Introduction

1. The United Kingdom continues to undergo a rapid process of constitutional change, with an ongoing redistribution of law-making and governmental powers to different parts of the Union under an expanded rubric of 'devolution'. But more than this, there is today a pervasive sense of crisis in the territorial constitution, as conceived in terms of the distribution of powers and resources across the different nations and regions, and the relations between them, inside the UK. Indeed, looking at the 'Union' through contemporary eyes as the UK’s voluntary association of four home countries, it is, in the words of the Oxford dictionary definition, ‘a time of intense difficulty or danger’. The fact of sudden multiple efforts at rendering the Union framework more robust further highlights this.

2. The current constitutional and political situation in the UK offers many opportunities, not just for those who in properly democratic fashion promote the cause of independence (in Scotland), but also for reform of the UK’s territorial constitution in terms of, in federal-type language, shared rule and self-rule. From a unionist perspective, I see a need for principles of mutual benefit, comity and parity of esteem to inform constructive and flexible federal-type responses at UK level inside our uncodified constitution. I am not sanguine however. Indeed, I recall the Constitution Committee in the previous Parliament heavily criticising the unionist parties at Westminster for no coherent vision for the future shape of the UK. Nor, from what has happened to-date, do I have much confidence in the readiness of Whitehall sufficiently to adapt to the exigencies of the situation.

3. The following remarks chiefly concern two related aspects: (a) the argument for constitutional principles contained in an Act or Charter of the Union, and (b) the unsatisfactory nature of the framework of intergovernmental relations. They serve to illustrate a broader theme, namely the case for constitutional renewal irrespective of whether reforms serve, in the Committee’s words, ‘to stabilise or reinforce the Union’. Indeed, the more constitutional change is presented as being in defence of the Union, the more difficult it may be to deliver on the ground.

Act/Charter of the Union

4. According to the call for evidence, the Committee aims ‘to identify and articulate the principles that should underlie the existence and governance of the Union’. The recent proposal from the Bingham Centre for the Rule of Law for a set of ‘principles

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3 The Union and devolution - call for evidence 24 July 2015.
of union constitutionalism’ grounded in a statutory charter is an obvious reference point.\textsuperscript{4} I agree with some but not all of the Centre’s arguments and proposals.

5. To put this in context, the Royal Commission on the Constitution 1969-1973 suggested a number of general principles for reform of the territorial constitution.\textsuperscript{5} The Report thus spoke of ‘the need to preserve unity’, desirable ‘flexibility’ and ‘good communication between government and people’. The Commission also emphasised a major element of legitimacy – ‘constitutional arrangements cannot be imposed against the will of the people’ – and constitutional fundamentals such as representative democracy and the liberty of the individual.

6. The Bingham Centre would go much further, for example by enacting precepts of social solidarity and a common economic framework.\textsuperscript{6} In my view, such principles could have a valuable role to play in guiding legislative and executive processes at UK level. But I am not in favour of turning substantive principles of this kind into statutory principles of interpretation, hence further invading the domestic political space, as the Bingham Centre explicitly advocates. Howsoever attractively packaged, this a recipe for excessive judicialisation and – yes – too much power for the UK Supreme Court.

7. Instead, Bingham’s list of principles could usefully be unpacked on the basis that, in statutory form, some such principles are better-suited to our political system than others. Familiar from the EU context in the guise of ‘sincere cooperation’,\textsuperscript{7} an overarching principle of comity, trust and fair dealing is my preferred candidate. It would reflect and reinforce many fine sentiments expressed in the official documentation of UK intergovernmental relations (see below). And who, one is tempted to add, could possibly object?

\textbf{Intergovernmental relations}

8. At the beginning of the century, I characterised the intergovernmental system centred on the Joint Ministerial Committee as a ‘black hole’ at the heart of the UK’s new constitutional architecture.\textsuperscript{8} Although precepts of co-operation, communication and consultation were contained in the official documentation,\textsuperscript{9} relevant processes were unstable and disjointed, discretionary and closed, and overly dependent on political and administrative goodwill. Highlighting the potential for central domination, but also an important role for the system as part of the ‘glue’ of a reinvented Union, I made a series of recommendations such as statutory

\textsuperscript{4} Bingham Centre for the Rule of Law, \textit{A Constitutional Crossroads: Ways Forward for the United Kingdom} (2015), ch. 4.
\textsuperscript{6} Bingham Centre, \textit{A Constitutional Crossroads}, at 21-22.
\textsuperscript{7} Treaty on European Union, Articles 4(3) and 13(2).
\textsuperscript{9} \textit{Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee} (1999 version).
underpinning for the JMC, transparency as a guiding principle, and proper parliamentary scrutiny.  

9. Nothing has happened to change my view. Indeed, testimony to Whitehall inertia during a period of territorial political movement from cosy Labour hegemony to wrangling cohabitation and possible break-up, a series of recent reports, including one from the Constitution Committee,\footnote{Rawlings, ‘Concordats of the Constitution’, at 259-260, 285-286.} rehearsing complaints about fragmentation, too little democratic oversight, and, not least in the EU context, organisational skews in favour of London. Today, an additional premium is placed on an efficient and effective system of intergovernmental relations in view of a looser Union characterised by more exclusive territorial authority and much shared interest.\footnote{House of Lords Constitution Committee, Eleventh Report, \textit{Inter-governmental relations in the United Kingdom} HL (2014-15) 146, ch. 3.} Meanwhile, a reference in the Queen’s Speech documentation to a revised Memorandum of Understanding on intergovernmental relations\footnote{Prime Minister’s Office, \textit{Queen’s Speech 2015 – Background Briefing}, at 58. The current version of the MoU dates from 2013.} points up the opportunity.

Going on

10. Looking forwards, much constitutional and political wisdom will be required if – and it is a big if – the Union is to survive and prosper. There is no quick fix, and in this particular multinational democracy that includes the type of full-form federalism famously rejected by the Royal Commission on the Constitution.\footnote{Royal Commission on the Constitution, para. 498.} To overlook the broader reach of federal-type ideas of shared rule and self-rule in a flexible system of multi-level governance\footnote{Best articulated in official circles by First Minister of Wales Carwyn Jones, speech to the Institute for Government, 15 October 2014.} would, however, be a cardinal error. Likewise, the chimera of heavy doses of law calming the storm should not obscure the many areas for territorial constitutional improvement by both legislative and non-legislative means.


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sphere of constitutional development. With the remit ‘to keep under review the
operation of the constitution’, the Constitution Committee is excellently placed to do
so. Once the present inquiry is complete, why not institute periodic reviews of the
state of the Union?

1 September 2015