Mr Paul Scott, Lecturer in Public Law, University of Southampton—Written evidence (UDE 0027)

1. In this note, I comment on some of the issues raised by the call for evidence put out by the House of Lords Select Committee on the Constitution on the topic of ‘The Union and Devolution’. I research and teach public law at the University of Southampton and include amongst my research interest certain aspects of the Union and the devolution settlements. Though I currently live and work in England I have previously studied and taught law in Scotland.

The Union and devolution

2. The call for evidence asks about the essential characteristics of a nation state and any difference between those principles and the principles which apply in a state in which power is devolved. It seems to me necessary to clarify that the United Kingdom was never a nation state – that is, one in which the state is co-extensive with the nation and in which the internal territorial distribution of power must therefore reflect some consideration other than that of nationhood. In the United Kingdom, both demand for and supply of devolution has from the beginning reflected the identity of Scotland and Wales as historic and ongoing nations (I leave aside here Northern Ireland). Though politically irresistible, the implicit recognition in 1998 of their nationhood and of its central relevance to the location of political power within the state has coloured everything that has followed – the Scottish independence referendum of 2014 was merely the extension of the same idea to its logical end. The key implication of the United Kingdom’s status as a multi-national state is, for present purposes, that the status of the nations qua nations must be reflected by their enjoying some degree of legislative and executive autonomy and, conversely, that territorial divisions of power which cut across national lines cannot easily be countenanced. Though these are contingent political constraints rather than inherent to the logic of the United Kingdom’s existence, when combined with the unbalanced size of the nations and the existence of a legally unfettered Parliament at Westminster they act to significantly limit the freedom of manoeuvre of anyone seeking to produce an ‘enduring’ devolution settlement.
3. The identification of ‘key principles’ underlying the Union is a fraught task. It risks treating what is historically and politically contingent as somehow rationally determined, and in turn requiring future development to take place in accordance with those arbitrary historical facts. The process of devolution – like the very existence of the Union – is a function of the balance of political opinion and convenience at the relevant point in history. This primacy of politics is of the upmost importance, for it strongly suggests that any principles which we might identify to govern the territorial constitution will do so successfully only to the extent that they are compatible with, and preferably reflect, prevailing political attitudes. That is equally true whether the relevant principles are identified inductively, by reference to the Union and devolution as they currently exist, or are imposed upon the constitution from outside of it, in the hope of achieving a stability which it currently lacks. This is not to say that there are no overarching principles that we might identify and which do in fact transcend the temporary political mood – the obvious one is that of democracy – but two points must be made about such principles. The first is that we would do well to clarify that such principles are in no sense unique to the United Kingdom: this exercise must not be allowed to lapse into chauvinism. The second is that, given that broad agreement on these principles is possible only because they are general enough to hide disagreements about their specific content and their implications in particular contexts, it is unlikely that any such overarching principle will be sufficiently precise as to usefully determine the content, or constrain the evolution, of the constitution.

4. Again, to identify principles underlying the various devolution settlements which exist is to ignore that the devolution settlements are responses to political claims. Any principles which can be read into them are by definition retrospective rationalisations of settlements which look so different precisely because the political contexts out of which they emerged and within which they were implemented were very different one from the other. There are important principles about the operation of devolution which have emerged – the most significant being that reflected in the evolving use of Legislative Consent Motions, which has influenced the development of proposals on ‘English Votes for English Laws’ – but even here there remain important variations in practice (why, for
example, will further devolution sometimes require popular ratification and other times not?) and these principles are very unlikely to be sufficiently specific or fundamental as to be able to do significant work in bringing stability to an unstable territorial constitution.

5. As the preceding paragraphs suggest, there is little scope for identifying principles which could be embedded in the constitution or entrenched in the work of the various governments or legislatures in order to bring stability to the territorial constitution. The instability which exists is a political phenomenon: though it might be managed to some degree by constitutional change (including the writing into the devolution settlement of certain principles), it is just as likely that rushed or careless changes (such as, potentially, the implementation of ‘English votes for English laws’ and the principles it reflects) will provoke greater instability by provoking political upset along nationalist lines. This is a particular danger when nationalist sentiment is inflamed for narrow partisan ends, as has happened with increasing (and worrying) frequency in recent years. And, in the end, if political sentiment moves in a particular direction (by, say, demanding greater devolution), there is no reason to believe that the reaffirmation in response of some previously-articulated principle of territorial constitutionalism will suffice to quiet it.

Asymmetry

6. The current asymmetry in the constitutional settlement is a significant source of instability in that it directly contributes to a devolutionary arms race: there is always a model of further devolution within easy reach for those minded to argue for it and there is no obvious principle which can be cited in arguing in favour of the asymmetry. Indirectly, but more importantly, the asymmetry is a source of frustration for those who perceive themselves to be disadvantaged by it and so it contributes to the sort of political dissatisfaction with the current arrangements which renders those arrangements unstable. But it must be remembered that the current (asymmetrical) settlement was not put in place arbitrarily. It reflects various attempts to address political dissatisfaction with the more outwardly rational and more symmetrical
arrangements pre- and even post-1998. There is no a priori reason to believe that a symmetrical system is more attractive than an asymmetric one from the point of view of the public at large. Indeed, it is almost certainly the case that for some section of the British electorate the system as it currently exists is acceptable precisely because of the asymmetry.

**Taxation and welfare**

7. The devolution of powers on taxation and welfare will not only undermine the economic and social union but is also liable to provoke further political dissatisfaction with the constitutional status quo by encouraging the divergence of policy throughout the United Kingdom in a manner which is perceived not only as substantively unfair, but as in fact resulting from the an underlying constitutional unfairness. This will become more obvious once the interaction of the devolution of taxation with the principle underlying ‘English votes for English laws’ is better understood. As it stands, it is clear that insufficient thought has been given to this point and it can be said with some confidence that it will be the source of significant political grievance in years to come. That grievance, and the need to address it, will further destabilise the devolution settlement which is being constructed at the present time. As things stand, therefore, it is not clear that there exists any natural end point for the devolution process.

**Final comment**

8. The call for evidence notes the Committee’s concern that devolution has “been the result of ad hoc, piecemeal change, rather than the result of a considered and coherent process that takes into account the needs of the Union as a whole.” This seems to me to be undeniably correct, though it is not at all clear that it would have been politically realistic to do otherwise, either by resisting the demand for devolution as it has emerged in different times and in different places, or by carrying out a more rational and thorough-going process of devolution. It is to the credit of the Committee that it now seeks to consider devolution both in the round and in the context of the continued existence of the Union. Nevertheless, I would note the potential here for a related error
to be made. Just as it is eventually unsustainable to consider the different devolution processes in isolation from each other and from the Union, so too is it unsustainable to consider these things in isolation from the broader constitution, including (but by no means limited to) the process of upper chamber reform, questions about the electoral system etc. These broader issues should be borne in mind by those who seek to understand the present instability of the Union and to give it the strength which it currently lacks. In particular, it may be necessary to consider whether the sort of stable, (semi-)permanent solution the Committee seeks is impossible: not because of the devolution itself, but because to achieve it would require changes elsewhere in the constitutional order which are themselves politically impossible to implement.

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