

House of Lords Select Committee on the Constitution

**INQUIRY INTO  
THE UNION  
AND DEVOLUTION**

EVIDENCE FROM THE  
**SOCIETY OF CONSERVATIVE LAWYERS**  
WORKING PARTY ON DEVOLUTION

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[www.conservativelawyers.com](http://www.conservativelawyers.com)

## **EXECUTIVE SUMMARY**

**The Union between England and Scotland is today in serious danger. The most obvious danger lies in the strong, and possibly still growing, support in Scotland for complete separation. A second danger lurks in latent resentment among Englishmen at what appear to be special privileges for, or unjustified obstruction from, Scotland.**

**The institutional changes of the Scotland Act 1998 emphasised the distinctness of Scotland without appearing to place it on a par with England. Therefore, they emphasised Scotland's separate identity without, as many Scots perceived things, respecting it. Therefore, the prime requirement in a more satisfactory devolution settlement is that it facilitates the popular understanding of the concept that there are layers of government.**

**The powers of the Scottish Parliament following the implementation of the Smith Commission should form the basis for a concept of United Kingdom standard devolved functions. The Welsh Assembly should be able to call down any legislative competence, if it chooses to do so, within such United Kingdom standard devolved functions.**

**The substance of the devolution arrangements for each part of the Kingdom should be brought together in a single statute, called the Statute of Union. This would provide a coherent structure for the whole of the UK and thus move beyond the ad hoc devolutionary initiatives which have taken place to date. Inconsistencies of language between different existing devolution statutes should be reconciled.**

**This statute should begin: 'The United Kingdom is a quasi-federal, voluntary union of England, Scotland, Wales and Northern Ireland.' The other suggestions in the Bingham Centre's proposed Charter of Union should be incorporated.**

**Following the trial period of 'English Votes for English Laws' by House of Commons standing orders, a role for the English Grand Committee should be enacted in the Statute of Union. Whilst in legal terms the English Grand Committee would not have power to veto legislation by the United Kingdom Parliament, a convention that the Parliament would not normally enact on English matters without its consent should be given the same statutory recognition proposed for the existing Sewel Conventions.**

**Public perception of the distinction between United Kingdom-wide functions and devolved functions should be promoted by adopting a practice of adding '(England)' to the short title of Acts affecting only England, in the same way as the word '(Scotland)' and so on is already part of the title of enactments of the devolved legislatures..**

**With the same aim, there should be a modest realignment of departmental responsibilities so that the Departments of Education, Health and Communities and Local Government, which are already 99 percent English, become 100 percent England in their functions. The word 'English' should then be added to their names, whilst 'UK' could be added to the names of some other departments.**

## **INTRODUCTION**

We welcome the broad perspective which the House of Lords Constitution Committee is bringing to the nature of the United Kingdom. We agree with the Committee's earlier conclusion that the lack of a coherent vision for the Union was a serious weakness in the 1998 devolution arrangements<sup>1</sup>. We are pleased to see the readiness of the Select Committee to take a holistic approach to the arrangements for government at different levels in the United Kingdom as a whole.

Applauding, as we do, the taking of a fresh and open approach to government of the Union we are concerned that sometimes the solution to the constitutional problems of the United Kingdom is said to lie in vague ideas which are more labels than meaningful policies. Expressions such as 'constitutional convention', 'written constitution' and 'federal UK' could mean a range of different things. They may, or may not, be suitable labels for a sound and carefully formulated policy, but they are certainly not a substitute for serious thinking as to the real nature of today's challenges.

## **THE NATURE OF THE CHALLENGE: THE DANGER TO THE UNION**

1. We start from a firm conviction that the Union of the three nations of Britain is in the mutual interest of all three, and that Northern Ireland is a very welcome fourth member territory of the Kingdom for as long as its people wish it so be. We start also, however, from a judgment that the Union between England and Scotland is in serious danger. We are not sure that the present Government or many Parliamentarians perceive this danger to be quite as acute as we do.

2. The most obvious danger to the Union lies in the strong, and possibly still growing, support in Scotland for complete separation. A second danger lurks in the possibility of latent resentment among Englishmen at what appear to be special privileges for, or unjustified obstruction from, Scotland. The policy which we advocate in this evidence seeks to address both those dangers. It remains in large part the policy we proposed in September 2014 in '*Our Quasi-Federal Kingdom*<sup>2</sup>' — but there have been significant developments over the last 12 months, and our ideas have developed in response.

## **WHY HAS SUPPORT FOR SEPARATION GROWN IN SCOTLAND?**

3. The formation of the right policy to address the grave danger of the break-up of the Union should be founded on a diagnosis of why the idea of an independent Scotland is currently so attractive to many Scots. The explanation will not necessarily lie in the reasons people express: the true explanation may be something deeper, of which, perhaps, Scots are only

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<sup>1</sup> 'Proposals for the Devolution of Further Powers to Scotland', March 2015.

<sup>2</sup> Published by the Society of Conservative Lawyers in September 2014. See [http://www.conservativelawyers.com/files/Our\\_Quasi-Federal\\_Kingdom.pdf](http://www.conservativelawyers.com/files/Our_Quasi-Federal_Kingdom.pdf)

partly conscious. We do not, for instance, find it plausible that the enthusiasm for independence is the result of the so-called 'bedroom tax' — a detail of social security policy affecting only a small proportion of the population. Nor that it is the result of Mrs Thatcher's poll tax — an event in history which was reversed nearly a quarter of a century ago. As Lord Sumption has said of Scottish nationalism:

*'It is important not to confuse the symptoms with the cause... this interesting phenomenon is likely to have far more profound causes than the ephemeral issues which have preoccupied British politicians for the last 30 years<sup>3</sup>.'*

4. The 'ephemeral' political issues from the past play into a current political narrative which is that Scots never wanted or supported such initiatives — in other words, the Scots are politically distinct from the rest of the United Kingdom. These irritations have been able to assume a dimension of constitutional significance only because, as policies from a government in London, they have reminded Scots that London is not the only capital in their consciousness.

5. In our judgment, what underlies the mood for independence is a submerged pride and sense of nationhood which new circumstances have allowed to push up through layers of subsoil and grow into the daylight. In one sense it matters not whether Scots are right or wrong to feel that their nation has received insufficient respect: what is important to political reality is that the feeling does exist. But, in fact, a feeling by Scots that their position in the Kingdom has been taken too much for granted is understandable. There is not, or, at any rate, has not been until recently, much awareness among the English that at the beginning of the century of the Enlightenment, that is to say in modern history, Scotland was an independent kingdom with its own Parliament. The English have tended to regard Scotland being part of Britain to be as much part of the inevitable order of things as the once independent kingdom of Wessex being part of England.

6. That feeling of detachment in Scotland is not restricted to constitutional arrangements. Scotland has long been referred to in United Kingdom broadcasting and print media, primarily London-based, as if it were already a separate country and certainly not as a fully-functioning and equal part of the United Kingdom. The creation of the Scottish Parliament has added to that because Scottish domestic issues no longer feature on the Westminster agenda. Unless some very significant event has occurred in Scotland, the politics of Scotland do not feature in the United Kingdom media. The result is that the extensive reporting of Parliament at Westminster, which is seen by the media as the parliament for the United Kingdom, has no relevance on domestic issues for the populace of Scotland. This perception of separateness is a part of the increasing feeling of actual separation between many in Scotland and the remainder of the United Kingdom.

7. The 1998 devolution arrangements played a role in nurturing the emergence into

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<sup>3</sup> 'The Disunited Kingdom: England, Ireland and Scotland' Lecture to the Denning Society 5<sup>th</sup> November 2013. The changing circumstances which Lord Sumption identifies include the decline of Britain's sense of its own historic destiny, and the loss of relevance of the British army and protestantism which he sees as 'engines of Scottish unionism'.

daylight of Scottish nationalist sentiment. The institutional changes of the Scotland Act 1998 emphasised the distinctness of Scotland without appearing to place it on a par with England. Therefore, they emphasised Scotland's separate identity without, as many Scots perceived things, respecting it. This in our judgment has been the crucial failing of devolution<sup>4</sup>.

## **PLACING SCOTLAND ON A PAR WITH ENGLAND**

8. It follows that placing Scotland on an apparent par with England has been a leitmotif of the constitutional proposals which we have made. This involves recognising that some form of devolution to England has an importance not only to meet legitimate English aspirations but also as part of the an architecture of appropriate parity in terms of competence.

9. Because under the asymmetrical character of the 1998 devolution there has been no distinction between the United Kingdom 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 matter reserved to the United Kingdom 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 2014 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 United States, 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.

## **THE CONCEPT OF A UNITED KINGDOM RESERVED FUNCTION**

10. Therefore, we see it as a vital component of any satisfactory devolution settlement that it facilitates the popular understanding of the concept that there are layers of government. If, for example, the Scots really can come to perceive a list running from education to income tax as things which they, and they alone, run in their own Parliament, then the concept of appropriate parity between Scotland and England is easier to achieve. This requires the sharpening of the concept of the devolved function, which, in turn, will be easier if the concept is more uniform across the Kingdom.

11. The boundary of competences between the United Kingdom level and the Scottish institutions which will be established by the Scotland Bill 2015 reflects an all-party agreement secured in the Smith Commission. Whilst one could debate almost endlessly where a theoretically ideal line might be drawn in the sand, we would be reluctant to see the Smith

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<sup>4</sup> In *'Our Quasi-Federal Kingdom'* we wrote: 'The devolution arrangements ... emphasised in the minds of Scots the separateness of Scotland, whilst allowing the Scottish National Party to imply that Scottish dignity was not respected' (p.17).

settlement disturbed. Whatever new devolution might be proposed, it would not be long before the Scottish National Party would be saying that it needed one more thing. We suggest that the Smith settlement not only demarcate the powers of the Scottish institutions, but also that it form the starting point for the concept of what might be called the standard devolved functions. The powers reserved to the United Kingdom Parliament following the Scotland Bill should be regarded as the fundamental United Kingdom reserved powers.

## **WALES**

**12.** The concept of standard devolved functions leads conveniently to consideration of Wales. The greater the extent to which functions devolved to Scotland are the same as those devolved to Wales, the smoother the emerging concept of standard devolved functions. Wales, of course, started far behind Scotland in the nature of its devolution, as well as its list of devolved executive competences. It has recently been catching up, only for Scotland to leap ahead again with the implementation of the Smith Commission report. That there should be a further step for Wales has received cross-party agreement in principle with the St David's Day Agreement. That agreement stopped short in some respects of proposals which had previously been received from another all-party forum, the Silk Commission, notably in respect of policing.

**13.** Wales ought not to have thrust upon it the devolution of competences which it does not want. But we believe that there is a good case for the reconsideration of the exact extent of the next phase of Wales' devolution in the light of the Scotland Bill 2015. Wales should have the opportunity to take note of the competences which will be exercised in Scotland by the Scottish Parliament, and to be asked whether it wants the same. The Silk Commission, whose Second Report was published in March 2014, did not have, or has not yet had, the opportunity to do that. We do not envisage that Wales will want devolution quite as extensive as that of Scotland in the near future. Whether Wales ever does should be a matter for Wales itself to decide. We see attraction in the concept which has sometimes been referred to as a 'drop-down menu': this envisages that the powers of the Scottish Parliament should be available to the Welsh Assembly, if it wishes to call them down, without the need for further primary legislation. The United Kingdom's constitution has never been logical, and is always likely to be asymmetric. But the emerging picture should be one in which for the most part the functions devolved in the case of Scotland and Wales are the same.

**14.** One of the most important features of Scotland's political life is the distinct Scottish legal jurisdiction. The Silk II report recommended that the question of a separate Welsh legal jurisdiction should be considered in 10 years time. More recently, the legal profession in Wales has demonstrated strengthening support for a distinct Welsh jurisdiction. On 23 September 2015, a distinguished group of lawyers published 'Justice for Wales', drawing attention to the fact that it was not until 1830 that the court system in Wales was harmonised with that of England: previously, it had its own Court of Great Sessions. It remains to be seen whether Wales will ultimately want some, or all, of its own judiciary, its own distinct courts and its own separate legal profession. But it seems to us no more than realistic for thinking about constitutional development in the United Kingdom to begin to recognise that such innovations are a possibility. The existence of a distinct legal jurisdiction is customary in truly federal

constitutions, and there is no reason why it should not be one of the more obvious characteristics of each devolved jurisdiction in the United Kingdom.

## **NORTHERN IRELAND**

**15.** The emergence of a general concept of the United Kingdom devolved functions ought to be assisted by the fact that there is great similarity between the competences exercised by the Scottish Parliament and those exercised by the Northern Ireland Assembly. At the time of drafting there are new clouds in Northern Ireland, and the journey of that province towards political harmony is one which its inhabitants must find in their own way. Nothing we suggest is intended to connote the slightest imposition from outside. All we say is that where there are, in fact, real similarities, language ought not to be used in such a manner as to disguise it, or to make Northern Ireland appear different to an unnecessary degree.

**16.** One respect in which Northern Ireland has been made unnecessarily different is in the terminology adopted in the 1998 suite of devolution statutes. Matters which can only be determined at United Kingdom level are in the Scotland Act called 'reserved', whilst in the Northern Ireland Act they are called 'excepted'. The Northern Ireland Act does have a category of 'reserved' matters, but the expression means matters initially allocated to United Kingdom level, but capable of delegation to Northern Ireland.

## **A SINGLE STATUTE OF UNION**

**17.** Smoothing out such inconsistencies of terminology should be one feature of the enactment which is at the heart of our proposals. We propose that the substance of the devolution arrangements for each part of the Kingdom, as they exist at the time of the enactment, be brought together in a single statute. We propose that this be called the Statute of Union. It could, of course, be amended from time to time. In one sense the statute would be little more than a consolidating Act. But it would readily assume an altogether greater significance. The enactment of such a Statute of Union would by itself demonstrate that the United Kingdom Government and Parliament had acknowledged the need to provide a coherent structure for the whole of the United Kingdom and thus to move beyond the ad hoc devolutionary initiatives which have taken place both before and since 1998.

**18.** A good illustration of what can be accomplished by a single statute bringing together distinct, but related law, is the Equality Act 2010. This replaced existing statutes on discrimination on grounds of race, sex, disability and sexual orientation. As well as consolidating existing law, it made certain extensions, and, importantly, harmonised concepts. By doing so it simplified the law, and also gave greater prominence to equality as a unifying theme.

**19.** There are already serious reasons for legislative tidying up. The Scotland Act 1998 will look a slight mess after the changes effected by the Scotland Bill with numerous awkwardly inserted new provisions. Moreover, the decision embodied in the St David's Day Agreement to change Welsh devolution from a conferred powers to a reserved powers basis requires major legislative new drafting in any event. We propose that the reserved powers of the United

Kingdom Parliament as they will stand in relation to Scotland after the Scotland Bill be enacted as the reserved powers of the United Kingdom Parliament generally. To these should be added in relation to Wales such further reserved powers as, after the reconsideration mentioned above, it is determined should not pass, at any rate for the moment, to the Welsh institutions.

**20.** The Bingham Centre Report's proposal of a Charter of the Union would fit with our proposal very well. The Charter is a set of political principles. The proposal is that these principles be enacted as a guide to interpretation. They would sit nicely as the opening chapter of the single statute.

**21.** In one respect there is a direct overlap between the Bingham Charter and our proposal. That is in a very first sentence stating what the UK is. The two proposals are almost identical. We suggested<sup>5</sup>:

*'The United Kingdom is a quasi-federal, voluntary union of England, Scotland, Wales and Northern Ireland.'*

The charter's text, published eight months later, is:

*'The United Kingdom is a voluntary union of four component nations.'*

## **IS ENGLAND ONE UNIT OR SEVERAL REGIONS?**

**22.** This leaves the most difficult question in the formulation of a coherent constitutional architecture for the United Kingdom, namely devolution within England. Whilst it is self-evident that Scotland, Wales and Northern Ireland will each be elements in the architecture, it can be debated whether the remaining 85 percent of the population should constitute one unit or several.

**23.** At one time regional assemblies were the preferred solution of the Labour Party: 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.

**24.** The McKay Commission cited the Future of England Survey<sup>6</sup> opinion research which showed that in 2012 only 8 percent of the English favoured regional assemblies, with 21 percent for the status quo, and a total of 56 percent for laws to be made either by English MPs

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<sup>5</sup> In 'Our Quasi-Federal Kingdom' page 51.

<sup>6</sup> Institute of Public Policy Research, Cardiff University and the University of Edinburgh.



or by a separate English Parliament<sup>7</sup>:

*'We are conscious too of the obvious and continuing lack of appetite for regionalisation in England.... More broadly, we note again the England-wide sense of disadvantage evident in public opinion (table 9): it is not clear that establishing a set of regional assemblies would address this England-wide sense of disadvantage.'*

The Bingham Centre expert commission was of the same view this year<sup>8</sup>:

*'For as long as England shows no appetite to be broken into regions this should not happen. Devolution in Scotland, Wales and Northern Ireland has been demand-led: governance in England should be according to the same principle.'*

**25.** There is, moreover, an even more profound reason why we reject English regions as suitable units in a holistic United Kingdom architecture. That is that it would do nothing to confer proper respect on Scotland to place it on the same plane as, say, the East Midlands. The only units within Britain south of the border which can be placed on the same footing as the once independent nation of Scotland are Wales and England.

**26.** This is not to decry growing localism within England. There is much to be said in favour of the creation of further urban 'powerhouses', the conferring of additional powers on the Greater London Assembly and its Mayor, and the idea advocated by academics such as Dr. Andrew Blick of menus of competences from which local authorities could choose to draw down new roles if they wished. But none of these enhancements of local government is any substitute for a clear recognition that the unit in the Union which corresponds to Scotland and Wales, and which has the identity and clear demarcation to operate as a focus of English identification, is England, and England as a whole.

## **WHAT INSTITUTION SHOULD REPRESENT ENGLAND?**

**27.** In one sense the logical political institution for England in a four-part Kingdom would be some form of English legislative assembly. But the idea of the creation of a fresh and separate institution for England faces obvious drawbacks. The popular dislike of politicians in general would generate hostility to the invention of a whole new cast of paid parliamentarians. There is also the grain of history running back to the 13<sup>th</sup> century. The likely reaction of many of the English would be likely to be: 'We already have a parliament and it is at Westminster'.

**28.** Both the McKay Commission and the Bingham Centre Commission concluded that the least unsatisfactory approach was a procedure whereby legislation with a separate and distinct effect for England be enacted by English MPs operating still within the House of

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<sup>7</sup> 'Report of the Commission on the Consequences of Devolution for the House of Commons' March 2013, chaired by Sir William McKay, para 70.

<sup>8</sup> 'A Constitutional Crossroads: Ways Forward for the United Kingdom' Bingham Centre for the Rule of Law 2015 Report of a Commission chaired by Sir Jeffrey Jowell.

Commons. In *'Our Quasi-Federal Kingdom'* we outlined a role for an English Grand Committee. The Conservative Party manifesto for the 2015 general election contained an unusually detailed proposal for such 'English Votes for English Laws' ('EVEL'). The proposal currently before the House of Commons is closely in line with that scheme.

## **ENGLISH VOTES FOR ENGLISH LAWS**

**29.** The main issues currently discussed are (i) whether any Bill which affects the scale of government in England should be deemed to affect Scotland by virtue of the Barnett formula; (ii) whether lack of approval by English MPs should constitute a veto, or merely an expression of politically significant advice; and (iii) whether the arrangements should be effected by standing orders or primary legislation.

**30.** We have a clear position on issue (i) which we see as a matter of law. It is quite simply incorrect to say that a Bill which may reduce the scale of government in England has, by virtue thereof, an effect on Scotland by reason of the Barnett formula. The formula, which has no legal standing, is merely a departmental practice within the Treasury by which the size of block grant to the devolved governments is calculated. It operates by reference to changes in planned and approved spending in England on devolved matters. The principle of law is that Government ministers cannot spend money unless and until Parliament has voted the necessary supply. The established practice is for Parliament to authorise spending by two annual supply statutes, known as the Supply and Appropriation Act (Main Estimates) Act and the Supply and Appropriation Act (Anticipation and Adjustments) Act. It is not the practice for Parliament to increase or decrease spending authority by individual statutes on particular topics during the course of a year. The supply statutes contain only overall figures for a government department, although they follow Treasury Estimates which have previously been presented to Parliament. It follows that so long as MPs from all parts of the United Kingdom participate in the enactment of the Supply and Appropriation Acts — and there is no proposal whatever to change that — the enactment of a particular statute on a solely English matter cannot alter the size of the block grant to any of the devolved governments.

**31.** The same view has been argued forcefully from the perspective of a civil servant with outstanding experience of devolution and its financial implications. Professor J Gallagher has said<sup>9</sup> that there are no such things as 'Barnett consequentials' from a measure such as the Health and Social Care Act 2012 which reformed aspects of the Health Service in England. This, he says, does not change the budget provision controlled by appropriation procedures voted on by all MPs.

**32.** Nonetheless, we recognise that the procedure for the approval of expenditure is not widely understood. Accordingly, it could assist if over the next few years Parliament were to adopt the practice of adding in all normal legislation a section near the end, stating,

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<sup>9</sup> 'England and the Union: How and Why to Answer the West Lothian Question' J Gallagher, IPPR 2012.

*‘For the avoidance of doubt, nothing in this Act affects the size of approved Government spending or the provisions in any Supply and Appropriation Act.’*

Another practice which could assist the wider world to grasp the distinction between United Kingdom and English matters would be for ‘(England)’ to be added to the short title of Acts which deal with a subject which would be devolved in the case of at least one other part of the United Kingdom. This would parallel the existing practice whereby ‘(Scotland)’, ‘(Wales)’ and ‘(Northern Ireland)’ appears in the short titles of Acts of the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly’.

**33.** So long as the EVEL procedure is effected by Standing Orders, the difference between English MPs having a veto, as currently proposed by the Leader of the House of Commons, or merely expressing an opinion, for which there may be a political price to be paid by a Government which ignores it, is more apparent than real. That is because a standing order procedure can be changed as easily as it is introduced, and any Standing Order change is voted on by all MPs, not merely English MPs. Therefore, it is incorrect for opponents of the present Government to contend that its plans will enable the will of the United Kingdom’s MPs as a whole to be thwarted by the English MPs. The United Kingdom’s MPs as a whole will be able, if they feel strongly enough, to override English MPs at any time by a change to standing orders. The situation would be different if the EVEL procedure were ever to be embodied in primary legislation. It would then be a more complicated exercise for the United Kingdom’s MPs as a whole to override English MPs blocking some statute, involving, as it would, the passage through both Houses of an amending constitutional Act. We see a substantial argument for the embodiment of EVEL in primary legislation on the basis that EVEL will be an important constitutional arrangement. However, if and when that happens, a case could be made out that there should be retained to Parliament as a whole the same power to legislate for England contrary to the wishes of England as exists for Parliament to legislate for Scotland, Wales or Northern Ireland on devolved matters without a consent motion from the devolved legislature.

**34.** There may be merit in the circumstances in which the United Kingdom Parliament will override the wishes of the English Grand Committee being circumscribed by convention rather than legal fetter. That, after all, maintains parity with the devolved legislatures. The latest development in what has in the past been called the ‘Sewel Convention’ is that statute will recognise that it exists in respect of Scotland, although the recognition is only of a convention, without any binding legal effect<sup>10</sup>. The St David’s Day Agreement proposed a similar recognition in respect of Wales. We see no reason why the Northern Ireland Assembly should be excluded: the formulation of the convention in the Memorandum of Understanding between the Governments already covers Northern Ireland<sup>11</sup>. The idea of a similar convention in respect of England has been proposed by the McKay Commission, and endorsed by the Bingham Centre Report. Thus what is currently in cl.2 of the Scotland Bill could be expanded

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<sup>10</sup> The lack of legal effect is made clear in the current Scotland Bill by the retention of s.28(7) Scotland Act 1998 which states: ‘This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.’

<sup>11</sup> Memorandum of Understanding between the UK Government and the devolved executives October 2013 paragraph 14.

into a provision in the Statute of Union stating:

'It is recognised that the Parliament of the United Kingdom will not normally enact,

- (1) bills or provisions in bills on matters within the competence of the Scottish Parliament without the consent of the Scottish Parliament;
- (2) bills or provisions in bills on matters within the competence of the National Assembly for Wales without the consent of the National Assembly for Wales;
- (3) bills or provisions in bills on matters within the competence of the Northern Ireland Assembly without the consent of the Northern Ireland Assembly;
- (4) bills or provisions in bills having a separate and distinct effect for England without the consent of the English Grand Committee; or
- (5) bills or provisions in bills having a separate and distinct effect for England and Wales without the consent of the English and Welsh Grand Committee.'

**35.** As a further discouragement to the United Kingdom Parliament from legislating contrary to the wishes of a devolved legislature or Grand Committee we previously proposed a modification of the Salisbury Convention so that the House of Lords should feel constrained from voting on second or third reading against a bill which had appeared in a party's manifesto only if the manifesto had expressly proposed that the measure be enacted in defiance of the expanded Sewel Convention.

**36.** We believe that if EVEL were introduced in the manner described above, all the objections which are currently raised against EVEL would be met. In one sense the English Grand Committee would begin to constitute a form of English mini-legislature. But it would not yet be fully on a par with the Scottish Parliament, since it would not yet have a competence to enact its own legislation, only to block. Developing the English Grand Committee into a body with an effective proactive legislative function might be a future step for another day. For the moment the recognition of a consultative role for an English Grand Committee, such as is described above, could not justify complaints of 'second-class MPs', but would constitute a significant step towards a more coherent constitutional architecture in which the concept of levels of government, and the distinction between reserved United Kingdom matters and devolved matters, would become increasingly clear.

## **AN ENGLISH EXECUTIVE**

**37.** There would remain one huge difference between the political arrangements for England on the one hand and for the other territories of the Kingdom on the other. The others have distinct executives; England would not. The prevailing wisdom of those with experience within Whitehall is that if there were to be designated a separate executive handling for England the matters which are devolved to the other parts of the Kingdom, its budget would be so large that it would become a rival power centre to the United Kingdom government, and would thereby destabilise the United Kingdom. Without necessarily accepting that inevitability, there is far short of the degree of support which would be needed for the institution of a distinct

English Executive reporting to an English legislature. To this extent, a coherent United Kingdom constitutional architecture consensus will for the foreseeable future be asymmetrical. For the same reason, we do not propose a fully federal UK: we regard 'quasi-federal' as a more accurate and useful characterisation of our model.

**38.** There are, however, measures which can quite simply be taken to promote a sense of England having a voice on England's government. We have proposed that the English Grand Committee form sub-committees of English MPs to scrutinise the activities of the three Whitehall departments which are concerned almost exclusively with England<sup>12</sup>. These are the Departments of Education, Health and Communities and Local Government. Such sub-committees would in practice replace the existing Select Committees studying those areas. We envisage they would call before the Sub-Committee departmental ministers and the like.

**39.** To facilitate this concept of an English voice on English government, we have also proposed modest realignments of departmental responsibilities so that these three departments become 100 percent England in their functions. The only non-England responsibility of the Department of Education is research councils, but they are already normally dealt with by the Department for Business, Innovation and Skills. The Department of Communities and Local Government is over 99 percent 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 percent 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.

**40.** Public understanding of the fact that Whitehall controls only England's health, and that Scotland's health is governed from Edinburgh, could be further advanced by a modest adjustment of the ministry's titles to, for example The English Department of Health; and so on for the other England-only ministries. Understanding of who does what could also be some departments assuming 'UK' in their title: for instance, HM Treasury could become the 'UK Treasury' without disrespect to Her Majesty.

**41.** The creation of such titles might be said to be unnecessary because the functions of the Departments in question are clear in any event. But that would be to miss the point. The perception of a clear distinction between functions which are United Kingdom-wide and functions which are related to an individual jurisdiction (including England) ought to be demonstrated to all. The use of such titles would show that when Parliament at Westminster was deliberating upon, say, education, it was doing so only for the population of England. This would both overcome perceptions derived from the media that the United Kingdom Parliament is deliberating for all and enhance the public perception that in the devolved jurisdictions such matters are regulated by their own assemblies.

## **CONSTITUTIONAL CONVENTION**

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<sup>12</sup> This proposal is set out at greater length in *'Our Quasi-Federal Kingdom'* at pp.46-48.

**42.** Some informed observers are today arguing that the threat to the Union is so severe that the only card left is to call a Constitutional Convention. There may at some future stage be a place for an exercise under such a banner, especially if it constituted a forum in which Scottish representatives could embrace a new model of the United Kingdom. On the other hand, the present dangers could become even greater if the Scottish representatives took the same stance as the politicians of the SNP. So the idea, if to be adopted at all, may have a more constructive role at a future moment when a clear new constitutional framework can be offered for approval. The unionist parties should not appear to throw up their hands and be saying, 'We have no idea what to do to save the situation, so we are hoping that somebody else can come up with a plan'. Most suggestions for a constitutional convention are vague as to how such a body would work, or why members of the general public should find a way through tricky legal and political problems better than those with great expertise.

## **WRITTEN CONSTITUTION**

**43.** To a small extent the Statute of Union which we propose could be regarded as a written constitution. For some commentators, however, the expression 'written constitution' connotes not merely pulling together into one document what today is in many documents, but rather an enhanced role for the courts at the expense of the sovereignty of Parliament. Whatever the arguments in favour of such a shift in power between judges and legislators, we are unconvinced that it would address the cause which we have diagnosed as at the root of the present threats to the union.

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