1. I have previously discussed before this Committee the report of a Commission, which I chaired, set up by the Bingham Centre for the Rule of Law, which I direct, entitled *A Constitutional Crossroads: Ways Forward for the United Kingdom* (The Bingham Centre Report). I would like to submit that Report in evidence now again, and in this paper briefly to outline the salient issues which I believe now need to be addressed by the Committee.

2. I should start by relating to you that all the members of my Commission were concerned to learn at the outset of our inquiry how little thought had been given to issues of devolution in the round. Your Committee has remarked in its March 2015 that the piecemeal development of devolution has led to a neglect of the larger picture, as has the Institute of Government. For various reasons, not least Probably because of the political urgency of dealing with issues in Northern Ireland and Scotland in particular, policy-making has concentrated on what powers should be devolved to the three nations, and on financing. What has been lacking has been attention to the principles that bind the nations and regions or, importantly, the mechanisms necessary to facilitate relationships between the nations and between them and the United Kingdom. Overall, we found that our arrangements for devolution lack certainty and continuity, coherence, and clear governing principles.

3. One reason for this is the typical view in this country that our problems are unique; that our lack of codified constitution and our asymmetrical model of devolution are such that we are exempt from considering suitable models in other countries, particularly those that adopt a ‘federal’ system. Federalism has a bad name in this country because it connotes in the European context a move to a centralised system yet, anomalously, in the domestic context it connotes a system of excessive autonomy. What is overlooked is that that different federal systems combine different models of centralisation and autonomy. Just as different unitary systems often include significant elements of decentralisation. Few states today are wholly

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1 The members of the Committee were: Sir Jeffrey Jowell QC (Chair), Professor Linda Colley, Gerald Holtham, Professor John Kay, Sir Maurice Kay, Professor Monica McWilliams, Professor Emerita Elizabeth Meehan, Philip Stephens, Professor Adam Tomkins (Rapporteur) and Alan Trench (Advisor).
unitary or wholly decentralised. They all contain elements of shared rule and elements of self-rule and it is the mix of the two that need careful consideration.

4. Nevertheless, an ideal federal system does contain certain elements which might provide some degree of benchmark by which we can evaluate the needs of our system especially if, as the Smith Report on Scotland recently proposed, devolution to Scotland should become “permanent”. (As the Bingham Report says, if we accept that our parliament is sovereign, a permanent devolutionary settlement is not possible, as it may be altered or revoked by any future parliament).

5. The Canadian scholar Ronald Watts is cited in the Bingham Centre Report at page 13 as defining a federal system as containing five features:

   - Two or more tiers of government, each acting directly with the people;
   - A written, supreme constitution, with a division of powers which cannot be changed unilaterally;
   - Proportionate representation of the devolved authorities at the centre (normally in the upper house of parliament);
   - An ‘umpire’ to resolve disputes (normally a constitutional court), and
   - Settled mechanisms to facilitate inter-governmental co-operation (because federalism requires shared power).

6. The UK contains two of these requirements, namely, the first (two or more tiers of government), and the fourth (an ‘umpire’ in the form of the Supreme Court of the United Kingdom). Of the other three requirements we do not have a codified constitution and although there are mechanisms to facilitate inter-governmental co-operation, the Bingham Centre Report considered those to lack the necessary qualities of the rule of law, transparency and accountability. Finally, on the question of representation of the devolved authorities at the centre, despite the fact that members of the House of Commons represent constituencies in the devolved areas, and that some members of the House of Lords have a connection to the devolved areas, we have no formal or indirect political representation from the nations to
parliament. In federal systems these are regarded as a means of melding the perspectives of self-rule and shared rule within the central political arena.

7. In our view Smith was correct that devolution should now be declared permanent. That might be the situation already under convention and practical reality, but not in our constitutional law. The only water-tight way to ensure that permanence is, however, by means of a written constitution, which our report recommends to lead us out of what Tom Bingham describes as, constitutionally speaking, “a trackless desert without map or compass”. Such a constitution would most securely provide the advantage of clear ground-rules to serve as a framework for our territorial arrangements; to set out the underlying principles as well as securing their permanence.

8. A written constitution would take time, as it should, but in view of the political ‘vows’ for maxi-devolution to Scotland, and the need for speedy action in that matter, we believe that the promised further devolution should be accompanied now by a statute (a ‘Charter [or Statute] of the Union [and Nations]’) which sets out the fundamental principles of our devolution settlement. Such a Charter should first make clear that devolution is as permanent as our principle of parliamentary sovereignty allows. Second, it should set out a principle of autonomy or subsidiarity - that each nation should have a government with powers that enable it most effectively to respond to the needs of its people. Thirdly, it would also make clear the necessity of issues that require a shared and centralised approach, such as common security, defence and a common economic framework. Fourthly, it should set out the principle of social solidarity and the conditions necessary for the pooling and sharing of risks and resources. Fifthly, it should set out core shared values such as democracy, the rule of law, personal liberty and rights. It is surely unacceptable that fundamental rights can be treated differently in different parts of the United Kingdom – as is possible now. Finally, the Charter should set out that the specific devolution statutes should be subject to its provisions and provide how future constitutional arrangements should be amended.
9. Such a Charter would go a long way towards providing the coherence and stability that is now missing and also assist in the task of settling not only what powers should be divested from the centre but also those that facilitate sharing, interaction and concerns with mutual interests.

10. I shall not now set out all the detail of all the Bingham Centre Report (including recommendations about the English question, reform of the House of Lords and reform of the funding of devolved governments) but refer the Committee to two particular issues which in my view need immediate attention.

11. First, the issue mentioned in paragraph 8 above relating to the failure of rule of law and transparency in respect of inter-governmental arrangements. These are characterised now by excessive informality, regulated if at all by concordats, memorandums of understanding, guidance notes and conventions. Parliamentary scrutiny is minimal. A clearer statutory framework is necessary here too in the interest of certainty and accountability. The new Charter or other statute should subject these arrangements to more formal accountability. We suggest too that a new Secretary of State for the Union and Nations would provide a more effective overview of inter-governmental arrangements at executive level than the separate secretaries of state for Scotland, Wales and Northern Ireland now provide.

12. Secondly, the role of the “umpire” should not be neglected. Our Supreme Court has proved itself more than equal to that task already, in accordance with principles which guide interpretation to the extent of recognising that devolved authorities, although “creatures of UK statute”, unlike local authorities possess powers as plenary lawmakers (a principle that might also be codified). As Welsh law may increasingly diverge from English law (as it is presently beginning to do) we recommend that all devolution cases are heard by enlarged panels in the Supreme Court (7-9 justices rather than the normal 5) including a judge from Wales as well as Scotland and Northern Ireland.

13. In conclusion, the quest for more certainty and coherence in our territorial patterns does not mean that we can expect perfectly balanced and clear solutions, or that we should or could abandon our a-symmetrical arrangements. What is needed,
however, is a commitment to over-riding principles which would provide the map and compass better to navigate the arrangements and to make them fair, coherent and stable for all parts of the UK. These are vital components of national harmony, local identity and effective governance.

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