Introduction

1. The Institute for Government is pleased to have the opportunity to contribute to this inquiry on The Union and Devolution. The inquiry is addressing many questions that relate closely to the Institute’s objective of helping to enhance government effectiveness across the United Kingdom, including in terms of the functioning of devolution and relations between the four parts of the UK.

2. In the main, the process of devolution since 1999 has delivered a necessary and welcome set of reforms to what was an overly centralised constitution, unable to respond adequately to the varying needs and preferences of the nations and regions of the United Kingdom.

3. The new devolved institutions in Edinburgh, Cardiff and Belfast (as well as at the city level in London) have all faced difficulties and questions about their effectiveness, but all pass the crucial test that voters in each part of the country support their continued existence. Indeed, with the possible exception of Northern Ireland, there is also evidence that voters across the country are keen to see further powers devolved.

4. That said, we share the committee’s concern that changes to the devolution settlements have often occurred in a disjointed fashion, in response to short-term political pressures rather than consistent principles, and with insufficient attention being paid to the coherence of the British constitution as a whole, or to how Westminster and Whitehall should adapt.

5. The above factors may have contributed to the present period of constitutional instability. Greater stability in our constitutional arrangements is to be desired, but this should not be confused with stasis. Even in mature federal democracies the relationship between national and subnational government is commonly debated and reformed.

6. However, it is not ideal for constitutional questions to be permanently at the centre of the political agenda, and for the rules of the game to be in constant flux (as they have been in Wales ever since 1999, in Scotland since at least 2011, and at present at the English subnational level). Achieving greater clarity about the principles underpinning the Union and devolution could help move toward a situation where constitutional debate is of lower importance than ‘normal’ political questions about public services, taxation, law and order, and so forth. Below we discuss some areas in which constitutional principles are or should be visible in the operation of the UK’s territorial constitution.

Principles guiding the division of powers between national and devolved governments

7. The allocation of powers and functions to the devolved governments created in 1999 was not driven by a declared set of design principles. For instance, there was no application of a subsidiarity principle, in which decisions are taken at the lowest possible level. Neither was there much deliberation about what functions should be retained at a UK-wide level in the interests of the Union as a whole.

8. Rather, the approach adopted was to stick closely to existing arrangements for administrative devolution via the territorial offices. That is, the policy areas devolved to Edinburgh were those already within the purview of the Scotland Office, and likewise for...
the other devolved nations (with the exception that in Wales, primary legislative powers were not initially devolved). This gave rise to some oddities that reflect historical accident rather than rational design – such as the devolution of social security administration and civil service management to Belfast but not to Edinburgh.

9. This approach had the great advantage of limiting administrative disruption and transitional costs, ensuring that the formal handover of executive power was a surprisingly simple affair. However, the lack of an underlying logic (other than path dependence) may have contributed to some of the subsequent constitutional instability in areas where the division of powers did not provide for a coherent and lasting settlement.

10. A second point to note about the division of powers is that the preferred approach (for Scotland and Northern Ireland at least) was to either devolve or reserve policy areas wholesale. The Welsh model was different, but has since moved in the same direction with the devolution of primary law-making powers and now the planned shift to a ‘reserved powers’ model. Unlike in some federal systems there have been no areas formally designated as shared competences, one result of which has been a neglect of intergovernmental arrangements to foster cooperation.

11. While the law itself can be written in black and white, in the real world of policymaking it is often impossible to maintain a watertight dividing line between devolved and reserved areas, leading to the emergence of ‘jagged edges’ such as in the interaction between devolved skills and reserved employment policies. The current Scotland Bill seems set to create more such policy areas (notably around tax and welfare) where responsibility is effectively shared between tiers of government, and governmental structures will need to adapt accordingly.

Principles of the fiscal constitution

12. Just as the allocation of functions to the devolved nations followed the contours of pre-1999 administrative devolution, so too was the system of fiscal devolution carried forward essentially unchanged through the Barnett ‘block grant and formula’ system.

13. The Barnett system’s chief advantage, in theory at least, is that it enables the setting of spending limits for the devolved governments to be carried out on the basis of automatic calculations, rather than via a probably messy process of political bargaining. Further, since the formula applies only to changes in expenditure, it ensures that existing budgets do not need to be renegotiated at each spending round.

14. However, the simplicity of the system also means that what might be considered desirable principles of a fiscal constitution are absent.

15. First, the Barnett block grant system does not take into account any assessment of need (however so defined), leading to criticism that certain parts of the UK (Wales and parts of England) are underfunded in comparison with others (notably Scotland). This has led to calls for reform particularly in Wales, where the government is now committed to introducing a funding floor, though precisely how this will be calculated remains to be confirmed. It is also an inherent oddity of the system that changes to devolved budgets are driven by political decisions taken with reference to England only.

16. Second, the current funding system does not directly encourage fiscal responsibility, in that spending governments have no responsibility for or control of their overall spending
envelope. The system therefore does not directly incentivise devolved governments to take decisions that increase the size of their tax base. This is now changing, as a result of the Scotland Act 2012, the Wales Act 2014, the current Scotland bill, and potentially via the devolution of corporation tax to Northern Ireland. These developments are welcome, but many important details (such as how the block grants will be adjusted to account for devolved tax decisions) remain to be clarified. Likewise the governments will need to reach agreement on principles governing the use of borrowing powers to ensure overall responsible management of the UK’s public finances.

17. Third, the system for devolution finance suffers from a lack of transparency. The system is controlled by the Treasury, which deals with the devolved administrations in a similar way to how it negotiates with Whitehall spending departments. Little detail is published on how the Barnett system operates in practice, so it is not possible to scrutinise how devolved government block grants are actually calculated. This limits accountability and given the growing complexity of the fiscal arrangements, it is something that should be corrected. The Treasury should show its workings.

Parliamentary sovereignty and constitutional entrenchment

18. In legal terms, devolution since 1999 has not qualified the fundamental principle of parliamentary sovereignty. This means that Westminster can still legislate in devolved areas and amend the powers of the devolved institutions, but in practice this is done only with the consent of the respective devolved legislatures, through the legislative consent convention.

19. The current Scotland Bill is now set to put the legislative consent convention into statute, as per the agreement reached through the Smith Commission process. However, the current version of the bill simply states (in clause 2) that Westminster “will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”

20. The wording of this clause (including the presence of the word “normally”) means that it is unlikely to be judiciable. Putting this convention into statute is therefore likely only to have symbolic value. But symbols can be important, and the importance in this case is that in passing this legislation the UK Parliament would be signalling that untrammelled parliamentary sovereignty is no more.

21. A similar point can be made about clause 1 in the Scotland Bill that states “A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements.” This clause could in principle be amended or repealed by a future Act of Parliament, but this would be unthinkable in the present political context.

22. The fact that the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly (and also the London mayoralty) were established with the explicit backing of voters via referendums further raises their constitutional status above pure ‘creatures of statute’ that can be abolished by Parliament, such as the Audit Commission or Police and Crime Commissioners.

23. In effect, the devolved legislatures and governments can now be considered entrenched parts of the British constitution.

A voluntary Union of nations
24. The Union can now be said to embody the principle that was explicit in 1707: that this is a voluntary union of nations. In the Northern Ireland Act 1998 and the Edinburgh Agreement of 2012 (the accord that paved the way for the Scottish independence referendum), the UK government accepted the principle that a vote for Irish reunification or Scottish independence at a free and fair referendum would be respected.

25. But this is not the same as the UK Government having granted a unilateral right to secession. The 2014 referendum was held under specific agreed conditions, and the Edinburgh Agreement has now expired (it allowed for a single vote before the end of 2014). The Scottish Parliament thus has no permanent power to hold a binding referendum on independence (its power to hold a consultative poll is disputed). For it to be regarded as binding, any future independence referendum should therefore also be carried out on conditions agreed between the two governments. But in practice, if the SNP wins another majority at Holyrood next year it would have a strong mandate to hold another referendum (assuming that is what its manifesto pledges).

26. In the case of Northern Ireland, the power to hold a referendum on reunification under the terms of the Northern Ireland Act is held by the UK Government, although the Act specifies that this power shall be exercised by the Secretary of State “if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland”.

A multi-level constitution?

27. It can also be argued that distinct constitutional principles exist at the devolved level itself. For instance, in all three non-English devolved systems the legislatures are elected on the basis of a proportional electoral system designed to embed power-sharing in the operation of devolved politics (though in both Wales and Scotland, this has not prevented the election of majority governments). In Northern Ireland the principle of power-sharing between the two communities is at the very heart of the constitutional model adopted after 1999.

28. The Scottish Parliament and National Assembly for Wales also formally committed at their outset to a set of founding principles that were intended to foster a “new politics” distinct from (a particular view of) Westminster. At Holyrood, the four founding principles were power sharing, accountability, access and participation, and equal opportunity. At Cardiff Bay, six principles were agreed: the Welsh language, social justice, diversity, community regeneration, social inclusion and equality of access.

29. In a further departure from Westminster majoritarian principles, the devolved legislatures are not constitutionally sovereign even within their own spheres of competence, as primary legislation can be struck down by the courts if found to breach EU law or the Human Rights Act, which is not the case for Acts of the UK Parliament.

30. The current phase of devolution is also notable in that powers over important constitutional issues such as the electoral system and the electoral franchise are themselves being devolved, raising the possibility of further divergence between the constitutional principles in operation in the different parts of the country.

Principles of intergovernmental relations
31. A final area where certain quasi-constitutional principles can or should be observed is in the sphere of intergovernmental relations. The Memorandum of Understanding between the UK and devolved governments commits all sides to the principles of *good communication, consultation and cooperation*.

32. In practice, as many past reports (including by the Institute for Government and the House of Lords Constitution Committee) have found, there has been a neglect of intergovernmental systems, and an over-reliance on informal and ad hoc interaction. But as the territorial constitution grows more complex, there is an increasing need for effective cooperation in policy areas shared between Westminster and the devolved governments such as tax, welfare and energy.

33. This will require reform of intergovernmental systems such as the joint ministerial committee and bilateral coordination bodies between Whitehall and the respective devolved governments. It may also raise bigger constitutional questions about the relationship between the four nations of the UK. One perennial idea that may one day bloom is to transform the upper house at Westminster into a representative chamber of the nations and regions (as in many federations).

34. As noted above in relation to fiscal matters, there should at the least be greater *transparency and accountability* of intergovernmental machinery, with greater information published about decisions taken through intergovernmental structures, and with ministers held to account by their respective parliament or assembly for intergovernmental agreements reached. Putting elements of the intergovernmental machinery into statute could be one way of ensuring effective accountability, although there could be drawbacks including reduced flexibility and potential for judicial challenge.

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