be entitled to form its own judgment about public interest and social justice in matters of social and economic policy within a field where, under the

²²⁸ HM Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015).

²²⁹ [2015] UKSC 3, [2015] 2 WLR 481.

²³⁰ *Ibid.*, at [95].

²³¹ *Ibid.*, at [105].

²³² *Ibid.*, at [108].

²³³ *Ibid.*, at [118].

structure of devolution, it has sole primary legislative competence".²³⁴ He acknowledged that the courts would not necessarily defer to a local authority to the same extent, but cases concerning what Lord Thomas called "the judgment of a municipality" were distinguished from those, such as this case, concerning "a legislature enacting primary legislation".²³⁵

Lord Mance took a markedly narrower approach, both as regards reserved/devolved matters and as regards A1P1. As to the former, his starting point was a dictum of Lord Walker's in the Scottish case of *Martin v Most*²³⁶ that the expression "relates to" (in section 29 of the Scotland Act and section 108 of the Government of Wales Act) indicates "more than a loose or consequential connection". There is a difficulty, however, in reading across what is said about section 29 of the Scotland Act as if it applies equally to section 108 of the Government of Wales Act. Of course, there are parallels between the three different devolution schemes in force in Scotland, Wales and Northern Ireland: as Lord Hope noted in the *Local Government Byelaws Reference*, "the essential nature of the legislatures that the devolution statutes have created in each case is the same".²³⁷ Equally, however, Lord Neuberger remarked in the same case that they are "different statutes" and that, even where the same words are used in each, one must be "wary of assuming that they have precisely the same effect, as context is so crucially important when interpreting any expression...".²³⁸

The words "relates to" do not have the same effect in section 29 of the Scotland and section 108 of the Government of Wales Act. As noted above, if an Act of the Scottish Parliament relates to a reserved matter listed in Schedule 5 to the Scotland Act it is outwith competence. On the other hand, an Act of the Welsh Assembly must relate to a devolved matter listed in Schedule 7 to the Government of Wales Act in order to be within competence. This is the difference between the "reserved powers" model used in Scotland and the "conferred powers" model used in Wales. The effect of interpreting "relates to" as indicating

"more than a loose or consequential connection" in Scotland is that the competence of the Scottish Parliament is treated generously: an ASP must have more than a loose connection with a reserved matter before it may be held on that ground to be outwith competence. However, the effect of interpreting "relates to" in this way in Wales is the opposite, and diminishes the legislative competence of the Assembly: an Act of the Assembly risks being held ultra vires unless the Assembly can show that it has more than a loose or consequential connection with a subject listed in Schedule 7.

Applying this approach to the matter before him, Lord Mance ruled that "rewriting the law of tort and breach of statutory duty by imposing on third persons... liability towards the Welsh Ministers to meet the costs of NHS services" was, at best, only loosely connected to the organisation and funding of the NHS and was therefore outwith the Assembly's competence. He contrasted the matter with prescription charges, where there is a direct connection, as users are directly involved with, and benefitting from, the service in question.²³⁹ Lord Mance made no mention of, and did not cite, section 154(2) of the Government of Wales Act. As we saw above, this provides that a provision of an Act of the Assembly "is to be read as narrowly as is required for it to be within competence..., if such a reading is possible".

As for A1P1, Lord Mance ruled that "rewriting historically incurred obligations" retrospectively to impose the recovery of hospitalisation costs on those whose breach of tortious or statutory duty caused them to be incurred requires "special justification". As none was shown, he ruled that the right to property had been breached – apparently as regards both employers and their insurers.²⁴⁰ Lord Mance conceded that the recovery of such costs "could be thought" to be a perfectly appropriate legislative policy and "would no doubt have been proportionate if introduced in relation to future exposure to asbestos and future insurance contracts".²⁴¹ It was the retrospective nature of the Bill that offended against A1P1, in the judgment of the majority.

²³⁴ Ibid, at [122].

²³⁵ Ibid, at [123].

²³⁶ [2010] UKSC 10, 2010 SC (UKSC) 40.

²³⁷ Op cit, at [81].

²³⁸ Ibid, at [50].

²³⁹ *Medical Costs for Asbestos Reference*, op cit, at [27].

²⁴⁰ Ibid, at [66].

²⁴¹ Ibid.

Whereas, for Lord Thomas, the Court should give the same “great weight” to the judgment of the Welsh Assembly as it would to that of the United Kingdom Parliament, for Lord Mance, the Court should give “weight” to the Assembly’s judgment while remembering that “it is the Court’s function, under GoWA, to evaluate the relevant considerations and to form its own judgment”.²⁴² Lord Mance noted that, in the light of article 9 of the Bill of Rights, there is “perhaps... a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions”.²⁴³ Again, the contrast with Lord Thomas is stark: the minority see all the UK’s legislatures in similar terms, distinguishing them from local authorities: the majority see Westminster as constitutionally distinct and suggest fewer differences between devolved legislatures and local authorities.

Absent from Lord Mance’s judgment is any echo of what Lord Hope had said in *AXA* about how “elected members of a legislature... are best placed to judge what is in the country’s best interests as a whole”, about the “advantages that flow from the depth and width of the experience of [a legislature’s] elected members”, and about “the mandate that has been given to them by the electorate”.²⁴⁴ Yet *AXA*, too, was a case in which insurance companies complained that legislation passed by a devolved legislature was incompatible with their Convention rights under A1P1. In *AXA*, Lord Hope said that “the democratic process is liable to be subverted if, on a question of political or moral judgment, opponents of an Act achieve through the courts what they could not achieve through Parliament”.²⁴⁵ It is worth noting that Lord Mance gave a short judgment in *AXA* in which he agreed with Lord Hope, stating that he was in essential agreement with all his reasoning (para 85).

The Welsh legislation struck down in the most recent Supreme Court decision is certainly distinguishable from the Scottish legislation the lawfulness of which was upheld in *AXA*. As Lord Mance noted in *AXA*, when the relevant insurance policies were taken out, “there was no certainty

whatever how the law might treat claims for pleural plaques if and when they ever emerged” (para 95). In the Welsh case, by contrast, there is clearly a more manifest retrospective effect. Even if this explains the outcomes of the cases being different from one another, however, it does not appear to explain the majority’s approach to deference, to weight and to proportionality being so starkly at odds with the approach taken by the Supreme Court in *AXA*.

Conclusions to draw from the case law

The devolution case law reveals three strands of authorities, or three different judicial approaches. First, there are those that interpret devolution, its constitutional innovation and its consequences narrowly (eg, *Whaley v Watson*; aspects of Lord Mance in the *Medical Costs for Asbestos Reference*). Secondly, there are those that go furthest in the opposite direction (eg, the majority in *Robinson*). Thirdly, there are those that strike a balance (*AXA*, *Imperial Tobacco*, Lord Thomas in the *Medical Costs for Asbestos Reference*). In our view, it would be preferable for the courts’ devolution case law to be clearly and consistently based on this third approach.

A number of principles can be distilled from the case law. Among these are the following:

- that devolution exists in order to strengthen and improve the governance arrangements of the United Kingdom as a whole;
- that devolution is intended to be a system of government for the UK that is ‘coherent, stable and workable’;
- that the devolved legislatures enjoy plenary law-making powers and that, within the limits of their competence as set by Westminster, they possess a generous grant of legislative authority;
- that, while there are differences of detail between the three devolution regimes, they are nonetheless best seen as a single body of legislative reform for the United Kingdom, accompanied by a single body of case law;
- that under devolution, the UK has four legislatures that enact primary legislation – that is to say, the devolved legislatures are not public bodies akin to local authorities, but parliaments or assemblies that make law.

²⁴² Ibid, at [67].

²⁴³ Ibid, at [56].

²⁴⁴ Op cit.

²⁴⁵ Op cit.