



HOUSE OF LORDS

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The Select Committee on the Constitution
Inquiry on

THE UNION AND DEVOLUTION

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Questions 1 - 17

WEDNESDAY 14 OCTOBER 2015

10.30 am

Witnesses: Professor Adam Tomkins and Professor Sir Jeffrey Jowell QC

Professor Robert Hazell

Members present

Lord Lang of Monkton (Chairman)
 Lord Cullen of Whitekirk
 Baroness Dean of Thornton-le-Fylde
 Lord Hunt of Wirral
 Lord Lester of Herne Hill
 Lord MacGregor of Pulham Market
 Lord Maclellan of Rogart
 Lord Morgan
 Lord Norton of Louth
 Baroness Taylor of Bolton

Examination of Witnesses

Professor Adam Tomkins, University of Glasgow, and **Professor Sir Jeffrey Jowell QC**,
 Director of the Bingham Centre on the Rule of Law

Q1 The Chairman: Can I welcome our guests? Professor Adam Tomkins is well known to the Committee as a former legal adviser, but he is a professor of law at Glasgow University and was active in the Bingham report, which has very kindly been sent to us by the Bingham Centre. Sir Jeffrey Jowell is also very welcome as a director of the Bingham Centre and also deeply involved in that report. We are grateful for the copy that you sent us; we have now circulated the report to all Committee members.

I will fire straight off with some rather broad questions. I think today will be a rather broad day, because there are a lot of general issues that we are trying to bring into focus to see how they stand up and interact with each other. The first question I would like to ask is: what is the purpose today of a union between England, Scotland, Wales and Northern Ireland? Professor Tomkins, you mentioned trade and security as a starting point. Would you like to embellish that and spread it outwards?

Professor Tomkins: I will try. Good morning. I am Professor Adam Tomkins, John Millar Professor of Public Law at the University of Glasgow. I should just also say that I am a prospective parliamentary candidate for the Conservative Party in the Holyrood elections and I am constitutional adviser to the Scotland Office, but I am not wearing any of those hats this morning, as you can see, appearing before you in a strictly personal capacity.

The purpose of the union between the four nations of the United Kingdom—England, Wales, Scotland and Northern Ireland—is nicely encapsulated in the phrase that was used in the end by the Better Together campaign, as a core part of their message in Scotland as to why we should not vote yes and should vote no, which is to say that the union gives all four nations of

the UK a pooling and sharing of risks and resources. That is illustrated, in my view, in the two fields of trade and the economy, on the one hand, and security on the other, which means not only security and defence but social security. The union enriches all four of the nations that are part of it, and if any of the nations of the United Kingdom were to leave the union it would impoverish not only that nation but all the others as well, not only economically but culturally and spiritually. The purpose of the union is to make each of the nations of the United Kingdom richer and greater than any of them would be alone.

Professor Sir Jeffrey Jowell QC: I would support that. I would only agree that it enriches in other respects as well by emphasising common interests and allowing for common opportunities and for different identities but on the other hand for shared aspects of identity at the same time, which must enrich the whole more than the sum of the parts. That point was stressed time and again by Professor Linda Colley, the historian, who is a member of the Bingham committee, who stressed the linkages between the identity and the background of all parts of the United Kingdom. In the report, we mentioned that the system requires attention not only to self-rule but to shared rule. This is the issue: the purpose of the union is shared, as well as self-rule, and to emphasise that aspect of that particular partnership.

The Chairman: That is an area we will want to study as our inquiry proceeds. It is a very interesting one and it might easily yield some solutions. On the question of security, can we spread it a little into a sense of cultural, personal and familial security? People, when asked what the union means, tend to compile a list that starts with the monarchy, the BBC and not much more. It peters out pretty quickly. Do you feel that there is an area there that should be further clarified?

Professor Tomkins: If you go back 50 years to the 1950s—perhaps that is more than 50 years—as Colin Kidd put it in his book *Union and Unionisms*, unionism in Scotland was so much the default opinion that it never needed to be demonstrative. Nobody in Scotland ever needed to articulate why they were a unionist; it was just so much the default position. This is a thesis that Colin Kidd runs in his book and I think it is largely right.

If you look at the ingredients of union in the 1950s and, to throw another book at you, Michael Keating's book *The Independence of Scotland*, in the opening chapters he identifies what he thinks the ingredients of union were in the 1950s. Top of the list are the two things that you just mentioned, Lord Lang: the monarchy, the BBC—the health service was also there. Empire was also an ingredient of union, and class—the idea that the class politics that was so important to the industrial north of England was identical to the west of Scotland.

One's loyalty, if one was a Glaswegian Labour voter, was to the idea of class, and that was one of the ingredients of union.

Keating argues in his book that all this has gone. The monarchy is no longer important in the way that it was 60 years ago. It is not unimportant, but it is no longer important in the same way that it was 60 years ago. Class politics has been replaced in Scotland by the politics of the flag and the politics of the nation, so that one's loyalty is now not principally to one's class but to one's national identity. That has been the great triumph of the SNP in west-central Scotland. Empire is no longer. The BBC does not enjoy unanimous authority and support across the whole spectrum of Scottish political opinion just now, I am sad to say, and the NHS is of course fully devolved in Scotland. Health is one of the areas that is most fully devolved under the original Scotland Act, along with education of course. You look at those ingredients of union and they have all essentially dissolved through various different forces of change and whatnot.

If one were thinking of rebuilding that sense of what the pooling and sharing of risk and resources means practically to the lives of people in particularly the parts of Scotland that last year voted yes to independence, one would not necessarily start with that list, but a substitute list needs to be found, in my view. I do not think there is any single magic bullet that one can identify and say, "If only we unionists were to do this, then the whole nationalist experiment would just go away or fall apart". It is much more complicated than that. We have a chronic problem, rather than an acute one, and it will require long-term solutions. The territorial constitution of the United Kingdom is an issue that requires to be managed in a long-term view.

I do think that one of the questions that ought to be at the forefront of unionist politicians, whether they are in government, in parliament or in opposition north or south of the border, is: "What we are doing to try to rebuild that idea of union?". What are we doing? What can we do? What contribution can we make to the rebuilding of a project that is, let us face it, terribly un-British? We are very uncomfortable about this. The Americans are great at nation-building; even the French are quite good at it. For all those reasons, we are not very good. We do not like it very much, but it is something that we have to embrace. That does not just mean flying a few more red, white and blue flags, although we could do that too, but thinking creatively about how we can use the idea of union to enrich and enhance, in a meaningful way, the lives of the people who live in the various nations of the United Kingdom, particularly in Scotland and particularly in those bits of Scotland that voted yes.

Lord MacLennan of Rogart: You have not so far referred to the relationship between Britain and external countries. It does seem to me that we will weaken ourselves if we are separate and that we have common interests with the European Union, with NATO and with the United States, and somehow that seems to me to be part of what needs to be strengthened.

Professor Tomkins: I do not disagree with you, but the way in which some of those ideas and labels play in Scotland is different from the way in which some of those ideas play in England. Britain's rather tortured relationship with the European Union is not a very Scottish problem. It is a very English problem. There is a danger, in the forthcoming EU referendum, that Scotland gets essentially dragged into a fight that is not really its fight or an argument that is not really its argument. When you say "NATO", in my city, Glasgow, people immediately think about Trident and the location of Britain's nuclear deterrents. The idea that you can celebrate the great Atlantic western military alliance as a cause of union, rather than as a threat to union, is not one that would be universally shared in Glasgow or in west-central Scotland generally, but I think you are right.

This is one of the great forces of Linda Colley's book that she wrote in conjunction with a Radio 4 series last year. We would be wise to see the UK's problems of territorial management in some kind of comparative light. We are not the only country going through this. Belgium is another union that is struggling. Canada is another union, a federal union in that case, that has struggled in the past with its territorial management. It may very well be that there are lessons to be learnt from Belgium and/or from Canada in this. To see the problem of secession, the problem of separatism and the problem of nationalism as a uniquely British problem would certainly be a mistake.

Professor Sir Jeffrey Jowell QC: I do think the international aspect is important, not only in terms of British influence in the world but also the opportunities that are presented with a union of our kind and significance. I was tempted, in answer to your question, to refer to the improvement that there might be in the status of our rugby if it was a British Lions team, rather than simply a team from the different nations, but I recall that Scotland is still a player and Wales, to some extent. Perhaps I will not press that, but I would also mention civil liberties, human rights and the rule of law as binding factors.

The Chairman: Thank you very much. Let us move on and try to find some principles to back up a union, Lord Cullen.

Q2 Lord Cullen of Whitekirk: I refer to the set of principles set out in the Bingham Centre report. It might be said that, if we look at those principles as a whole, there are a number of threads running through those statements, perhaps three in number, the first being the shared

values and benefits of the union, to which reference has been made already. The second is the relationship between individual member nations and the union, and that includes the working relationship between the Governments, and what I describe as simply the characteristics of devolution, whereby powers are devolved to a particular nation but at the same time that nation contributes to the functions discharged by the union. It seems to me there are at least those three threads. Are all the principles set out in the Bingham Centre report of equal importance and significance, or are some more fundamental than others? In other words, what is at the heart of the idea of a charter?

Professor Sir Jeffrey Jowell QC: The charter sets the compass that Lord Bingham always thought was lacking in our constitution, particularly evident in our devolution arrangements. What are the rules? What are the principles? What are the procedures even? These are fundamental constitutional requirements, and we seem to be at sea about them, uncertain about them and cannot quite define them. The charter will be an opportunity to define the fundamental principles and processes of our devolution settlement, which is very important: such as the notion of subsidiarity. Often one thinks that if there are going to be principles of unionism, that has a centralising effect, but it need not if one of the principles is that each nation should have a Government with the powers that enable it most effectively to respond to the needs of its people. Call that subsidiarity, call that the principle of autonomy if you like, but that is a principle and it is fundamental, as fundamental as the shared values and powers. Common security and defence, and a common economic framework, are clearly terribly important. The principle of social solidarity allows a kind of mediation between the different principles, so one need not necessarily have to choose between the most important if that principle, as in a number of federal constitutions—Germany, South Africa and so on—is incorporated. Finally, the core values such as I have just mentioned—democracy, rule of law, personal liberty and rights—ought to be uniform across the union, and then there ought to be some opportunities for the constitutional arrangements to be amended. You build in a permanence, but you also build in, as with all constitutions, a certain degree of flexibility allowing for change, if a significant number of the population wish it.

Q3 Lord Lester of Herne Hill: The fourth of the principles that is listed from your committee, which both of you were party to, is on shared commitment to personal liberty and human rights. As you both know better than I do, we are the only country in Europe, and almost alone in the Commonwealth and in the common law world, not to protect basic rights and freedoms through our own constitutional instrument. We use instead a European treaty,

and we use the European treaty also to limit the powers of the devolved institutions, rather than a constitutional instrument of our own.

I just wonder whether, in trying to find how to give effect to that fourth principle, you think that having a charter or something else would be a way forward, because at the moment there are obvious disadvantages to using a European treaty, as no other country does, as a substitute for a constitutional instrument. An example that has been given before by Lord Lexden, when he was on the Committee and beyond, is of course defamation—a very good example—where Parliament spent three years getting a statute on the books to reform the law; Northern Ireland says no; the result is the public is faced with no core principle of free speech that everyone can enjoy throughout the United Kingdom but, instead, different standards because of a reluctance by one part of the United Kingdom to accept the principles that Parliament had accepted for the rest, or for England and Wales.

Professor Tomkins: For me, the value of thinking about what we call principles of union and constitutionalism, which you might or might not want to include in a charter, treaty or act of union, is that it responds to the way in which devolution has been developed in the United Kingdom. Devolution has been developed in the United Kingdom in silos, so the argument about Scottish devolution has happened over here, the argument about Welsh devolution has happened over there, there has been an altogether different argument about Northern Irish devolution, and there has not been very much argument about devolution in England at all, although we might turn to that in due course.

It was abundantly clear to Annabel Goldie and to me on the Smith commission that we really could not carry on like this. We really cannot carry on, in the United Kingdom, developing devolution or developing Britain's territorial governance in silos. There is no understanding in Scotland of what is happening in Wales. There is very little understanding in Scotland of what is happening in Northern Ireland, and there is very little understanding in England of what is happening in any of the other nations of the United Kingdom, as far as this is all concerned. Really for me the value of thinking about principles of union constitutionalism is that it gets us, or might help to get us, out of those silos and into the space where we can start thinking about the things that we have in common. The things that we have in common might be values or they might be rights, or they might be institutions or principles. In answer to the question about whether some of these principles are more important than others, perhaps they are, but the order in which you would put them in importance might vary depending on what you were trying to do with them and where you were in the country. That, to me, is why we embarked upon this.

Also, I was challenged in an academic conference a few years ago by another professor of public law in Scotland, who said that in her view there was no such thing as principles of devolution and it was all just made up. It was all just the product of rather shabby political compromise. Here is a thing that you think you can devolve, so devolve it, and here is a thing that you think you should not devolve, so reserve it, and that was really all there was to it. I thought that was not true and it is not fair. There are principles that underscore what we have devolved, why we have devolved it, what we have recommended for further devolution and why we have resisted other issues.

It is to me principled, rather than shabby, to say that taxation of income should be a shared responsibility in Scotland between the Scottish Government and the United Kingdom Government, and what we have tried to do in the Smith commission is to find a way of sharing that out. National insurance is reserved, because it speaks directly to the pooling and sharing of risks and resources that, after all, 2 million Scots voted to maintain in the referendum last year, but control over the rates and bands of income tax on earned income is devolved in full to the Scottish Parliament in order to allow the Scottish Parliament to start thinking much more seriously than it currently does about how it is going to pay for all the money that it wants to spend. It is the same on the welfare piece. We did not want to devolve the state pension. We thought that the only coherent thing to do with universal credit was either to devolve it or to reserve it. You cannot really fiddle around with it. Those two issues between them, universal credit plus the state pension, take care of about £15 billion out of £18 billion spent annually on welfare in Scotland, so you are only left with about £3 billion. Devolve that in order to try to have some kind of shared responsibility about welfare, but at the same time confer on the Scottish Parliament the power to top up any welfare benefit, whether in a reserved area or a devolved area, if the Scottish Parliament thinks that welfare provision at UK level is being unfairly, too aggressively or too quickly cut, so that the UK sets the floor and the Scottish Parliament can raise that, if it sees fit.

Yes, the context in which the Smith commission met was a very peculiar context, where we had to find common ground very quickly after a very divisive and difficult referendum campaign. Nonetheless, there are these principles that try to understand, as happens routinely in a federal country, where power is appropriately located, so that would be my answer to Lord Cullen's question.

Q4 Lord Morgan: It seems to me we have been discussing how to articulate and express the idea of the union more effectively, and to me the answer in considerable measure is the remit of this Select Committee: namely, articulating the idea of the constitution. As everybody

knows, in the United States, let us say, the constitution supremely embodies ideas of American citizenship, of Americanness. In France, particularly since the reform constitution of 1958, the constitution embodies the idea of republican virtues, sometimes not always happily so perhaps. These are accessible documents that people can turn to, and of course they are written down. I was wondering if that could be a possible way ahead for us.

Professor Sir Jeffrey Jowell QC: If I may address Lord Lester's question first, I understood him to be referring particularly to fundamental rights being treated differently in different parts of the United Kingdom, as with our Defamation Act at the moment not applying to Northern Ireland. This creates great uncertainty. It is unacceptable that fundamental rights should be treated differently in different parts of the United Kingdom, as is possible at the moment. We also noticed, in doing this report, that there is increasing divergence between Welsh law on a different level, landlord and tenant, and English law, as devolution continues. These are questions we really have to grapple with. They may seem trivial, they may seem lawyers' points, but they do apply. When you have this kind of uncertainty, when you have this kind of divergence, this is not good for commercial activity and it is unsettling for publishers to have a different rule about free expression in one part of the UK than the other. This is an important issue that should be grappled with. A by-product might well be to provide a kind of British bill of rights, with common agreement across the board, incorporating, one would hope as a minimum, the European Convention on Human Rights and perhaps even going further.

In relation to Lord Morgan's question, I have probably cited this to too many committees over time, and you are very familiar with Lord Bingham's statement that constitutionally speaking we are in a "trackless desert without map or compass". One sees this as a teacher of constitutional law. Even students who come into law are at sea for a long time about what our constitution is. They are more informed than other people of their age, but some degree of gathering together of the rules that govern us, the procedures and, most importantly, the values that bind us could be a task certainly worth doing. One would hope that this Committee would lead on that with vigour.

Professor Tomkins: I have just one little caveat: you can have a new act, treaty or charter of union without having a written constitution. This is not something that would have to wait for the enactment or adoption of a written constitution. It may or may not accelerate or herald the need or perceived need for a written constitution. I see the two projects as distinguishable from one another and I certainly would not want anyone to think that my view was that this was all part of a back-door attempt to get a written constitution. It might lead to a written

constitution, but it does not necessarily have to and it certainly does not have to wait for a written constitution.

Lord Hunt of Wirral: Just to Sir Jeffrey and a wonderful throwaway line on subsidiarity, I recall that the establishment of a Committee of the Regions within the European Union followed a wish to see a decentralisation of more power to the regions from the Commission, but it has not been a great success. I am not really sure what powers were devolved down at all, so what is your view on subsidiarity within this wider context?

Professor Sir Jeffrey Jowell QC: There are many definitions of subsidiarity, almost as many as sustainability, another term one comes across frequently these days. My definition is that each nation, each region, perhaps even each city, although that may be going too far, ought to have a government, as I have said, with powers that enable it most effectively to be responsive—responsiveness is the key—to the needs of its population, of its people, however defined. I would think that with subsidiarity goes the notion of consent. There may be areas or regions in England in particular that have no wish for any further subsidiarity, and one can surely accommodate that. If there is a strong feeling that they should, then that should be provided and, if it is provided, it should be in an open way, not simply through deals between mayors and Chancellors of the Exchequer, if I may say, as was the case with the Manchester deal, but as is happening now through parliament and, if possible, with the consent of the people. If it is considered by them to be important for their own governance and they feel that government can be more responsive in that way, then yes, it is an important concept.

Lord MacGregor of Pulham Market: On the same issue of subsidiarity, I remember well when I was negotiating in the EU, way back in the 1980s, in education and particularly in agriculture, subsidiarity was a principle that I was applying very strongly. There, of course, you were dealing with a whole number of nations that had different practices, different backgrounds and different everything, and the temptation of the commission was clearly to try to centralise and get involved in the detail of food matters that really should have been settled at the national level. I had no difficulty in saying that subsidiarity should be a very strong element of the community.

I find it more difficult to define it exactly in practice in the United Kingdom, with the long record that we have had. I was going to ask you where you draw the line. How do you apply it in practice? It seemed to me that, from your answer to Lord Hunt, you were suggesting that if a local community wanted something that they thought they could better do at the local level, they should be able to run it themselves. Where do you decide whether it is right that they should do so or that, in fact, it is just too difficult and that, like so many areas of the other

principles, it is necessary to have the national Government making the decisions? Do you see what I mean? You could get into a terrible muddle if you said that every local community that wanted to do such and such should be able to decide it for themselves.

Professor Tomkins: The idea of subsidiarity requires two things. We are only looking at one of them. It requires decision-making to be driven down, in the UK context, to national level, so below Westminster and Whitehall to national parliaments in Edinburgh, Cardiff and Belfast, and within the City Deals programme to city regions in England, but it also requires something else. It also requires those nations and regions of the United Kingdom to be effectively and robustly represented at the centre. This, to my mind, is the failure of the Committee of the Regions at EU level. Of course, it was an idea in the Labour Party manifesto in 2015—but just because it was in the Labour Party manifesto does not necessarily mean to say that it was wrong—that the representation at the centre for the nations and regions of the United Kingdom is one of the things that we have got wrong. I agree with that statement; it is one of the things that we have got wrong.

In the Supreme Court, for example, there are 12 justices. One quarter of those justices must come from jurisdictions other than England and Wales, and even then the Welsh think that they are underrepresented in the Supreme Court. Apply that sort of number to the House of Commons or perhaps even more so to the House of Lords, or to the institutions of government rather than the institutions of parliament, and you might begin to see how an effective representation at the centre of Scotland, Wales, Northern Ireland and the north of England might look.

Q5 Baroness Taylor of Bolton: It is very interesting, because this is partly highlighting the difficulties of federalism where you have one participant so much larger than all the others. That is part of the problem that you are talking about. Can I just follow up a little on subsidiarity and your report? One of your recommendations is that there should be more fiscal devolution to follow with subsidiarity. I wonder to what extent you think that is realistic and to what extent you think you can have that in the present situation. We have a debate in the Commons today about fiscal responsibility. Central government will want to maintain some very tight overall control. How do you get a deal struck that is sustainable and makes a real difference, at that local level?

Just so as not to waste time, can I go to my second question, which is about the values that Lord Cullen was talking about in the context of the English question? When Professor Tomkins was talking about his list at the beginning and the need for a new list, surely the north of England, Cornwall or wherever needs its list as well. You have to be able to

establish shared values there. Is not one of the problems that we have politically the fact that so many people feel alienated from current establishments that it is quite difficult to establish shared values or at least to articulate shared values?

Professor Tomkins: One of the reasons why people feel alienated, of course, is because there is neither sufficient local autonomy nor sufficient representation of localities at the centre.

Baroness Taylor of Bolton: Chicken and egg then.

Professor Tomkins: Perhaps so. On federalism, I am not in favour of a view that says that the United Kingdom can straightforwardly or needs straightforwardly to become a federal state. There is a lot in federalism that the United Kingdom can borrow from and learn from, but you are right that a country such as the United Kingdom, in which 85% of population and GDP is in one of the four components, cannot become a fully federal state, because that one part is too big. Why is that one part too big? If you had an English First Minister with the powers of the Scottish First Minister, that English First Minister would have a bigger budget than and would be more powerful and important than the United Kingdom Prime Minister. That is a recipe for collapsing the union rather than strengthening the union. Maybe that is your agenda. If your agenda is to collapse the union, then having an English First Minister with the powers of the Scottish First Minister would be a very good way of going about it, it seems to me. If your agenda is to try to strengthen the union, rather than to collapse it, moving in that direction is very dangerous, I would have thought. There is no desire in England for England to be broken up into regions. One of the absolute principles of devolution, which is common across all four nations of the United Kingdom, is that devolution is on demand. It is not imposed on parts of the United Kingdom that do not want it. England does not want to be divided up into regions, so Whitehall should not force England to be broken up into regions in order to deal with this problem of 85% of the UK being in England.

None of that is to say that there is nothing that can usefully be learnt from federal experience in terms of improving the governance arrangements of the United Kingdom, particularly when it comes to things like intergovernmental relations and fiscal federalism or the fiscal framework. One of the huge problems, it seems to me, with the way in which we do block grant transfers of money from the centre to the nations in the UK is that it all happens in a big black box that nobody from the outside understands. There is a complete lack of transparency about the fiscal framework, and that is an issue that needs urgently to be addressed.

Q6 Lord Lester of Herne Hill: We do not have time to go into your views about federalism in any detail, but I wonder whether I could just put this to you. If you want Scotland to remain part of the union, one intelligent way of thinking about it is in terms of home rule of a

kind that would keep Scotland within the union and not lead to independence. I do not know what you mean by drawing on some kind of federal principle. If you oppose that, it seems to me to be more likely that you will encourage independence in Scotland.

Professor Tomkins: My view is that that is exactly what the Scotland Bill will deliver. The Scotland Bill currently in the Commons but shortly coming to the House of Lords delivers exactly the home rule that the Smith commission agreed, and this is home rule that is consistent with maintaining a union that pools and shares risks and resources. You cannot move from where we are to what the Scottish nationalists now call full fiscal autonomy, which might be what you mean by home rule or devo-max, as they used to call it, without disrespecting the result of last year's referendum. The result of last year's referendum was that a majority of Scots voted to maintain a union that pools and shares risks and resources. The whole point about full fiscal autonomy is that there is no longer any pooling or sharing of economic or social risks and resources across these nations, so you would have to have a referendum on it, it seems to me, because it would be disrespecting the result of last year's referendum to impose it without going back to the people. It is also of course the case that there is no comparable country anywhere in the world that is run on anything like these terms, and it seems to me that it is not a version of devolution but a version of independence. Again, that is not what we voted for last year.

Professor Sir Jeffrey Jowell QC: Just very briefly, one of the recommendations of our report, the main thrust, was that we have been doing this helter-skelter, ad hoc, without considering some of the criteria for subsidiarity or anything else. Attention has to be turned to that. We have rested devolution largely on popular will, but insufficiently on criteria such as workability. Is this a matter on which we ought to have divergence? Are there common values that ought to be applied? Do we need economies of scale? There ought to be a number of different criteria by which we measure and evaluate, for example, devolution to further regions in England. They are nowhere available. One just does not see them. We looked for them; we could not find them. There is popular will, deals between here and there, a new statute in the light of a recent election. This is what needs to be dealt with.

We have great experience of this in this country. Look at our planning, for example. Terribly important questions about planning are done at a totally local level, but there are certain safeguards. If you are given permission, there is nothing much you can do about it. If you are refused permission, there are appeals, there is an inspectorate, there is centralisation. We have probably as much experience as any country in the world, at the local authority level, with balancing local powers and central powers. We normally enter into that exercise with a

great degree of circumspection and analysis. We do not do that at all in the area of devolution to nations.

The Chairman: Thank you very much. We have spent quite a lot of time on the first three questions, because these are central and very important issues, and your answers have been extremely informative and helpful. However, there are a lot of other specific points we want to raise with you, so we must try to make a bit of progress. Lord Morgan, would you like to ask your question?

Q7 Lord Morgan: Thank you, Mr Chairman. With regard to having something like a charter of union or some similar document or statute setting out the principles and structure of the United Kingdom, would parliamentary passage, so to speak, be sufficient? Alternatives might be also to have approval from the Assembly or Parliaments in Wales, Scotland or Northern Ireland, or possibly a referendum. Some people have suggested some kind of constitutional convention. Would you feel that something wider than merely parliamentary passage would be sufficient?

Professor Tomkins: I am nodding, which is not really useful for the record, is it? Yes, I do very strongly feel that. I do not think that a mere Act of Parliament will be enough, and we can see that in the context of the current political skirmishes around the future of the Human Rights Act. One of the reports that this Committee produced when I was your legal adviser was a report on the process of constitutional change, and that report set out the very great importance of trying to proceed with consensus, rather than in a party-political way.

One of the unfortunate aspects of where we find ourselves in British territorial governance is that there is very little cross-party agreement at the moment. There is no agreement between government and opposition about English votes. There is very little agreement—too little agreement—between the Scottish Government and the UK Government about the Scotland Bill. I suspect that there might be some disagreements not too far into the future between the Welsh Government and the UK Government about the next steps in the St David's Day process. The only bit of the puzzle where we do have some cross-party agreement is on city regional devolution in England, at the moment, but it would be not only futile but dangerous in my view, if you are trying to secure and strengthen the union, to proceed without cross-party consensus and without bringing the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly into the process.

Professor Sir Jeffrey Jowell QC: I would agree.

Lord Norton of Louth: To follow up on that, if these principles were embodied in, as you say, a charter, treaty or Act—and you have mentioned that that could be independent of

moving towards any form of codified constitution—absent a codified constitution, how could one protect that measure, given the potential changes in government or the political situation in any part of the United Kingdom? If they are embodied by giving consent elsewhere, would you have to make them subject to some sort of an agreement? Could one protect that charter?

Professor Tomkins: It is possible, is it not, to deliver successful constitutional change in the United Kingdom, even in circumstances where you do not have immediate cross-party support, that turns out to be, one, pretty smooth, two, pretty stable and, three, pretty successful? I would have thought that devolution is an example of that. Of course, it was resisted to start with by the Conservative Party, but the Conservative Party is now more enthusiastic devolutionists than the Labour Party, certainly north of the border. It has all the ingredients that you need in order to try to engender a degree of stability. It had popular support to start with in the referendums. It had enactment by primary legislation and it has been supported, enhanced and helped, in my view, by the jurisprudence of the United Kingdom Supreme Court on devolution, which we spend quite a lot of time analysing and summarising at the back of the Bingham Centre's report. If and insofar as the Bingham Centre's report makes any really useful contribution, amongst its most useful contributions might be to try to synthesise what the lessons are from a pretty chaotic and messy series of about eight or nine Supreme Court cases. You have all three ingredients. It is very interesting how the Conservative Party calls the Human Rights Act "Labour's Human Rights Act", but it does not call the Scotland Act "Labour's Scotland Act".

Lord Norton of Louth: As a follow-up to that, there is still the implication of still seeking to protect those values that may be shared. The question that flows from it is: what are the consequences to the doctrine of parliamentary sovereignty? In your evidence, Professor Tomkins, you follow Dicey in distinguishing between political sovereignty and parliamentary sovereignty. If significant constitutional change is to be endorsed by referendum, if there is going to be further change, is that then going to be subject to the people having to give their agreement, or would it still be possible for Parliament to pass it?

Professor Tomkins: I think, Lord Norton, the answer is probably yes. With each passing year, I am less and less of a Diceyan. I hope that is a tolerable thing to say in this Committee, but I am increasingly coming to the view that real constitutional authority rests in the combination of parliamentary sovereignty and popular sovereignty.

Think about this from a Scottish perspective. Think about the Claim of Right—the extraordinary claim to constituent power that is in the opening words of the 1989 Claim of Right. It has never really been challenged by any Act of the United Kingdom Parliament. As

I say in my written evidence, that mere demand, that mere assertion, is not enough to grant home rule, as it was then called, with legal authority. You need an Act of Parliament as well. It is that coming together of what you might very loosely call popular sovereignty through a referendum and parliamentary sovereignty through an Act of Parliament that really vests a change in full constitutional authority. If you wanted to do this for the longer term—if you wanted to ensure, if you wanted to insulate, these constitutional principles of the union constitution in a way that managed to withstand changes in political tides et cetera—you would need to have that combination of constitutional authority that comes from both parliament and popular ratification.

Lord Norton of Louth: You are suggesting that we are more or less there and that what is needed is this charter, this drawing together of the principles, rather than a significant change in our fundamental constitutional arrangements.

Professor Tomkins: We have arrived at the position in the United Kingdom where we are able to harness popular sovereignty through referendums alongside legislative supremacy in parliament. We see the same in the EU referendum. Referendums require Acts of Parliament in order to have legitimate status. There is no standing referendums Act that just means that a Minister can call a referendum when he or she wants. Each referendum has its own bespoke statutory authority that is an Act of Parliament. If “Are we already there?” is the question, then my answer is yes.

Professor Sir Jeffrey Jowell QC: I would just like to say that Professor Tomkins was a student of mine, which was a great challenge to me at the time. The greatest challenge was to move him away from the pure Dicey position. I am so pleased that, in this room today, we have finally succeeded in this.

Yes, ideally we should have a written constitution. If you want permanent devolution, as the Smith report suggests, you have to have that. Of course, it is never totally permanent, because every constitution provides for amendment, with support from the regions and nations perhaps as well. Even a constitution is not totally written in stone. Short of a written constitution, a constitutional convention towards a written constitution is a wonderful idea, for reasons I have already given, but in the meantime there is no reason not to act now, because it seems to me urgent to act now. Such a charter, which would try to elicit the support of the devolved nations (and would have to do so if it is to have any real legitimacy and effect), is required. Of course, the great virtue of it again is that the provisions for amendment and change would be written into the charter itself, and we would know what the ground rules are.

Q8 Lord Lester of Herne Hill: In your written evidence, Professor Tomkins, you wrote that, “The asymmetry of the UK’s devolution arrangements is inevitable. It would be counter-productive to seek to iron out the differences and impose a single uniform model on all parts of the UK”. Just two questions, if I may. First of all, I take it that you are not saying that we should not try to have core values that apply throughout the United Kingdom. You are not talking about ironing out those kinds of differences. Is that right?

Professor Tomkins: Correct, yes.

Lord Lester of Herne Hill: I thought it would be. The second thing is: who is to decide, judges, Parliament or through popular sovereignty, the allocation of powers between the centre and states, as it were? As you know as well as I do, in written constitutional federal systems, the courts ultimately draw the boundaries and decide to what extent a policing function should be federal or state, but we have tended to use Parliament on an ad hoc basis to make those distinctions. Is it your view, either of you, that those are questions best left to Parliament on an ad hoc basis, because whatever the constitutional charter they will still have to be decided, or do you think it is better as a judicial function?

Professor Tomkins: I think it is both. It is the function of the United Kingdom Parliament to legislate for the allocation of powers between the UK level and all sub-state levels in the United Kingdom, whether you are talking about local government, city region devolution or national devolution in Scotland, Wales and Northern Ireland, and the United Kingdom Parliament does that, at least with regards to devolution, by consent, with the relevant part of the United Kingdom, rather than by imposing it coercively. Local government in England is still treated differently.

It is then for the courts to adjudicate on disputes arising between private parties and Governments or between Governments and each other about whether a particularly ministerial action or parliamentary enactment is or is not within the competence. The United Kingdom Supreme Court does that as well or as badly as other constitutional courts do around the world. What we did in the appendix to the Bingham Centre report was to try to analyse the UK Supreme Court’s contribution to that task, and some of the judgments are more congenial than others. What we tried to do was to draw out the common principles in those judgments and to suggest, rather gently, to the Supreme Court and to others reading the report that some approaches are perhaps preferable to others. This is an issue that has divided the Supreme Court in the United Kingdom on a number of occasions now. Not all the judgments have been unanimous or anything like that. That is not uncommon; federal questions divide the US Supreme Court and indeed the Canadian Supreme Court quite frequently, and it is not a

problem that the courts are divided, but it is something that the court will obviously want to take into account. My answer is that it is for Parliament to legislate with consent what the appropriate boundaries are, and for the courts to adjudicate on disputes arising thereunder.

Q9 Baroness Dean of Thornton-le-Fylde: Good morning. With devolution, it seems to me there are so many bids within the nations for different levels of economic policy. You have the SNP saying full fiscal devolution outside of defence and possibly monetary policy and foreign policy. You have Professor Gallagher saying that at least 50% of the resources needed for the devolved bodies should come from national taxation. I do not know how he has arrived at 50%. It just seems to me that figures are often almost just plucked out of the air and do not necessarily help the principles of the debate.

In Scotland, you have the NHS fully devolved and yet the permission or the provision within the devolution document of being able to raise taxation to meet whatever—perhaps you want 3% in Scotland—has never been acted upon, and yet it was a big issue in the referendum vote last year. At what point do you get to what I would call the tipping point of fundamentally moving away from the union and the basic economic and welfare provisions of the nation as a union, but with the devolved powers within it, to having complete separation or not?

Professor Tomkins: That is the \$6 million question, is it not? In a sense, it is the same as the question that Lord Lester asked. This is the act of British statesmanship, is it not? How much home rule do we need to accommodate within the looser fabric of the new union state in order to keep Scotland within the United Kingdom? Now, there are some places that you can look for help with that question, and one place that you can look for help with that question is the range of successful, prosperous federal countries in the western world, in Europe and in the Commonwealth.

People like Jim Gallagher get to the 50% figure by looking at what happens in places like Germany, Australia, the US, Canada, Switzerland and the rest. There is no federal country anywhere in the world where the sub-state legislature raises all the money that it spends. It is very difficult to get above 60% without destabilising the centre. In the UK, it is difficult to get even as high as 60%, because one of the taxes that makes sense to devolve you cannot devolve consistently with EU law, for as long as the UK continues to be a member state of the European Union, which is VAT. It would make sense, in addition to income tax, to devolve VAT, but you cannot devolve VAT, because EU law requires each member state to have only one rate of VAT, so what we decided to do instead of devolving it was to assign a share of it, which is the next best thing. It is not the same as devolution, but it is the next best thing. To have a parliament, such as the Scottish Parliament, which is responsible for spending like

£35 billion without being responsible for raising very much of that money is unsustainable. One of the tasks of all the parties that campaigned for a no vote in the Scottish referendum was to think about how you could enhance devolution to close that fiscal gap—to close the gap between what the Parliament is responsible for spending and what it is responsible for raising. All three parties—the Liberal Democrats, the Labour Party and the Conservative Party—focused on that question in their various proposals for further devolution, which came to a head, of course, in the Smith commission. That is where we have landed. These figures are not quite plucked out of the air, as you put it. They are thought about with reference to successful comparative experience.

Beyond that, this is art, not a science, and this is a question of judgment and of statesmanship. What is the appropriate balance of power? Given the craving for a substantial degree of home rule that there is in Scotland, what is the appropriate balance of power between the Scottish Parliament and the United Kingdom Parliament that is fair and just, not only to the 2 million Scots who voted no but to the 1.6 million who voted yes, but also not so much devolution that it amounts to independence by the back door? I think that Smith landed in a pretty good place. I think that the Scotland Bill delivers Smith in full and on time, and I hope it has an easy passage through this House, in due course. Others take different views. Others think that Smith went far too far and will destabilise the union, and of course some think that Smith did not go far enough. As I say, this is a question of judgment, and my judgment is that Smith gets it about right.

Professor Sir Jeffrey Jowell QC: I would just add to that that it is the \$6 million question, but there are some answers in a number of different countries. Germany, Australia, Canada, the United States and others would be able to provide some of the replies or answers to your question. I have no idea whether your inquiry will seek comparative evidence from other countries that have embarked on this route and deal with these issues every day.

The Chairman: I feel sure we will. I wish we could go on for very much longer this morning with these two distinguished witnesses, but you have been extraordinarily helpful to us. There are three further questions I would have liked us to be able to ask, but sadly we are not going to have time. One relates to the position of England within any new development, and English votes for English laws, and other related matters. Secondly, there was the House of Lords and whether it should have a territorial role or some other role in a reform arrangement, and thirdly to give you an opportunity to give a wind-up comment on anything you think we have not asked you about but you wish we had. I hope it is not too much of an imposition if I asked you to think about putting pen to paper to us on those three issues, which would be

enormously helpful and would embellish what you have already touched on in your extremely good answers. Thank you very much indeed for coming.

Examination of Witness

Professor Robert Hazell, Professor of Government and the Constitution, School of Public Policy, University College London

Q10 The Chairman: Can I move on and welcome Professor Robert Hazell, a figure very well known in constitutional circles and a man who has had a very varied and rich career as a barrister, senior civil servant in the Home Office, director of the Nuffield Foundation and founder of the Constitution Unit, from which he has only recently stepped down? As you would have heard, Professor Hazell, we ran out of time with the previous two very informative witnesses, and that is because this is our first evidence-taking session and we are plunging into big, broad issues. We shall probably run out of time with you as well, but we are most grateful to you for coming.

I would like to ask the first question, which is of a rather broad nature: what do you see as the purpose of a union and does that purpose vary in the different parts of the United Kingdom?

Professor Hazell: Chairman, forgive me, I did not hear all of the previous session so, if I start to repeat things that your two very distinguished witnesses before me have said, please press the fast-forward button. The purpose of the union, classically, is divided into three categories. There is a political union, a social union and an economic union. The economic union provides the UK with a single market, with a single currency and a strong central fiscal regime. The social union provides the social solidarity that binds the union together, by redistributing revenue and pooling and sharing risk through welfare benefits and through the pension system. In the political union, every part of the UK is represented here in the Westminster Parliament, and the UK Parliament manages the economic and the social unions. As the sovereign parliament, it can itself reshape the political union, as it has done quite dramatically through the devolution settlements that we are discussing today.

The Chairman: Thank you. That is a brilliantly concise and extremely good analytical answer, if I may say. If I were to ask you to embellish it and say if there is not another layer, where the purpose of the union is to maintain a certain set of values that brings people together from the different components of the United Kingdom, would you feel able to define some of those? The monarchy and the BBC immediately spring to mind, and the Olympics every four years, but where does this begin, where does it end and how important is it?

Professor Hazell: To adopt another tripartite classification, the union is bound together through shared common values, but also through shared interests and through some common institutions, which give expression to those interests and those values. You just mentioned some very important institutions, bodies like the BBC. We could add the Armed Forces. The monarchy is very important, a common institution across the UK.

The interests that bind us together in part I mentioned in my first answer, but primarily they are interests of defence, of national security, but also the common interest that we all have as citizens of the same state in paying our taxes as a form of mutual insurance when any of us becomes old, sick or disabled, and needs to draw on the benefit system, which is the common insurance policy. Those are interests that bind us together.

The values are the hardest one, because those are not laid down formally anywhere. Different citizens might give you a different readout of the main values, and they are not uniquely British values. They are values of which any self-respecting democracy would say, “Those are our values too”. They are democratic values, values of fairness, of equality, of respect for humanity, fundamental human rights and all those things.

The Chairman: Thank you very much. Perhaps we should go on to the principles involved. Can I bring in Lord Hunt?

Q11 Lord Hunt of Wirral: What principles should underline the governance of the UK in future, as well as any further devolution or decentralisation of power?

Professor Hazell: Forgive me, these are all quite high-level principles. Staying with my three-part classification, talking first about the political union, the political union needs to observe principles of democracy and so of democratic accountability and of transparency, in terms of the division of powers between the UK and the devolved or lower levels of government, to observe the principle of subsidiarity and, in terms of dealings between governments at different levels, principles of mutual respect and comity.

For the economic union, there need to be principles of economic efficiency. There needs to be a level playing field, in terms of taxation regimes, and any fiscal framework needs to be sustainable, in the sense that, as we move to many more taxes being devolved, I hope we will move to a system that is regarded as durable.

Lastly in terms of the social union, there need to be principles of fairness and of equal rights between citizens, equal access to the benefit system, and therefore a system of fiscal redistribution in order to be able to ensure that equalisation.

Lord Lester of Herne Hill: I listened with admiration to what you said about British values, shared values and so on, and how you were explaining that what we call British values are in

fact shared by any civilised society. If that is right, then presumably one of our so-called British values is tolerance of views that we hate, but which ought to be expressed as part of free speech.

Professor Hazell: Indeed.

Lord Lester of Herne Hill: I find that concept fundamental, but there are those in power who want to tackle that as being unacceptable extremism—the notion that there are certain kinds of views that are inimical to British values. Does that tension help to highlight the dilemma of those who would say that there are uniquely British values that need to be respected on that basis?

Professor Hazell: I hesitate to say very much, because you are a far, far greater expert on human rights and, in particular, freedom of expression than I am, but you will know, as a very distinguished human rights lawyer, that in any society there is a tension between the right to freedom of expression and national security. It is open to any Government to try to draw the line in a slightly different place, but its decisions, as you again will know very well, are subject to review by the courts.

Q12 Lord Morgan: Just one question, Robert, if I may: you have expressed broad principles that should entrench devolution settlements everywhere, and I would agree absolutely with everything, but they have been modulated by, as you so well know, an asymmetry in the way that devolution has been operated. I wonder if there is a problem here. It seems to me that, quite often, asymmetry has become inequality or unfairness. I am thinking specifically, as you might guess, of the standing of the Welsh Assembly, which has only just acquired reserve powers, for example, with the Scottish Parliament. Is asymmetry a problem in that sense?

Professor Hazell: Yes, asymmetry is a problem. It is a problem for two reasons. One is it is more difficult for citizens in different parts of the UK to understand their rights as citizens and their responsibilities if there is a different set of powers in different parts of the UK. Secondly, in an asymmetrical system, there is the risk of a game of leapfrog between the devolved countries, so that, if Scotland is offered something more, then Wales puts its hand up and says, “We want that too”, and Northern Ireland, and perhaps in time English cities or regions. Asymmetry possibly creates a dynamic that makes it harder to reach a stable and enduring settlement.

Coming to Wales, as you will all know, there is consensus across the parties to introduce a reserved powers model for Wales, and we have been told by the Government that they plan to publish a draft Wales Bill, possibly next week. I hope this Committee, if it has the time, alongside this very important inquiry, might possibly do a scrutiny hearing or hearings into

the draft Wales Bill, because the schedule of reserved powers in that Bill will be a core part of the new devolution settlement in Wales. It would help reduce the asymmetry, if, as I expect, all three of the devolved nations in future have a reserved powers model, if they could have a core of reserve powers that are held in common. That is not moving all the way to a written constitution, which you began to discuss with your previous witnesses, but it would be moving towards greater harmonisation of the devolution settlements if, once they are all built on a reserved powers model, the schedule of reserved powers was harmonised across the three devolved countries.

Baroness Taylor of Bolton: I just wanted to follow up on part of that, because we have asymmetry, especially between Scotland and Wales, because devolution has been demand led. When we were talking to Professor Tomkins, he was very keen to make that clear as a driving force. If we move to more of what you are talking about, there is a danger that you get to an imposition from the centre of what devolution should be. I am thinking particularly in the context of England, city powers and so on. Do you think that devolution or decentralisation should be demand led?

Professor Hazell: Generally I do and my previous remarks were mainly directed towards devolution in Scotland, Wales and Northern Ireland. If the Committee wants to hear evidence about the extent of demand, you need to hear from experts on public opinion. There has been a huge amount of academic research over decades on that, not from people like me but people like Professor Curtice and others connected to the Centre on Constitutional Change in Scotland.

Coming to England, I do not think that devolution should be imposed on parts of England that do not want it, but the risk of continuing with devolution on demand is that we may end up, in England, with a very fragmented and patchwork set of powers and responsibilities in different parts of England. I do not myself think that that, in the longer term, is sustainable.

Lord Lester of Herne Hill: In response to the question that Baroness Taylor asked you, is it not possible to establish a coherent framework for the UK as a whole, while at the same time having a demand-led opt-in within that framework, in the sense that different parts of the United Kingdom could opt in, rather like I believe happened in Spain, at a certain stage. When you have rolling devolution on that basis, you establish your framework. The framework is there to stay, hopefully, and within it the consensus would apply and you can have what you could call the demand principle or the consent principle.

Professor Hazell: That is certainly possible as an overall framework and it is how they started out in Spain, in the late 1970s. If you do have a comparative dimension to your inquiry and

you have witnesses from Spain or experts about Spain, they would not necessarily tell you a very strong story about where they are now. In particular, there have been very big problems with the amount of fiscal devolution, and Spanish regions getting into serious deficits contributing to a banking crisis et cetera. We tend, in our British ignorance, to think that other countries must have done it better, but many of these devolved and federal countries are grappling with very similar sets of problems and finding some of them as difficult as we do.

Q13 Baroness Dean of Thornton-le-Fylde: Good morning. Your second point on the purpose of the union was social welfare, and you were in when I asked the earlier question, so I will not repeat that part of the question about proportions. Picking up on the point about asymmetry and the latter point you have just been making, in devolving areas of social welfare, and I use it in its widest context, is your view that what should be provided is perhaps a basic minimum beyond which no citizen can fall, going back to your point about equality? If in fact there was a top-up to that, would that have to be both agreed and funded within the devolved nations? That is one part of my question.

Perhaps I can ask a more political question: the SNP is talking about full fiscal powers of autonomy, which from my interpretation flies in the face of some of the unifying principles that we have. To have full fiscal devolution without defence and foreign policy, is that devolution or home rule, or is it in fact full independence?

Professor Hazell: To take the first part of your question—whether there should be a common floor in terms of access to universal benefits, but different parts of the UK, if they are willing to fund them, should be entitled to top up certain benefits—that in effect is the model being proposed in the Scotland Bill. From memory, as many as almost a dozen personalised benefits, in future, if the Scotland Bill is passed, would be devolved to Scotland, and it would be open in future to the Scottish Government, if they are willing to raise the necessary revenue—

Baroness Dean of Thornton-le-Fylde: Forgive me for interrupting, but that is about Scotland and the debate is really about the union. It is not about our other nations within the union. What we seem to be faced with is Scotland determining what is going to happen in the other nations too, without the other nations necessarily being centre of the debate, and I include in that England.

Professor Hazell: Just staying with the three devolved governments for the moment, I support strongly the principle for fiscal responsibility for all of them. I think the Government in Wales and the Government in Northern Ireland should also be responsible for raising a significant proportion of their own revenue. That leads me to the second part of your

question, full fiscal autonomy, which the SNP says it aspires to. First, it is completely unrealistic, as Professor Tomkins said. There is no country in the world, no federal system, where one of the states or provinces has complete fiscal autonomy. Secondly, it is undesirable and impossible so long as we remain a union. Full fiscal autonomy is a complete opt-out from the social union, and the social union is a bargain about pooling and sharing risk. It is a bargain whereby the richer parts economically of the UK redistribute very significant resources to the poorer parts and, over time, we do not know in future which the richer parts or the poorer parts will be. It is in the nature of insurance and it would be completely wrong of Scotland to claim that they want to remain in the union but they want to opt out totally from the social union.

Q14 Lord Maclellan of Rogart: The Bingham Centre has proposed that we should have a charter for the union, setting out the principles and structure of the union. If that is to be other than a parliamentary exercise, and I think it would need to be in order to reflect the wishes of the country, how do you suggest we might invoke the public view? One of the possibilities might be through a convention on the future structure of the union, expressing principles that people would agree to. In the early post-war period, a million people signed up to the Covenant in Scotland, and somehow we need to get across the ideas that are worthwhile for securing the union to the public. Have you any thoughts about that?

Professor Hazell: Just briefly on the charter, I have said to the people involved in writing the Bingham Centre report—it is an excellent report, which, as you know, proposes the charter—that since they are primarily a team of lawyers, their next step should be to draft the charter, so that we know what it looks like. That would make this kind of discussion much easier, and it will be quite challenging to draft because, if it is at too high a level of generality, then it becomes rather meaningless but, if it is too detailed and specific, then it runs the risk of possibly being inflexible. Perhaps this Committee could add their invitation to the Bingham team to draft the charter that they advocate.

In terms of the idea of a constitutional convention, which was much mooted, in particular in the run-up to the election by several political parties, it sounds a good idea in principle. There are quite a lot of potential difficulties. One is that ideally the convention should be cross-party and, if one or more parties were to boycott it, would that reduce its credibility? You will remember that was an issue with the Scottish Constitutional Convention.

The second is that I think people overestimate the prospects of success. If the model of the convention is to be a citizens' assembly of randomly selected citizens then, looking at international experience, it is not very encouraging. There have not been many of these

citizens' assemblies, but in British Columbia, Ontario, the Netherlands and Iceland they all ended in failure, in that the political project that the citizens' assembly was asked to formulate was not subsequently adopted. Most recently, there has been an Irish constitutional convention with a slightly different model of two-thirds citizens and one-third politicians, and that does seem to offer slightly better prospects of success but, so far, I think it is right that, of its 38 proposals, the Irish Government have decided to adopt only four.

The other worry I have about people proposing a constitutional convention as some kind of panacea is the risk of the agenda being overloaded. There are a lot of constitutional reforms that a convention could be asked to consider and many of them are interconnected, so there is a kind of logical case for asking them to think about reform of the second Chamber alongside devolution and our relationships with Europe, et cetera. My worry is that it would then collapse under the weight of much too wide an agenda.

Lord MacLennan of Rogart: How would you suggest we get the expression of views from the general public about what ought to be in the charter?

Professor Hazell: Watch this space, because there are next month starting to be two pilots with citizens' assemblies, conducted by academic colleagues of mine, in particular Dr Alan Renwick from the Constitution Unit at UCL, working with Professor Matt Flinders in Sheffield and Professor Gerry Stoker in Southampton. The pilots are in Sheffield and in Southampton. They are testing two models—one an assembly that is 100% randomly selected citizens, and the second in Southampton will be two-thirds citizens and one-third politicians, from all levels of government, so following the Irish model. Forgive me, but I cannot remember precisely what task they have set for these pilots but, if the pilots are deemed successful, there will be a lot of academic interest in pursuing further citizens' assemblies and giving them further tasks, and so this could certainly be something offered to them.

Q15 Lord Cullen of Whitekirk: You suggested that a charter, if it formed the basis of a statute, should be put to the parliaments of the other nations within the union. Do you see a prospect of that commanding support from the Scottish Parliament?

Professor Hazell: As currently composed, perhaps not.

Lord Cullen of Whitekirk: If that is so, might there be something to be said for taking a different approach, possibly appealing directly to electors, by way of some form of referendum or some kind of exposure of the charter to see what kind of support there was across the board?

Professor Hazell: What you said about seeking the consent of the devolved Parliament and assemblies reminds us that no change to any of the devolution settlements can be made without their giving legislative consent through the convention known as the Sewel Convention and, in effect, seeking their consent to the charter would be another version of that.

Lord Cullen of Whitekirk: Is that quite right, because what we are talking about is a charter that is meant to entrench what already exists or should exist, rather than change the status quo? The trouble is there are problems with the status quo, because it is being invaded by the effects of devolution.

Professor Hazell: Forgive me, but I do not think we need to venture very far down this road because, as I indicated earlier, first we need to have a charter—and I hope the Bingham Centre will draft a charter—and then we will have a better sense of what it is that we are talking about.

Q16 Lord Lester of Herne Hill: There are examples where constitutional conventions have worked quite well and surprisingly so. One was the Scottish convention that eventually led to the Scotland Act and indeed the judicial review as part of that. The other example is Northern Ireland where Lord Lowry presided over a deeply divided community, but the constitutional convention was able to achieve a remarkable degree of agreement across the two tribes in Northern Ireland. Are you saying that, if we had a draft charter and therefore a fairly focused discussion, it would make some sense to have a constitutional convention but no sense if the constitutional convention was simply a talking shop without a precise agenda to discuss?

Professor Hazell: There is a lot of interest in the idea of a citizens' assembly, especially in the academic community but also among the political parties, as a possible forum in moving some of these matters forward. As we said in our report about devolution and the future of the union, which we published in April of this year, it is by no means the only model, and you remind us that there are plenty of alternative models for considering proposals for constitutional reform, fleshing them out and testing them.

There can be expert commissions, like for example the Royal Commission chaired by Lord Wakeham on reforming the House of Lords, 15 years ago. There can be cross-party talks, and we have seen plenty of examples of those. Again staying with the issue of House of Lords reform, there were cross-party talks chaired by Jack Straw under the Brown Government, and then by Nick Clegg under the coalition Government. That is another possible forum in which to try to seek some kind of cross-party consensus. There are several different models for

trying to progress and test support for specific constitutional reforms. The citizens' assembly is in fashion, if I can put it that way, particularly among my academic colleagues, but it is not the only model, by any means.

The Chairman: We are running short of time, but I would very much like to bring in Lord MacGregor on the situation in England in any settlement, because we had to forgo it in the last session.

Q17 Lord MacGregor of Pulham Market: Coming on to England alone, is a settlement that does not include legislative devolution to and/or within England sustainable in the long term? If I can first of all take it at the parliamentary level, I know that you have had views about this in the past, but there is clearly going to be an increasing demand, also because of the prevalence of Scottish MPs since the election, for a solution to this problem. I wanted to ask you on that if a parliamentary mechanism, such as English votes for English laws, or an English grand committee solution, which are the two that have been suggested, answer the English Question? Secondly, within England, does decentralisation under the Cities and Local Government Devolution Bill and City Deals provide a long-term solution to the other issue?

Professor Hazell: Can I take your question in two parts, starting with English votes for English laws? On that, I have expressed great scepticism in the past, in particular in a book that we published now 10 years ago called *The English Question*. I have since modified my view, and I would like to see and hope to see, in this new Parliament, some experimentation with English votes for English laws, as the Government intend to do. I do not know and, in all honesty, nobody can say with confidence whether English votes for English laws can be made to work in terms of the technical procedures in the House of Commons, which as you will know are potentially quite complex on the Government's proposals, but also, more importantly, in terms of their political impact. By political impact, I do not just mean in terms of Parliament and the vexed question of whether we then introduce two classes of MPs—those kinds of questions—but more fundamentally whether it works for the public.

Why has English votes for English laws been proposed? There is a sense amongst politicians that, with devolution to Scotland, Wales and Northern Ireland, England feels left out and the people of England need a louder political voice, and so Evel is being offered as giving English representatives that louder political voice. If, as I hope, we have experiments with English votes on English laws, one piece of research I am longing to do, or I hope that some of my colleagues who do polling will do, is to see what impact that has on the people of England. I personally would be quite surprised if the people of England notice that a particular Bill has

been passed by Parliament under the new Evel process. Ordinary people know very little about the legislative process.

Lord MacGregor of Pulham Market: Is there not some evidence that English votes for English laws is now becoming a preferred solution, not just among parliamentarians and politicians, because there has been much more written in the media around this? When one has a particular piece of legislation that looks as though it is English-only, and may not carry the House of Commons because of the presence of a lot of Scottish MPs, do you not think that is likely to create a lot of feeling among a lot of people that Evel is the answer for that particular type of legislation?

Professor Hazell: You are right that, in terms of the polling evidence, there has long been quite strong support for English votes for English laws, and it is right also to add that the Conservative Party has not just recently pulled this proposal out of the hat. It has been in every Conservative manifesto for the last four elections since 2001, and that is another reason why I would now like to see it tried. There is strong public support for the idea, so I hope there will be experiments, and let us see how it works. In terms of whether the public notice, critically it will depend on whether the media notice and choose to report it. Again, we know that the ordinary public do not read *Hansard* but, if it is widely reported in the press that this has been used, and possibly against Scottish opposition, that is the kind of thing that will come to public notice.

Lord MacGregor of Pulham Market: I agree with that and think the media is very likely to focus on it, in fact, because it is going to be quite a big issue. What about within England itself, the second part of the question—whether the Cities and Local Government Devolution Bill and City Deals will provide a solution?

Professor Hazell: As I said to Lady Dean, my worry there is that it risks being a very fragmented and patchwork solution. If it consists, as appears likely at the moment, simply to be a set of bilateral deals, in effect between the Chancellor of the Exchequer, who is driving this policy, and different cities or city regions in parts of England, that to me is not from the sound of it a very sustainable long-term framework. It may last only as long as this Chancellor. The part I am keenest to see further detail on is the financial side and, at the moment, the funding deals appear to depend upon a competitive bidding process. It was announced by the Government last month that there had been 38 bids for this next round and, connected with the Autumn Statement, I expect the Chancellor probably to announce further winners of these new deals under the umbrella heading of the northern powerhouse but, in the longer term, that does not seem to me a very sustainable basis.

The Chairman: I am afraid we must draw to a close at this stage. Professor Hazell, thank you very much indeed for giving us extremely helpful, concise and informative answers. I wish we could have gone on, but we have other business we have to deal with. May I say that we would very much appreciate it if you are willing to drop us a note about the answers to the last two questions, which I think you knew we were hoping to ask and did not get round to? One was concerning the possible territorial role of the House of Lords, and the other was to do whether there were any other non-constitutional solutions that would help establish a more stable settlement. We would very much appreciate some written work from you on that.

Professor Hazell: I will gladly do so.

The Chairman: In the meantime, thank you very much indeed for coming to us today. It has been extremely helpful.

Professor Hazell: Can I wish you good luck with your inquiry? I do think it is very important.

The Chairman: We need a lot of that. Thank you.