Introduction

1. In my memorandum of 1 September 2015 on ‘The Union and Devolution’, I drew the attention of the Committee to four key aspects: (a) the case for constitutional renewal not only in terms of ‘strengthening the Union’; (b) the importance of principles of mutual benefit, comity and parity of esteem in a reworked Union; (c) the chimera of heavy doses of law calming an ongoing territorial constitutional crisis; and (d) the failure of Whitehall properly to come to terms with the changing territorial constitution. In turn, given the evident need for profound institutional – cultural - change at the centre, I identified an important role for the Committee in holding Whitehall to account through periodic – annual – reviews of the state of the Union.

Parity of Esteem

2. In this further memorandum, I emphasise the importance of greater parity of esteem between the various legislatures and governments/executives in the United Kingdom. To speak, as UK ministers and officials continue to do, of ‘devolved administrations’ is in this regard singularly lacking in constitutional sensibility. To push home the point, it is important when thinking about the principles which should ‘underlie the existence and governance of the Union’¹ to look beyond the allocation of legal and financial responsibilities among the several democratically legitimated centres of authority. The general temper of relations among the UK’s proverbial ‘family of nations’ must also be considered. Corrosive attitudes and practices associated with what I have elsewhere called ‘constitutional patriarchy’² need to be carefully guarded against if the Union is to survive and prosper.

3. Reference must be made to the Asbestos Diseases case,³ where a Welsh legislative scheme for the recovery from employers/insurers of NHS treatment costs was blocked in the UK Supreme Court. The two different ways in which the judges approached the issue of compatibility with the fundamental - Convention - right to peaceful enjoyment of possessions, or more precisely the question of proportionality and hence the degree of deference or respect accorded the legislative choice, go directly to the constitutional status of the several parliaments and assemblies in the UK. Elaborated in the minority judgment of Lord Thomas of Cwmgiedd, and there combined with a strong defence of democratic legislative space, one approach is determinedly non-hierarchical in character. Alongside contextual sensitivity to the matter in issue, this is the stuff of each parliament or assembly being ‘entitled to

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¹ The Union and devolution - call for evidence 24 July 2015.
³ Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales [2015] UKSC 3.
form its own judgement about public interest ... no logical justification for treating
the views of one such body in a different way to the others ... great weight ...
attained to the legislative choice made by the Welsh Assembly’. Put simply, parity
of esteem.

4. Coupled with the according of ‘weight’ – not ‘great weight’ - to the Welsh Assembly’s
legislative choice, the other approach appears in the majority judgment of Lord
Mance. Referencing Article 9 of the Bill of Rights 1689, Lord Mance suggests ‘a
relevant distinction between cases concerning primary legislation by the United
Kingdom Parliament and other legislative and executive decisions’. For which read,
cutting to the chase, greater judicial esteem for legislation affecting England and
little differentiation between the devolved legislatures and other public bodies such
as local authorities. Going directly against the constitutional direction of travel, not
least in Scotland, this is a backward-looking approach in more ways than one. The
sooner it is authoritatively rejected, the better for the Union.

30 September 2015

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4 id., paras 118-124.
5 id., paras 56, 67.