



HOUSE OF LORDS

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Inquiry on

THE UNION AND DEVOLUTION

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Questions 44 - 56

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10.30 am

Witnesses: Professor Charlie Jeffery, Professor Jim Gallagher and Professor Alan Trench

Members present

Lord Lang of Monkton (Chairman)
 Lord Brennan
 Lord Cullen of Whitekirk
 Lord Hunt of Wirral
 Lord Judge
 Lord MacGregor of Pulham Market
 Lord Maclellan of Rogart
 Lord Morgan
 Lord Norton of Louth
 Baroness Taylor of Bolton

Examination of Witnesses

Professor Charlie Jeffery, University of Edinburgh, **Professor Jim Gallagher**, Nuffield College, University of Oxford, and **Professor Alan Trench**, University of Ulster

Q44 The Chairman: I welcome our three distinguished witnesses, all of whom have vast experience in constitutional and devolution issues. You are aware of the size and scale of the task we are undertaking and I think that with your particular skills we shall be able to cover a lot of it. Professor Jeffery is Senior Vice-Principal of Edinburgh University; apart from his many other activities, he was a member of the McKay commission, which is quite important in the context of where we are now. Professor Gallagher was the senior Whitehall civil servant involved in devolution for quite some time, Visiting Professor at Glasgow University and author of quite a lot of literature on this subject. He has achieved great things since the time when he was my Private Secretary.

Professor Jim Gallagher: It was the training.

The Chairman: You took that fly very effectively.

Professor Alan Trench, again, is very well-known. He is a Research Associate for the Constitution Unit of University College London and was an adviser to our Committee on the Barnett formula, which came up with a successful and effective report many years ago—it was immediately shelved by all political parties, which were frightened to tackle it.

You have all seen a list of questions that we will probably want to touch on and I hope that we will explore all those areas. I want to ask you all, as a general Second Reading approach: how deep is the damage to the UK that you see from where we are at present? What sort of action do you think in general terms is needed on the union and on the four nations, which I will call them for shorthand, to stabilise matters?

Professor Charlie Jeffery: Thank you very much, Chairman. That is a very big, expansive question, and I think it needs to be addressed partly in a historical sense. I think we have seen a failure since the mid-1990s, when we embarked on the devolution journey, of the central institutions of the UK to think about the coherence of the territorial constitution alongside the measures for decentralisation of that constitution. Since then, we have seen a pattern of reaction and often of tactical response that is very short-termist in its thinking and piecemeal in the way in which it treats each individual part of the UK. There are plenty of examples of that; I will focus just now on the Scottish one.

Our initial devolution settlement had a period of stability, right through to the point when the Scottish National Party became the governing party, at which point there was a response, in which Professor Gallagher was involved. That response led to what became the Scotland Bill, and we have seen that responsive mode again more recently. In fact we have in effect seen constitution-making by YouGov poll, in the sense that one poll showing a majority supporting yes and a group of others on the same weekend last year showing a neck-and-neck race prompted a very short-term, tactical, reactive and piecemeal response that has opened up a new phase in the constitutional journey, now with very clear spillovers that were not thought through in the debate about what on earth to do with England. That, frankly, is no way to run a constitution, but it has become a pattern, and no part of the UK's central political institutions has shown the capacity to give sustained thought to UK-wide coherence and to stand back from the short-term reactions and think in the round. Unless something is done to disrupt that, I see the likelihood that we will continue with short-term tactical responses with no particular end destination in mind.

Professor Jim Gallagher: I agree with some of that. I agree in particular that the strategic UK response on the territorial constitution has been lacking and that the UK's approach has been, if not tactical, then certainly reactive: that is, change happens—let us be blunt—when something happens in Scotland, and Northern Ireland marches to its own tune somewhere else. Typically, Wales is dragged along in the Scottish slipstream to the extent that it wants to be. So I agree with Charlie that reactivity is a problem. Part of the answer to that problem is to look at it through the lens of what sort of United Kingdom we are seeking to create, particularly what its territorial constitution is—to use the phrase that Charlie used, which I strongly favour—and how that relates to the rest of its constitution.

That takes us on to an area where in some respects I disagree with Charlie. Although the UK response has often been reactive, it has not only been to throw further concessions in the direction of the nationalist movement. There has at least been some analysis of the nature of

the UK as a union and what that means for Scotland and, by implication, for Wales and Northern Ireland. So far we have failed to write the story for the entire UK. What does the union mean for the largest member of the union, England? To echo Charlie's points, there is a weakness in the central institutions of the UK. If you were to ask which institutions represented the forces of decentralisation, it would be very easy to say the Scottish Parliament, the Welsh Assembly and so on. Which institutions represent the cohesion of union, and why, is much harder to see. That is an issue for this place, by which I mean certainly both Chambers of this Parliament, but particularly perhaps for the upper House. Then there is question of the nature and organisation of central government, but that unpacks another set of questions that we might want to come back to later.

The Chairman: Yes, we will develop all these points with later questions.

Professor Alan Trench: I probably agree more with Professor Jeffery than Professor Gallagher does. I certainly agree that the UK has failed to understand and respond actively to the challenges of devolution and has been left operating in a reactive mode that has reinforced existing trends to have a very different set of arrangements for each of Scotland, Wales and Northern Ireland, and arrangements that would go beyond what is necessary to respond directly to the circumstances in each of Scotland, Wales and Northern Ireland. One clear example of that emerges in the Wales Bill that was published about 10 days ago, which is supposed to be an attempt to deliver for Wales a Scottish model of devolution, or something very similar to it, on the reserve-powers approach. It ends up putting in all sorts of constraints in the way of the National Assembly that are missing from those set out for the Scottish Parliament in the Scotland Act 1998 and its subsequent amendments and changes, including the Scotland Bill that is presently before Parliament. I would also say that this is not merely—indeed, perhaps not even primarily—a large-scale macro-level problem of thinking about the UK as a state. It manifests itself very directly in a sequence of practical, tangible matters that are encountered in the day-to-day practice of government. It is dismaying that many of these are matters that were highlighted by this Committee in 2003 in a report carried out when it was then chaired by Lord Norton, and for which I had the pleasure of acting as a specialist adviser, which pointed out all these difficulties. That report—like, I am sorry to say, the Barnett formula report—hit the table and effectively received an acknowledgement from the Government but was not acted on. I think that things might be rather different now if it had been acted on in a timely manner.

I shall highlight three areas where this is a major concern to me. The first is the machinery of Whitehall and how it operates and deals with territorial matters, which is partly to do with the

absence of any strong centre or department that has charge of formulating and implementing a strategy for the territorial constitution of the UK. The second is the approach taken within Whitehall to the machinery of intergovernmental co-ordination, which has developed along very different lines from those that the Committee foresaw in 2003, and indeed very problematic ones because in some ways co-ordination is even more limited than it was when the Committee carried out its inquiry. In some ways it has become more intensive, particularly with regard to finance matters, but in others it is more fragmented. The third relates to how the financial arrangements operate and the fact that the Treasury remains in control of all matters. This was of concern, of course, to the Barnett formula committee, but it has now become much more serious and acquired much greater stakes, particularly now that substantial tax devolution to Scotland is now on the cards.

Q45 The Chairman: Thank you. The union, of course, is made up of four countries, let us call them, of differing democracy and economic size. Do you think that the purpose and benefits of the union are perceived differently in those four different areas, and is that the reason?

Professor Charlie Jeffery: I think it is probably quite difficult at a general level to articulate purposes and benefits of the union, because that has simply not been the style of operation when we have been thinking about the component parts of the UK. You pointed to demography, which I think was code for England being 85% of the whole but the only part of the territorial constitution that does not have its own institutional recognition.

The Chairman: That is true, but it does not exclude the relevance of the reference to the others.

Professor Charlie Jeffery: Of course not, but in England we have seen an emergence of questioning of the purposes of the benefits of the union, which is relatively new. Because England is an 85% component, that is particularly significant. It was quite striking in the last UK election that one political party, the Conservative Party, stressed a number of specifically English themes, often in a quite localised frame and to some extent at wider manifesto level: English votes on English laws, which I am sure we will come back to; the idea of an English rate of income tax, which I think was somewhat underdeveloped; the Carlisle principle, which was presented by the Prime Minister in a visit to Cumbria, which was essentially about the protection of people this side of the Scottish border from the consequences of decisions made by the Scottish Parliament that could be disadvantageous to them; and the imagery of the Scottish National Party as threat, in some of those very evocative campaign posters. It is no coincidence that that was the campaign theme. It could equally have been taken forward by

other political parties; I am not picking on one particular party. It was no coincidence because there is growing evidence that people in England—all the way across England—feel short-changed by the way in which the UK is governed. They feel short-changed in the representational sense: the West Lothian question, to which English votes on English laws is some kind of answer. They feel short-changed by disparities in levels of public spending between the different parts of the UK; they feel this as a “fair share” argument, and that England is not getting its fair share. That transforms the debate about the union. If the major parties are beginning to pose instrumental questions—“Is this of value to us?”, “Are we getting a fair share?”—then that really challenges the nature of the union as a whole. One of our colleagues who we often see in engagements like this, Professor Vernon Bogdanor, has long said that the English do not need to bang the drum and blow the bugle because they have the great preponderance of representatives in the House of Commons, so England gets its way. Well, England does not feel that any more, and that is a real challenge if one is seeking to think about the purposes and benefits of the union.

Professor Jim Gallagher: Again, I agree with some of that, Lord Chairman. The interesting thing about the purposes and benefits of union is that if one looks back over a period of decades or even centuries, as it says in the literature, they have largely been regarded as banal and taken for granted. They have been there and have not been reflected upon or challenged. Obviously Scottish nationalism, in particular the referendum campaign, challenges them. I would assert that during that campaign and indeed before it, certainly in the Scottish debate, it was possible to discern quite well-defined and well-argued purposes and benefits of the union. Those purposes and benefits are, broadly speaking, the same for each of the constituent parts, with a key difference that I shall come back to in a moment. They are political, in the sense that they provide peace, security and external representation—an international personality. They are economic in providing an integrated domestic market and economic benefits from that, to a much greater degree than the European single market seeks to provide. They are social, in providing a common social solidarity and sharing of resources, however imperfectly, to support broadly common standards of welfare and public services across the UK. Those are the purposes and benefits of union that were demonstrated and argued in the Scottish referendum campaign, and in the end they won. They are the same for Wales, Northern Ireland and indeed England, although they are not acknowledged or noticed in England because the union, to the extent that it is thought about in England, is thought of as a question of what those pesky Scots are up to. The difference is not in the purposes and benefits of the union for each part of it but in the relationship between each of the constituent

parts and the union as a whole. The relationship between the smaller nations and the union is bound to be different from the relationship between 85%, as Charlie says, and the union as a whole. England is indeed the overwhelming part of the union; it is 10 times the size of Scotland, 20 times the size of Wales and 30 times the size of Northern Ireland.

My view is that the nature of the union needs to be explained to the English, the Scots, the Welsh and the Northern Irish as follows. The smaller nations have protected status in the form of devolved legislatures. As Charlie says, and as Vernon has repeatedly said, if England wants something then it will get it. The smaller nations therefore have a protected status in the form of devolved legislatures so that, in so far as it is possible while retaining the benefits of the union, they can make up their own minds and change things that they do not want, if they wish. For England, however, one cannot have that same relationship, because to a substantial degree it is the United Kingdom. That crystallises in the fact that the Parliament at Westminster is both England's Parliament and the UK's, and the Government in Whitehall is England's Government as well as the UK's. By and large, that is unproblematic; there is political noise about it—there was a particularly painful set of political noises in the last general election campaign—but by and large it is not really a problem. On the few occasions when it is a problem, it is because England is split down the middle and the balance of opinion from the smaller nations might tip the question one way or another. That takes us into an issue that I am sure you will want to come back to, Chairman: the happy question of English votes. So the purposes and the benefits are the same but the relationship is, and should be, different.

The Chairman: Thank you. Professor Trench, you are allowed to say “I agree with the other two” if you wish.

Professor Alan Trench: I largely agree with them, but I would point out something that I am sure is obvious to the Committee: the differences between Scotland, Wales and Northern Ireland, not only in terms of population or age structures of population—there was a lot of discussion about that during the Scottish referendum campaign, particularly with reference to pension implications if Scotland were to become an independent state—but also in terms of the economics and how the financial arrangements of the Barnett formula work. It is worth recapping what I am sure your Lordships already know: Scotland is, more or less by UK standards, averagely wealthy, and receives a significant bonus of around 15% to 18% in public spending, if one's benchmark for that is relative need. Wales is a pretty poor place and receives just about its fair share of public spending on the basis of relative need at present. Northern Ireland is also a pretty poor place, but is also privileged in the system of financial

allocation through the Barnett formula to the tune, again, of around 10 to 12 percentage points compared to relative need. Scotland has very slightly higher relative need than the UK average; Wales and Northern Ireland have substantially higher. The fact that Scotland corresponds pretty closely to the UK average is itself remarkable. The UK is a pretty varied state. If one breaks England down into its various regions, at that point you start to see just how varied England is. London is of course the most varied by pretty much any standard or indicator—the most exceptional part of the UK. It may sometimes be far richer, better and more successful than the others; it might also have much greater pockets of deprivation, with more people living in higher levels of poverty and so on. London is a truly extraordinary place by any standard. The fact that Scotland can be average really is quite remarkable.

Lord Morgan: A very quick supplementary. Alan, nice to see you. You were indicating various areas in which Wales and Scotland differ. Would you not like to add a fourth, which is cultural identity, a theme that has not come up too much? The Welsh nationalist movement, as you well know, began with the Welsh language movement in the 1960s.

Professor Alan Trench: Indeed. There are a number of other respects that I did not want to go into where Wales differs. Language is perhaps the most significant and directly important, not least because, according to our best evidence, it is in regular use by a little over 20% of the population pretty much every day.

Q46 Lord Morgan: We have been discussing how to give more stability and permanence to the idea of the union in relation to devolution. There have been various proposals about this, notably from the Bingham Centre, which proposed a kind of charter of the union that would have statutory form. How would you feel about this? Would it be easy? How easy or difficult would it be to create a series of principles that meant anything in more than abstract generalities? What would the likelihood be of it enduring or surviving, given the inevitable political changes in Governments and policies?

Professor Alan Trench: If I may, Lord Chairman, I will respond first. As I am sure the Committee knows, I was also an adviser to the Bingham Centre on that piece of work, so unsurprisingly I regard it as being a valuable and useful contribution. It is without doubt a difficult way forward. It will require a considerable amount of work to make happen. I remain unclear about the process by which one might adopt it, and that will be a major area of concern. The term to use for what Bingham is proposing is “retrofitting devolution”: retrofitting a UK-wide constitution on to this fissiparous sequence of interlocking and overlapping unions, for Scotland, Wales and Northern Ireland essentially with England, not necessarily with the centre, as they are two different things. One should not underestimate the

difficulties of that. If the UK is to operate as a single state into the future, I cannot see how it can operate without that. So for all the difficulties that achieving it presents, how the UK would operate without something like that is something that I struggle to understand. For that reason, it is a very necessary direction in which to move.

Professor Jim Gallagher: I agree that the Bingham Centre stuff is a valuable contribution, and I agree that it is time for us to write down more of the territorial arrangements of the UK. Whether it is quite time to legislate with primary legislation, I am not sure. The thing that we have not quite got yet is the right set of drafting instructions for the legislation. We need to understand what the content of this territorial constitutional documentation should be, and we need to ask ourselves also which parts of it are appropriate for legislation and which parts might be done by some other means. The most obvious distinction is the extent to which our territorial fiscal constitution—how we share out the money—is written down. At the moment, if you were to search the statutes for how the different nations of the United Kingdom are funded for their public services, you would find only one provision that says, “The Secretary of State may from time to time pay grants”. That is not sufficient. To be fair, you would also find quite a lot of extra-statutory documentation in the form of Treasury publications essentially explaining how the Barnett formula works. Those are in fact very valuable documents, although they are insufficiently scrutinised. We probably need to find some intermediate status for those things that explains why what we do is a good thing and how it reflects the allocation of risks and resources across the UK, and perhaps a rather fuller ultimate statutory base for it. So yes, it needs a bit more writing down, but also a bit more thought before we actually take the pen into our hands.

The Chairman: Do you wish to add anything to that, Professor Jeffery?

Professor Charlie Jeffery: At the risk of prolonging the discussion, I will. Jim is going partly in the right direction, wondering about what would go into such a statement. However, such a statement has no particular meaning unless it is believed—unless there is a diffuse belief in the values that it is trying to embody, perhaps in some clearer elaboration of what our financial arrangements are for. That deeper dimension is absent. We have seen two attempts quite recently to invoke the deeper dimension of what it is all for. One of them we might call the Prime Minister’s union, which we heard about during the Scottish referendum last year: a kind of cultural appeal to history, heritage and shared achievement. It was largely backward-looking, not forward-looking. It did not say—not clearly, at least—why we all, Scots and other parts of the UK, would benefit, and why this would be a better place if Scotland stayed; it was about how things could get worse if Scotland left. The other union that we have heard

about we might call Gordon Brown's union, one focused on the idea of risk-sharing, particularly around welfare, and perhaps subject to the financial arrangements that Jim was talking about. Thinking in that way has a fairly noble history in other states as a way of generating common purpose for a union of disparate parts. I am not sure that it is believed very much anymore; I think that there has been a loss of belief in the UK as a framework for solidarity and redistribution in Scotland, and quite likely in parts of England as well. More generally, it has been lost in England as an understanding of how to share this space with Scotland. Lots of the grievances that we reveal in public attitudes in England are about the sense that “our” money is going to fund “them”. That is not a very promising way to invoke that kind of solidarity across a state. I think that we lack the deeper values that could give meaning to whatever it is we would articulate in detail in such a charter.

Lord Cullen of Whitekirk: Just to take Professor Gallagher a bit further, if there were to be some statement of practical principles, should they include some indication of the conditions on which the union is dependent—in other words, its stability and existence? As I think you yourself have pointed out, with taxation there may be a point at which you put in peril the union itself. Should that form part of any statement?

Professor Jim Gallagher: Any statement that explained how the union worked would have to have an allocation of powers and responsibilities, including taxation and spending powers, which were consistent with its maintenance. It would be contradictory to say that the union could include an allocation of powers and responsibilities that were not actually consistent with the union. I shall make that concrete, because I suspect that there are many real examples of that argument in the public domain at the moment: if the Scottish Parliament, and Scotland as a whole, were to become—in the jargon—fully fiscally autonomous, and send a cheque here once a year to cover the cost of the Army, that would not be a union, for two of the three reasons that I set out earlier. First, it would not be a genuine economic union because there would be no fiscal transfers to stabilise economic activity across the territory; it would be more like the eurozone than a sterling zone. Secondly, to follow up Charlie's point, with which I agree, at least in part, it certainly would not be a union of social solidarity. I would not imagine a statement of the union that included that allocation of powers and responsibilities. I do not however think that we would have to write down a list of the forbidden degrees, as it were, alongside the description of the marriage.

Q47 Lord Hunt of Wirral: It is very difficult to translate the discussion about a set of principles from the academic to the practical but, recognising that you have already placed the drafting process into the “difficult”, or perhaps even the “too difficult”, box, say that you did

draft such principles, how would you incorporate them into the work of Governments and Parliaments around the UK? What changes might be needed in Westminster and Whitehall to ensure that those principles were followed at UK level?

Professor Alan Trench: I take it that you were putting that question to me. The way in which we at the Bingham Centre envisaged these matters working was that there would be an overarching document called the charter of the union, which would probably, though not necessarily, take the form of a statute of this place. The British system knows no higher law than a statute of this place, and we wanted it to be as high a form of law as it could possibly be.

Lord Hunt of Wirral: Or a court decision?

Professor Alan Trench: That gets one into a really arcane tangle about the rules of recognition and which takes precedence. In terms of politically adopted statements of law, statute is the highest form of law that we know. Equally, it would need to be adopted following a broad process of engagement with the devolved legislatures and with the wider conception of what the UK is about, or a wider collection of people. It would need to reflect something that was quite big, rather than simply being an Act of this Parliament in a way that ordinary legislation is. That would not necessarily change the way devolution operated in relation to Scotland, Wales and Northern Ireland on a day-to-day basis because the statute of the union would sit above, as it were; it would not replace the existing devolution statutes. Those statutes, spelling out the roles, functions and powers of the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly and their respective Executives, would remain in place, but equally would be subject to possible change in future. The object of the charter would be to provide a framework within which those changes were considered and discussed and, if needed, to provide a broader framework for the court to assist it in determining how to approach devolution matters.

Professor Jim Gallagher: Could I add something, Chairman? I come to this from the perspective of someone who is looking to find things that will work and is scratching around for some principles to make sense of what needs to be done, rather than the other way around. If there were some sort of territorial constitutional statement, in whatever legal form, to some degree at least it would have to guide the behaviour of UK Ministers; they would have to be under some sort of obligation to follow it. Secondly, and this is quite important, there should be someone in the UK Government whose job it is to worry about these things.

Lord Hunt of Wirral: As well as the Prime Minister?

Professor Alan Trench: That was indeed another of the Bingham recommendations, and indeed echoed one going back at least to this Committee's report in 2003, as well as earlier discussions.

The Chairman: My colleagues want to ask supplementaries. Perhaps before Professor Jeffery speaks, I will ask Lord MacLennan and then Lord Judge to speak.

Lord MacLennan of Rogart: I wondered if we might gain assent for the charter through some form of convention across the country.

Professor Alan Trench: That is a logical implication of the way one might do that. We deliberately did not want to call for a constitutional convention, not least because we were drafting our report in anticipation of an election at which a convention was one party's manifesto commitment and not a commitment of other parties. We did not want to entangle ourselves in uncertainties about the outcome of the election and the possible composition of the Government. However, a constitutional convention is probably the most effective way of doing that. That in turn raises major questions about the nature of that convention, of course—its composition, its remit and how it should work.

Q48 Lord Judge: Why should those who seek independence participate in the creation of a charter? Why should they, if a charter were to be created, accept it?

Professor Alan Trench: The latter question is a very difficult one, understandably. The former question, however, has a very straightforward answer, which is that they represent a very substantial slice of Scottish public opinion. As we know, 45% supported independence last year in the referendum and the SNP still commands very broad support in Scotland, a little short of 50%. One cannot simply ignore the will of 50% of the population of Scotland. Apart from the political—

Lord Judge: I am sorry to interrupt you, but who would represent that at this great meeting or convention, or however it is dressed up?

Professor Alan Trench: That is one of the many problems with a constitutional convention. There clearly has to be a role within it not only for the Scottish Government but much more so for representatives of the Scottish Parliament. Equally, they are not necessarily the only people who would speak for Scotland. In the same way, it would be wrong for MPs to be the only people who were to speak for England. A variety of interests from England would need to be engaged, whether through local authorities or through other bodies. The question of how one would want to engage with something that would be of a manageable size but also command genuine respect for its composition is key, but it is far from straightforward to answer.

Professor Jim Gallagher: I do not think that this is just about process—who would go to a convention and how many people there would be and all that stuff. I think that your question is: what role, or what attitude, would a separatist movement take to an integrating project?

Lord Judge: Exactly.

Professor Jim Gallagher: That is the critical thing. I would say two things in response. First, as the Scottish Government, the Scottish National Party has an obligation to represent the entire Scottish population, at least in relation to devolved matters as far as this is concerned. Secondly, of course, they might look like a monolithic and successful separatist movement heading unerringly towards their goal, but they are as confused and mixed up as the rest of us; at least as many of them, I strongly suspect, are in their hearts autonomists rather than separatists. I recently said, in a separate paper, that it is time for them to demonstrate something that I have called constitutional generosity and remember that they have to represent everyone and try to unite the Scottish nation rather than continue to divide it. Whether they will is a different question.

Professor Charlie Jeffery: There are a few things to comment on, but I will limit myself. A process—I will leave the mechanism to one side for a moment—may well be integrative, but it could also be about rebalancing amid the integration. There is the possibility that a separatist, pro-independence movement could find a level of rebalancing that, as Jim suggested, might be where the critical mass of opinion is in Scotland and, in that sense, would be a point acceptable across the political spectrum in Scotland. Another reason for accepting it, of course, would be to see it as a staging post on the long march, which is I suspect a little bit more where we have been in recent constitutional debates.

I wanted to make a wider point, though. Whether it is a convention or an intergovernmental negotiation—whatever it is—which would produce some kind of principles of union, we should not forget that that would require change here in these buildings and the buildings in Whitehall. I expect that many would see a component of a charter or whatever we would call it as suggesting that there would be a minimum level of welfare in all parts of the UK. Some parts could decide to go above it and some may wish to stay at that minimum. If we were to think in that way, that would mean that central political institutions—to put it bluntly, the Treasury—would need to agree with other political institutions with a different basis of legitimacy what those minimum standards were. It could not simply be imposed; it could not be driven simply by Whitehall. It would need to be agreed by the contracting parties. I do not yet see a willingness in Whitehall or indeed in the two Houses of Parliament to agree that kind of diminution of the sovereignty of the UK Parliament and of the Government whose

legitimacy is based on it. Until we have a willingness to do that, I do not think that a charter around our territorial constitution could be stable.

Q49 Baroness Taylor of Bolton: You mentioned minimum welfare. When we were talking last week, I was struck by an example of real difficulty that could arise if we only had minimum welfare and allowed topping-up. In the case of the steelworkers in the north-east and in Lanarkshire in Scotland, we have exactly the same problem, with steelworkers being made redundant, by the same company on occasions. If we have a situation where those steelworkers in the north-east have a minimum requirement and those in another part of the United Kingdom, who are being made redundant for exactly the same reasons at exactly the same time, get a top-up, how will that help social solidarity?

Professor Charlie Jeffery: It would draw attention to differences—that is for sure. Let me take the steel point in a slightly different direction. I imagine that some kind of charter of union would have something to say about a UK single market and that some level of common regulation should extend across the UK. However, we would very quickly see pressures—we are seeing some of them at the moment around steel—for particular parts of the UK to want to intervene in the market to secure the future of an industry and the future of employment in that industry in that place. That may not be the same kind of pressure or a pressure so resonant as to produce similar action elsewhere. We would have to be willing to accept that kind of difference among the contracting parties. That is a very difficult thing to imagine, partly for the reason that I mentioned of conceding power from the UK centre and partly in understanding the impact on public opinion in different parts of the UK if there are manifestly differences of approach in different parts of the UK. Those are hard to reconcile.

Q50 Lord Maclellan of Rogart: Can we have a stable constitution for the United Kingdom if we have asymmetrical devolution of powers to the member nations? Will we not face the possibility of countries wanting to get ahead of other countries, all the time diminishing the stability?

Professor Jim Gallagher: I do not see why we should not be stable on the basis of asymmetry. As Alan Trench said, the different parts of the UK have demographic, economic and social differences. Things that matter in Wales might not matter in Scotland; things that matter in Northern Ireland certainly quite often do not matter in Wales and Scotland. It is not just a question of leapfrogging and always asking for more powers. It is interesting that neither Wales nor Northern Ireland, for understandable economic reasons, is banging the drum to be able to control income tax. So I do not think that this is simply a one-way ratchet.

The Chairman: But once you have a division of economic powers where part of the United Kingdom might be able, for instance, to give more assistance to steel than others, surely you are creating an unstable situation.

Professor Jim Gallagher: When you were Secretary of State for Scotland, Chairman, you exercised economic powers that were not available in the north of England.

The Chairman: But I did it within a unitary Parliament, using the powers of that Parliament. The regional assistance policies that applied in Scotland were at the same level as those that applied in England; it just happened that a larger proportion of Scotland qualified for assistance.

Professor Jim Gallagher: And you had a Scottish Development Agency that had no parallel south of the border.

The Chairman: That is true. Again, though, it was set up within the confines of the UK Parliament in a unitary state.

Professor Jim Gallagher: Any devolved economic variability inside the UK could be set up in the context of the UK Parliament

The Chairman: Sorry, I have excluded the other witnesses. Please feel free to join in.

Professor Charlie Jeffery: I think that I made these points at an early stage. We have embarked upon a practice of short-term reactions to political pressures in different parts of the UK that is helping to produce that asymmetry. With asymmetry come at least the seeds of instability, because you tend to get spillovers from one part of the UK to the next, or senses of fairness or unfairness deriving from particular powers that one place has in comparison to another. That might be contained were there to be values that might underpin a sufficient sense of coherence across the UK as a whole, but without those values, and without them being clearly understood in different parts of the UK, it is very difficult to see a system like that stabilising because it will always be vulnerable, to put it crudely, to the next opinion poll.

Professor Alan Trench: I am somewhat sceptical about the idea of constitutional stability. Constitutions are always changing in their meaning, if not in the words that are used within them. In federal systems around the world, you can distinguish broadly between countries that are able to change their constitutions quite easily and do so quite often—Switzerland being a notable example, Germany perhaps being another—and countries in which constitutional change becomes almost impossible because of veto powers for varying units, of which the United States, Canada and Australia are pretty good examples. The Swiss completely rewrote their formal constitution in 1999 and they amend it extensively quite frequently. By those standards, the Swiss constitution is a pretty easy one to revise. In a sense, the UK has the

problem of having an extremely flexible constitution because it is unwritten. This perhaps contributes to an excessive degree of belief in its flexibility and that anything can be done if people want it, because in reality very often that has been the case. If, however, one is going to manage a complex multinational devolved union, that cannot be the case anymore; you have to entrench these things rather more, if not formally, then in people's understandings of them. None the less, this will necessarily need to be changeable according to varying circumstances. That is one advantage of the model of the charter of the union with a devolution statute sitting beneath it that the Bingham recommendations offer: it would still be possible to change individual devolution statutes, if that were necessary, within the overarching framework of the overall charter.

Lord MacLennan of Rogart: If we had a charter that was popularly supported, would that not provide stability?

Professor Alan Trench: That would be the hope. Equally, though, what it meant would necessarily change over time as circumstances changed. Even if the words remained the same, how those words were understood and applied might well change. That is a necessary note of caution to go with a greater degree of stability, that this is relative rather than an absolute.

Baroness Taylor of Bolton: I think we are talking about two different things that are essential. We have to be careful how we do this. I want to go back to what you said about retrofitting the constitution. Parliaments cannot bind their successors, yet we are talking about retrofitting a framework, which seems slightly unusual and peculiar. I am not saying that it is not worth doing but my point, which echoes something that Lord Judge was saying, is that it is about getting people to buy into it. It will be very difficult, despite the responsibilities of the Scottish Government, to get a Government who are intent on independence to buy into it. The stability does not necessarily come from the wording of anything that we write; it comes from convincing people that it is a proper settlement and you get stability from that cohesion. So unless we have the cohesion, we do not get the bind or the stability. Whatever we write on paper, that is still the crux of the problem.

Professor Alan Trench: That is all quite true, but the problem that remains is that if you do not write these things down, and in particular provide a clear framework for how the UK Government operates, the UK Government will act as if they were unconstrained—the problem that Professor Gallagher was highlighting earlier.

Baroness Taylor of Bolton: It is tempting.

Professor Alan Trench: It is a very practical reality on pretty much every level, from the most macro constitutional issues to the very detailed day-to-day practice from the point of view of

devolved government—with the partial exception of Northern Ireland, simply because Northern Ireland was never part of the British system of public administration, as Northern Ireland’s administration comes out of the old Irish administrative system, so there is a pre-1922 set of arrangements that distinguish Northern Ireland from what goes on in Great Britain. That clearer framework to structure what happens through the UK Government is the part that is perhaps most acutely needed, as well as something that says, “This is what the union stands for and does, and this is how the union works”, which then points out to Scotland, Wales and Northern Ireland, “This is what the union does for you. There are things that it can’t do; maybe you want to make a different arrangement if you don’t want those, but this is what the union can do”.

Professor Jim Gallagher: Our way of dealing with this issue and defining what the UK offered to the devolved nations was to reserve things to the UK Government, so we reserved economic policy and social security. That looked like an allocation of power, and it was, but it was actually a statement of principle about commonality. One of the things that some kind of territorial constitution or charter would do would be to make clear that it was not merely a grab for power by people here but a statement about what is shared across the UK.

Q51 Lord Cullen of Whitekirk: With regard to reservation, what powers need to be reserved within the union? I am not asking for a list—they have been published by writers and organisations—but what should underlie the right choice, as it were, as to what should be reserved? Would it apply across the board to devolution wherever it took place in the United Kingdom? Is there a need to spell that out so that it is quite clear in advance in future?

Professor Alan Trench: I will start, if I may, because I have recently done some work for a project by the Constitution Unit and the Welsh Governance Centre on the reserved powers model for Wales. I had to go away and look at the indicative published schedule from the UK Government of matters that might be reserved, from a Command Paper that they published last February called *Powers for a Purpose*, and to compare that with what is in Schedule 5 to the Scotland Act 1998 and the matters that are excepted and reserved in the Northern Irish context. It is quite remarkable how varied those lists are. Notwithstanding the distinction in Northern Ireland between excepted and reserved matters, the functions that are protected for the UK level vary a good deal, as they do in the way in which they are expressed. Often, matters that take half a line for Northern Ireland take a sentence or two for Scotland and, now that we have the draft Wales Bill, a paragraph for Wales. So working out what should be devolved in that very formalistic sense has become longer and longer the more that Whitehall has thought about it.

I would say that you need to reserve a certain range of functions to the UK level if the UK is to function as a meaningful state, and that those are going to refer largely to the three unions that we have been talking about—the economic, political and social. That becomes the underlying rationale for reserving them. There is a big decision to be made about whether, in the absence of an explicit rationale for reserving something, it should at least be devolvable if not devolved, and, if so, by what mechanism. I hesitate to resort to Spain as an example in these matters—I am afraid that for comparative purposes I generally take the view that if Spain does something, that may be a good reason not to do it—but the Spanish model that was put in place after 1978 for varying forms of devolving functions to the autonomous communities may actually offer us a bit of light here.

Professor Jim Gallagher: In short, I think that the analysis of the Calman commission which underlay the economic, social and political unions remains valid and remains the basis on which the UK should have its common offering. The only change I would make to that would be, first, to accept its recommendation—which nobody did—that there should be a statement of certain common welfare offerings; and secondly, to accept the proposition that in the Scotland Bill which is before the House at the moment, welfare should be regarded as a minimum which is addable to—most, certainly, provided centrally but supplementable by Scotland. That analysis has been done.

Professor Charlie Jeffery: May I take the opportunity to disagree with something that Jim said a few minutes ago, which I think addresses your question as well? The reservation of powers, back at the foundational stages of the union, was a statement of principle. It was a statement of the then practice of the Scottish Office, which was subject to democratic procedure. The stages we have seen since have been articulated very effectively as principle, but have been enacted by negotiation around both the Calman powers and, more recently, the Smith commission powers, which have been entirely contingent on the persuasiveness or other means of the negotiating parties. This has not been a process driven by principle. I suspect that if you are looking for an enduring settlement with a clearly understood set of reserved powers at the centre which are respected by everybody, we need to start thinking about principle rather than the contingences of negotiation processes.

Baroness Taylor of Bolton: So if we had a set of reserved powers at the centre, as a principle, would you still envisage a system where different parts of the UK, in a demand-led way, could start to bid for taking more powers? Do you envisage that that could be sustainable as a settlement, or would we get back to where we are now, with a system of leap-frogging?

Professor Charlie Jeffery: You can find a more or less irreducible list. I know you do not want to have lists, but taking a particular reading of the independence White Paper of the Scottish Government last year, you could read it in some ways as suggesting that, even with Scottish independence, national defence, aspects of external representation and currency would remain shared powers at the UK level, even if there were two separate states operating. Getting beyond that becomes more challenging, because once you start moving into areas of market regulation, welfare and taxation, you have an allocational element. The allocational element is where more instrumental calculations begin to form, which will produce different understandings of what is right and good for each place. Wales has a very different interest in income tax powers, as has been said, because, I think, the decision-makers in Wales do not see any particular instrumental benefit coming to Wales from that. There is a different calculation in Scotland. So we would need to be happy with an irreducible core and then variation beyond that core. The extent to which we can articulate a set of values which encompasses both of those dimensions is as yet unclear to me.

Professor Jim Gallagher: The interesting thing is the extent to which such principles might also guide devolution within England.

Professor Alan Trench: One thing we should not overlook is the importance of how further functions that are devolved are to be financed. It is much easier for Scotland to decide it is going to take a punt on not being adequately funded for further devolved functions because it is generously funded at the moment. That is not an option that is open in Wales because Wales is not generously funded at present. That may explain part of the caution of the Welsh Government over accepting and demanding further functions, particularly when it comes to the welfare area. They have had their fingers, if not burned, singed somewhat on a couple of occasions already and appear to be in no mood to take any further chances.

Baroness Taylor of Bolton: I am assuming that you all rule out a federal arrangement as a solution to this.

Professor Alan Trench: It depends what you mean by a federal arrangement. Do you mean a four-nation or four-unit federal arrangement, or do you mean something more complicated than that? We are already very close to the point at which we have that sort of relationship between Scotland, Wales and—with certain qualifications because of the oddities of the Belfast agreement—Northern Ireland, on the one hand, and the centre on the other. England is the big bit that alters that. The practices of Parliament and Whitehall profoundly alter that. Then you come to the questions about England. Since the idea of a regionalised England, consisting of eight or 10 regions that would function more or less as constituent units, seems

to be off the table, then it is very hard to see how a federal UK has any sort of medium-term, let alone long-term, future.

Q52 Lord Brennan: The Scotland Act speaks of fiscal responsibility being adopted if the Government of Scotland wish to adopt it in certain formats. Most of the reserved powers that we have on the list under the question have macroeconomic consequences. Professor Gallagher, you said that not enough is written down about this fiscal arrangement. I want to ask each of you whether you think that there should be a reserved power, properly identified, for the UK Government to intervene where fiscal irresponsibility is such as to damage the macroeconomic interest of the entire union.

Professor Jim Gallagher: Let me kick off on that since you blamed me, as it were, for it. First of all, I think the issue is not the extent to which the Scottish Parliament, the Welsh Assembly or others have tax powers but the nature of the budgetary obligation that is placed on them: do they have to balance the books? There are two arguments one can make, both of which are perfectly plausible. The first is that subnational Governments should, taking one year with another, balance the books, because there is then no impact at the net level for the UK. If you were to give them borrowing powers and allow them to run a Keynesian deficit and try to promote economic growth in their region by borrowing, it would impact the whole UK. There would be the risk, which every federal state which has this arrangement faces, that it would be assumed that the central Government would always stand behind them, no matter how irresponsible they were. This goes back to the founding of the United States and whether the federal Government would stand behind the borrowing of the individual states. The tax powers themselves are not the issue. In fact, giving devolved Administrations tax is more a responsibility than it is a power, because it requires them to balance both sides of the fiscal equation, at least to some degree. One of the persistent problems of the Scottish political discourse is that devolved institutions are presented as nice people who spend money while Westminster is a wicked institution which raises it. It is therefore possible for them to be politically irresponsible and say that if it was not for the bad people down here, every good thing would happen under their Administration, which is manifestly nonsense. To that extent, I am very keen on fiscal responsibility. My personal view on borrowing powers is that all of the Scottish Parliament's capital expenditure should be funded by borrowing undertaken by them, not merely any additional borrowing that they chose to do. That would give the market the opportunity to send some signals about the extent to which their policies are sensible. I do not myself favour the capacity of a substate institution in the UK to indulge in long-term deficit financing; although in the long run the market might fix that for us too.

Professor Charlie Jeffery: Very briefly, going back to the point I made earlier to Baroness Taylor, the vision of Scottish independence given last year was one that also included the notion of a fiscal compact with the UK central Government, in particular around levels of borrowing, as a price for being part of a single currency area. I see that as a fairly uncontroversial issue. If we or at least some people could imagine that as part of a two-state solution, we can envisage it as part of a single-state solution were there to be something like the Keynesian borrowing powers that Jim was talking about as part of a package.

Professor Alan Trench: One thing about the powers that are proposed for devolution under the current Scotland Bill is that it is very hard for those ever to amount to a licence for fiscal irresponsibility. As the person who originally formulated this model through the Institute for Public Policy Research *Devo More and Welfare* project, that was one of the considerations that we carefully kept in mind. Simply, the nature of the taxes that are devolved means that in a sense you do not need a fiscal compact under what is proposed, although without question you would if you were to go down the path of full fiscal autonomy. It is worth saying that that has been somewhat messed up by the Treasury, which seems to think that serious harm could be caused within England by the existence of these powers and has tried to articulate that through the way in which it has formulated the “no detriment” principle. I think that that formulation is gravely dangerous; it is one of the great flaws in the structure of the Scotland Bill—although obviously it is not in the Bill itself. But it is part of the way the Government presently intend to implement that Bill. That is going to be a recipe for disagreement, for blame shifting and for some very bad-tempered relations between Scotland and the UK Government.

Lord Brennan: I did not ask about the consequences of a completely independent Scotland where, for example, you have uncontrolled debt arising in a small sterling area in a common economic zone. It is presumably the case that with that kind of model, if there were full independence, you might finish up with a quasi-Greek situation in which London is the “central banker” and has to rescue Scotland. I do not want to go into that in detail, but in the debate that we had when the independence argument was going on last year, people were often using the phrase “no going back”. That is not an easy concept to apply to central government finances in London if one part of the country has gone haywire, even though it is independent.

Professor Jim Gallagher: The only history we have to guide us is that of the UK’s relationship with the Republic of Ireland in the 1920s and 1930s. You will remember that Ireland was not in a formal currency union with the United Kingdom, but chose to tie its

currency to the pound by a very old-fashioned currency board mechanism. The idea was to keep as many pounds sterling in a box in Dublin as they allowed Irish pounds to circulate in the Irish economy. That was a bad thing for Ireland for all sorts of reasons, but two interesting things followed from it. One was that in the end Britain did not ask Ireland for a share of the national debt. It wrote that off in the 1930s for two reasons, the first of which was that there was no money to be had and, secondly, a war was about to be fought, so good relations trumped it in the end. I think that it is probably unfruitful to speculate about what would have happened with the currency had the vote been yes in Scotland. There is a nice counterfactual novel to be written about where we would be now, but this is not the place to write it.

Professor Charlie Jeffery: I feel that I may have deflected us a bit by talking about the Scottish independence White Paper. My point was not to reopen the debates of last year but to suggest that, at least from some perspectives—these were not agreed by those on the other side—you can envisage a fairly small amount of federal union and very extensive decentralisation to the component parts of that union. In effect, that White Paper was a description or an evocation of something like a confederal system. Some of the lessons from that can be that there are institutional mechanisms which can serve even a highly decentralised union within a single state. That was my purpose in raising it, not to set Jim off on the events of last year.

The Chairman: They were interesting.

Q53 Lord MacGregor of Pulham Market: To what degree can policy on service delivery diverge in different parts of the UK before compromising the social or economic union? In fact, this covers some of the points that you have just been making.

Professor Jim Gallagher: Could I answer that, because I think this is something that Lord Cullen might be interested in? What is really striking, if one looks back over the 300 years of the Scottish union, is the extent to which at the beginning we were willing to tolerate really very large policy differences that, if we sought to invent them today, we would find very difficult. So people in Wales talk about devolving the criminal and the civil law and creating a Welsh jurisdiction; if history had not meant that we had retained the Scottish jurisdiction to this day, and it works perfectly well, people would be saying that that would be awfully difficult in Scotland too. So far as social policy is concerned, there is scope for quite wide variation and I think that the legal system demonstrates that.

Lord MacGregor of Pulham Market: Could you elaborate a little more on a statement you made in a recent paper, which I shall quote: “Resources are shared across the UK so that the same key aspects of welfare can be guaranteed to all citizens. So at least 50% of the resources

of the devolved bodies should come from shared national taxation, but the devolved nations bear the economic risk on their own resources for the remainder.”

Professor Jim Gallagher: Yes, the 50% is not quite plucked out of the air in that it could be 45% or 55%, to take two numbers at random. The key to understanding it is that this is not about social security, pensions and welfare, which are uniform across the United Kingdom; it is an argument as to why and on what basis the United Kingdom should share common tax resources to fund devolved services. So the devolved institutions will be funded by a mixture of own resources and shared national resources. Why do we share national resources? Not merely because it is easier to collect taxes nationally, but because we want to ensure that, even if they are not legally enforceable, there is a set of common social rights across the United Kingdom. This is what Charlie described earlier as the Gordon Brown view of the union. Common social rights, which I think I probably mentioned in that paper, in my view are access to healthcare free at the point of need and at the very least access to free schooling across the United Kingdom. I took those two as being where the 50% comes from, roughly speaking, by adding together the health budget and the schools budget.

Lord MacGregor of Pulham Market: So in university tuition fees, care for the elderly and a whole host of other areas where one of the devolved institutions would want to do more, would the financing of that be their fiscal responsibility?

Professor Jim Gallagher: Yes. As it happens, there are two ways in which you can choose to do something different. One is to reprioritise your existing budget and the other—and so far no Scottish Government have ever done this—is to take a big bold decision that if you want more public services you have to have more taxation. This comes back to the point that I was making to Lord Brennan about the benefits of fiscal responsibility. Until such time as the Scottish political system has to look at both sides of the equation, it will remain fiscally irresponsible not in the sense that it will borrow the UK into bankruptcy but in the sense that it will continue to make unfunded promises and blame somebody else for not delivering them.

Lord MacGregor of Pulham Market: So it would have to have the tax-raising powers to deal with those areas where they were making provision way beyond the UK ones.

Professor Jim Gallagher: Yes, it would have to have sufficient tax-raising powers to do that. People say, “Well, they are not getting very much in the way of taxes”. First, the Scottish Parliament has, for the past 20 years or so, had £4 billion tax powers in the form of local taxation. The striking thing is that council tax has been frozen in cash terms for eight of those years. It has some small taxes now such as stamp duty land tax and landfill tax, but the big tax would be income tax. It is the largest single UK tax. It is a tax that is buoyant because

incomes go up and down. It is a tax that is perceptible—people notice it and therefore it is quite hard, to be fair, to increase it. But it is also a tax, particularly under the Scotland Bill model, where Scottish Ministers are able to play tunes around the progressivity of the system. So devolving it it is a good thing.

Professor Charlie Jeffery: May I add a comment? I think that, ultimately, the answer to your question, Lord MacGregor, about how much policy and service delivery can diverge will depend on how much the peoples of the different parts of the UK are prepared to tolerate. There has to be a sense of legitimacy in the system as a whole. I have been with colleagues at Cardiff University doing regular public attitudes work in England about what people in England think of constitutional relationships across the UK. It is rather interesting that people in England are quite happy with the idea of the Scottish Parliament having extensive tax and welfare devolution. That is one part of the equation. What they are not happy with is the idea that Scotland has higher funding per capita than does England and they are not happy in those circumstances with Scottish MPs having a part in decision-making on English business in the House of Commons. There you see some sense of a potential compact that could satisfy the peoples of different parts of the UK. It is effectively about self-reliance in a fiscal sense and self-government in an accountability sense. If one can produce arrangements that work in different parts of the UK and which embody that self-reliance and accountability, we could probably get away with quite significant variations in service delivery. However that is probably easier said than done.

Lord MacGregor of Pulham Market: But that would also re-raise the question of the Barnett formula, would it not?

Professor Charlie Jeffery: Absolutely.

Professor Alan Trench: Can I say something about the Barnett formula? The Barnett formula has to be consigned to history. It means a number of things, as you all know only too well. It is used as shorthand for the amounts of money that the devolved Governments receive and by implication an unfairness to England, because England does not receive as generous an allocation as Scotland in particular. In some ways, that is actually the least objectionable bit of the Barnett formula, although it causes many problems. Between the fact that it has grossly defective machinery that gives all decisions to the Treasury, which bears no resemblance now to the practical division of administrative and political power across the UK, and the fact that, at the same time, what the Barnett formula does is impliedly to tie devolved public services broadly speaking to an English model—although much less so for Scotland, because Scotland is generously funded—that becomes really difficult. Decisions that are taken for England,

such as that England will abolish university tuition fees, then triggers a reduction in the block grant which is noticeable for Scotland, Wales and Northern Ireland. They are then stuck with following suit, cutting some other service in order to maintain subsidised teaching and funding for humanities subjects or finding themselves stuck with a variety of other options, none of them very attractive. They do not get a say in the decision that is made for England, but they are affected by the consequence of that. Finding a way through that is profoundly difficult, but substantial financial autonomy and tax devolution is a big part of the answer to that.

Q54 The Chairman: Professor Gallagher, you are on record as saying that the Scotland Bill welfare provisions are incoherent. Accepting that it was the product of an agreement that was very hard to reach, can it be reconfigured in a way that that could make it less incoherent without breaching the terms of that agreement?

Professor Jim Gallagher: You might be right that I used the word “incoherent”, Chairman. I certainly think that they are imperfect—that is for sure. If I remember correctly, my objections to them are relatively small, but important. First, it must be as clear as it can be that the devolved welfare powers are exercisable at the choice of the devolved Administration. They are not reliant on the agreement of UK Ministers to operate in principle. Obviously, there are practical questions about who might pay out the money and so on. Secondly, a coherent proposition is that, to the extent that the minimum levels of welfare that the UK chooses to provide are regarded as inappropriate by the Scottish political world, the Scottish Parliament should, if it is willing to raise the money, have the ability to supplement them. At the moment, it seems to me that it gets 90% of the way there. For example, it gets a power recommended by Professor Trench’s commission to top up UK welfare so that, if the tax credit system were to be cut, the Scottish Parliament has the legal power to supplement it. Where it falls short is in the case where the UK chooses not to meet a need at all by means of a reserved benefit. There, the provisions that allow the Scottish Parliament to do that are not sufficiently clear or strong. I will give you a concrete example of that: if the UK Government decided that housing benefit were no longer payable to persons aged between 18 and 24, which I think is a proposition on the table, I do not see why the Scottish Parliament, if it chose, should not be able to legislate to fill that gap. At the moment, its powers to do that are constrained by being short-term rather than permanent. Those are my problems.

Professor Alan Trench: As Professor Gallagher noted, many of the ideas that underpinned the Smith commission’s recommendations for welfare originated in work that we also did in the IPPR’s *Devo More* project. We were very clear in that a broad, general and unconstrained

power was needed to top up welfare to provide additional benefit as the Scottish Parliament saw fit from within the overall package of devolved resources—whether that is own-source taxation or from the block grant. If it wanted to pay an enhanced housing benefit to people aged between 18 and 24, it would be completely free to do that, but it would have to find the funds for that whether by putting up taxation, reducing education spending or whatever. It is regrettable that that has not come through as clearly as it might, doubly so because there is in fact a neat legal mechanism that could have been used to do that, which is to alter the status of social security schemes that are presently reserved matters under Schedule 5 and turn them into matters protected from amendment under Schedule 4 to the Scotland Act. It would not be possible then for the Scottish Parliament to derogate from the UK levels and arrangements, but it would be fully able to introduce its own provisions.

Lord MacGregor of Pulham Market: We have mainly been talking about fiscal autonomy in relation to welfare benefits and that sort of thing. In all the other areas, the Constitution Reform Group, for example, and others have said in evidence to us where they believe that all the powers and financing must be reserved for a state to remain a state—foreign affairs, defence, national security, macroeconomic and monetary policy, immigration, nationality and various other matters. If one of the territorial Governments objects very strongly to the amount of money that has been spent on defence, presumably that would be a reserved power and would be settled at the national level.

Professor Jim Gallagher: Yes.

The Chairman: Thank you. We are getting towards injury time but we have a big subject that we still want to address in detail, which is England, so I shall bring in Lord Judge.

Q55 Lord Judge: We have touched on England from the very start. I think that Professor Gallagher asked the rhetorical question, “What does the union mean for England?” I have a simple question. What are the chances of survival of a system which settled all these matters but in which there was no legislative devolution to England for English matters?

Professor Jim Gallagher: I think that the chances of survival of such a system are quite good. There are two potential models of legislative devolution. One is that there might be a Birmingham Parliament, but I do not think that that proposition is being seriously considered anywhere. The second is that there might be an English Parliament. If instability is to be created by English legislative powers, an English Parliament is the way to do it, because an English Parliament produces an English Government, and an English Government becomes dominant in English politics in the same way as the Scottish Government are dominant in Scottish politics, and the vestigial federal level is not disabled. It seems to me that stability

requires that this place remains England's legislature. That is not to say that there is not scope for procedures in the other place that give English MPs a vote and a voice. I do not myself object to any proposal that says that they should even have a veto over legislative change that genuinely affects only England. To take a common example, I cannot see why English MPs should not have a veto over changing the law on fox hunting. I cannot imagine why anyone would want to have it or ban it, so I care not at all, and I care not constitutionally either.

Looking towards the issue on the table, I do not think that the Government's present proposals do the job here because they have not correctly considered the spillover questions. This is not to do with Barnett consequential—forget about them. This is to do with the extent to which English tax decisions determine the overall tax framework and the overall funding framework of the United Kingdom. A Government who, *ex hypothesi*, had to rely on Scottish or Northern Irish votes, or who could not get their English income tax legislation through, would not be able to deliver their Budget and would no longer be stable. I think that the Government's proposals have many strengths: they have the right approach; they are doing it through Commons Standing Orders; and they understand that we are talking about procedural changes which give a special voice to English Members. However, I think that their application of it to taxation, and in some respects to secondary legislation, is imperfect. Nevertheless, in my view that is the basis of a stable solution.

The Chairman: You are quoted as saying that it could make England ungovernable. Could you talk us down that path, although not too excessively?

Professor Jim Gallagher: Let us imagine that there is a UK Government who depend on Welsh Members, for the sake of argument—1950 is the only example of that, by the way. Let us imagine that the Welsh Members were not allowed to vote on English income tax but that they were allowed to vote on every aspect of public expenditure, which is what is envisaged. At that point, the Government would be able to secure a majority for their spending programme but unable to secure a majority for their financing programme. The English Members who were determining English income tax would have all the power of taxation but none of the responsibility of spending for England. That, it seems to me, would be an unstable situation that would make England ungovernable.

Professor Alan Trench: I do not see any innate problem in not representing England, as Professor Gallagher said. I think that you need to go in the direction of English votes for English laws, but there are some really profound problems with what the UK Government have proposed and what has now been adopted in the other place. It is another symptom of this reactive approach, which means that devolution is treated as an event, not a process, to

turn on its head Ron Davies's famous remark. A much broader approach needs to be taken to make English votes for English laws work in a sustainable way, and I shall highlight three possibilities.

The first is a point that was recommended by the McKay commission as the counterweight to the procedural mechanism for delivering English votes for English laws. That was a devolution committee. Its recommendation was a Committee of the House of Commons. My view is that a Joint Committee of both Houses may well be better. Of course, apart from anything else, the commission could talk only about recommendations for England because that was the limit of its remit. In the absence of a high-level Committee within Parliament that draws attention to devolution questions looked at in the round, the problems that arise from spillover issues in particular are going to exist, remain and become worse, so a Committee like that would provide a means of identifying and perhaps resolving those problems, and also, upstream, of pre-empting them.

That relates to the second problem presented by English votes for English laws in its present form, which is to do with how Whitehall is organised and how legislation is framed. The tendency of course has been to use a legislative slot as possession of a scarce commodity within Whitehall and for departments to put as much into the Bill that fills that slot as they possibly can with little regard to the territorial pattern that that follows. Of course, most Whitehall departments have a curious combination of England-only, England and Wales, Great Britain-wide and sometimes UK-wide functions. Taking the Home Office as an example, it has responsibilities for policing in England and Wales but for immigration and nationality in relation to the whole of the UK. If the Home Office, for example, gets a legislative slot, ensuring that that slot relates clearly to England, or not, is part of the difficulty.

The third difficulty goes back to the discussion that we have already had during this session about finance and how finance is organised. I remain very concerned about the extent to which financial arrangements may be determined by English MPs only but will have significant knock-on effects for devolved budgets. There are ways to address that. They involve a pretty wholesale redrafting of how Parliament as a whole, but particularly the other place, handles supply. In the absence of those, it starts to look rather messy to me.

The Chairman: Professor Jeffery, I know that you have made a special study of this subject, so please share your thoughts.

Professor Charlie Jeffery: I worry that I may advance into territory that you may wish to question us on in a bit more detail. On the specific question on legislative devolution to or

within England, if you had asked that 15 years ago, there would have been no problem. However, I think that a problem has emerged more recently—a perception in England that the system is unfair both in an instrumental sense about the distribution of resources across the UK and in an accountability sense of who makes decisions on my behalf. If you imagine legislative devolution to include English votes for English laws, or similar adaptations to House of Commons business, then I do not think you can imagine a stable situation without that kind of legislative devolution. Within England, I think that that is pretty irrelevant. I do not see measures to empower in various ways subnational units within England as at all responding to those concerns about the allocation of resources and the unaccountability. I see the northern powerhouse, or city regions, or whatever language is being currently used, as a technocratic solution. It is an economic policy issue. It is about enabling different parts of the UK to build sustainable centres of economic activity. It is not about democratic representation and I do not think it should be understood as that. People in England, from our research, clearly do not understand city region devolution, or regional devolution in any form, as responding to the concerns they have about how they are governed.

The Chairman: We will come on to the city powerhouses on a later question. Can I bring in Lord Norton?

Q56 Lord Norton of Louth: I move on from the last question because I think we have covered English votes for English laws. It is really a case of moving beyond the constitutional aspects because obviously there is significant constitutional change, which we argue is necessary but not sufficient if you are going to create a stable union. So it is really a case of what we can and should do beyond the constitutional changes. Even at the level of constitutional changes, how do you get people to respond to them, know about them and see the value of the union? Discuss.

Professor Charlie Jeffery: Discuss, indeed. I would probably go back to the themes that I was raising at the very outset—that there has to be some articulation of a sense of shared purpose, which we have not seen, at least in a compelling and sustained way, amid the various responses we have made in Scotland, Wales, Northern Ireland and now England to senses of dissatisfaction.

Lord Norton of Louth: How do we get from here to there? I think that is the key point.

Professor Charlie Jeffery: We—and probably by that I mean rather more you as part of the central political institutions of the UK—need to think about it in a sustained way. You will recall, Lord Norton, that Jim Bulpitt, a colleague at the University of Warwick, who, sadly, is no longer with us, talked about statecraft and territorial statecraft. We have seen, I am afraid,

a real absence of territorial statecraft—thinking about how the state as a whole can accommodate the demands for decentralisation in its various parts. Unless we do that, we will continue on this ratchet process of gradual disintegration. I do not necessarily mean by that the formation of separate states but I do mean a gradual process of disintegration which is fluid and uncontrolled.

Professor Jim Gallagher: I agree with much of that analysis but would add two things. It certainly requires the political leadership of the United Kingdom in a broad sense to have a common understanding of what the union is for. I do not think it is particularly difficult to describe that. As Charlie says, doing it in a consistent and compelling way is the challenge. I think the institutional mechanisms need to change. I go back to something I said before: somebody has to have this as his or her job, and at the moment nobody does. I think there are very particular challenges in Scotland, where you have an unusually energetic and active nationalist party, for which the political competition is at present weak. If the United Kingdom political parties as institutions believe in the UK, they have to think about, at a tactical and personell level, how they deal with that question. I echo something that Alan said, which is that of course we will never get to a crystallised final state. There will always be people in Scotland, and perhaps some people in Wales, who do not want to remain in the United Kingdom. Some accommodation may well be reached with them in my view but it will not stop that potential source of instability for the long run. And Northern Ireland has its own history and story which suggests that it is never in our lifetimes going to be a settled matter that no one worries about. So let us not try to get to perfection, but I think there are better places we could be than we are today.

Lord Norton of Louth: Presumably the body you envisage, which at present does not exist, which would have that responsibility, would have to be fairly high-powered or vested with quite strong political authority to be proactive in the way that you are proposing.

Professor Jim Gallagher: Absolutely. One of the striking things about the British political system is that it struggles to deal with more than one big question at one time. The eye of Mordor was on the Scottish referendum for a period but it has moved on now. I think you will find that it is about to alight on this place for different reasons. We need the capacity to have multi-channel government, which does more than one thing at a time. All things in government are ultimately the Prime Minister's responsibility, but you need a senior Cabinet Minister with a substantial department of state, money to spend, authority in the Cabinet and the vision to do the statecraft that Charlie has described. Applications are now in for this post.

Professor Alan Trench: I have nothing to add to what has already been said.

Lord Morgan: Can I ask an incidental question? In terms of clarity of decision-making at the centre, we would need help if we had followed the view of this Committee 12 or 13 years ago and abolished the Welsh and Scottish Offices as redundant.

Professor Jim Gallagher: One would not so much abolish as combine.

The Chairman: We have leapfrogged over the question of decentralisation and the cities but, given the time, it is unfair to keep you here any longer. If you feel inclined to write to us about that, and on whether or not stability can be created through that sort of decentralisation and powerhouses that are being developed in England, then please do. Also, if you feel there is anything on the reform of the House of Lords—a subject we have not raised with you—on which you would like to unburden yourselves from the safety of some miles away, or on any other issue, we would welcome it. We are extremely grateful to you for sharing these extremely interesting replies with us today. Thank you so much.