# OUR QUASI-FEDERAL KINGDOM

A REPORT OF A WORKING PARTY OF THE SOCIETY OF CONSERVATIVE LAWYERS

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## Foreword by Sir Edward Garnier QC MP

My first and easiest task, because it enables this politician to be unguardedly sincere without fear of criticism or being required to fall back to the Party line, is to thank Peter Moran, the catalyst for this paper, and his colleagues, Albert Costa, David Hughes, Jonathan Lafferty and Anthony Speaight, for devilling long and hard to produce it. Each of them has a busy practice and other demands on their time and each of them has given up much to work on this wholly unremunerated project.

Unquestionably the future of the United Kingdom, its internal relationships between its constituent parts and its external relationships with the European Union and the Council of Europe, which husbands the European Convention on Human Rights, have been at the forefront of political controversy over the last few years. It is therefore both right and timely that the co-authors of this paper have contributed in such a thoughtful and carefully analytical way to the debate about our country's future. Even in my short time as a Law Officer it was apparent to me that the exchanges between ministers and civil servants in all four United Kingdom administrations were frequent, often difficult politically and constitutionally, but always cordial and professional; and if papers like this one set the standard of debate we should have no fears for the future of our country so far as its internal relations are concerned.

The recent Scottish Referendum has not, much as some of us would no doubt have preferred, brought an end to the debate about the Union but simply ended one chapter and opened another. The principal characters, the salience of the ideas, the shades of opinion expressed and the underlying national political context within which the questions relating to the Union and unionism, to independence, to devolution, to regionalism, to parliamentary sovereignty in Westminster or political power and tax raising in London, Edinburgh, Belfast and Cardiff are debated may change, but the big questions of politics, the collection and distribution of power and money, who holds and distributes them and to whom, and to whom they are accountable, remain and need constantly to be revisited.

The Society of Conservative Lawyers has long been a source of not just good legal thinking but of public policy work as well and in this paper we see yet further evidence of that. Too

many “professional” politicians see lawyers as inconvenient dullards who try to stop them having fun and doing what they believe is right for the country or the Party. They are wrong to think that but often do so because they talk only to themselves and those with whom they agree. I therefore commend this paper to current and future Members of Parliament of all political parties, nationalist or unionist, and from all four territories of the United Kingdom, and to all others outside Parliament and the three devolved assemblies who see themselves as possessing the self-confidence to be certain about the future of our country. Read this and think. Its authors have read, listened and thought and only then written. They have done a good thing.

EDWARD GARNIER

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## Executive Summary

The devolution arrangements enacted by the Labour Government have had the following weaknesses:-

(i) Because under the asymmetrical character of the 1998 devolution there was no distinction between the UK government and the government of England, decisions taken in London on genuinely "Union" government matters have been able to be presented as impositions by England. Thus the arrangement has ended up emphasising the separateness of Scotland, whilst allowing a sense that its dignity is not respected.

(ii) The inconsistency of constitutional concepts and terminology in the enactments of devolution to Scotland, Wales and Northern Ireland have unnecessarily detracted from any sense of an emerging quasi-federal UK. This, in turn, has exacerbated the difficulty in Scotland of understanding the notion of layers of government and perceiving the UK government as compatible with the dignity of Scottish government.

(iii) The unfairness to England of MPs from other territories having a voice in determining policy affecting only England – a problem which will become more acute if income tax becomes a devolved matter.

(iv) The failure to match spending power with tax-raising responsibility.

The Tory tradition conceives of the UK as a union of territories of distinct identities. It would be a fulfilment of that vision, not a departure from it, to develop a quasi-federal UK, in which the four above-mentioned defects would be addressed in the following manner.

(1) The UK Parliament should pass an enactment entitled "the Statute of Union".

(2) This statute should begin:-

"It is hereby declared that the United Kingdom is a quasi-federal, voluntary

union of England, Scotland, Wales and Northern Ireland."

(3) The statute should contain new provisions for devolution to Scotland, including,

(a) The complete devolution of personal income tax, including competence to set both bands and rates.

(b) Other elements of the Strathclyde Report.

(4) The statute should contain a complete redrafting of the devolution settlement for Wales on the basis of conferring on the Welsh Assembly full territorial competence subject only to the reservation to the UK Parliament of defined competences. In designating the boundary of competences between the UK level and the Welsh level, the recommendations of Silk II should be implemented, including the devolution of policing to Wales.

(5) "English Votes for English Laws" should be introduced by the House of Commons making the following procedural changes proposed by the McKay Commission:-

(a) The designation of an English Grand Committee composed of all MPs representing constituencies in England.

(b) The English Grand Committee should consider whether or not to approve legislation, whether entire Bills or parts of Bills, proposed by the UK Government which would have a separate and distinct effect on England, in a manner akin to a devolved legislature contemplating passing a Legislative Consent Motion.

(c) Entire Bills which are of predominantly English subject matter should be considered in a Public Bill Committee drawn only from English MPs in proportion to the party strength in England. Such a Bill's its report stage should be undertaken in a Report Committee of similar composition.

(d) The results of voting on any matter of predominantly English interest should

be "double counted": that is to say, announced both by the votes of all MPs, which would be the determinative votes, and, for information only, as the votes of English MPs only.

(e) Similar arrangements, mutatis mutandis, would apply to proposed legislation of predominantly England-and-Wales interest.

(f) The identification of Bills and parts of Bills of English or English-and-Welsh application would be made by certificates from the Speaker.

(6) An "English Voice on English Government" should be introduced by:-

(a) The passing of Treasury Functions Orders to effect the very minor re-allocation of departmental functions so that the Departments of Education, Communities & Local Government, and Health are concerned wholly and exclusively with English matters.

(b) The House of Commons should supplement the McKay proposals by Standing Orders to effect the following procedural changes:-

(i) The creation of sub-committees of the English Grand Committee to scrutinise the UK Government on Education, Communities & Local Government, and Health.

(ii) Oral questions in the English Grand Committee to any Government minister in respect of a matter having a separate and distinct effect on England.

(iii) A substantial allocation of parliamentary time to the English Grand Committee to enable it proactively to introduce and debate English Bills.

(iv) There should be equivalent arrangements for English-and-Welsh MPs in respect of the field of the Ministry of Justice.

(c) The House of Lords should be invited to reformulate the Salisbury Convention so that an English, or English-and-Welsh, Bill sent by the House of Commons in defiance of opposition from the English Grand Committee, or English-and-Welsh Grand Committee would be treated as a "manifesto Bill" only if the governing party's manifesto had expressly proposed so legislating even in defiance of such opposition.

(7) We would encourage the Leader of the House of Commons within the remaining months of the present Parliament to initiate consultations and discussions on the suggested procedural changes in the House of Commons.

(8) There should be an annual UK Summit, attended by teams representing the UK Government, the Scottish Parliament, the Welsh Assembly, the Northern Ireland Assembly and the English Grand Committee. The venue should rotate between London, Edinburgh, Cardiff and Belfast. It should be chaired by the Prime Minister, and opened by the Queen.

## Introduction

Those who value the union of the United Kingdom will not wish to see again the risk it faced this September.

By the final week of the referendum campaign a consensus of all three pro-union parties had emerged in favour of early implementation of substantial further devolution to Scotland. For all practical purposes this represents acceptance of the proposals of the Conservative Party Commission under the chairmanship of Lord Strathclyde published in May 2014. That report recommended significant extensions of the competence of the Scottish institutions, including the devolution of complete responsibility for setting rates and bands of income tax. It is not our purpose to re-consider those proposals, although we do indicate why those proposals greatly commend themselves to us.

Our judgment, however, is that such further devolution, whilst an essential component of a future, stable UK will not in itself achieve a satisfactory constitutional settlement either for Scotland or for the remainder of the UK. This is in part because of the repercussions of the Scottish Parliament acquiring such extensive tax-raising powers. It is also, and more profoundly, because of fundamental flaws in the original devolution arrangements, which as yet have not been corrected.

The closing days of the campaign were also marked by an outburst of renewed interest in devolution to England. That, too, is a topic which calls for urgent attention as part of a comprehensive reconsideration of the UK's constitution.

Our aim is to bring the perspective of lawyers to the formulation of constructive ideas to meet these challenges. As the Strathclyde Commission said:-

> "... a No vote in September should be the impetus for a re-examination of what devolution and the Union mean beyond Scotland: i.e. in England, Wales and Northern Ireland. In recent decades our relationships have been considered too much in silos, without sufficient regard of the effects of constitutional change in one part of the country on the remaining ones. The time has come for this to stop."[1]

[1] Commission on the Future Governance of Scotland May 2014 p.18

## Tories and the Union

Support for the union is a bedrock of the thinking of Conservatives. This is a matter not merely of a pragmatic judgment that the interests of all parts of the Kingdom are better served by being together, but also of emotional commitment. In a recent lecture Lord Sumption quoted the French historian Ernest Renan as saying that the identity of a nation depended on collective sentiment:-

> "It depended on a consciousness of having done great things together in the past and wanting to do more of them in the future. The definition is pithier in French: 'avoir fait de grandes choses ensemble, vouloir en fair encore'."[2]

That captures the essence of the patriotic Tory commitment to the union by which the United Kingdom has been formed .

However, it would be a mistake to imagine that the Tory tradition conceives of our Kingdom as a homogenous entity. The commitment is to a union of territories of distinct identities. Both elements of that conception are important – union and distinct identity.

The importance of support for the union as a theme for the English Conservative Party was emphasised by its very name – Conservative and Unionist Party. But at the same time the reality of its belief in the separate identity of the different parts of Britain was reflected by the arrangement until 1965 of the Unionist Party in Scotland being organisationally distinct from the Conservative and Unionist Party in England[3]. The label "Conservative" was not used by candidates at elections in Scotland, although Scottish Unionist MPs took the Conservative whip at Westminster, This arrangement enabled Andrew Bonar Law and Alec Douglas Home to become Prime Ministers heading Conservative Governments, although, being members for

[2] Lord Sumption lecture 5th November 2013 "The Disunited Kingdom: England, Ireland and Scotland", quoting Renan's lecture "What is a nation" delivered at the Sorbonne in 1882.

[3] A forgotten chapter of history is that when the 1706 Treaty of Union between England and Scotland was being negotiated, it was the Whigs in England and Scotland's Court party who wanted union, whilst the English Tories and the Scottish Cavalier party opposed it.

Scottish seats, they had never been elected to the House of Commons as Conservatives. Until 1973 the Conservative whip at Westminster was also taken by a third organisationally distinct party, the Ulster Unionists.

In a similar way, a number of the institutions esteemed by Tories reflect this recognition of the distinct identities of the different territories in the Kingdom. For example, the Brigade of Guards includes the Scots Guards, the Welsh Guards and the Irish Guards. The royal family has since the reign of Queen Victoria made a feature of Scottish identity when at home at Balmoral.

Over the last half century Conservative Party policies towards devolution have fluctuated. With the Declaration of Perth at its Party Conference in 1968 the Conservative Party was the first of the main British parties to adopt devolution as party policy. In 1970 a party policy committee chaired by Sir Alec Douglas-Home published a paper entitled "Scotland's Government", which proposed a Scottish Assembly. However, these proposals were not implemented by Heath's government, even though that government maintained a devolutionist position. In the October 1974 election campaign, the Conservatives promised to "set up a Scottish Assembly" though the constitutional arrangements were not specified in the manifesto[4].

In October 1976, the Conservative Party led by Margaret Thatcher published *The Right Approach,* a statement of Conservative aims which acknowledged "in our view the Union is more likely to be harmed by doing nothing than by responding to the wish of the people of Scotland" and added that Conservatives support "a directly elected Scottish Assembly, acting as another chamber of the UK Parliament. Its functions would be to take an important part in legislation with Parliament and to subject government in Scotland to full democratic scrutiny"[5]. In 1977, Mrs Thatcher wrote "Our commitment to the principle of a directly elected assembly for Scotland as outlined…..on numerous occasions, stands. I have not retracted it and do not intend to do so"[6].

[4] October 1974 Conservative Party General Election Manifesto

[5] The Right Approach (Conservative policy statement), October 1976. http://www.margaretthatcher.org/document/109439

[6] Devolution: Letter from Margaret Thatcher to Alick Buchanan-Smith MP

However, the 1979 Conservative manifesto marked the cooling of Conservative enthusiasm for Scottish devolution, committing the party only "to discussions about the future of government in Scotland"[7]. Indeed, the following two manifestos (1983 and 1987) were silent on the issue[8].

In the early 1990s, following Labour's and the Liberal Democrats' commitments to devolving power to an elected assembly in Scotland, the Conservatives addressed the issue again. The 1992 manifesto, while it did not oppose devolution per se, was highly critical of the "costly"[9] proposals offered by Labour and the Liberal Democrats. It did not offer an alternative; John Major simply promised to review Scottish constitutional issues, a process which became known as "taking stock".

The 1993 white paper "Scotland in the Union: a partnership for good"[10] was the product of that taking stock. It recommended devolving more power to the Scottish Office and to regional bodies within Scotland (both in principle and recommending specific functions to be devolved). But while the white paper exhorted the virtues of Scottish representation at Westminster, it was silent on the creation of a Scottish, democratically-elected assembly. Nonetheless, the Conservative government's opposition to an elected assembly in Scotland was clear. It refused to take part in the unofficial Scottish Constitutional Convention[11] and Michael Forsyth, the Scottish Secretary from 1995 and 1997, and John Major were vocal in their criticism of the principle of a Scottish assembly. The 1997 manifesto opposed devolution to Scottish and Welsh assemblies, instead arguing for increased powers to the Westminster grand committees[12].

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http://www.margaretthatcher.org/document/111695

[7] 1979 Conservative Party General Election Manifesto

[8] 1983 and 1987 Conservative Party General Election Manifestos

[9] 1992 Conservative Party General Election Manifesto

[10] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271977/2225.pdf

[11] The Scottish Constitutional Convention was an association of Scottish political parties, churches and other civic groups, that developed a framework for Scottish devolution. It is credited as having paved the way for the establishment of the Scottish Parliament in 1999.
http://en.wikipedia.org/wiki/Scottish_Constitutional_Convention

[12] 1997 Conservative Party General Election Manifesto

In the 1997 general election, the Conservatives lost all their Westminster seats in Scotland, a position from which it has barely recovered. At present, there is only one Conservative MP in Scotland (out of 59 constituencies). During the 1998 referendum on whether Scotland should have a Parliament, in the face of overwhelming Scottish public support for such a Parliament and despite earlier Conservative support for a directly elected Scottish Assembly, Conservatives strongly campaigned for a No vote and substantially lost.

In more recent years the Conservative Party's policies have quietly returned to favouring devolution. The present government enacted by the Scotland Act 2012 a major extension of the powers of the Scottish Parliament, in particular the partial devolution of income tax. The Conservative Party in Wales campaigned in favour of the transformation of the legislative competence of the Welsh Assembly in the 2011 referendum; and the Coalition Government is currently enacting new tax and borrowing powers for Wales. The Strathclyde Commission report, proposing, as it does, a more far-reaching development of the powers of the Scottish Parliament than that currently espoused by the Labour Party, returns the Conservative Party to the position of the leader of the two main parties in terms of devolution.

It is submitted that the Party's early position of repeatedly promising a form of Scottish devolution and subsequently failing to enact any substantive constitutional change for the governance of Scotland whilst in office over 18 years, should be an abject lesson to those within the Conservative Party who are still reluctant to advance devolution and further UK constitutional change such as proposed in this paper. It is also suggested that if the Conservatives fail to adopt these or similar proposals in respect of the 'English Question' given current polling trends, UKIP, might well seize this as another profitable endeavour and advance this issue as one of its brand policies mainly to the detriment of the Conservative Party.

To those England-based members of our Party who may feel inclined to mutter that there is nothing for us in the new political institutions in Scotland and Wales, we would draw attention to what Professor Alan Trench has called "one of devolution's more curious practical effects"[13]: that is giving the Conservative Party a fresh electoral platform. This

[13] "Devolution and the Future of the Union" Alan Trench, in "Democracy in Britain" IPPR 2014.

platform has provided the opportunity for a Party renaissance in difficult territory. Over the last 17 years in which the Party has never had more than one MP in Scotland, it has seen the emergence of a whole new generation of Conservative parliamentarians as MSPs, currently numbering 15. Meanwhile in Wales the Party nearly entered government in 2007 as part of a "rainbow coalition", and might well actually do so in the foreseeable future. These new Conservative legislators have brought valuable new thinking, discussed under a separate heading below.

## The weaknesses of the present devolution arrangements

The devolution arrangements enacted by the Labour government have had four principal failings.

First, they emphasised in the minds of Scots the separateness of Scotland, whilst allowing the Scottish National Party to imply that Scottish dignity was not respected. We have been struck by the near unanimity of the analysis on this matter of thoughtful Scottish Conservatives to whom we have spoken. Because under the asymmetrical character of the 1998 devolution there was no distinction between the UK government and the government of England, decisions taken in London on genuinely "Union" government matters, such as macroeconomic fiscal strategy, have been able to be presented as impositions by England. The assertion by the SNP Government that it ought to be able to organise and hold a referendum on independence, when constitutional change is so clearly a reserved matter to the UK institutions, was one example of the lack of any general appreciation of the concept of layers of competence. Another example of difficulty in grasping the idea of layers of government was the resonance in the closing stages of the referendum campaign of the claim that the NHS in Scotland was threatened with privatisation by London, when anybody with an elementary understanding of the legal structure would realize that the Scottish institutions had complete legislative and executive power over health. By contrast, in a country with a well understood federal system, such as Germany or the USA, the inhabitants of, for instance, Bavaria or Texas do not see injustice in their state political institutions' lack of power over, say, the national budget, nor fail to appreciate their total control of, say, education. This is the principal reason why the Scotland Act 1998, which the Labour Government enacted in order to reduce the attraction of separatism, has ended up enhancing it.

A second weakness of the 1998 statutes is the unnecessary lack of consistency in the treatment of the three devolved territories[14]. Although the arrangements in all three cases

[14] Terminology can be troublesome. The Prime Minister recently described the UK as a union of four nations, and to call England, Scotland, Wales and Northern Ireland merely "regions" would be belittling. But a standard terminology of four "countries" in the UK may cause unease or offence in some quarters, for instance in Northern Ireland. Therefore, we have followed the Whitehall practice in using the noun "territory". If it is for

were being made at the same time, and although the Scotland Act 1998, the Government of Wales Act 1998 and Northern Ireland Act 1998 were all enacted in the same session of Parliament, there are numerous distinctions of treatment and terminology. To some extent there remain good reasons for differences. One such reason is that the Northern Ireland arrangements embody a multi-party agreement which was reached only after long and tortuous negotiation to deal with unique circumstances. Another such reason is that even today there is no clear wish in Wales for every aspect of devolution enjoyed by Scotland. In particular, there is as yet no clear Welsh wish for a separate legal jurisdiction and justice system: that may prove to be a future development, and could be a topic for another paper. But in many other respects differences between the territories, even if once justified, are necessary no longer. One of the principal inconsistencies is that whereas the Scottish Parliament has competence in all areas unless specifically reserved to the UK Parliament, the Welsh Assembly has competence only for such matters as are specifically devolved to it. The Welsh settlement has been particularly problematic, resulting in three referrals to the UK Supreme Court on the whether the Welsh Assembly had exceeded its legislative competence. The default arrangement for Northern Ireland is slightly different again, having three categories of subject matter. Matters which can only be determined at UK level, and which in the case of Scotland would be called "reserved", are called "excepted" matters. For Northern Ireland, there is a category of "reserved matters", but it means matters initially allocated to UK level, but capable of delegation to Northern Ireland. Everything else is called "transferred"

A third weakness of the 1998 devolution arrangements has been the complete absence of any provision for England. One reason why the present treatment of England is unsustainable in the medium term is that, as the powers of the devolved institutions grow, the English will feel it ever more anomalous that MPs representing Scottish, Welsh and Northern Irish seats have a voice in determining policy for England in respect of matters, including so sensitive and visible a matter as income tax, which are outwith the scope of English MPs in the devolved territories. We discuss the English problem at greater length below: but that is only one reason why something must be done about England. Another important reason is that it can

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some not the first choice of term, it is, at least, an essentially value-free expression which is not inaccurate in relation to any of the components of the Kingdom.

only be when the English political institutions cease to be indistinguishable from UK political institutions that the myth of Scotland being governed by England can be killed.

A fourth defect was the failure to match spending power with tax-raising responsibility. Whilst over 60% of identifiable public spending in Scotland is the responsibility of the Scottish Parliament, it has to date been responsible for raising only a fraction of that money[15]. Social security is the only major area of public spending identifiable as related to Scotland where the decisions are taken at UK level. Decisions on the provision of the NHS, education, roads and much else are taken in Edinburgh. Wales and Northern Ireland have had no tax raising powers at all, although much the same picture prevails as to expenditure. The devolved institutions receive a large annual grant from HM Treasury and have, in effect, almost complete power over how they choose to use it. Under the Barnett Formula there are effectively no strings attached by the UK Government. Economists use the expression "vertical fiscal imbalance" to refer to such situations where one level of government raises most of the tax and another level does most of the spending. To some extent this occurs in any multi-level system of government, but the phenomenon has been present in the UK to an extreme degree. Professor Jim Gallagher expresses the point vigorously:-

> "[Vertical fiscal imbalance] is a real problem. If one level of government does a lot of the taxing, and another does a lot of the spending ....the lower tier enjoys spending money it has not raised, which is always more fun than spending money it has had to raise itself."[16]

Measures are already in the pipeline, or proposed with high authority, in respect of this last defect. But the other three remain to be tackled. We explain below our proposals for doing so.

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[15] The Scottish Government's annual budget is about £30 bn. It has legislative and executive control of council tax and business rates, which raise about £4 bn. It also has the power to adjust the basic rate of income tax by 3p up or down (but no power to modify other rates or income tax bands or thresholds).

[16] "The Principles of Fiscal Federalism" in "Scotland's Choices" (2nd ed, 2014) Edinburgh University Press, page 146.

## The emergence of Conservative Federalists

Two interrelated issues must be addressed before our discussion proceeds further. They are whether the ultimate sovereignty of the Westminster Parliament should be preserved, and whether the outcome should be, or even already is, a "federal" UK.

The 1998 devolution settlements preserved the power of the Westminster Parliament to amend the devolution arrangements and to legislate for the devolved territories if it chose[17]. But predictions that the devolved Parliaments might clash with Westminster were it to infringe on their legislative powers have come to little. On the second reading of the Scotland Bill in 1998 a minister, Lord Sewel, said:-

> "... as happened in Northern Ireland earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament."

This rapidly became known as the Sewel Convention, and is now known as a Legislative Consent Motion. It has recently been set out in more formal terms in the Memorandum of Understanding between the UK Government and the devolved governments. We are not aware of any serious dissatisfaction with this arrangement. Indeed, where Westminster has altered the legislative power of the devolved assemblies, it has been to increase their powers.

An interesting development in recent years has been the emergence of Tory federalists, federalists that is in the context of the UK , not federalists in the European sense. These include Murdo Fraser MSP and David Melding AM.

Murdo Fraser is a Scottish lawyer who has been a member of the Scottish Parliament since 2001. He was formerly Deputy Leader of the Scottish Conservative Party, and has reached

[17] S. 28(7) of the Scotland Act 1998 allows for Westminster to legislate on matters which are devolved. The equivalent power in respect of Northern Ireland is in s. 5(6) of the Northern Ireland Act 1998. S. 107 of the Government of Wales Act 2006 contains the equivalent power in respect of Wales. Originally, as the Welsh Assembly had more limited and finite powers compared to the Scottish Parliament, Westminster's retention of power of devolved matters was expressed in s. 22 of the Government of Wales Act 1998 which provided that transferred powers could be returned to the Secretary of State for Wales.

his conclusions from intimate involvement in devolution politics. In a lecture in June 2014[18] he said:-

> "I would suggest that federalism within the UK, if it were workable and could be achieved, is a solution which could unite both unionists and many nationalists, and provide a secure framework for the future....
>
> Federalism has the potential to be the common ground on which we can unite a divided nation after September's vote and move forward."

His preferred outcome is a number of English regional assemblies, but considers that an "English Parliament" could comparatively easily be achieved,

> "by taking the existing members of the House of Commons who sit for English constituencies and constituting them into a de facto English Parliament sitting on certain days of the week."

David Melding has been a member of the Welsh Assembly since its inception in 1999, and has been the Welsh Conservatives' Director of Policy. He is a former Deputy Director of the Welsh Centre for International Affairs. In 2011 he was elected Deputy Presiding Officer of the Welsh Assembly. He has recently published a book "The Reformed Union, the UK as a Federation". A dedicated unionist he has become convinced that the only stable future for the UK is as a federal state. He writes:-

> "... only a reformed unionist ideology can hope to respond to the momentous constitutional events of our times."

He regards it as crucial that English sovereignty be recognised. He conceives the English element in the UK Federation initially as "an English legislative process within Westminster", with the possibility of this developing into a separate English Parliament.

Baroness Hale has suggested that the UK is already a federal state:-

> "The United Kingdom has indeed become a federal state with a Constitution regulating the relationships between the federal centre and the component parts."[19]

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[18] http://www.bbc.co.uk/news/uk-scotland-scotland-politics-28025736

[19] Speech to Legal Wales conference at Llandudno 2012

Professor Alan Trench may have had such remarks in mind when complaining at the limited understanding of what federal systems entail shown by some who speak of a "federal UK"[20]. That criticism cannot be made of either Murdo Fraser or David Melding, both of whom understand the rigour of a federal structure, and are emphatic that sovereignty must be entrenched at each layer.

We have been heavily influenced by the thinking of these Conservative federalists, but have not been convinced for so drastic a reformulation of the British constitution. Any national constitution must have some mechanism for its own variation. If the UK Parliament is not to have power, if it so chooses, to legislate changes to arrangements for all the territories of the Kingdom then there must be some other way of doing so. In theory it could involve resolution by the Westminster Parliament by a two-thirds, or some other, enhanced majority. Or it could mirror the USA by requiring a similar majority of the legislatures of the Kingdom: in a federal UK of four parts that would in practice mean that three out of four territories would have to support any change affecting any part of the UK. These would seem to us to be excessively rigid and inflexible arrangements. Furthermore, many Conservatives regard upholding the sovereignty of the Westminster Parliament a cardinal constitutional principle for a separate reason: that is the challenge to democracy which they see posed by judicial activism and interventionist jurisprudence[21].

herefore, we do not advocate any change to the continuation of the sovereignty of the UK Parliament to legislate, if and when it chooses, on any matter affecting any part of the UK. This has led us to adopt the term "quasi-federal" as the label best to characterise the significant development of devolution, as we shall explain, which we propose throughout the UK. Although the language of a "quasi-federal UK" may sound different from that associated with the Conservative Party in recent years, we believe that it is in tune with the centuries-old Tory tradition which we outlined earlier in this paper.

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[20] "Devolution and the Future of the Union" in "Democracy in Britain" Institute for Public Policy Research 2014 footnote 6

[21] See generally the Society of Conservative Lawyers' publication "Democracy Must Prevail" Anthony Speaight QC (2013)

## Scotland after the referendum

Following recommendations by the Calman Commission, the present Government enacted the Scotland Act 2012. This has effected from 2016 a substantial, although only partial, devolution of income tax. The scheme sets tax rates in Scotland 10p in the pound lower than in the rest of the UK. The Scottish Parliament will have power to determine whether to restore that 10p, or to set a higher or lower sum: in effect this means the Scottish Parliament will control half the basic rate of tax. But it will have no power over tax allowances or tax thresholds. And the power to set rates is subject to a restriction called "lockstep" under which the decision must be the same for all rates: so, for instance, if Scotland adds just 9p to the basic rate, bringing it up to 19p, it must set the higher rate at 39p The Act also devolved two minor taxes, Stamp Duty Land Tax and Landfill Tax.

The Strathclyde Commission has suggested sweeping away the restrictions in the half-way house income tax arrangements of the 2012 Act, and instead a full devolution of income tax to Scotland. This would allow the Scottish Parliament complete freedom to set personal income tax rates and bands. Similar proposals have been made by the Liberal Democrat Party, and several independent think tanks[22]. Although the Labour Party's policy on income tax devolution is more limited, we hope and expect that a major contribution to reducing the fiscal gap will be made by the almost complete devolution of income tax. The Strathclyde Commission also recommended the devolution of Air Passenger Duty.

There is little scope for further major devolution of areas of legislative competence to Scotland. The Calman Commission carried out a detailed review and could suggest only such minor changes as road speed limits. Major matters of state such as defence, foreign relations, and macro-economic policy are inevitably topics for government at the UK level. So, too, should be social security: the fact that the same level support is provided to pensioners, the unemployed and so on in all parts of the Kingdom contributes to the concept of a "social union". The SNP has spoken of a version of "devolution max" in which Scotland's position would be something akin to that of the Isle of Man or the Channel Islands: this can have no

[22] The Institute for Public Policy Research ("IPPR") and Devo Plus Group

appeal to unionists. What, however, will make a big difference to how Scotland sees itself in relation to the rest of the UK could be changes, not to Scotland's own arrangements, but to the wider constitutional framework of the Kingdom.

Three "key concessions" to Scotland were identified by James Cornford, founding director of the left-leaning Institute for Public Policy Research, as the basis of the pre-1997 union. These were: (i) over representation in the House of Commons, (ii) a generous share of public spending protected through the Barnett Formula, and (iii) preferential treatment in government through its own Secretary of State for Scotland sitting in the Cabinet. The over representation finally disappeared at the 2005 election. The other two features remain, and are discussed later in the wider UK context.

The combined effect of the changes already enacted by the Scotland Act 2012 and the widely proposed complete devolution of income tax would be that Scotland would itself raise about 60% of the money it spends. Therefore, these reforms would meet the fourth of the weaknesses in devolution which we have mentioned, namely, the fiscal gap. But the other three defects would remain to be tackled.

## The transformation of devolution in Wales

"Devolution is a process not an event", a Secretary of State for Wales famously remarked[23]. In the case of Wales the development has had a number of steps, and the transformation has been extraordinary.

In 1978 the Callaghan government enacted legislation creating a Welsh Assembly. Its implementation was subject to a referendum, in which it was rejected by a massive 4 to 1 margin. Several Labour MPs campaigned against their own government's policy, including Neil Kinnock, who dismissed talk of a great Welsh heritage, saying,

> "Between the mid-sixteenth century and the mid-eighteenth century Wales had practically no history at all, and even before that it was the history of rural brigands who have been ennobled by being called princes."[24]

In September 1997 the Blair Government held a pre-legislative referendum on its proposed Welsh Assembly. The proposal itself was modest: the Assembly was to be essentially an administrative body, somewhat akin to a glorified county council, discharging the executive functions hitherto performed by the Secretary of State for Wales. It was to have no primary legislative competence. On this occasion the Labour Party took steps to restrict its own members campaigning against its policy, and the only party campaigning against was the Conservative party, which suffered from the fact that in the general election three months earlier it had not won a single parliamentary seat in Wales. Despite all these factors, the proposal was very nearly defeated. The voting was 50.3% in favour and 49.7% against. Few then could have predicted that in little more than decade Welsh devolved institutions would have become as widely accepted by the Welsh as they now have.

In *Agricultural Sector (Wales) Bill*[25] Lords Reed and Thomas recently analysed the steps in devolution to Wales. This first phase was described by them as "executive devolution". The

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[23] Rt Hon Ron Davies MP

[24] Evans, Gwynfor (2000). *The Fight for Welsh Freedom*. Talybont: YLolfa Cyf. p. 7

[25] *Agricultural Sector (Wales) Bill* - A Reference by the Attorney General for England and Wales [2014] UKSC 43

Government of Wales Act 1998 created the Assembly as a body corporate. Its only legislative competence was to make subordinate legislation in 18 fields. The Assembly was to elect an Assembly First Secretary, who could appoint other Assembly Secretaries to assist in the discharge of administrative functions. In all respects its competences were limited to those specifically conferred on it.

In 2004 the Welsh Assembly appointed a Commission chaired by Lord Richard QC: it recommended that the Assembly be upgraded into a body with primary legislative powers, and that, like the Scottish Parliament it should have full territorial competence save in areas specifically reserved to UK level. A first step towards these recommendations was taken by the Government of Wales Act 2006 with what the Supreme Court described as split functions in the second stage of devolution. The devolved institution was now reconstituted into separate legislative and executive organs. The Assembly acquired primary legislative powers to enact what were called Measures, but only in very narrowly defined fields. So it remained to a large extent an administrative body discharging the executive functions formerly performed by the Secretary of State for Wales.

The third phase of devolution came with a referendum in March 2011 on the proposal that the Assembly should have full primary legislative competence to enact what are now called Acts in all the fields where it exercises executive competence. This proposal, which was supported by all the four significant Welsh political parties, was carried with 63.5% voting in favour. Following this development the Welsh institutions had legislative and executive powers over some £18 billion[26] of the total £30 billion identifiable public spending in Wales, but no taxing or borrowing powers at all.

In October 2011 the Welsh Government established a Commission under the chairmanship of Paul Silk to consider in two phases further steps in devolution. The Commission contained nominees from the Conservative Party, the Labour Party, the Liberal Democrat Party and Plaid Cymru. Its first report was concerned with fiscal powers. In November 2012 it published a series of unanimous recommendations on taxation and borrowing, which were

[26] £9.2 bn spent by the Welsh Government and £8.6 bn spent by Welsh local authorities, over which the Assembly had legislative power.

similar to the features of the Calman Report, which were enacted in the Scotland Act 2012. These included the devolution of stamp duty land tax and landfill tax, and the partial devolution of income tax. These ideas received support from all the political parties in Wales, and have been accepted by the Coalition Government. They are being implemented by the Wales Act currently before Parliament. The proposed change to income tax will not come into effect unless and until approved in a referendum in Wales.

The second phase of the Silk Commission's work was to consider the wider powers of the Welsh institutions. Its report on this second phase was published in March 2014. Again its recommendations were unanimous. It concluded in favour of the devolution of a number of additional competences and against the devolution of a number of others. The most important additional competence which it favoured devolving is policing. Others include some further powers in relation to the regulation of water, planning of energy, rail franchising, speed limits and drink driving. It recommended against the devolution of the court system, criminal and civil law, and welfare, although it did favour devolution of the youth justice system. It recommended further studies of the possibility of devolving some other fields, including prisons and the probation service. Bearing in mind the fractiousness associated with constitutional matters in other parts of the Kingdom, it is a remarkable success story for Wales that in recent years so many questions, both as to what should and what should not be devolved, have been the subject of unanimous agreement right across the political spectrum including Plaid Cymru.

Whilst we are not, as lawyers from all parts of the UK, in a position to make any particular informed contribution on many of the technical and economic matters considered by the Silk Commission, there is one fundamental topic which is a matter of lawyer's law, and so central to our interests. That is whether the conferred powers basis of the Welsh institutions' competences should be changed to a reserved powers basis, as exists for Scotland and Northern Ireland. The Welsh Assembly has competence to act only in fields for which it has expressly been conferred. By contrast, the Scottish Parliament has competence to act within the territory of Scotland on any matter, unless it has expressly been reserved to the Westminster Parliament; broadly speaking, the same is true of the Northern Ireland Assembly within the territory of Northern Ireland.

In other parts of the world there are examples both of conferred models, such as in Belgium and Spain, and reserved powers models, such as the USA and Australia. Belgium and Spain are in a sense closer parallels to the UK since they were originally unitary states which at a later date decided to devolve powers to a lower tier, as opposed to countries which were federal from the outset. However, there is no other known example of a country within which there is a mixture of conferred power and reserved power models for different parts of the country.

Many of those who submitted views to the Silk Commission favoured a change to a reserved model. One of the arguments most often presented was that this would give greater clarity as to the Assembly's powers. At a theoretical level we can see no reason why this should be so. The difference between, on the one hand, listing the fields within the lower government tier and stating that the higher tier has everything else, and, on the other hand, listing the fields within the higher government tier and saying the lower tier has everything else is in theory merely the difference between a half full glass and a half empty glass. As Professor Thomas Watkin, former First Welsh Legislative Counsel has said:-

> "Logically, neither is different from the other in its result. The basis on which the choice is to be made must therefore rest on other factors.... If very broad powers are to be devolved, it will be simpler to set out {not x} [i.e. what is not devolved]; if fairly narrow powers are to be devolved, setting out x [i.e. what is devolved] will be simpler."

In this case Professor Watkin's utility argument is far from leading decisively to a conclusion: the length of the lists of conferred powers in the Government of Wales Act 2006 and those of reserved powers in the Scotland Act 1998 are not markedly different.

However, when one moves from the theoretical plane to practical experience the strength of the case for the reserved powers becomes stronger. In the relatively short period since 2011 in which the Welsh Assembly has had full legislative competence there have already been three cases which have reached the Supreme Court challenging the vires of the Assembly. The first was *Local Government Byelaws (Wales) Bill 2012 - Reference by the Attorney General for England & Wales* [2012] UKSC 53. The second was the case already cited about the

Agricultural Sector (Wales) Bill, in which the issue was whether a regime for the regulation of agricultural wages related to agriculture, which is a conferred competence, or to employment, which is not. The third case concerns a private member's Bill, the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill 2013. In the considerably longer period in which the Scottish Parliament and Northern Ireland Assembly have had legislative powers not a single similar challenge to their vires has reached court[27].

The Silk Commission reported officials in both Scotland and Northern Ireland saying that their experience suggested that the reserved powers model was preferable. We have ourselves been privately told by a former, recent Law Officer that he considers a reserved powers model would work better for Wales. A further particular factor in the case of Wales weighing in favour of change is that the drafting of the scope of the conferred powers is very complicated, with numerous exceptions to the devolved fields and even exceptions to exceptions. David Melding AM told us that he supported a change to a reserved model, as did Mr Keith Bush, whose experience led him to conclude that the present Welsh arrangement is unnecessary complicated. The Richard Commission also favoured a change to a reserved model. So the voices for a reserved model are numerous and coming from various different quarters.

Any hesitation as to whether the above factors amount to a sufficiently strong case for a major change is in our view ended by a further consideration – this is that a reserved powers model for Wales would be a significant step towards a more consistent constitutional arrangement throughout the UK. Whilst it is inevitable that there will always be some asymmetry, it has become a corner-stone of our thinking that the emergence of a coherent quasi-federal constitution for the UK as a whole will assist in defusing the damaging myth promulgated by the SNP that everything decided in London is decided by the English, as opposed to the UK, government.

It has been suggested that the move to a reserved powers model would inevitably mean that

[27] In 2011 the A G for Northern Ireland commenced a reference relating to the Damages (Asbestos-Related Conditions) Bill, but withdrew it the following month. There have been challenges on the different vires ground of incompatibility with Convention rights.

Wales became a separate legal jurisdiction. The idea of Wales becoming a separate legal jurisdiction is, in fact, a multi-faceted matter, since there could in theory be a separate legal profession without a separate court system and vice-versa. The Silk Commission was not convinced of the case for a separate Welsh judiciary and legal profession; it suggested that the matter be reviewed by the two governments in 10 years' time. We do not consider that a change to a reserved powers model is impossible unless and until there is a decision in favour of a separate legal jurisdiction. The principal reason why this is argued is that it is assumed that a reserved powers model would leave the Welsh Assembly free to change substantive law in such fields as criminal law, contract law, trusts and the like. The technical answer to this objection, as recognized in Silk II, is that it would be perfectly possible for the competence in respect of those fields of substantive law to be amongst the powers reserved to the UK Parliament[28].

Accordingly, we would support the major change in Welsh devolution involved in the abandonment of the conferred powers model and the adoption of a reserved powers model. This will, of course, entail a substantial drafting exercise in a new statute.

Assuming that the referendum supports the partial devolution of income tax, there will have been achieved an acceptable degree of fiscal responsibility; and if the result of the referendum is against this then the Welsh people will themselves have made the decision to halt for the moment further devolution of powers. Provided that the Silk recommendation of the devolution of policing is adopted, justice (including the courts and civil and criminal law) will represent the one and only major area of competence which is devolved to Scotland and Northern Ireland and which is not yet devolved to Wales.

[28] Silk II spotted a parliamentary draughtsman's precedent for just such a reservation in the obsolete Scotland Act 1978.

## Devolution in Northern Ireland

The present constitutional arrangements in Northern Ireland are a product of Northern Ireland's unhappy and complicated history, and the Northern Ireland Assembly is the latest iteration of devolution in the territory[29]. Originally, power was devolved to the Northern Ireland Parliament which was formed in 1920 at the partition of Ireland. The Parliament was suspended in 1972 with the introduction of direct rule from Westminster, which remained in place until 1998 when the present Assembly was created as part of the Good Friday Agreement. However, devolution has not been without adversity and the Assembly has been suspended several times during its lifetime.

As noted above, the Assembly's powers are set out by the Northern Ireland Act 1998. Like the Scotland Parliament, the Northern Ireland Assembly has power over all matters which are not explicitly retained by Westminster (known as "transferred matters"). However, there are differences. "Excepted matters" [30], are those which Westminster retains indefinitely, while "reserved matters" are those which may be transferred to the Northern Ireland Assembly at a later date[31].

The Northern Ireland Assembly's powers have increased since its establishment. In 2010, policing and justice was devolved as a part of the 2006 St Andrews Agreement and, more prosaically, Air Passenger Duty was devolved in the Finance Act 2012. Devolution of further fiscal powers to Northern Ireland has been considered recently, and may yet happen in the foreseeable future[32]: for instance, devolution of power over corporation tax has been proposed to help the Northern Irish economy's private sector.

In this paper, we do not propose any changes to the constitution in Northern Ireland. We need not rehearse the turbulent political and social history of Northern Ireland. Nonetheless; the present constitutional settlement is the product of decades of negotiation over that history and serves to deal with Northern Ireland's community's own issues and consequently, the

[29] For the reasons mentioned above, we are using the neutral term "territory" in this paper.
[30] Schedule 2, Northern Ireland Act 1998
[31] Schedule 3, Northern Ireland Act 1998
[32] http://pwc.blogs.com/files/fiscalpowers-nicva_final_270613.pdf

position in Northern Ireland is very different to that in Wales and Scotland. As Conservatives, we believe in preserving the status quo because it works however we this paper also recognises the other Conservative principle that change should be driven by necessity. Several Northern Irish politicians and commentators have suggested that devolution in Northern Ireland should be revisited in light of the Scottish independence referendum and a new constitutional settlement for the rest of the UK. While we do not intend to offer any suggestions as to how this should look, we support such change in principle but are mindful of Northern Ireland's special constitutional situation and that any such settlement must do justice to those considerations too.

## The English problem

Is there really an English problem?

The National Centre for Social Research has collected data over the period 2000 to 2012 from the British Social Attitudes Survey and the Future of England Survey[33]. The proposition that Scottish MPs should not vote on English laws was supported by 57% in 2001 with 14% against. By 2012 it was supported by 81% with only 6% against. In the same survey a clear majority felt sufficiently strongly to support a constitutional change for England, with "English votes for English laws" the most favoured[34].

In March 2013 the McKay Commission concluded:-

> "There are clear, consistent and strong majorities over time and across different surveys suggesting that people in England do not think it right that Scottish MPs should be allowed to vote in the House of Commons on laws that affect England only....
>
> Survey findings are of course a snapshot, and can be read in different ways. On balance, though, the findings set out above provide compelling evidence that there are distinct concerns, felt across England, that lack sufficient opportunity to be expressed through current institutional arrangements. We have heard evidence from a range of sources that reinforces this conclusion and suggests need for a significant response to enable those concerns to be – and to be seen to be – addressed...."[35]

In the same month the all-party House of Commons Political and Constitutional Reform Committee unanimously also recognised the existence of the English problem. In its report "Do We Need a Constitutional Convention for the UK?" it said:-

> "We believe the English Question needs to be addressed swiftly."

As long ago as 2006 Professor Robert Hazell wrote, "England is the gaping hole in the

[33] Conducted by the IPPR, Cardiff University and the University of Edinburgh.

[34] 36% for "England to be governed by laws made by English MPs only", 20% for a separate English Parliament and 8% for regional assemblies. 21% were content to retain the status quo.

[35] Report of the Commission on the Consequences of Devolution for the House of Commons (March 2013)

devolution settlement"[36]. With the developments in devolution since then it becomes more gaping. And if, as seems likely, within a few years there is a devolution of income tax, which is so visible and in popular sentiment important a tax, fully to Scotland and to a substantial degree to Wales, devolution there will become a new and far more pressing version of the West Lothian question:

> "If the basic rate of tax is reduced by 1p in Scotland and/or Wales, who votes on whether the same happens in England?"

In other words the current and likely future developments in devolution in Scotland and Wales have consequences also for England.

In our judgment English resentment, which currently festers largely unseen beneath the surface, has the potential to burst out in a manner destabilising to the Kingdom as a whole. It is surely far better to lance the boil in time. Professor Michael Kenny has written:-

> "If this slowly burgeoning sense of English nationhood remains unvoiced in mainstream politics then there is a greater chance that such sentiments will mutate into harder-edged nationalism that frames the political system and the post-devolution constitution as alien impositions."[37]

Therefore, we emphatically reject the conclusion of those like Professor Vernon Bogdanor who counsel doing nothing. But even if we did have any hesitation in accepting the case for the need for some form of devolution to England, it would be blown away by the desirability in the interests of the union of enabling Scotland to perceive a distinction between the UK's and England's government.

<u>The options for England</u>

What, then, are the range of possible options?

One option could be regional assemblies for various parts of England, presumably to fit the nine administrative regions which have been recognised by Government for various purposes

[36] "The English Question" ed Robert Hazell (2006) Manchester University Press p.1

[37] "The many faces of Englishness: Identity, diversity and nationhood in England" M Kenny (2012)Juncture 19(3) p. 157 , quoted in the McKay Report

over recent decades. At one time this was the preferred solution of the Labour Government, and has been a Liberal Democrat policy. In 2002 the Labour Government published a white paper "Your Region, Your Choice" outlining plans for assemblies in the English regions. The Regional Assemblies (Preparations) Act 2003 made provision for referendums in three regions. The first was held in the North East, which was chosen by the Government as the region most likely to vote in favour. However, it did not do so. The proposal was rejected by 696,519 votes to 197,310. This crushing rejection of a regional assembly has been seen by the great majority of commentators as an insurmountable obstacle to proceeding with the idea, even if it were desirable.

In fact, we do not consider that regional assemblies are the right answer to the English problem. The most important reason for our conclusion is that areas such as the East Midlands are simply not on the same plane as Scotland. Scotland was once a sovereign nation in the post-Renaissance world, with its own legal system, parliament and so much else of the apparatus of statehood. By contrast not even in the early Anglo-Saxon days of King Offa of Mercia was the East Midlands ever any kind of kingdom. In order to conquer the myth that decisions by the UK Government are decisions by England, we consider it vital that there be some decision-making at the level of England.

Another reason why assemblies in nine English regions will never have the resonance to be meaningful political institutions is that the boundaries do not correspond to any sense of human identity. Watford is in the same region as Norfolk, although few Watford residents consider that they live in East Anglia. Some miles further north Milton Keynes is in the South-East region, as is Oxford, which receives Midlands television. The only "regions" which correspond to any sense of identity are those which have an identity on a different plane – Yorkshire because it is a historic county, and London because it is a great city. A development of county council powers and a development of city government are both policies which have much to commend them: but they do not provide answers to the English problem.

A second answer, and one which would provide something on the same plane as Scotland, would be an English Parliament with or without an English Executive or, indeed, two

executives each answerable to one Parliament. In some ways this can be seen as the logical answer to the English problem, and it would certainly provide a direct counterpart to the Scottish Parliament. On the other hand, there is no clear example elsewhere in the world of a successful federal system in which one component represents 85% of the whole. In our judgment the fact that an arrangement does not have a parallel elsewhere in the world is a less than conclusive objection, since the British constitution is already in so many ways unique. But even if such English institutions could work in practice, it seems improbable that the creation of a wholly new and distinct English Parliament would command public approval. The English reaction would be likely to be: "We already have a parliament and it is at Westminster". Furthermore the popular dislike of politicians in general would generate hostility to the invention of a whole new cast of paid parliamentarians.

A third answer which is sometimes heard is the reduction of the number of MPs from Scotland, Wales and Northern Ireland. This would not wholly eliminate voting on solely English issues by non-English MPs but it would reduce its impact in proportionate terms. There is also a historical precedent: during the years of the Stormont Parliament Northern Ireland had only 12 MPs at Westminster, whereas the size of its voting population would have entitled it to 20 MPs. But even if, which we doubt, the mere reduction in numerical terms of non-English votes is sufficient to satisfy English concerns, such a "devolution discount" would be profoundly unjust to the populations of the other territories. It remains the case that the majority of really important decisions, such as whether we go to war, whether the UK holds a referendum on EU membership, and whether there is to be a macro-economic policy of austerity are taken at UK level. It could not be right for the voice of citizens living in the other territories of the Kingdom to count for less than those in England on such great issues.

A fourth solution is the strengthening of local government: this is the solution advocated by a number of academics, including Dr Andrew Blick. He proposes an English Devolution Enabling Act which would permit existing local authorities, or consortiums of local authorities, to take on powers previously exercised in their localities. As we have already mentioned, we can see much inherent merit in a major strengthening of existing local authorities. This could extend to limited legislative powers as well as executive action. For

instance, a good solution to the hunting issue might be to confer on every county council the power to legislate on hunting with dogs, a topic currently within the competence of the Scottish Parliament[38]: that would enable Leicestershire to legalise fox hunting and, say, Kent wholly to ban it if such outcomes matched the attitudes of the local population. But few topics are as boring to the general public as the powers of local government. Beefing up local authorities is not likely to have much traction in the kind of future constitutional crisis which might erupt if, for instance, a Labour Government with a tiny UK majority and no English majority were to use the votes of MPs from other parts of the UK to impose on middle earners in England a more onerous rate of income tax than that chosen for own residents by the Scottish and Welsh legislatures.

Therefore, the answer to the conundrum of the constitution must lie in some new arrangement within the Westminster Parliament. It must square the circle of allowing the English to feel that they are still governed by the great Westminster Parliament whilst avoiding the impression that non-English voices are altering what England would otherwise decide on what everywhere else in the Kingdom would be a devolved matter. Can this be achieved? If so, how?

[38] Oddly hunting with dogs is expressly excluded from the conferred powers of the Welsh Assembly.

## An English voice in the Westminster Parliament

The double majority plan

One suggestion as to how to achieve an English voice in Westminster is the idea of Sir Malcolm Rifkind QC MP that legislation affecting only England should require a double majority. Under this idea such legislation would be declared carried only if it achieved both a majority of all MPs voting in the division lobby and a majority of the MPs representing English seats. Sir Malcolm, who kindly took time to explain his thinking to us, argued that this would avoid the emergence of two classes of members at Westminster, one capable of voting on all legislation and the other entitled to vote on only some. However, we are doubtful whether everybody would accept that the double-majority scheme really achieves this end. Although it would technically be the case that the MPs for seats in the other territories would be casting a vote on the English-only legislation, their votes would not truly count. For if the majority of English MPs voted against the outcome would be a defeat: English MPs would have a veto. So in reality it is only the English MPs votes which would count.

We have also a second reason for not adopting the double majority idea. That is that it would be inconsistent with the principle of the ultimate sovereignty of the UK Parliament. It would also give England a privileged position in relation to the other territories. This can be illustrated by considering the readily imaginable scenario of a UK Government enjoying only a narrow majority in the House of Commons as a whole, and lacking such a majority among English MPs. Suppose the Chancellor of the Exchequer regards it as a matter of overriding importance that the basic rate of income tax throughout the UK be raised by 1p. And suppose that this plan is unpopular in all parts of the UK. If that Government's Finance Bill contained a clause providing that the basic rate in Scotland be so raised notwithstanding the failure of the Scottish Parliament so to enact, this clause upon passing the House of Commons would override the Scottish Parliament's decision. Similarly, if that Government's Finance Bill contained another clause providing for the basic rate in Wales to be so raised notwithstanding the failure of the Welsh Assembly so to enact, the clause upon passing the House of Commons would override the Welsh Assembly's decision. But if the Government's Bill contained a third clause raising the basic rate to 21p in England, and a majority of English

MPs voted against whilst an overall majority of the entire House of Commons voted in favour, then under the double majority scheme the clause would fail to pass. Thus the will of the majority of the House of Commons would not be sovereign in England, undermining the sovereignty of Parliament as to England. And because the sovereignty of Parliament would not be so undermined in any other part of the UK, England would be placed in a privileged position. Accordingly, whilst we have been stimulated by Sir Malcolm's proposal to see the importance of a strong English voice, we are not persuaded to support the double majority plan.

The McKay Commission proposals

Another scheme for English votes for English laws is that unanimously proposed by the McKay Commission. This commands careful attention for several reasons. One is the detail with which their scheme has been worked out. Another is the distinction of the members of that Commission, including in their membership a former senior Clerk of the House of Commons and a former First Parliamentary Counsel: it can hardly be doubted that a scheme coming from such authorship will be one that is both workable in practice and compatible with the traditions of Parliament.

A number of features of the McKay scheme immediately appeal to us. The first is the proposal that there be designated an English Grand Committee comprising every MP sitting for a constituency in England[39]. The Commission stated:-

> "A Grand Committee of quite such a size – far larger than any of the existing equivalents – would be something of a novelty, and it could sit only in the Chamber, but it could be argued that few other procedures would demonstrate more clearly outside the House what was being done to meet the demand in an organic development of existing procedures."[40]

Whilst McKay is plainly correct to say that the size of this Grand Committee would be novel, it would not be novel in any other respect. The Standing Orders of the House of Commons provide for a Scottish Grand Committee comprising all MPs representing Scottish

[39] McKay 204

[40] McKay report 207

constituencies, although, in consequence of devolution, it has not met since 2003[41]. The House also has a Welsh Grand Committee[42] and a Northern Ireland Grand Committee[43]. Therefore, in constitutional principle the creation of an English Grand Committee would not break any new ground.

The next feature of the McKay scheme which appeals to us is the adoption for the English Grand Committee of a procedure equivalent to the Legislative Consent Motion practice in respect of the devolved legislatures. The expression Legislative Consent Motion refers to a resolution passed by a devolved legislature indicating that it approves the enactment by the Westminster Parliament of something within a devolved area. Whilst in such situations the devolved legislature could enact itself there may be a variety of reasons why all concerned consider it more convenient for the Westminster Parliament to do so. The effect of the Motion is that the Westminster Parliament may proceed to legislate without infringing the Sewel Convention. Such motions have, in fact, become a regular feature of the practice of the UK's multi-tier government. McKay proposes that whenever a UK Government proposes to introduce legislation relating to England in respect of a topic which is devolved to the other legislatures of the UK the English Grand Committee should, in effect, be invited to pass a Legislative Consent Motion. Since committees of the House of Commons frequently express views in various ways, such as reports of Select Committees and by the voting of committees considering Bills, and since the emergence of the practice of Legislative Consent Motions in the devolved legislatures has been a mere matter of convenience with no statutory foundation, this second feature of McKay would again break no new ground of constitutional principle.

It would make little sense for any legislative body to consider whether to pass a Legislative Consent Motion after the UK Parliament had legislated; to have any purpose the Legislative Consent Motion must come first. Therefore, perfectly naturally McKay proposes that the English Grand Committee should consider whether or not to pass a Legislative Consent Motion before 2nd reading of a Bill.

McKay observes that a consequence may be that the 2nd reading need occupy

[41] Erskine May "Parliamentary Practice" 24th ed (2011) p.883

[42] Erskine May p.885

[43] Erskine May p. 887

less time than would otherwise have been the case. In the case of a Bill which concerns only England that might prove to be an under-statement. Since every English MP will have been able to participate in the English Grand Committee deliberation in the Chamber on whether the Legislative Consent Motion should be carried, for all practical purposes what happens at a 2nd reading will already have happened. Therefore, whilst the English Grand Committee deliberation will, of course, occupy the time of Members of the House that new expenditure of time may in many cases, so to speak, be cancelled out by the abbreviation of the formal 2nd reading.

Any such scheme would have a vast loophole if it applied only to Bills which solely concerned England in all their parts. It would then be too easy for a Government to circumvent all English involvement by ensuring that every Bill it presented to the House contained some feature relating to a part of the Kingdom outside England. Accordingly, it is a welcome and important aspect of the McKay proposals that they are to apply if part of a Bill applies to England, as much as if the whole Bill does[44]: in such a case the English Grand Committee would deliberate on whether to pass a Legislative Consent Motion in respect of the English features of a Bill.

McKay descends to the detail of who would present the motion to the English Grand Committee to consider whether or not to give legislative consent. One of the two suggestions offered is that Standing Orders should recognise a leader of the largest party in the English Grand Committee and confer on him a right to initiate motions. This has a close analogy in the existing arrangement in the House's Standing Orders which allocate 17 sitting days in a session to the Leader of the Opposition, and 3 days in each session to the leader of the second largest party[45].

McKay also envisages the creation of a Grand Committee comprising all English-and-Welsh MPs to deliberate on matters which are devolved to Scotland and Northern Ireland, but not to Wales. As we have mentioned the principal such area is Justice.

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[44] McKay 204

[45] Standing Order 12

There need be no difficulty as to the determination whether a Bill in whole or part affects England only, or, in McKay's more exact terminology, has "a separate and distinct effect" for England. Since the Parliament Act 1911 the Speaker has been involved in certification as to the subject matter of Bills, since by s.3 of the 1911 Act he has the role of certifying "money bills". The practice is for the Speaker to consult two members of the Panel of Chairs. Erskine May states:-

> "criticism has seldom been voiced of the speaker's action in giving or withholding a certificate"[46]

Bearing in mind that it has for decades been conventional practice to state whether Bills extend to Northern Ireland, and is now become practice to state whether they apply to Scotland or Wales, the certification of whole Bills as applying only to England or England-and-Wales should be entirely straightforward. Certification might not be quite so obvious in respect of individual clauses, but with all the advice available to the speaker there seems no reason to anticipate any difficulty in that respect either.

In the case of a whole Bill which applies only to England, McKay proposes that the public bill committee undertaking the committee stage should be composed only of English members; or in the case of a Bill affecting only England and Wales, be composed only of English and Welsh MPs. To be more accurate McKay proposes this where the "predominantly English or English-and-Welsh interest was clear and undiluted": that is to ensure that a Bill to which a small non English (or English-and-Welsh) element has been added, possibly for purely tactical political reasons by a Government, and where such element is no more than "supplementary, incidental or ancillary", should not be allowed to escape this aspect of the public bill selection procedure[47]. McKay also suggests that for Bills which concern England only or England-and-Wales only, the report stage be undertaken by a report committee containing up to 80 MPs drawn only from MPs sitting for English, or as the case might be English-and-Welsh, constituencies and reflecting the political balance of parties in England, or England-and-Wales, rather than in the UK as a whole[48].

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[46] Erskine May p. 796

[47] McKay 222-223

[48] McKay 231

The membership of the Committees undertaking the committee stage of Bills is determined by the Committee of Selection of the House of Commons, a body of nine members, typically party whips. It is exhorted by Standing Orders to ensure that a Committee reflects the party composition of the House. It seems to us that it may be necessary to extend the speaker certification procedure to a certificate whether a Bill is predominantly of English interest, or English-and-Welsh interest, as the case may be. Subject thereto, it seems reasonable to anticipate that subversion of the system by a government would be relatively unlikely.

The McKay Commission has one final idea of some political value. That is that when votes of the House as a whole are announced there would separately be announced not only the numbers of the votes of the House as a whole but also the votes of English Members, or English-and-Welsh Members. McKay points out that, since the names and constituencies of all MPs voting are recorded on the division lists, it would not be difficult to add the territory of the constituency. Although, consistent with our principle of the sovereignty of Parliament, the vote of all Members would always be what was decisive, the announcement of the votes by territory would add political pressure on a UK Government contemplating overriding the wishes of the MPs for the part of the Kingdom affected. McKay says:-

> "...if a government was seen to have failed to attract the support of a majority of MPs from England (or England-and-Wales) for business affecting those interests, it would be likely to sustain severe political damage."

We express profound admiration for the ingenuity of the McKay Commission in devising this, as it calls it, "menu" of ideas from which a selection might be made. We have not outlined above all the ideas, some of which are alternatives: those we have set out are the ones which commend themselves to us. They are all consistent with constitutional principle and have close parallels in existing parliamentary practice. Moreover, it seems to us, although McKay does not itself mention this, that all the above mentioned procedures could be implemented without primary legislation. They require only resolution of the House[49].

[49] Most aspects of procedure in the House of Commons are governed by its Standing Orders, which are formulated by the House of Commons to regulate its own procedure.

Shortcomings in the McKay proposals

There would remain, however, significant respects in which the McKay ideas, taken at their highest, would fall short of providing for England a voice equivalent to that of Scotland, Wales or Northern Ireland.

Firstly, the McKay procedures are designed merely to discourage the passing of legislation which England does not like. They contain nothing positively to encourage the enactment of legislation which England might want, but which the UK Government chooses not to propose. All the devolved legislatures may, of course, take the initiative in enacting what they choose within their jurisdiction.

The second shortcoming in comparison with the devolution to the other territories is the complete absence of any English executive, whereas all the devolved territories have, in effect if not in name, their own governments. Whilst some governmental action requires legislation, much power can be exercised by executive action alone.

Thirdly, it will, of course, be perfectly possible under this scheme for the House as a whole to ignore a refusal of the English Grand Committee to pass a Legislative Consent Motion. Some commentators have suggested that a governing party would be reluctant to take such a course. Bearing in mind the determination with which the Labour Government of 1974-1979 drove through its wishes despite a minute UK majority, and later no majority at all (and, of course, for a longer period no English majority), we are sceptical whether all political parties will feel so inhibited. We are even more sceptical whether the Labour Party will accept McKay's proposal that a new convention be brought into being – or, put another way, that the Sewel Convention be extended to England . McKay proposes the passing by the House of Commons of a resolution that:

> "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 for constituencies in England (or England-and-Wales)."[50]

It is possible that if a majority of MPs after a general election were minded to vote for the

[50] McKay 12

above list of procedural changes they would also vote for such a motion. But a convention under our constitution does not come into being merely from a 51% vote on one occasion.

To what extent can, or should, the above shortcomings be overcome?

An English Executive?

It is convenient first to examine the major question of whether any form of English executive should be formed. Of course, if an entirely separate English Parliament were to be established, it would be natural to see a separate English Executive alongside it discharging the administrative functions in respect of whatever were designated as the English devolved competences. That option does not arise for us, as we have already rejected the model of a separate English Parliament. The question here is whether any form of English Executive is possible consistent with the model of English legislative procedures resting within our traditional Parliament.

In theory such an arrangement might be possible. The UK Government could, much as now in the Chancellor of the Exchequer's autumn statement, make a determination as to the sums which it was desirable to spend on health, education, and so on throughout the UK. The Government could, as now, allocate a block grant to Scotland, Wales and Northern Ireland based on the Barnett Formula or any successor financial formula. The Government could then, by way of a further block grant allocate to an English Executive the sums for those categories of public spending which it considered appropriate for England (which in simple terms would be the remaining monies for those categories after the block grants to the other territories) . The English Executive could use those monies as it saw fit, spending, if it so chose, a little more on, say, primary schools and a little less on, say, accident and emergency departments than the UK Government had envisaged, or the other way around; or, assuming that England could exercise the same range of choices as to income tax as Wales, it could spend more on both, financing that by raising income tax to 21p.

It can be well argued that there is no real reason why this kind of arrangement should destabilise the UK. This form of arrangement would properly meet the call for "justice for England", and would also ensure that there was a clearly visible difference between the UK

Government and the English Government. Nonetheless, it would amount to a fundamental alteration to the architecture of government in London, and would amount to a giant step into the constitutionally unknown. As Tories we feel more attracted to the incremental development and natural evolution, which has in general been the manner in which our great institutions have grown. Therefore, we do not advocate the formation of a new and distinct English Executive, and seek to tackle the weaknesses which we identified earlier in this paper by a number of moves, each tiny in itself, and none requiring primary legislation.

An English Voice on England's Government

Our first step would be a micro-exercise in tidying up boundaries of Whitehall departments so as create a number which deal wholly and exclusively with England. One such department exists already: the Department of Education effectively deals solely with English matters[51]. The Department of Communities and Local Government is over 99% an England-only ministry: its only wider responsibilities are the regulation of architects and the Ordnance Survey, which are non-core topics which could easily be dealt with by another Whitehall department. The Department of Health is also 99% an England-only ministry: its only wider responsibilities are in respect of embryology, abortion and genetics, which again could well be dealt with by another Department. So by minimal re-allocation of functions three England only departments could exist. By virtue of the Ministers of the Crown Act 1975 the requisite fresh allocation of functions can readily be accomplished by a Treasury Functions Order, which is subject to the negative resolution procedure. Far more extensive Whitehall re-organisations, including splitting and merging of entire departments have been carried out by recent Prime Ministers using that procedure without any parliamentary debate ever taking place upon the requisite Orders.

We suggest that the English Grand Committee be authorised to create sub-committees for the three areas of Education, Communities and Health to examine the functioning of those departments. These committees would expect the departmental ministers and (as at present subject to ministerial consent) officials, to attend before them for in depth scrutiny. One can imagine that the scrutiny might be particularly searching in periods when the majority in the

[51] The only qualification to that statement is involvement in research councils, but they are normally dealt with by the Department for Business, Innovation and Skills.

English Grand Committee is of a different party from that forming the UK Government. Currently there is a Select Committee of the House of Commons for each of those departments, charged with the very same scrutiny role. To avoid duplication of work, we suggest that these new sub-committees replace those Select Committees, but the re-arrangement entailed would be of only a fairly trivial character. The only real difference would be taking the appointment of chairs out of the Select Committee system of secret ballot voting[52] on a schema where chairs are allocated in proportion to party strength: for the sub-committees which we propose the whole purpose of the arrangement would be that when the English majority party is different from the party forming the UK Government, the leading role in scrutiny should be played by the English majority. The re-arrangement would, however, have a serious purpose in demonstrating the emergence of a quasi-federal Kingdom.

There are two other Whitehall departments for whom a significant part of their functions are areas which are devolved to all three of the other territories. These are the Department of Transport and the Department of the Environment, Farming and Food. If the proposals which we make in respect of Education, Communities and Health prove to run smoothly, consideration might well be given in future to the formation of sub-committees of the English Grand Committee shadowing those functions of these ministries which are devolved outside England.

From the outset we propose that the English Grand Committee be authorised by Standing Orders to question any Government minister in respect of matters which have a separate and distinct effect on England. This would be yet another move which would break hardly any new ground in terms of parliamentary precedent. The standing Orders of the House of Commons currently provide for the Scottish Grand Committee orally to question Scotland Office ministers, for the Welsh Grand Committee orally to question Welsh Office ministers, and for the Northern Ireland Grand Committee orally to question Northern Ireland office minsters[53], in each case provided the minster is a member of the House. It may be recalled

[52] Standing Order 122B. Secret ballot elections have allowed members of party A to vote for a candidate in party B, who commands relatively little support in party B, to frustrate the election of party A's most strongly supported candidate: this happened, for instance, in the election of Speaker Bercow.

[53] Standing Orders 94, 103 and 110 respectively.

that the devolved competences of the devolved institutions were initially those transferred from the Secretaries of State for Scotland and Wales, and to a large extent from the Secretary of State for Northern Ireland. Therefore, it would be no more than ensuring consistency for the English Grand Committee to be permitted orally to question Government ministers responsible for England-only functions.

In exceptional cases there would be nothing to prevent the English Grand Committee carrying a motion of no confidence in a particular Secretary of State for an England-only department. This would not compel his resignation, but might make it hard for him to continue. Analogous examples of the exercise of such soft power both failing to achieve a resignation and succeeding in doing so may be seen in relation to Sir Ian Blair. In November 2007 Blair declined to resign upon the passing by the London Assembly of a vote of no confidence in him, but he felt compelled to do so in October 2008 when Boris Johnson, who had in the interim become Mayor of London, but did not then exercise the role of crime commissioner for London, and had no backing from the then Home Secretary, called on him to do so.

Our above suggestions would not achieve, and are not intended to achieve, an English Government. It is emphatically part of our vision for the future that parliamentarians from any part of the UK could not only continue to the great offices of state, such as the treasury and Foreign Office, but also be Secretaries of state for Education health and so on. The aim, however, is to achieve the answerability of such ministers handling England-only affairs to an England-only voice. That goes as far as we wish to go in terms of the Executive for England, but does not begin to touch the need for England to be able proactively to initiate legislate change, as well as raising objections to the UK Government's proposals.

To permit the English Grand Committee to play a role in the promotion of legislation it must have a proper allocation of parliamentary time. In theory, backbench English MPs who draw high places in the ballot could in future introduce Private Members Bills embodying policies favoured by the majority on the English Grand Committee. But as a matter of reality the limitations of time for private members' business render this route of virtually no value. Accordingly, it is essential that the parliamentary timetable be adjusted so as to allow for

debates in the English Grand Committee on business initiated by MPs for English seats as well as for responses to Government proposals. Once again, this is a matter of procedure controlled by the House. Although a UK Government bent on frustrating the English Grand Committee might seek to fill every almost available day with business for the floor of the House, it is customary for Select Committees to be able to sit notwithstanding an adjournment of the House. Therefore, the English Grand Committee would probably have enough cards in its hands to ensure that it is able to sit for the days it needs. This ought to lead to a consensual recognition of the very outcome suggested by Murdo Fraser, namely certain days of the week for English business. In this, as in so much else, if there is a majority in the House of Commons for just one parliament which uses its UK majority to carry the procedural changes which we are advocating, there is good reason to hope that they will stick: if the following general election were to produce a UK Government unsympathetic to the English voice, the sheer convenience for MPs for Scotland, Wales and Northern Ireland, who might have become accustomed to being able to plan their diaries on the basis of needing to be in London on only, say, Monday and Tuesday each week, might act as a powerful discouragement to attempts to restrict the English-only sitting days.

In principle similar arrangements would be made in respect of English-and-Welsh matters. Since in practice that refers to only one topic, namely justice, there would be no need for a sub-committee: justice would be the principal diet of the English-and-Welsh Grand Committee. It should be able orally to question the Secretary of State for Justice and other ministers of the Ministry of Justice sitting in the House of Commons, and have an allocation of time proactively to promote justice Bills.

There remains the risk that a party with a narrow governing majority in the House of Commons may feel free to disregard the views of the English Grand Committee more readily than any UK Government would contemplate overriding the expressed will of the devolved legislatures in the other territories of the UK. It may be the case that the Labour Party will from the outset reject the entire concept of the McKay principles, in opposition will vote against the resolution of convention which McKay proposes, and on entering Government at a later date declare that it will routinely ignore adverse views of the majority of English MPs. An outright policy of hostility to the procedures proposed above could go a considerable way

to rendering them ineffective. Can any safeguard be devised to seek to promote the same degree of respect for the English voice procedures as exists for the Sewel Convention? It is possible that the House of Lords could play a role. The House of Lords recognises the so-called Salisbury Convention that it will not on 2nd or 3rd reading vote against a Bill which has appeared in a governing party's manifesto. However, the precise nature and scope of this convention is unclear and subject to some challenge. A useful development of the convention might be for the House of Lords to regard a Bill sent to the Lords by the Commons as a "manifesto Bill" only if the manifesto in question had clearly stated that the policy in question for England (or England-and-Wales) would be enacted even if opposed by the majority of English (or English-and-Welsh) MPs. In other cases the Lords might regard themselves as free to exercise their powers of delay to give the Government a pause for thought. A role in safeguarding a constitutional settlement in a country with multi-tier government is well suited to a second chamber in the modern climate.

The proposals above are all consistent with existing constitutional principles. None of them even require primary legislation. Half arrive with the imprimatur of the constitutionally authoritative McKay Commission. The other half, which are our own ideas, are within the conceptual parameters already established by McKay. Everything would occur within the Parliament which the English know. Taken individually, each proposal is modest and in some cases minimal. Nonetheless, the cumulative effect would be to promote not merely English Votes for English Laws but also an English Voice on English Government.

We would encourage the Leader of the House of Commons within the remaining months of the present Parliament to initiate consultations and discussions on the implementation of these ideas.

## Drawing the threads together

A Statute of Union

The proposals which we have supported above for Scotland and Wales, based respectively on the Strathclyde and Silk II Reports, require legislation. Rather than enact two separate Bills, one for each territory, we propose that there now be enacted a single statute dealing with the Kingdom as a whole. The centre-piece of this statute, and perhaps its opening, should be a declaration of the new nature of the Kingdom. We propose:-

> "1. It is hereby declared that the United Kingdom is a quasi-federal, voluntary union of England, Scotland, Wales and Northern Ireland."

Each element in that formulation has a purpose.

David Melding has written:-

> "Declaring the United Kingdom a federal state is more important than writing a federal constitution."

Subject to the qualification that we are advocating a quasi-federal, rather than a federal, state, we agree. There needs to be a formal statement of the highest authority formalising the change in the character of the UK which will have occurred between 1998 and the completion of the currently envisaged phase of devolution. As Professor Gallagher has said, it is "time for a better articulation of the UK as a nation state".

We have explained why we consider "quasi-federal" to be the correct nature and description of the character of Kingdom which we believe must emerge. It is a "voluntary" union because it is recognised on all sides that none of the territories remains part of the union against its wishes. That was formalised for Northern Ireland by the Belfast Good Friday Agreement where the signing parties recognised:-

> "the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland"

The voluntary character was formally recognised for Scotland by the Edinburgh Agreement

of October 2012 for the holding of the Scottish referendum. Indeed, it had been considered voluntary for some time before even amongst Conservatives: in 1993John Major noted that "no nation could be held irrevocably in a Union against its will"[54]. We are pleased to observe that the Scottish National Party spokesmen now accept that if at any future time Scotland should make a choice for independence, the Orkney and Shetland Islands should be permitted their own choice of whether to be part of the independent Scotland or part of the remaining United Kingdom. Whilst there has not been a formal recognition that Wales could leave the union if it wished – in the light of its hesitation until very recently to accept even moderate devolution that has hardly been necessary – nobody doubts that if Wales did ever wish to leave the union, the other territories would accept its right to do so.

Having acknowledged by enacting the word "voluntary" that each of the territories may leave if it chooses, the remaining emphasis should be on the fact of togetherness. We should like this to be emphasised in the enactment's title, and we seek a title proclaiming its importance. Almost all enactments are given the short title "The [X] Act". But on rare occasions enactments of major constitutional importance have a different label. In 1215 we had a *Charter*, Magna Carta. In 1689 we had a *Bill* of Rights. And in 1931 the enactment establishing the relationship between the UK and the self-governing dominions was christened the *Statute* of Westminster. That seems a good word to use again. So for the enactment which we intend to establish the future stability of the Kingdom and protect us from ever again seeing our nation state threatened with fracture we suggest the short title "the Statute of Union".

It would be possible, although not necessary, for this statute to record the English procedural changes, and, as something in the nature of a recital, the non-binding conventions of the Sewel Convention and the new "conventions" envisaged in respect of England. We should also welcome a reiteration of the sovereignty of the UK Parliament as the institution of ultimate democratic authority within our constitution. The opportunity should be taken to streamline the devolution provisions for the different parts of the Kingdom as much as possible.

[54] "Scotland in the Union: a partnership for good", 1993

UK Summits

A further valuable manifestation of the quasi-federal character of the UK could be achieved by well-publicised high level meetings. There are already ministerial meetings between the UK Government and the devolved governments. But these are unlikely to fulfil our purposes. They attract minimal notice. Moreover, since we are not proposing a distinct English Executive of any form there can be no separate representation for England at a ministerial meeting.

A meeting of legislators is a more promising idea for our purposes, since the English Grand Committee will constitute a distinct legislative entity for England. The Strathclyde Commission proposes a "Committee of all the Parliaments and Assemblies of the UK". This is the idea which we would wish to build upon.

Accordingly, we propose that there be held an annual UK Summit, chaired by the Prime Minister and attended by five teams representing, respectively, the UK Government, the Scottish Parliament, the Welsh Assembly, the Northern Ireland Assembly and the English Grand Committee. The venue should rotate between London, Edinburgh, Cardiff and Belfast. To attract as much attention as possible to the event, we propose that it should be opened by the Queen, and adorned by ceremonial symbolising the UK's four territories through the presence of, for example, elements of the Brigade of Guards, including the Scots, Welsh and Irish Guards, and the Grenadier or Coldstream Guards representing England, or other regiments recruited from each of the four territories of the United Kingdom. Following the formal opening, one can envisage a day of discussion in sessions between the politicians. The opportunity could be taken for this to be followed by subsequent days of the technical discussions between officials, which already have to be held from time to time for the smooth functioning of multi-tier government.

## The Working Party

This report has been written by a working party of the Society of Conservative Lawyers. Its members have been:

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