What are the essential characteristics of a nation state?²

1. The United Kingdom is not a nation state. It is a union state: that is to say, it is a state comprised of four nations. France is a nation state. The USA is a single nation comprised of 50 states. England, Scotland, Wales and Northern Ireland are nations within a single state (although some would hold that Northern Ireland is only one part of the nation of Ireland – in this evidence I take no view on that particular matter).

2. Union states such as the UK are rare. Other possible examples include the Netherlands, Belgium, and South Africa. As this short list suggests, union states may be either federal in design or unitary. The United Kingdom is neither. For more than a century English-based public lawyers, under the influence of such figures as Professor Dicey, understood the UK as a unitary state. Scots saw both the limitations and the inaccuracies of this portrayal long before the English.³ The twenty-first century United Kingdom constitution is neither fully federal nor fully unitary in character: rather, it has aspects of each character, held in uneasy tension with one another.

3. In the UK matters are made more complicated by the fact that underscoring the constitution is not one union but three. The union of England and Wales was an incorporating union, in which English rule – and English law – was extended to Wales. The reinvention of Wales as a separate jurisdiction is recent, nascent and ongoing. In the twentieth century Welsh identity had much more to do with culture and language than with law and politics. The union of England-and-Wales and Scotland has never been understood as such: it has always been understood as the union of England and Scotland. Scotland has no particular constitutional relationship with Wales at all. The Anglo-Scottish union was not an incorporating one: rather, Scots law, the Scottish legal system (and profession), and the Kirk were left intact even after the 1707 union. The union of Britain and Ireland was different again. For the purposes of this evidence I will focus on constitutional relations within Great Britain and will not focus on Northern Ireland.

¹ This evidence is submitted in a strictly personal capacity and sets out no-one’s views but my own. Since 2003 I have held the John Millar Chair of Public Law at the University of Glasgow. From 2009-15 I was a legal adviser to the House of Lords Constitution Committee. In 2014 I was nominated by the Scottish Conservatives to be a member of the Smith Commission. In May 2015 I was appointed by the Secretary of State for Scotland, the Rt Hon David Mundell MP, as Constitutional Adviser to the Scotland Office. In August 2015 I was selected as the Scottish Conservative candidate for Glasgow Anniesland in the May 2016 Holyrood election. I co-authored the Bingham Centre report, A Constitutional Crossroads (May 2015). This evidence builds on aspects of that report.
² The headings used here broadly follow those used in the Committee’s call for evidence.
The principles of union

4. The Anglo-Scottish union has – and has always had – two values at its core: security and trade. The union gives both England and Scotland greater security than either would possess on her own. By this I mean not only defence from external threats but also economic and social security for the people who live and work here. The “pooling and sharing of risks and resources,” which the Better Together campaign in 2013-14 rightly understood as lying at the heart of the case for a No vote in the 2014 independence referendum, is an expression of this. Economic and social security are enhanced and protected by the union. Likewise trade: the union gives to Scots a domestic market ten times the size of Scotland to live and work in, to trade with, to retire to, etc, wholly without legal impediment. Unlike the European Union, this is a genuinely and fully single market.

5. When thinking about what the union is for – and when considering proposals for further devolution within the union – I have found it helpful to rely on the ideas of security and trade as a benchmark.

Principles of devolution?

6. The central constitutional principle on which devolution in the UK has been based is that it is demand-led, not imposed from Westminster. Thus, there is a Scottish Parliament with powers of taxation only because the Scottish electorate voted for that in the 1997 devolution referendum. Likewise, the Welsh Assembly will not be able to exercise the powers of taxation legislated for in the Wales Act 2014 unless the electorate in Wales first signals its approval (by referendum) that Cardiff Bay should have tax powers. Similar principles of consent are written into the Belfast Agreement and underpin the Northern Ireland Act 1998.

7. Demand alone, however, cannot supply devolution with authority. The devolved institutions operate within a single state, and the Parliament of that state must agree before legislative or executive power can be devolved – hence the constitutional importance of the Scotland Acts 1998 and 2012, of the Government of Wales Act 2006 and of the various Northern Ireland Acts.

8. Thus, devolution can be seen as the result of “popular sovereignty” (or a desire for a form of home rule) sitting alongside “parliamentary sovereignty” (the willingness of the state to recognise and to act upon legitimate claims for home rule). That devolution has been made and fashioned through this combination of popular and parliamentary sovereignty makes it all the more robust. (It is to be noted that other instances of constitutional reform, such as the Human Rights Act 1998, have not enjoyed the force of this combination of popular and parliamentary sovereignty, which has served to undermine that Act’s authority, in my view.)
9. Is there a constitutional principle that tells us what can – and what cannot – be devolved? In my view the clear answer is Yes. Bearing in mind what I wrote above about security and trade, a proposal to devolve a power that would undercut the values of security and trade should be resisted. Perhaps I could seek to illustrate this with an example. In the Smith Commission it was clear to all participants that welfare devolution would be a major topic. The Yes campaign had enjoyed considerable success in the referendum in what they had said about social justice and child poverty. But how to address these concerns without devolving so much of the UK’s social security that you start to cut away the “security” threads that tie the union together was not – and is not – easy or straightforward. In the end the approach taken was as follows: first it was decided that the state pension would not be devolved. The moment of retirement is one of maximum mobility, and we did not want to break the principle that there should be no link between “where you work” and “where you retire”. The freedom of movement that is one of the core ingredients of union (it is a key aspect of free trade) would have been jeopardised by devolving to Holyrood responsibility for the state pension in Scotland. Secondly, it was decided that universal credit (“UC”) should, so far as possible, remain reserved. This was for several reasons, not least that there is a direct link between UC and the UK’s single employment market – one of the aims of UC as a policy is to lift hundreds of thousands of people out of welfare and into work. Thirdly, it was decided that most remaining (non-UC) working-age benefits would be devolved, as these would tear at the fabric of union the least, whilst honouring the fact that the referendum campaign had demonstrated a clear yearning in Scotland for at least aspects of social security to fall within Holyrood’s, and not Westminster’s, competence. A similar sort of thinking underpins the Smith Commission’s conclusions that the rates and bands of income tax should be devolved, but not national insurance.

10. The Smith Commission had to complete its work under extraordinary conditions, not least in terms of time. It has become fashionable in some quarters to rubbish the Smith Commission Agreement as little more than a cobbled together shoddy compromise, or as a rushed and ill-considered political agreement that is devoid of principle. I would reject these criticisms. Of course there was very little time – and one well-known consequence of that was that the Commission was not able to engage in effective public deliberation anything like as much as the members of the Commission would have wished. But it is unfair, in my judgement, to condemn the Agreement as unprincipled compromise. Whilst I am sure there are rough edges, the core of the Agreement is based firmly on principle: namely, that the union of pooling and sharing risks and resources, which a majority of Scots voted to maintain, should be upheld whilst, at the same time, conferring upon the Scottish Parliament the powers and the responsibilities that make it one of the world’s most powerful and effective sub-state legislatures.
11. Underneath this was another principle: that one of the mistakes of Scottish devolution in 1998 was to have created a parliament that is responsible for spending a great deal of money without making that parliament responsible for raising that money. The Scotland Act 2012 closed the “fiscal gap” to a modest degree but the Smith Commission was unanimous in understanding that more was required to make Holyrood fully a responsible legislature. No sub-state legislature in any federal system is responsible for raising all of the money it spends – there is always some sort of grant from the centre – but just as “no taxation without representation” is a constitutional principle dating back centuries, so too could “no representation without taxation” be seen, perhaps, as a more recent constitutional principle of devolution.

12. A final way to think about “principles of devolution” is to consider the relevant case law of the UK Supreme Court and other courts. We did this in the Appendix to the Bingham Centre report, *A Constitutional Crossroads* (May 2015), in which we sought to draw out from what is sometimes a rather messy case law a set of coherent constitutional principles. These are summarised by bullet point in the final paragraph of that Appendix, on page 66 of the report.

**Implementation**

13. Effective territorial governance in a multi-nation country such as the United Kingdom requires two things, aptly labelled by Daniel Elazar “self-rule” and “shared rule”. At least as far as Scotland is concerned I consider that we have gone about as far down the “self-rule” road as we can without beginning to tear away at the union itself. Full fiscal autonomy, for example, or “devo-max” as it used to be known, is simply not compatible with a union that pools and shares risks and resources. Those who advocate it, it seems to me, fail to honour the result of the 2014 referendum, in which two million Scots voted to maintain a union that pools and shares risks and resources.

14. Wales is in a different position. The journey towards self-rule for Wales is still underway and may take longer to complete than is the case for Scotland.

15. When it comes to the shared rule aspect of effective territorial governance, however, the United Kingdom still has a very great deal to learn. It is a truism that devolution has been delivered in the UK without either Westminster or Whitehall seeming to notice. There is still a Scotland Office, a Wales Office and a Northern Ireland Office, as there was before devolution. The Barnett formula remains, notwithstanding that it dates from an era long before devolution. Inter-governmental machinery in the UK leaves much to be desired, as the Committee found in its report on that matter in March 2015. And inter-parliamentary relations

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in the UK are more or less non-existent. All of this will have to change if the United Kingdom is to start taking seriously the proposition (which I would subscribe to) that, in the longer term, the union state will survive and thrive only if we address questions of shared rule as well as those of self-rule.

16. In Scotland there is an urgent need to go beyond Smith. But going beyond Smith does not mean even more devolution of power from London to Edinburgh. It means, rather, that twenty-first century unionism needs more than devolution. Again, it may be more useful to illustrate this with an example.

17. Thus far we have proceeded on the basis that a power is either devolved or it is reserved. If it’s the former it’s for Scottish Ministers, accountable to Holyrood; if it’s the latter it’s for Ministers of the Crown, accountable to Westminster. The result of the Smith Commission’s work, it seems to me, is that this rather starkly binary approach will no longer hold and that, as well as devolved and reserved powers, we are moving into a new area of shared powers. This was acknowledged by the Secretary of State for Scotland, the Rt Hon David Mundell MP, when he gave evidence on 26 June 2015 to the Scottish Parliament’s Devolution (Further Powers) Committee. The Secretary of State talked of “the environment that Smith envisaged, which involves having shared responsibilities and which must be based on a different type of relationship” [between the governments]. Welfare provision will be a shared power when the Smith Commission Agreement is implemented. Other areas of shared power will include energy and transport. Where there is shared power there needs to be provision for shared decision-making as well as for shared accountability. At the moment we have the architecture for neither of these. Our inter-governmental machinery does not appear to extend to shared decision-making and there are no established means of joint parliamentary accountability, in which members of the Westminster and Holyrood parliaments work together to hold UK and Scottish ministers to account.

**Asymmetry**

18. The asymmetry of the United Kingdom’s devolution arrangements is inevitable. It would be counter-productive to seek to iron out the differences and to impose a single, uniform model on all parts of the UK. Rather, we should be making a virtue of asymmetry. What is good for Scotland may well not be good policy for Wales. For one thing, the nature of the Anglo-Scottish border is very different from that of the Anglo-Welsh border. The latter is crossed about 130,000 times daily, whereas the former is crossed only about 30,000 times each day. Further, whereas 48% of the Welsh population lives within 25 miles of England, only 3.7% of Scots live within 25

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miles of England. These differences could mean that differential income tax rates, for example, could have significantly different consequences for England/Wales than for England/Scotland. Considerations as to tax competition and (potentially) tax avoidance could arise in quite different ways as between England/Wales and England/Scotland. I worry that, even now, too much of the debate about the future of devolution in Wales is dominated by attempts to copy and paste from Scotland (compare the Wales Act 2014 with the Scotland Act 2012, for example).

19. Asymmetry is likewise a virtue within the nations of the United Kingdom. The city deal for Greater Manchester is and should be different from the city deal for Cambridge, for example. City regional devolution can and should be allowed to grow in a bespoke manner, with each city or city region negotiating with HM Government and other partners the deal that best suits it. If the days of Whitehall’s top-down reorganisations of local government are over, this is something to celebrate.

20. All of this said, however, there is also a note of concern to be sounded. Scottish, Welsh and Northern Irish devolution, and city regional devolution in England, have each been developed in silos, sometimes without great regard for each other and often – shamefully – with no regard at all for the United Kingdom as a whole. This has to stop. We cannot sensibly carry on developing devolution in one part of the country without considering the future of the country as a whole. I would like to see no more Calman, Silk, or indeed Smith Commissions, each charged with considering only one of the nations of the UK. Were there to be any further devolution commissions, they should be pan-UK inquiries, not focused narrowly on only one of the UK’s four home nations.

The constitutional and legal structure of Union

21. The central recommendation of the Bingham Centre report, A Constitutional Crossroads, was that the United Kingdom needs a new Act of Union (or charter of union, as that report put it). I agree. That Act could usefully identify and articulate the constitutional principles upon which the UK’s territorial constitution is based; it could strengthen the Union by making new legal provision about solidarity, loyalty and comity; it could place currently non-legislative matters on a statutory footing (such as inter-governmental machinery); and it could bring clarity to what are currently rather opaque matters (such as the frequency with which secession referendums may lawfully be held in the UK). To be worthwhile, however, such an Act of Union would have to proceed on the basis of cross-party support and would have to enjoy legitimacy and support in all four home nations.

Practical steps to stabilise and reinforce the Union?
22. Whilst I consider that strengthening the constitutional and legal architecture of the union state is important, I recognise, at the same time, that it is nothing like enough, if the goal is to safeguard the United Kingdom from threats of secession in the longer term. In my opinion there is no single magic bullet here – no one thing that unionists should do now that is guaranteed to keep the country together. A series of little steps, many of them on their own perhaps quite minor, may be what is needed.

23. I do not pretend to have all the answers but one place to start would be to understand why four regions in Scotland voted Yes to independence last year. Glasgow, Dundee, Clydebank and North Lanarkshire did not vote Yes by mistake, or because they misunderstood the question, or because they were misled. They voted Yes because they could no longer see what the Union does for them, they felt they had no stake in it, that it was a Union for others and not for them, and that, for all the uncertainties and risks of independence, “things could only get better”, to rehash a slogan from the Blair era. Glasgow is the UK’s third-largest city, and Glasgow voted Yes by a margin of more than 25,000 votes (195,000 to 169,000) on what was, for Glasgow, a very high turnout. My question would be this: what efforts have UK parliamentarians gone to in the year since the referendum to understand why this happened and to address the reasons for it? What steps have been taken to make the people of Glasgow (and Dundee and Lanarkshire and Clydebank) understand and see the benefits that Union brings?

24. Here are two ideas: (1) Glasgow is full of schoolchildren for whom London is as much a foreign power as New York or Amsterdam. Why not twin every schoolchild in Scotland with one in England and pay for them to visit one another? (2) In Scotland there is only one airport connected to a city by train – and that’s Prestwick. Why not scrap HS2 and spend some serious money on infrastructure north of the border? You could even call the new train links the Union Line and paint the new carriages red, white and blue.

25. Effective territorial governance – the internal management and security of the union state – cannot only be about devolution. Of course, enhanced devolution is a necessary component of the union state’s constitutional architecture, but taken alone it is far from sufficient. Bold and imaginative steps will have to be taken at the centre – in both Westminster and Whitehall – if the union state is to gather in strength and solidarity. It is not beyond repair, but people from across these islands need to feel they have a real and meaningful stake in central government. We are much nearer the beginning of addressing this in the United Kingdom than the end.

30 September 2015