Introduction

My main submission to the Committee was a copy of the Constitution Unit’s report *Devolution and the Future of the Union*, published in April 2015 (see [https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/163.pdf/](https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/163.pdf/)). It was produced by a team of ten people, seven of them former senior civil servants, who pooled their experience of working for Scotland, Wales, Northern Ireland and the UK government. My oral evidence on 14 October drew heavily on that report, as does this further written evidence. I was asked to submit further evidence on the possible territorial role of the House of Lords, and on other non-constitutional solutions that would help establish a more stable settlement.

Remodelling the House of Lords as a second chamber of the nations and regions

There have been calls recently for the House of Lords to be remodelled as a second chamber to represent the nations and regions of the UK. The underlying assumption is that a reformed second chamber could bind together the nations and regions at the UK level by representing them directly in the Westminster parliament. That is the theory; but experience elsewhere suggests it may be more difficult to realise in practice. Federal second chambers rarely operate to bind a federation together, because they rarely contain representatives of state governments or parliaments.

Second chambers in federal systems can be directly elected, indirectly elected or appointed. Examples of all three types can be found in the larger countries of the Commonwealth; but whatever the method of selection they tend to be party chambers first, and federal institutions second. The Australian Senate is a powerful second chamber, a strong check and balance, but it does nothing for the federation. Its directly elected members represent the people of the states, not the states themselves, and they vote on strict party lines. The Canadian Senate is all appointed and relatively weak, but its members also vote on party lines, not as representatives of the provinces. Similarly with the US Senate, which is directly elected: Senators vote primarily as Republicans or Democrats, not as representatives of their individual states. How the Senate behaves depends on which party holds the balance of power. Directly elected second chambers tend to be dominated by national political parties, and do nothing to represent state governments or state legislatures at the federal government level.

Indirect election appears to be a more promising model for a federal second chamber. But should it be elected by the state parliaments (as in India) or local government (as in France or Ireland); or contain representatives of the state governments, as in the German Bundesrat? Only the German model offers functional representation of the states at the federal level: in the other models members of the second chamber are party politicians first, and representing their states or localities comes a long way second. Even in Germany the party balance in the Bundesrat is crucial. But the German model is not directly transferable to the UK, because the Bundesrat gives representation to the state governments, with
floating membership depending on the topic being discussed, as in the EU Council of Ministers.

The difficulty in replicating the Bundesrat lies in finding equivalents to the governments of the Länder. Scotland, Wales and Northern Ireland could be represented by their governments; what are the corresponding regional governments in England? The difficulty arises to a lesser extent even with proposals for a directly elected federal chamber: Scotland, Wales and Northern Ireland could be represented as nations – what are the corresponding units in England? Most proposals for a directly elected second chamber have relied on the same regional constituencies as are used in elections for the European Parliament, using a regional list system. This would result in a party dominated chamber, with very weak local ties: with list systems, party loyalty predominates.

In terms of institutional design to bind a federation together, the machinery of intergovernmental relations is generally far more important than the design of the second chamber. The German Bundesrat is the only second chamber which enables the state governments to negotiate with each other and the federal government over federal policy. In other federations that is achieved through the machinery of intergovernmental relations: in Australia COAG, the Council of Australian Governments; in Canada through the Minister for Federal-Provincial Relations. But the machinery only works if there is political will from the Prime Minister to make it work; in Australia and in Canada that fluctuates, depending on the interest of the current Prime Minister.

**Stronger territorial role of the House of Lords as presently constituted**

But the House of Lords could play a stronger territorial role without further reform, and a stronger contribution is badly needed. The Lords particularly needs to do so because the committee structure in the House of Commons is so fragmented, reflecting the fragmentation in Whitehall. Whitehall has six centres for devolution policy (Scotland Office, Wales Office and Northern Ireland Office; Cabinet Office, DCLG and Treasury). In the Commons responsibility for devolution is similarly divided between the six Select Committees which scrutinise the work of these departments.

Only the Lords can bring a more coherent and rounded view. That could be provided by the Constitution Committee, and is exemplified by the Committee’s current inquiry. If the Committee does not have the capacity to maintain a sustained focus on devolution and the future of the Union, because of the importance of its other work, then it might wish to establish a Devolution sub-committee. Or if that is deemed impractical, it might wish to ask the House authorities to consider establishing a new Select Committee dedicated to this task.

**Non-constitutional solutions to establish a more stable settlement**

There are no easy answers to this question; and a limit to what governments alone can do. In the concluding chapter of *Constitutional Futures* in 1999 I said “Constitutions alone cannot bind nations together: but constitutions embody values, and to work they need politicians who accept those values and can give force and expression to them”. So
politicians, through their speeches and media interviews, can set out to create a constructive framework for intergovernmental relations based upon mutual respect and effective co-operation. Or sometimes they can do the reverse. The latter was exemplified in David Cameron’s comments about English votes for English laws in the aftermath of the Scottish independence referendum. That set up two opposing nationalisms, when a statesmanlike approach would have been to reach out to the people of Scotland and be generous in victory. Getting the tone right matters.

Devolution on demand

I should like to finish with two parting comments on other issues raised at the evidence session on 14 October. One is the unquestioned assumption that devolution should only be granted in England upon demand. If devolution unfolds in a haphazard way, through a continuation of the City Deals bidding process, there may come a point in future when the patchwork is considered too fragmented. A future government which wishes to introduce greater coherence and consistency between the different powers and financing arrangements of different cities and regions may need to legislate to impose greater uniformity, if some areas resist levelling up or levelling down.

That would breach the principle of devolution on demand. But other countries have not been so precious in observing the principle. Take just two examples from Europe. When Germany became a federation in the post war German constitution, several of the Länder were new creations which initially were very unpopular. And when Italy introduced direct election for its regional Presidents in the reforms of 1999 and 2001, it was a centrally imposed reform, not something demanded by all the regions (the equivalent for the UK would be the imposition of directly elected Mayors).

Interpreting and altering the division of powers between the UK and devolved governments

Lord Lester asked (Q 8 on 14 October) about the relative roles of the courts and Parliament in interpreting the division of powers. One advantage of the devolution settlements, denied to countries with federal constitutions, is their built in flexibility. The devolution statutes all contain provisions which enable the UK government to amend the division of powers by Order. To take one example, the Scotland Act 1998 includes provision in s 30(2) to amend Schedule 5 (the list of powers reserved) by Order in Council. This adjustment provision has been used quite frequently to make minor adjustments to the settlement. Powers have been moved both ways: more power has been given to Scotland, and further functions have been reserved to Westminster. This power to rewrite the settlement is subject to the important safeguard of requiring an affirmative resolution of each house at Westminster and of the Scottish parliament.

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