



Revised transcript of evidence taken before
The Select Committee on the Constitution
Inquiry on
THE UNION AND DEVOLUTION

Evidence Session No. 23 Heard in Public Questions 289 - 311

WEDNESDAY 27 JANUARY 2016

10.35 am

Witnesses: Lord Empey

Professor Arthur Aughey, Professor Derek Birrell and Professor Colin Harvey

Mark Durkan MP

USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.
2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.
3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 7 days of receipt.

Members present

Lord Lang of Monkton (Chairman)
 Lord Brennan
 Lord Hunt of Wirral
 Lord Judge
 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 Witness

Lord Empey, Ulster Unionist Party

Q289 The Chairman: Good morning, Lord Empey. This inquiry into the union and devolution has taken us to Scotland and to Wales, but most of our evidence sessions have been held here in London. We would happily have come to Belfast. However, two of the sessions involve people who come to Westminster regularly, including yourself, so overall it is for the convenience of all of us to have these sessions here. Perhaps on another occasion we shall have the chance to come to Belfast. Thank you for coming to see us. We much appreciate it. We recognise that the concept of union probably has stronger resonance in Northern Ireland than it has elsewhere in the United Kingdom. One of the things we are trying to get a feel for is what people mean by union. Does it mean different things to different people? How do you feel Northern Ireland's union differs from the union of Wales or Scotland?

Lord Empey: Thank you very much, Lord Chairman, for the opportunity to speak to the Committee today. Like everything else, there is no single definition. Neither is there a single definition of nationality. Sometimes people regard their identity in different ways. Historically, of course, there are differences. There is a geographical difference; we are an island off an island off a continent, so there are those issues. The Committee will be more than familiar with the history.

Fundamentally, the Belfast agreement of 1998 made absolutely clear that Northern Ireland is an integral part of the United Kingdom. That was accepted by the Irish Republic. In fact, you will recall that the negotiations focused on what were then Articles 2 and 3 of its constitution, which we felt laid claim to our part of the United Kingdom. That was resolved. It was voted on, on both sides of the border, and a settlement was agreed, by a very substantial plebiscite.

Therefore, as far as we are concerned, we are an integral part of the union, but that does not mean that we cannot have and should not have relationships elsewhere, because resolving the identity issue was the critical point of the whole process. I very strongly believe that we feel ourselves to be part of the union, albeit that the union does not have to be an absolutely one-size-fits-all concept.

The Chairman: That is recognised in the agreement that brought peace a few years ago. Can you define how the relationship with Ireland adds a distinctive perspective to how you see union with the rest of the United Kingdom?

Lord Empey: The first thing, of course, is that a very large proportion of the population of Northern Ireland feels its identity drawn more to Dublin than to London. That said, polls over a long period of years show that the number of people who support the union is larger than the number of people whom traditionally one would have identified with the Irish Republic and, indeed, who would vote for parties that seek to break the union. The way things have developed since the agreement was reached has been to settle the issue such that more people feel content with the constitutional framework. They can see that they have a relationship with the Republic with which they tend to identify, but it is not one that is inconsistent with the constitution of the United Kingdom, including Northern Ireland.

Q290 Lord MacLennan of Rogart: Thank you, Lord Empey, for that clear statement. If we attempted to set out common principles for the union, would that upset the people who feel part of the union in Northern Ireland? If not, would a new charter for the union be an appropriate vehicle for those principles? It has been suggested to us by the Bingham Centre and others that that might be a way of embracing all four nations of the United Kingdom.

Lord Empey: You raise what is probably an even more fundamental question, in so far as we are struggling at the moment to find a definition. Because we have an unwritten constitution, I have a fear about developments in the last few years. We seem to be changing things quite radically, but not within an overall envelope that has a plan as to where we intend to take those changes and what we are trying to achieve. To some extent, they are haphazard. We have had very significant changes made. We saw that even a couple of weeks ago, when the House of Commons radically changed the constitution of the United Kingdom by means of a Standing Order.

If you are asking me whether we should try to define things, I think that we have to decide fundamentally as a nation how we treat our constitution. If we are going to change it, there should be some kind of process in our minds as to how that can be done. It seems to me that we are doing things here and things there; things are done on the hoof in response to a

particular political situation. I need hardly tell you, as someone representing Scotland, that we ran ourselves into considerable difficulty a couple of years ago, for understandable reasons. We are now living with the downstream consequences of that. I would be reluctant to see something unsettle what I think we have settled in our part of the United Kingdom. Rather than overdefining things, you need a degree of flexibility, so that people can feel comfortable. The more you define a thing, the more you start people saying, “I could cope with this bit, but I am not so keen on that bit”. The danger is that one moves to a position where, at the end of it, more people feel that they do not fit. Maybe I am not describing it terribly well, but that is one of the risks we run.

Lord MacLennan of Rogart: There are certain common values between Northern Ireland and the rest of the United Kingdom, and there are certain areas of policy that are decided by Westminster and Whitehall. If we articulated those, would it make people feel uncomfortable?

Lord Empey: No. I have a wider issue with devolution issues and the way we do them. We have this “devolve and forget” principle, which is incorporated in the Sewel convention. I do not agree with that. I said in a debate recently that I felt that, to the general public, local assemblies felt like giant ATMs. They produce money, and nobody cares or even knows where it comes from. There is certainly no accountability for the money. If you look at our history, it was precisely because we devolved and forgot in the 1920s that we ended up in difficulty in the 1960s. We were pushed to a desk at the back of the Home Office and forgotten about. Parliament has an overarching responsibility to see that certain things are maintained and standards set. Given the fact that Parliament votes the money to make these things run, there has to be some quid pro quo so that Parliament gets some kind of feedback on what is happening. The departments seem to want to push it over, so that it is off the table, in a way, and they can forget about it and go on to something else. We made that fatal mistake, and it cost us dear. I do not think it should be repeated.

Q291 Lord Lester of Herne Hill: If I am allowed to say this, I sympathise very much with everything that you have said so far. Do you think that one of the flaws in our present system is that we rely too much on a European treaty, the European Convention on Human Rights, rather than some constitutional instrument? When we are dealing with problems with Northern Ireland that are current—normally about sex or abortion or, sometimes, about euthanasia: matters of that kind where feelings run high—the only real limits on the powers of the devolved institutions in Northern Ireland are direct rule, which is heavy handed, or the European convention. Do you think that it would help in principle if one had a charter of the kind that Lord MacLennan mentioned? Would that give more support than a European treaty,

with all the problems of relying on something European and a treaty to do a job of work that it was not intended to do?

Lord Empey: That is a very incisive question. I know what you are getting at. When I started on a political career there was a famous article in the *Sunday Times* that described Northern Ireland as “John Bull’s political slum”. That was a very hurtful thing to read from a unionist point of view, but it drew its source from the fact that Parliament devolved and forgot. There are certain national situations that require to be maintained by Parliament. Certain standards and values could come into that category. There is widespread support for the European Convention on Human Rights. Whether that translates into support for the Human Rights Act is a different issue, but there is widespread support for the treaty. If you start to define things, you have to accept that the Sewel convention, if it is applied to devolved issues, will have to be set aside in certain circumstances. I know that the theory is that it can be done, but departments are very reluctant to do it.

The other thing, of course, is that if you have a situation where an awkward decision can be pushed back to London and local politicians do not have to take it themselves, they get a free ride. In other words, they can say to you, “You have the power to do it—you do it. It is too difficult for us”. We had an example of that a few months ago, when the Northern Ireland Assembly had to pass back its legislative responsibility for welfare. London had to deal with that and pass it back again. That was one case where local politicians had an exit strategy for themselves. Having said all that, we have to think of the citizen, the circumstances they are living in, the laws they have to obey and so on. “Supervisory” is not the word that I am looking for, but Parliament will always have to keep an eye to the big picture. Sometimes it is not possible for that to be dealt with at local level, because of various pressures, belief systems and so on.

Q292 Lord Judge: May I ask some questions in relation to the Civil Service? The Civil Service in Northern Ireland has been separate for nearly 100 years, but there are still some reserved matters. My question is directed to that issue. In relation to reserved matters, what are the advantages and disadvantages of a separate Northern Ireland Civil Service?

Lord Empey: In my experience of working for many years in departments with the Northern Ireland Civil Service, it is a very professional organisation. It is about 30,000 strong. There is a difference; it may be an obtuse point, and you may or may not be aware of it. In a Whitehall department, the Secretary of State of the day is effectively responsible, and if that person is out of office, the department has nobody to take decisions for it. In Northern Ireland, the power resides in the department, as opposed to being with the Secretary of State, so a

Northern Ireland department can function without a Minister. That is not something that is widely understood. Although devolved Ministers have power under the Act to direct and control the department, the department is quite self-sufficient. If it is not given policy directions, it can do a lot of things itself. It can make public appointments; the Permanent Secretary can sign them off. During the troubled period when we did not have devolution, I have to say that departments in Northern Ireland kept the place civilised, in as much as that was possible, so I have a lot of regard for them.

It is a separate organisation, with different structures, but during the direct rule period the head of the Civil Service in Northern Ireland was also a deputy secretary in the Northern Ireland Office. That person was given two posts, so they had a link. That situation no longer applies, although it is the case that we have swap-overs, where civil servants from Northern Ireland departments serve in Whitehall departments. That is an important thing to do.

I do not think there is a huge issue. My experience of civil servants is that if you give them a direction they do their best to carry it out. At the end of the day, even if devolution is not functioning, there will still be a Secretary of State who is able to direct the organisation. Ministers and Whitehall would be perfectly capable of doing that, and showed through the direct rule years that they can do it. I would not be of the view that it has created a big problem.

Thinking about the Civil Service in Scotland, the only thing I would be concerned about is that it gets too introspective. In view of the conversations I have just had in answer to noble Lords on this side of the room, I think that there should be a formal mechanism for having civil servants from Northern Ireland and the other devolved regions in Whitehall, and vice versa. That exchange of information, ideas and how policies can be implemented would avert or offset the issue that I think you are concerned about.

Q293 Lord Norton of Louth: Names are important. It has been suggested that it might aid intergovernmental relations if we moved from calling devolved institutions “legislatures” and “Administrations” to using the terms “Parliaments” and “Governments”. Do you see any merit in that? Would that terminology cause problems in the context of Northern Ireland?

Lord Empey: I do not see it as a Northern Ireland issue, but I do see it as an issue. For example, journalists have to use language and terms that people understand; the Northern Ireland Executive are not a Government, but they are frequently referred to as the Government. Given that a very wide swathe of day-to-day life for ordinary citizens is dominated by issues that are devolved, ordinary citizens see the Executive as the Government.

They are called an Administration; sometimes their opponents may call them a regime. It confuses people.

The link between London and the devolved Administrations is not understood, because there is no requirement on the devolved institutions to account to Parliament for the money they receive. That is a fundamental flaw. It creates an impression that many of them are very happy to foster and promote. Indeed, it happened this week, when the Deputy First Minister at home was asked whether he was going to stand for a Westminster seat. He said, "I am not going to go back there to stand again, because all the decisions are made here". No account is taken of where the money comes from, and there is no accountability for it. Where else could you give people billions of pounds with absolutely no feedback? Parliament has to recognise the fact that the money it is giving is UK taxpayers' money, and I would have thought that the representatives of UK taxpayers were entitled to some kind of feedback on whether we are getting value for money.

It goes back to Lord Lester's point. If things veer off beyond what we would regard as our national sets of values or things like that, currently there is no mechanism in place to do anything about it. That devolve and forget process is wrong. Although I have always supported devolution, it seems to me that we are in danger of not simply creating a United Kingdom but of heading inexorably into federalism. That, of course, brings up the role of this House.

Q294 Lord MacGregor of Pulham Market: I would like to ask a question about the social union aspects. The sharing of risks and benefits, particularly welfare and equivalent benefits, in what is described as a social union is seen by many as important to the union. It has, of course, the concomitant pooling of resources for those benefits. Is this UK-wide sharing and redistribution of resources seen as important in Northern Ireland?

Lord Empey: For us it is pretty critical, for the simple reason that we are so heavily dependent on the public sector, sadly. Largely as a result of 30 or 40 years of disturbances and trouble, as we call it, our private sector was very severely weakened. You will know, because as a Cabinet Minister you implemented them, that there have always been national policies of redistribution to the regions. In our particular case, and in recent years in the Scottish case, those have become focused on the relevant elected institutions, but the principle has always been there. Although I am a great supporter of Stormont, my biggest disappointment is that to date it has not fully exploited its powers and ability to promote the economic recovery that is needed to rebalance our economy. On the social side of things, until last year we had a policy of parity on welfare issues. Although the power was there to deal with them, we merely

incorporated the UK-wide things to keep social cohesion, but also because of the sheer scale of the sums of money involved.

I support the principle of regional policy, but there is a tendency not to have regional policy defined. It works in practice, but there does not seem to be a big picture. We have the Barnett formula, Barnett consequentials and so on. The ordinary person in the street does not get any of that, so we have an opaque process, again without any accountability to Parliament. I am in favour of regional policy. I see no alternative to regional policy throughout the United Kingdom.

Lord MacGregor of Pulham Market: Regional policy including welfare benefits?

Lord Empey: Yes. I have to say that I supported the principle of parity, because, if you start any significant change on the social side of things, we get the agitation that we have seen between England and Scotland over student fees, for example, where people say, “We are paying for this, yet my son or daughter goes there and has to pay. If somebody comes from Stuttgart, they do not have to pay”. There is a danger that, if we do not have some overarching envelope within which we operate, we cause destabilisation of the relationships. Maybe that is what you are getting at.

Lord MacGregor of Pulham Market: It is interesting to take the Scottish case, where they are arguing for full fiscal autonomy. We still have to debate that in the Bill, but it means that all but certain core functions—the obvious ones being macroeconomic policy, currency, foreign affairs and defence—are devolved. They accept that what goes with that is the fiscal competence to pay for those services. Indeed, a Scottish Minister, Fiona Hyslop, rejected the idea of social union as described by some other witnesses, along the lines you have proposed, as fiscal redistribution amounting to central control. I take it that that is not where you come from.

Lord Empey: All I can say to you is that if you asked me, “Should the Northern Ireland Assembly have more fiscal powers?” I would say no. My party would totally reject that. The ATM analogy is that, when the money runs out, local people do not get the blame; they just say that London has not put enough money into the machine and that if it had put in more money they would be able to spend it. The danger is that we loosen the links completely. The taxpayer generally is already becoming frustrated about a lot of things. That would make it even worse. We have more than enough powers at the moment. We should be making an effort to use the powers that reside in Belfast properly and effectively, rather than acquiring more. There are disagreements between the parties because of our mandatory coalition. Some people would have tax at 99p in the pound. I do not think that we should go any further down

that road. There might be three or four completely separate tax regimes in one country and it would become so complicated that people would give up. I would take great care about going down that road.

Q295 Lord Hunt of Wirral: I greatly enjoy your constant references to ATMs, because I have just led a legal team in a governance review of the 60,000-plus LINK machines. It is important to get a simple formula, which is what we decided as far as hole-in-the-wall machines were concerned. To go back to welfare benefits, how are we going to deal with them? Do you believe that there should be a minimum level of welfare benefits set right across the United Kingdom, which devolved Governments could supplement but never reduce? In other words, responsibility for welfare would be split between the UK and the devolved legislatures. If so, who should be involved in setting that minimum level, and how?

Lord Empey: First, the reason we in Northern Ireland have kept a policy of parity since the welfare state was introduced was not simply that it was a national service but that the sums of money were so enormous. We have power in that area. Indeed, the changes that took place last year mean that Stormont is doing some things differently now, but it is taking the cost out of the block grant. Whitehall is not giving it any more money, but it has chosen to spend some of that on things on which money is currently not spent here, for instance. That is fine, in so far as it is paying for that. However, when it comes to things like pensions and so on, which people have earned over their lives—they may have been working in Scunthorpe and gone back to Belfast to retire—devolved Governments will soon learn. To take the Scottish example, when they start to total the cost of doing certain things, it will be a very sobering experience. My sense is that they may do a lot less than they are talking about doing, because of the sheer scale.

Your point was about a minimum level, and no involvement with pensions and things like that. I do not think that you can leave a completely empty space, so there may be merit in what you are saying. Yes, you should have a certain degree of flexibility to deal with particular local circumstances. For instance, we were very unhappy about the idea of housing benefit being paid to tenants themselves, rather than to landlords. We had particular local reasons for that; we felt that certain organisations—ex-paramilitaries—would pounce on a lot of people if they were getting large sums of money at the end of the month, because they run money-lending rackets and so on. We felt that at least if the landlord was paid there would be a roof over the person's head. You can have differences, for perfectly good local reasons, but ensuring that there is at least a coherent minimum level, particularly for things like pensions, may be something worth pursuing.

Q296 Lord Morgan: In this session, as in every other, we have heard about the differences in history and policy between Northern Ireland, Scotland and Wales. At the same time, although there are those observed long-term differences, there have been suggestions from many sources, including this Committee, that there should be a more coherent vision for the shape and structure of the union. Do you feel that it is feasible or desirable for Northern Ireland to be considered alongside Scotland and Wales as part of a more coherent scheme of development, or are the history and background of Northern Ireland so different that that is not really feasible?

Lord Empey: I feel that it is essential that it is. We went into this literally for years during the negotiations in the 1990s. As you may recall, we had a three-stranded approach. We came to terms with our neighbours, we came to terms internally with our colleagues, and we have a structure, a framework and an agreement that recognise that the constitutional position of Northern Ireland is as part of the United Kingdom and that it will not change without the consent of the people. In those circumstances, if you follow through to the logical conclusion, you include Northern Ireland in the wider picture of the union. The union is no longer a one-size-fits-all constitution in any event.

The bigger question that you pose is: what are we trying to achieve? My anxiety, as I said earlier, is that we are doing bits and pieces here and there in reaction to events, but there does not seem to be a plan. I know that the idea of a constitutional convention has been rejected by the Government. We all know that it could take years, which is an issue in and of itself. At the same time, you cannot ignore the implications of doing things in Scotland, for instance. Last week we debated the Scotland Bill in Committee. Issues were raised regarding the fact that certain things were being devolved, but what was forgotten was that there would be implications for other parts of the UK. It is essential that all parts are involved in the discussions and in the move to get some kind of coherent outcome with which people can feel comfortable. The fundamental point is that we want people to feel as comfortable as they can. If you are a Scottish nationalist, you do not want to be in the United Kingdom. We understand that. If you are an Irish nationalist, you do not want to be in the United Kingdom. The reality is that the people in both those territories voted to stay in the United Kingdom, so you have to honour that, respect it and follow it through to its logical conclusion.

Q297 Lord Lester of Herne Hill: I would like to give an example to illustrate my question, which is about whether or not we should go on giving separate and special powers to the Northern Ireland legislature. The example is what has happened to libel reform. Our Parliament spent three years enacting a Defamation Act, but Northern Ireland politicians

refused to apply the Act in Northern Ireland. At the moment, there is a great deal of prevarication, which means that a publisher in London trying to publish a newspaper or a book across the Irish Sea and here faces bad old law in Northern Ireland and modern law, balanced by Parliament, here. Does it make sense for that kind of situation to prevail and for the Northern Ireland legislature and Executive to go on being able to do something of that kind, given that until this happened the law on libel was always the same in Northern Ireland and England?

Lord Empey: Lord Lester, you will get no argument from me on the principle of amending the law. From a purely party-particular political stance, we are in favour of change. Indeed, Lord Black of Brentwood came over to a meeting that we organised to promote the changes. We tried Private Member's legislation, but the relevant departmental Minister thwarted it, effectively. It was put in for review to the local law people, for them to look at it. Then their money was taken away, so the whole thing collapsed. As you say, we have the ridiculous situation that publications are subject to very different laws.

We know that Scotland has its own law—a wonderful tradition of law—and I do not think that anybody would want to see that changed. However, you are coming to the whole point of fundamental rights in all of this, where the Sewel convention collides with some of the bigger issues. I am entirely for a change in the laws; they are hopelessly outdated and quite dangerous. However, if the devolve and forget philosophy is ingrained in central government, from top to bottom, none of that will change. People will argue that devolution means what it says—that you give somebody power. The question is: for how long and to what extent, and are there limitations? The only limitation at the moment is our international treaty obligations. It might be difficult to make a case that the libel laws come into that category. The question is: do we confine it to international treaty obligations? I am sure that is something that your Committee will want to consider.

The Chairman: We are running short of time. We still have time to squeeze in a question from Lady Taylor.

Q298 Baroness Taylor of Bolton: It is a brief question; I am not sure about the answer. In all that you said, you have made it clear that you think that there is real lack of clarity in the public mind about the Administration and Whitehall. You have your giant ATM, which will hover in our minds all day, but what is the answer? How do we change those public perceptions? How do we educate the public? How do we make them realise that devolution is a reality and not something where we devolve and forget?

Lord Empey: One thing that might change would be for the relevant First Ministers and Finance Ministers to sit before the Select Committee in the House of Commons annually to explain how they had spent the money and to submit reports that the relevant Secretaries of State would publish, again annually. During consideration of the Armed Forces Bill a few years ago, we managed to get in a clause requiring the Secretary of State to report to Parliament on what each devolved Administration was doing with regard to the Armed Forces covenant. That is now published. In fact, the Northern Ireland Executive's contribution was that there was nothing, because they could not agree on a response, but at least that was reported to Parliament. The concept would be that an Administration at least had to inform Parliament what they had done with the money—what the stresses and strains were. The Bank of England has—or used to have—an agent in Northern Ireland who regularly goes around the country assessing the economy in different areas and reporting back. Why could we not have some mechanism like that? At least people would see the link.

Baroness Taylor of Bolton: That might stop us at Westminster forgetting that we had devolved, but how do you get the division of responsibility across to the public in Northern Ireland?

Lord Empey: The fact is that, if you have devolved Ministers speaking to a parliamentary Select Committee and so on, it will be on television. People will see it. It will be written about. They will be quoted. What people see is very often how they are informed. It seems to me that one of the ways is for them to see those Ministers telling Parliament what they have done and being asked questions by you and other colleagues. You will never get all the labyrinthine processes of what is and is not devolved across to people, I suspect, apart from those who are particularly interested.

Ministers could even say how well they have done and what they are doing. This morning I attended a breakfast that dealt with exports and how the different job promotion agencies work throughout the UK. We can learn from one another. It is not reporting to the headmaster; it is about sharing ideas. Good ideas come from the regions, and we can all learn from them. It is similar to moving your civil servants and, on a reasonable scale, having people move around the different Civil Services. It means that people share ideas and procedures. The more devolution gets entrenched, the greater the differences will become, and the culture will change. That is the point Lord Lester was getting at, I suspect. If we do not have some interchange, things in local areas will atrophy: "Oh, we only do it this way". There are things we can learn from one another, and that is where devolution could play a role.

The Chairman: Lord Empey, it is a real source of regret that we have to draw stumps there, because we have been learning from you all morning. It has been absolutely fascinating and very lucidly and clearly expressed. We are very grateful to you. We had to pass on the last two questions. Would you be willing to put something on paper to us on those—just a paragraph or two on each?

Lord Empey: I will do that.

The Chairman: That is very kind of you. Thank you very much for coming to talk to us. It was most informative.

Examination of Witnesses

Professor Arthur Aughey, University of Ulster, **Professor Derek Birrell**, University of Ulster, and **Professor Colin Harvey**, Queen's University, Belfast

Q299 The Chairman: I do not know what the collective noun is for professors; perhaps it is an enlightenment of professors. We are delighted that you have agreed to come to talk to us today. We are engaged in what we acknowledge is a difficult and extensive inquiry into the union and devolution. We are very keen to include all parts of it, and we are grateful to you for coming from Belfast. As I explained outside, the other two sessions are with witnesses who are here anyway, which is the only reason we have not travelled to Belfast. We are very grateful.

You have seen the sort of areas we want to cover in our questions so I will dive straight in. We may change the order of the questions, but please do not be thrown by that. As I said to our last witness, the concept of union is something that resonates for different reasons and in different ways more strongly in Northern Ireland than it probably does in other parts of the United Kingdom. Can you tell me how you see a state of unions as being different in Northern Ireland from the rest of the country? Perhaps you would like to start, Professor Aughey.

Professor Arthur Aughey: Certainly. There is a historical aspect that is rather distinctive from the other nations and regions of the UK. What distinguishes the Northern Ireland case is a question of legitimacy. The legitimacy of Northern Ireland as a part of the union has been challenged at three distinct but interrelated levels: first, politically; secondly, constitutionally; and, thirdly, as we have experienced over the last quarter of a century, violently.

The question of political legitimacy meant that nationalists in Northern Ireland felt excluded from the political institutions, such that we now have in Northern Ireland an attempt to bring those communities together in a form of power-sharing or compulsory coalition that is very

distinctive from the system in Scotland, in Wales and certainly in the UK Parliament here. Constitutionally, of course, Northern Ireland was challenged by the Irish state. Under Articles 2 and 3 of the old 1937 constitution, the Irish state made a territorial claim on the six counties of the north. That has been resolved under the Belfast Agreement; those two articles are now aspirational rather than territorial. What distinguishes Northern Ireland again is that it has not only a bi-communal form of political institutions within, but a bi-national relationship on the island of Ireland. Ever since the Anglo-Irish agreement of November 1985 the Irish Government have had a role to play, at least consultatively, in the politics of Northern Ireland, and that continues today, institutionalised in cross-border co-operation and in the North/South Ministerial Council.

What also distinguishes Northern Ireland in the policies that are pursued there is the legacy of violence and the terrorist campaign. We have had reform of the police and we have had change to the legal system, but we have issues outstanding. A treaty has just been laid before the House—I think it was this week—setting out a way of resolving the legacy issues of violence and historical crimes. That is what distinguishes Northern Ireland itself as an entity within the union, but it is very clear that Westminster remains the sovereign authority and Northern Ireland remains a part of the United Kingdom, albeit a part of the United Kingdom on the basis of consent.

Professor Derek Birrell: I would add to that historical viewpoint that the contemporary viewpoint is that the future of the union for Northern Ireland very much rests with the electoral wishes of the people of Northern Ireland, which is in the Good Friday agreement, but that is no different from Scotland. Since the Scottish referendum you could say that the future of the union for Scotland rests with the vote of the Scottish people. Wales is a bit different, of course, where it is not such an issue.

The other point I would make is that, rather than studying the state of the union, I have found it quite helpful to look at Northern Ireland and its Government and governance as part of a system of multilevel governance. There are a number of different levels, including the Irish Republic and the EU dimension, which are important. There are even some external influences from the United States, apart from UK involvement and other internal aspects of governance. I would add those two points.

Professor Colin Harvey: I underline the distinctiveness of the arrangements in Northern Ireland. I would be cautious and sceptical about seeing them exclusively through a devolution lens. There is something else going on, and that is important to note for the conversation today. Obviously there is the history and politics of Northern Ireland, as has been mentioned.

There is also the legacy of violent conflict, and it is still working its way out of that conflict—it is still a society that is emerging from conflict.

It is important to note that the Belfast/Good Friday Agreement of 1998 and other agreements are not merely internal settlements for Northern Ireland. One of the fascinating dimensions of the Belfast/Good Friday Agreement is the three-stranded approach adopted there—the Northern Ireland internal dimension, the north-south relations and, perhaps interestingly for the conversation today, the British-Irish intergovernmental relationship and the connections between all the democratic entities on these islands.

Obviously the internal Northern Ireland arrangements are distinctive: the power-sharing model; the sense in which, through the Belfast/Good Friday Agreement, the whole arrangement is underpinned by the notion of consent; the self-determination principle that has been mentioned; and the fact that Northern Ireland, historically and now, has to deal with the fact that political unionism is just one particular political position in the context of Northern Ireland. Constitutional arrangements had to be designed in such a way that whatever choice the people make as to their future, whether they wish to reunite with Ireland or remain within the UK, they have certain rights, and the Government with authority there will act with impartiality.

We have had to face that issue—a strong focus on people and the relationship between peoples across these islands. That is something that could usefully feed into this conversation. I would go even further. Looking again at some of the language in the Belfast/Good Friday Agreement 1998 about relationships across these islands, there are lessons for this conversation today, and in any discussion where we are thinking about negotiating the future of the UK.

I hope I have made it clear that the Irish Government has an important role in relation to the conversation about Northern Ireland, and there is the fact that the British and Irish Governments are co-guarantors for the 1998 Agreement. That brings the Irish Government into the conversation about anything that will impact on what is happening in Northern Ireland, potentially. We have seen that in the last number of years around the debate on the Human Rights Act, for example, and the various participants who have involved themselves in that conversation.

There are two more things. One is the legacy of the conflict, which, as we know, is still a work in progress. There are still mechanisms to be put in place to begin to address that effectively. I end by underlining, in this first response, the fundamental underpinning of human rights and equality throughout the Agreement, as well as the centrality of the European

Convention on Human Rights and the Human Rights Act to what has followed in Northern Ireland from 1998.

The Chairman: Thank you very much. That has been a very useful scene-setter. I would like to come back to the union a little later in our discussion, to the extent that there is time to do so. I will move on to one or two of the devolution issues that interest us, and bring in Professor Morgan.

Q300 Lord Morgan: You refer to me as a professor. I was once a principal and the collective term that was commonly used was a “lack of principals”. You have all emphasised, obviously correctly, the historical differences that mark out Northern Ireland in so many fundamental ways. It has emerged throughout our discussions that the starting points for Wales, Scotland, Northern Ireland and indeed, potentially, England are all quite different when we consider this question. However, it has been suggested by many sources, including this Committee, that there should be an attempt to articulate a coherent vision and structure where Northern Ireland would be brought in with the other nations and peoples of these islands. Do you feel it would be possible to give a coherent settlement, or do the historical and other differences within Northern Ireland make that not feasible?

Professor Arthur Aughey: It is perfectly possible and very valuable. I would make the distinction between the notion of a statement of union or a charter of the union. There is a distinction between a question of identity and a question of procedure. If it were the case, as Professor Harvey intimated, that one consequence of such a charter or statute of the union would involve you signing up to be a unionist and that was a denial of your identity, it would not work. For many nationalists the 1973 border poll seemed to be a question of, “Are you going to vote to be British or not?” and the consequence was a boycott of that poll. As has been made very clear since 1998, Northern Ireland, like Scotland and Wales potentially, and even England, are part of the union on the basis of consent. I would see that statement of the principles of the union not being about identity, because under the Belfast or Good Friday agreement of 1998 we can be British or we can be Irish, and some of us may feel British and Irish when the mood suits us. I do not see it as a question of identity but as a question of procedure.

Northern Ireland devolution is enmeshed into the process of governing the UK. I would see some sort of statement, charter or declaration of the union as a way not of establishing administrative details or identity but of indicating the values of that union—its democratic values and human rights values. It would be about procedures, not identity, such that relationships between the various parts of the union would be conducted on the basis of

mutual respect and dignity for those institutions. That would reflect or incorporate some of the language that we find in the Belfast/Good Friday agreement, and in other distinct declarations such as the Edinburgh declaration between the Scottish Government and the UK Government, about mutual respect, open communication and institutional dignity. I would see that declaration or statement of the principles of the union as procedural, not, “This is a statement of our British identity, and if you don’t feel part of it, sorry”.

Professor Derek Birrell: It would have to be handled sensitively and politically. The danger is that it would be seen as strengthening the union and weakening the Irish dimension, so it is a political issue. For the reasons Arthur has given, you would need to avoid a kind of straitjacket. It might cause problems. When dealing with Northern Ireland, you need flexibility to deal with legacy issues that come up: for example, the Stormont agreement and negotiations and so on.

It might be useful with particular reference to intergovernmental relations, which are not really laid down in any kind of statement and have been developing on a bit of an ad hoc basis. Even the formal bodies are not very well codified, like the joint ministerial council or the British-Irish Council. It might also give a clear meaning to devolution. We now have a situation where people are starting to talk about whether city devolution for Manchester and so on is really devolution. It is worth getting devolution down in some sort of statute or statutory guidance.

Professor Colin Harvey: I have three points. First, I preface everything I say by noting the continuing importance of stabilising the distinctive power-sharing arrangements in Northern Ireland. We should frame the conversation in that way. It remains work in progress, as we have seen in the last few years.

The second point is to note that there is a changed constitutional context in the UK, and that changed constitutional context should not necessarily be seen as a threat but perhaps as an opportunity for rethinking, in a more pluralistic way, the nature of constitutionalism in the UK, and therefore the opportunities that might open up for different types of constitutional conversations in the future. My concern would be how something with the title “Charter of the Union” might play out in the distinctive Northern Ireland context I mentioned. There is also the concern that it might be an attempt to revive, or bring about a resurgence of, a very traditional understanding of the unitary state in the UK when real opportunities are emerging for a more pluralistic and different type of constitutional conversation in the UK that we should take the opportunity to pick up on. I have expressed some scepticism about that title,

and the concerns that it might raise, in that it might be a step backwards rather than a step forwards.

The third point is around process, and it touches on other questions that you may have. Should we begin to think about constitutional conversations in the UK as intergovernmental discussions, the outcomes of which are not predetermined? In other words, we begin a different type of conversation in the UK, and even around these islands. I am not saying that we are going to draft a charter of the union, but what do we have in common, for example, in relation to issues of human rights and equality? What are the things that we share and can agree on as common principles or common statements? We can then think about what we might want to call it. The new constitutional context in the UK presents opportunities. Yes, there are challenges, but it raises profound questions about processes that are likely to lead to meaningful outcomes in the longer term, processes that stabilise rather than destabilise.

Q301 Lord Lester of Herne Hill: I declare an interest because I have a house in west Cork. I love Northern Ireland. I was an unpaid adjunct professor at University College Cork, so I am quite close to Northern Ireland events.

I am going to be a bit crude, I am afraid. Listening to all three of you, I am interested in getting you to talk about the real context—what you call the Northern Ireland context—and looking at it from the point of view of the people. From the point of view of the people of Northern Ireland, we have a polarised political situation at the moment in which the Government are paralysed by extremism. From the point of view of the citizen, if you are gay and you want to have a marriage in Northern Ireland, you cannot have one; if you are a pregnant woman and want a safe abortion in Northern Ireland, you cannot have one; and if you want the same free speech in Northern Ireland as in England, you do not have it.

There seem to be real problems about identity in Northern Ireland even now, all these years after the Troubles. To avoid complacency when we come to think about the constitutional framework, should we try to think of ways, from the point of view of the people, of producing a better system than we have now?

Professor Derek Birrell: Part of the polarisation is the conflict in identity, which of course is closely related to religious identity. Some of the more conservative attitudes that politicians tend to follow come from basic religious beliefs and religious differences that are seen as important in Northern Ireland. The polarisation appears worse when it is translated into the operations of the devolved Assembly because of the system of vetoes that exists, which means that there are a number of obstacles to a clear vote. There was actually a majority vote in favour of gay marriage, but it was vetoed because of the mechanism that can be used. It was

originally built in to give protection to both communities, particularly the minority community. It was originally intended to cover constitutional issues or major political issues, but that was never clarified, so it can be used on any measure that comes before the Stormont Assembly.

It is quite difficult to make progress on that in Northern Ireland. It may be that eventually public opinion will change and therefore the politicians will follow public opinion, but on conservative attitudes on issues such as gay marriage and abortion, and on poor community relations despite many attempts to improve them, it is a slow business. There is no easy answer. It is very difficult to see any major change in the political configuration of the parties that are looking for internal change.

The only other way of altering it is to look at devolved powers. You can ask why abortion and gay rights were devolved matters. It was probably never thought about; that is the way it was in 1921, and it was left. You could interpret it as a UK citizenship matter. The Calman commission looked at the importance of UK citizenship in determining certain basic rights. That was one of the Calman arguments for the union. One way of addressing it would be for a UK Government, if they were brave enough, to say, “Really this is a matter of UK citizenship and maybe international obligations and perceptions”, so you could either exert pressure, or even legislate over the heads of the Northern Ireland Assembly.

Professor Colin Harvey: I have three points. First, the power-sharing model in Northern Ireland has largely been successful. It is stabilising the politics of Northern Ireland and providing a foundation to try to build the new Northern Ireland that so many people want to see. I have a rather different understanding of that model, how it has worked out and its importance, recognising its distinctiveness.

Secondly, it underlines the importance of the Human Rights Act. That is a UK-wide piece of legislation that applies to Northern Ireland, is used in Northern Ireland and has made a difference in Northern Ireland. People are trying to make use of their human rights to change Northern Irish society for the better, including in relation to the appalling treatment of the LGBT community.

On the third point I have to declare an interest. I was a member of the Northern Ireland Human Rights Commission and I was involved with others in proposing to the UK Government a Bill of Rights for Northern Ireland. The mandate for our process was clear that our advice had to supplement the European Convention on Human Rights. We recommended a Bill of Rights that would build on the Human Rights Act, supplement it and go further. To

answer the question, that Bill of Rights has not been implemented. It is one of a number of things that remain outstanding from the Belfast/Good Friday Agreement.

There was reference to a charter of the union earlier. There is reference in the Belfast/Good Friday Agreement to the possibility of a charter of rights for the island of Ireland, for example. There is no charter of rights for the island of Ireland as we speak. There is no Bill of Rights for Northern Ireland. Those are the sorts of measures that, if implemented, would assist greatly in creating a rights-based and equality-based society that could only benefit all the people of Northern Ireland.

Professor Arthur Aughey: I always remember one of my great intellectual mentors, Michael Oakeshott, saying very mischievously when referring to the Russian revolution that the further away you get from the Russian revolution it is less a new beginning than a modification of Russian circumstances. That became very clear in the 1990s when we saw the sort of Russian state that emerged from the Soviet Union. A lot of things were very familiar. Maybe the illusion of 1998 was that the Belfast Good Friday agreement was a new beginning and that one could read into it a fundamental transformation of Northern Ireland. However, it was really a modification of Northern Ireland's circumstances such that those profound arguments about identity and belonging did not go away. The conservatism of religious attitudes did not go away but became modified in institutional form, which was power-sharing devolution, north-south relations and the stabilisation of Northern Ireland's position within the union. When you look at those institutions, I agree with Professor Harvey that the situation has stabilised, and that is a profound blessing of the policy that the two Governments pushed through in 1998.

A colleague of mine, Professor Gormley-Heenan, makes a distinction between power-sharing, which suggests some form of positive engagement of political parties, and power-splitting, which we often see in the way the various ministries in Northern Ireland operate, going on different trajectories without any form of Cabinet collective responsibility. What she said is quite distinctive about Northern Ireland. It is not power-sharing and it is not power-splitting; it is power-snaring. That may address your point about the institutionalisation of vetoes.

I have often thought of a motoring analogy for Northern Ireland. It is almost in political neutral. The engine is revving and there is a lot of activity going on. It is using precious fuel, but in some ways the engine is not engaged and major issues are not addressed within the institutions, so that when you come up against significant problems it is still a case of crisis management. We saw that over the welfare reform issue that had to be addressed through the recent Stormont House agreement.

I declare an interest: when I was a lot younger I was a member of a group called the Campaign for Equal Citizenship, which made the point you mentioned—there were certain rights that, as citizens of the UK, people in Northern Ireland should benefit from. At the time one of them was abortion, but today it would most certainly be gay marriage. Northern Ireland is distinctive not only in the United Kingdom but in the island of Ireland on that issue.

Q302 Baroness Taylor of Bolton: I want to move to a different aspect, although it is not entirely unrelated. Our inquiry is called “The Union and Devolution”. One of the aspects that we are interested in is public perception on the ground of what is happening in the different areas. We have frequently been told that there is lack of clarity and that people do not know what an assembly is responsible for or what central government is responsible for. As you have been explaining, you have extra dimensions in Northern Ireland, with power-sharing and the political situation, which make the situation even more complex. Can you give us an idea of what you think public perception is of clarity? Do the public know who is responsible for what? You mentioned the welfare decisions. How do they resonate with ordinary citizens there, and can more be done to engage ordinary people so that they do not see devolution in terms of history but as the way forward?

Professor Colin Harvey: There is a general problem for politics at the moment, and that question is distinct from the issue of clarity around devolution. Clarity around the devolution arrangements is work in progress across many areas. There is scope for profound confusion among the general public, and even within the various Governments in the UK as well. There is more that could be done to try to explain better what the current nature of the UK actually is. That is part of a general problem of alienation from politics at the moment. That is one part of the picture. In that sense, Northern Ireland is probably no different from other parts of the UK.

More positively in relation to that, there is one thing that I would like to say. I was born in September 1970 in Derry, and people were being killed on the streets in great numbers. I have two daughters, aged six and eight at the moment, and I want them to grow up in a different sort of society from the one I grew up in. I see what has happened since 1998 as progress. It is not perfect; it is flawed in many fundamental ways, but it has had a measure of success in stabilising politics. The positive side of that is that if people are increasingly alienated in Northern Ireland about the ability of their Executive and Government to deliver on socioeconomic issues for the people of Northern Ireland—as I think they are—in a sense that is progress, because the focus is turning to the Executive in Northern Ireland, the Assembly, and what they are doing to deliver for people.

Another positive point is that we have seen a re-energising of politics around constitutionalism in the UK. The Scottish referendum—in scale, extent and participation—is a wonderful example of that. It takes me back to an earlier point. It would really profoundly concern me if the approach to the question you are addressing was seen in some kind of fearful or risky way. There are opportunities around the new politics emerging in the UK. Those opportunities can be taken, but you are right that there is a need for more clarity as to how all the intergovernmental elements relate to each other, and then how they relate to and explain themselves to the general public.

Professor Arthur Aughey: Lord Norton, who is on this Committee, suggested at one point that, rather than a constitutional convention, we should have a constitutional convocation to address those questions of exactly where we are and who does what. That is why there is great value in the investigation that you are engaged in. There is value in trying to think through what a statement or a charter of the union might be, which might address the issues that Professor Harvey mentioned.

In Northern Ireland specifically—perhaps it is the case throughout the UK—it is not just the public’s perception of who does what, where, when and how in our contemporary politics that is confused. During the May general election, I was very much struck by the fact that, in discussions in the local televised forums, those who were engaged in the general election and seeking election to the House of Commons very rarely touched on the issues that they would be responsible for as MPs. The sorts of issues they talked about were the issues being covered by the Northern Ireland Assembly, the Northern Ireland Executive. That certainly is a problem of public perception.

I mentioned that Northern Ireland was in democratic-neutral. The justification for Northern Ireland’s institutions hitherto was not that they actually did anything but that they existed. The profound achievement was that we had institutions where political parties that formerly could not agree on anything at least had the civility to discuss with one another in a parliamentary assembly. Professor Harvey is right: there is a generational limit to the acceptability of that proposition. There are younger generations coming into politics who have no experience of the Troubles and they are asking, “What are you doing for us? What is the purpose of turning out to vote?” What used to distinguish Northern Ireland from other parts of the United Kingdom was the high electoral turnout, but turnout has been dropping in Northern Ireland.

Professor Derek Birrell: I know of only a few small bits of research that have been done in the area about campaigning and people taking complaints. Quite a lot of the confusion arises between local government and the Assembly; it is not so much at the Westminster level.

There is evidence that a lot of people take housing problems and issues to local councillors, even though local councils in Northern Ireland are not responsible for housing; it is the Assembly. On the negative side, there is quite a bit of information suggesting that people and even some pressure groups and organisations are not terribly aware. Dealing with the economy is very much a divided responsibility, so it is often unclear whether it is a Westminster or Northern Ireland responsibility.

There are two things to say about complaints and campaigning. People often go to their MP rather than an MLA, but that is largely because MPs are seen as more powerful—whether they are or not, that is the reason. Campaigning and lobbying groups in Northern Ireland find that the Northern Ireland Assembly is very accessible. It is easy to meet people, to arrange meetings, hold lobbies and get the media involved. It functions as a kind of focus for people to bring issues, even though they may not actually know the precise boundaries and powers.

Q303 Lord Brennan: We listen to evidence from time to time about the way in which the union and devolution is working in practice. Some powers are to be transferred, some not to be transferred and some may be the subject of an agreed transfer. The catchphrase that has been used is “draw-down”. Northern Ireland has much more experience historically than Wales and Scotland in recent times in dealing with these things. What lessons do you think your experience has given you that would reflect on our view about draw-down, and in particular the relevant criteria of transparency, accountability and underwriting? Does draw-down mean eventual take-back? How does it all work?

Professor Arthur Aughey: I happily defer on this matter to my colleague Professor Birrell, who has just published an excellent book on multilevel governance. I was reading it on the way over. He is the expert.

Professor Derek Birrell: Northern Ireland makes a unique distinction, which again is purely historical, between excepted services, reserved services and devolved services. There is a kind of three-step involvement. The origins and reasons go back to Irish history. The excepted services were originally to be UK, but the reserved services were to be for an Irish home rule Parliament in Dublin and then they would be devolved as well. That was the origin. Northern Ireland has kept that distinction. The way it is meant to be used today is that there are certain powers that the Secretary of State can use such that reserved powers can be acted on by the devolved Government. Powers can be drawn down or declassified from excepted to reserved, to prepare them for becoming devolved. They have done that recently with Civil Service Commissioners. That was an excepted matter but it has now become a reserved matter and may shortly become devolved.

There is a more general question. Basically there has not been a lot of demand in Northern Ireland for an increase in powers. It is fairly restricted, of course. There is the corporation tax campaign. The law on justice was transferred and that had cross-community support. There is no great demand for an increase in powers, but neither is there any demand for a decrease in powers. The point that is sometimes overlooked, especially by my Scottish colleagues, is that Northern Ireland has more power devolved to it than Scotland has. It has powers over the Civil Service, social security, employment, trade union law and so on, so it is not as important for Northern Ireland to increase its powers. There has not been great demand for more fiscal devolution. I will stop at that point.

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

Professor Colin Harvey: Only that it seems from what has happened in Northern Ireland is that the system has generally worked; it has not been a great cause of dispute. Justice and policing were reserved and are now subsequently transferred matters. We have obviously seen what happened around welfare reform recently.

The Chairman: If we wish to pursue this further, perhaps we can come back to Professor Birrell. In the meantime we will move on. Lord Hunt wants to ask a question to take you very briefly out of your comfort zone to England.

Q304 Lord Hunt of Wirral: Yes, it is a very good question. Is it possible to deliver a devolution settlement that both recognises England as a nation and brings power closer to communities or regions within it?

Professor Derek Birrell: I will shortly hand over to Professor Aughey, but I will just say a couple of words. Devolution on the three-country model is probably out for any region of England following the north-east events. Federalism is probably out. You are left with EVEL, which I will leave Professor Aughey to talk about, or the new city devolution. As I mentioned, that has become a kind of government priority. You could possibly see it more as a form of regionalised local administration or local government quango partnerships and so on. Whether it is really devolution as it is understood in Scotland, Wales and Northern Ireland is probably not the case. Given that the idea of setting up parliaments in different regions of England is not very popular, and it seems very complex to set up an English parliament, probably exploring the full capacity of city devolution will remain the route. I will pass the problems of EVEL to Arthur.

Professor Arthur Aughey: I am reminded of George Dangerfield's famous book, *The Damnable Question*, which was about Irish home rule. I think England is the damnable question today. We started off by looking at Northern Ireland as the exception, but I think

England is the exception. Professor Lord Norton will probably agree that what we have actually seen since 1998 is the textbook integration, if not the political integration, of Northern Ireland into the UK in major textbooks about British politics, because it fits a pattern. It is enmeshed in the new institutional arrangements, albeit reasonably exotically, but certainly it is there. Northern Ireland is now discussed along with Scotland, Wales, England and the United Kingdom.

The damnable question facing England is this. Professor Robert Tombs mentioned it in his recent book on English history. He said that local devolution is not national devolution. From what I remember when I was first a student in the 1970s, it was not called devolution at all; it was called de-concentration—taking powers out of Westminster but not losing control. There is a profound distinction between that form of local government, or recognition of local identity, and the recognition of England as a nation. The two things are not the same. Robert Tombs did not mention it, but if you were to go back to Dicey and his polemic *England's Case Against Home Rule*, which was written in the 1880s—Dicey is in bad odour or bad favour at the moment because he is assumed to be simply a parliamentary supremacist or a Westminster sovereigntist—

The Chairman: You are stirring up a hornets' nest.

Professor Arthur Aughey: But Dicey said the same thing. He said that local self-government is not the same as recognising the nation in the form of home rule. Those two things are incommensurate and incompatible. How do we deal with England? I suppose it depends on where you think we are constitutionally at the moment. I am reminded of the old tale of Sir John Cutler's stockings. It seems to me that devolution has proceeded on the principle of Sir John Cutler's stockings. He was a member of the City of London and a profound public benefactor, but as many profound public benefactors tend to be he was personally very cheap and mean. He would get his servant Dolly constantly to darn his silk stockings with wool until it came to such a point that the stockings were no longer silk but entirely wool.

It may well be the case—some people have argued it—that the way devolution has proceeded hitherto, with ad hoc darning of the constitutional fabric, means that we have reached a point where we need to recognise that we have a new constitutional arrangement that must be formally recognised. Members of the House of Lords, such as Lord Lexden and Lord Salisbury, now argue that we have to recognise that we now have a new pair of constitutional stockings to acknowledge, and England must be dealt with equally.

The Chairman: Before I bring in Professor Harvey, two of my colleagues want to ask supplementaries: first, Lord MacLennan, and then Lord Lester. We need to be concise because we are short of time.

Lord MacLennan of Rogart: Professor Harvey indicated that he was not in favour of a charter of common values or common policies that should be exercised at that level. I find that difficult to understand because it seems to me that, if the people of Northern Ireland want to remain in the United Kingdom, they must have issues in common with the other nations.

The Chairman: Before you answer, Professor Harvey, I will bring in Lord Lester and then you can cover both questions.

Lord Lester of Herne Hill: I resist the temptation to say something about Dicey in view of the time. This really relates to what Professor Birrell said: federalism is out. Did you mean by that that it is out under the present Government and present circumstances, or that it is out as a matter of principle?

Professor Derek Birrell: Not as a matter of principle. Federalism tends to be associated with very large countries. It is in the realm of governmental activity of Canada, Australia and so on. It would be possible to design a federal constitution. You can look at the German one, which is quasi-federal. The Swiss one is kind of federal. I have not really seen any work on trying to apply a federal model to the UK. There are issues about representation in a central parliament and the role of a central parliament and so on. Of course, it would imply a separate parliament for England; it would be hard to imagine federalism without that. It would be possible to look at it, but it would require very careful thinking even to produce potential blueprints for it.

The Chairman: Professor Harvey, you have the floor.

Professor Colin Harvey: To clarify, the premise of a lot of what I have said today is about not destabilising the distinctive power-sharing arrangements in Northern Ireland. On that basis, I was simply expressing caution and scepticism in relation to the notion of the charter, but I was also asking for reflection, given the new constitutional context in the UK, on procedural and process issues about how any such discussion would proceed. I hope I have made it clear that we increasingly need to think in terms of intergovernmental conversations for those sorts of important constitutional discussions. It was caution and scepticism on the basis of not wishing to destabilise a power-sharing arrangement in Northern Ireland that is still in a sense bedding down and still trying to balance all those principles noted earlier.

To respond to the question about England, if I may, following a number of commentators I have tried to argue that there are opportunities in the new constitutional pluralism that is

emerging in the UK. Devolution in an English context makes perfect sense. Some of the principles, thinking back to the Belfast/Good Friday Agreement, were partnership, equality and mutual respect. A profoundly and deeply unhappy and resentful England is of no use to the other parts of the UK. It is important that England is content with its place in the UK constitution, in whatever way that is worked out. That is an important point.

Speaking as somebody who lives and works in Belfast, I would also like to make the point that English politics is having an enormous impact on the other parts of the UK—Scotland, Northern Ireland and Wales. I mentioned earlier the debate about the Human Rights Act, for example. From the discussions about that, it seems that Scotland, Wales and Northern Ireland feel fairly comfortable with the Human Rights Act and with the European Union. The new constitutional arrangements need to reflect England's mood and the politics of England, but there needs to be awareness of the impact of English politics on the rest of the UK. We are all acutely aware of the impact.

The Chairman: It is a great shame that the clock is against us, but we have had a fascinating hour with you and we are extremely grateful. There were two or three questions on the union that we did not manage to get back to, but you covered them to a large extent in your supplementaries to other questions, so we are very grateful for that. The one I would particularly mention, however, and where we would welcome something in writing from one of you, or all three of you if you feel inclined, is about the separate Civil Service in Northern Ireland and its relations with other devolved parliaments or institutions and with the UK; and whether that inhibits or helps the circumstances of Northern Ireland within the United Kingdom. If any of you feel like putting pen to paper, please do. Have you been delegated, Professor Birrell?

Professor Derek Birrell: A House of Lords report in 2002 described the Northern Ireland Civil Service as “semi-detached”.

The Chairman: We would be very interested to see that from you. Thank you very much indeed. It has been extremely productive for us and we are most grateful to you for coming from Belfast to talk to us.

Examination of Witness

Mark Durkan MP, Social Democratic and Labour Party

Q305 The Chairman: Mr Durkan, we are very grateful to you for coming. You are third in hand, but we are all the more grateful to you for being in a position to wind things up. We

have had two interesting sessions, one with Lord Empey and the second with the three professors whom you have just met. It is clear that there is a separate perspective in Northern Ireland that is very important to us, as we must look at all aspects of the United Kingdom. The word “union” has a resonance in the Province that is different from elsewhere in the United Kingdom, but it is also stronger for different reasons. How do you see the union in Northern Ireland?

Mark Durkan MP: I am not one of nature’s unionists.

The Chairman: We understand that.

Mark Durkan MP: The inquiry is a very interesting one. As someone who, in the last Parliament, spent a few years on the Select Committee on Political and Constitutional Reform, I am conscious of a number of the conundrums and issues that you are looking at. I was increasingly sensitised to those, not least the variety of issues and arguments coming forward from within England about what the post-devolution landscape is.

As someone who is not a fan of the original Act of Union, as an Irish nationalist, I am not sure that what I want is a new Act of Union, which some people have been proposing, but I believe that what we need in all parts of the United Kingdom, and maybe more widely, is a new parliamentary charter or charter of representative democracy that allows people to make sense of all the different people they are being asked to elect to office, whether it is in local government, devolved government or the Westminster Parliament. People are getting increasingly confused as to where powers lie and how powers shift. They are also, of course, confused and concerned about where power lies as between the UK and the EU, and about the various roles of the European Commission and the European Parliament. As someone who has supported the arguments that have been made previously for a broader constitutional convention, I certainly believe that we need a democratic colloquy that comes up with some sort of coherent guide or statement for citizens as to who represents them, at what level and on what issue, and that sets out clearly, in a way that is comprehensible and accessible for citizens, the various roles and responsibilities of the different bodies, what citizens’ rights are under those bodies and what the rights and relationships of each of those bodies are. That means sorting out a number of issues such as resource and revenue—we are on a roll of Rs. Because things will be subject to change, and policy issues change just with technological developments and other things, there has to be responsiveness. We have to fine-tune and adjust where responsibility lies, where the right interventions or new collaborations are needed and where there needs to be a realignment of devolution or, in some cases, possibly realignment from devolution.

The Chairman: Thank you very much. That is a very good and comprehensive answer, if I may say so. Perhaps we can explore aspects of it a little further.

Q306 Lord MacLennan of Rogart: As you are not speaking as a unionist, this may be an importunate question. What do you think are the common values between the United Kingdom and Northern Ireland? Should we pull them together in some form of charter?

Mark Durkan MP: I do not speak as a unionist, but I am not here as an aggressive anti-unionist in any sense. I speak as a democrat and as someone who has always been, in Irish terms, an absolutely constitutional nationalist. I am someone who always believed, as a member of the SDLP, that the only solution to our problem was going to be within a British-Irish context and within a British-Irish framework. John Hume's old adage was that the framework of the problem would have to be the framework of the solution. Just as we said there would not be a purely internal settlement in Northern Ireland, so I do not believe that there is a purely internal settlement in Ireland either. We share throughout these islands a number of wider values. Those have been underpinned in many ways for people in Northern Ireland by the Good Friday agreement and the way it helped to create new institutions, and allowed us to agree that the issue of constitutional status would be resolved on the basis of consent, but that differences on those issues would not prevent us having shared institutions to which we could give common allegiance, because those institutions are legitimate from everybody's point of view. They are legitimate for unionists, because they were endorsed by the majority of people in Northern Ireland. They are legitimate for nationalists, because they have been endorsed by the majority of people in Ireland as a whole. Of course, the agreement also rests strongly on human rights provisions. The more those understandings can be reflected and understood in other parts of the UK, not least in London, the better. When there are strains in understanding around those things—around issues like the entrenchment of human rights provision—there will be difficulties, and the sense of those shared values and that shared basket of protections and principles diminishes and some of our own more local contentions start to emerge again.

Q307 Lord Judge: There has been a separate Northern Ireland Civil Service for, roughly speaking, 100 years. My question is directed to that. Does the fact that there has been a separate Northern Ireland Civil Service affect its relationship with the United Kingdom Government and indeed with the other devolved Administrations within the United Kingdom?

Mark Durkan MP: As someone who served as a Minister in Northern Ireland—when we finally got our Executive set up I was the first Minister of Finance and Personnel, which meant that I had responsibility for working with the Civil Service and responsibility for the

Civil Service because I also served as Deputy First Minister—I would have to say that a separate and distinct Northern Ireland Civil Service is a resource that you want as a devolved Minister. You want to think that the Executive has the resource of their own Civil Service and you want to think that the Assembly is able to call that Civil Service to account alongside its Ministers.

However, the experience of many of us is that even this long into devolution the default position in the Northern Ireland Civil Service seems to be that it still sees Whitehall as the mother ship. Even if it is notionally separate, it seems to be very conditioned by things that are happening in Whitehall. Even in circumstances where local politicians, or indeed people involved in different local policy communities and sectoral interests, point to policy innovations south of the border or policy developments or innovations in Scotland, there still appears to be a very Whitehall-oriented perspective on the part of the Northern Ireland Civil Service.

Lord Judge: Why do you think that should be after 100 years or so?

Mark Durkan MP: The long experience of direct rule itself created a different relationship. We had a Northern Ireland Civil Service that became hugely powerful because it was advising, and in many cases managing, Ministers who were not from Northern Ireland and who were representing policies that were not particularly supported in Northern Ireland. Civil servants became the governmental Sherpas in that peculiar territory for Ministers. It meant that they had quite a powerful role in interpreting and reinterpreting, or re-nuancing, government policy. In many ways the Northern Ireland Civil Service got used to being quite powerful. It also developed bad habits during direct rule, which are now being worked out.

I will give you an example. The Assembly is meant to be a legislative Assembly but in the early days of devolution, there was very little legislation coming forward from departments or Ministers. In the first full session of the Assembly there were 18 Bills. Nine of them were from me as the Minister of Finance and Personnel, four were finance and five were law reform. There was very little elsewhere. Part of the reason was that during direct rule civil servants had got very used to the Order in Council system of legislation. They got used to having the first and last word on legislation. They got used to the idea that legislation had to be absolutely perfect from their point of view, so that when it was tabled it could not be amended. There was an aversion to tabling legislation in an Assembly whose job it might be to proof or improve that legislation. We used to get Ministers coming to us at the Executive who regarded it as a crisis that a departmental committee in the Assembly was contemplating a combined amendment. It was regarded as a fundamental challenge. The working experience

and conditions for the Northern Ireland Civil Service have been different. Some in the Civil Service have been learning new practices and approaches under devolution; others seem to have been slower to do so.

Q308 Lord Norton of Louth: In part, this follows on from something you have just said. You have experience of both an Assembly and a Parliament. You have served in a devolved Administration. It has been suggested that intergovernmental relations may be eased or helped if, instead of referring to legislatures and Administrations, we move to more collective terms, simply referring to Parliaments and Governments. Do you see any merit in that? Would it be a problem from the particular perspective of Northern Ireland?

Mark Durkan MP: I do not think there is a particular problem from the perspective of Northern Ireland. I see merit in it, in the sense that during the Commons stages on the Scotland Bill, although I did not involve myself too much in the Scotland Bill, I made a number of observations. One was that so many of the key references in the Bill to the delicate area of welfare reform and welfare powers all related to Scottish Ministers and not to the Scottish Parliament. In a Bill that was meant to be about resolving the status of the Scottish Parliament, many clauses referred to the Secretary of State and Scottish Ministers, not to the interests of the respective Parliaments. I believe that there should be more reflection of the status of the Parliaments. We have a similar issue in lots of Bills relating to Northern Ireland that go through the House; they refer to the Northern Ireland Executive or Ministers in Northern Ireland, or a different route of reference might be used. Sometimes it is the First and Deputy First Minister, and they are then taken as the postbox for the Administration, but rarely is it for the Assembly itself. There have been times when I have been involved in amendments here that involved reports being produced or tabled, and have said that those reports should be remitted to the Northern Ireland Assembly, among others, or referred to the Speaker. For good relationships and good standing, those relationships should not be seen as purely intergovernmental, as though they are the property of Ministers who are themselves meant to be respectively accountable to different Chambers; they should reflect and respect the Chambers to which they are meant to be accountable.

Q309 Lord Morgan: We have heard a great deal, Mr Durkan, about the extraordinary difference in history and process in the way that Northern Ireland has come to devolution. Do you feel that the historic and policy differences between Northern Ireland, Scotland, Wales and, indeed, England make it difficult to think of a coherent approach UK-wide towards the next stage of devolution, or do you feel that it is nevertheless possible and desirable that such an approach should be carried through?

Mark Durkan MP: I am not sure that it is going to be possible to take a line-dancing approach to devolution, where everybody now takes the same next steps and should only take the same next steps. I do not think that will fit for different places. The character and the culture of politics in different parts of the UK will be different. The balance of politics within Wales, Scotland and Northern Ireland will clearly be different from Westminster. It is not going to be the case that whatever next might happen in Northern Ireland should equally and simultaneously happen in Scotland or vice versa. We have to do more than take the dolly mixtures approach to devolution, which is very confused and confusing, not least for the public but increasingly, as we have seen, within Parliament itself. People now get confused as to what is or is not already devolved or is on its way to being devolved. Of course, in the Northern Ireland situation we have complicated that further. We now have a picture where some things are un-devolved, or are simultaneously un-devolved and devolved, such as welfare reform. On paper, the Assembly has kept its powers of legislative competence over welfare, but at the same time it has handed competence to the Government in London to legislate until the end of this calendar year. There is a bizarre dual control arrangement for legislation. That is something that has come about in the peculiar circumstances of Northern Ireland. I am not going to make my own party political comment on all of that, but in the context of the changes that are afoot in relation to Scotland on welfare, I doubt that you could have an Administration in Edinburgh or a majority in the Scottish Parliament envisaging a similar sort of reversion to dual control such that, in the absence of Scotland being able to decide things in the way they wanted, they were going to hand control back to London to make decisions.

That example shows that there are still a number of uncertainties, even about what is happening at the minute. I still have not found clarity from Treasury Ministers as to whether the welfare spending that goes to the Scottish Parliament will count as part of the UK welfare cap, or whether it is outside the UK welfare cap. People might think that that is a small and pedantic point, but somebody should know and one would think that a Treasury Minister should know. Given that, in the future, things such as the welfare cap could be used as a clear instrument of imposing policy limitations by virtue of the expenditure seal that it creates, it could become politically quite a vexed issue. There are differences and there are also confusions.

The Chairman: It is not a small pedantic problem. There are lots of things we are waiting to hear about from the Government regarding the Scottish fiscal framework. Lord Lester had a supplementary question.

Lord Lester of Herne Hill: The Good Friday agreement envisaged reforms north and south of the border, but a common set of values in the north and the south. Does that idea give hope that it would embrace nationalism and unionism? Could you imagine citizens' rights, duties and interests being brought within a framework that embraced the Republic and the North of Ireland, and, for that matter, this side of the Irish Sea?

Mark Durkan MP: I think it does. As someone who was involved in negotiating the Good Friday agreement, I obviously think it set out a hugely positive prospectus for everyone, so that people could fully engage in and embrace the political emancipation that it offered without being any less unionist, no matter what position they held, and without being any less nationalist, no matter what position they held, and without having to concede to either unionism or nationalism to a degree that they did not want to do. As I said earlier, it was about making sure that we could all give allegiance to institutions that we regarded as legitimate, whichever light we held up to it. It had a holographic quality. Depending on which light we wanted to hold it to, we could see legitimacy from our point of view.

As you say, it also provides key common principles. Some of them have not been developed or articulated in the way that was envisaged in the agreement. For instance, the agreement committed us to bringing forward a Bill of Rights that would be very particular to the circumstances and experience of Northern Ireland. That has not happened. Although it was a disappointment to many of us that we were going to have to work towards that Bill, we took as at least a key reference point in the context of the agreement the fact that we were going to be able to rely on the Human Rights Act. At that stage, it at least provided a working floor for rights. There are concerns in case that floor is knocked out.

In the context of the human rights example in particular, the agreement also provided for the idea of an all-Ireland charter of fundamental rights that could be signed by political parties on both sides of the island. It did not purport to be an Ireland-wide version of a Bill of Rights. It looked at addressing some of the issues that a society in the process of change and seeking reconciliation on both sides of the border would have to look at, including statements as to how it would treat the rights not just of the respective traditions in Ireland but of different minorities and incoming communities. It is a pity that, as well as not having taken forward the Bill of Rights, we have not moved on that all-Ireland charter, which would have brought broader understanding. That conversation would not have created any particular tension for unionists as opposed to any conversation they might have about rights in a UK forum.

Q310 Lord MacGregor of Pulham Market: I want to go back to what you were saying just a moment ago about welfare benefits and so on. As the Chairman said, we are waiting for the

fiscal framework of the current Scotland Bill, and unsurprisingly it looks as though it will take rather longer than was hoped. The question relates to welfare benefits, pensions, tuition fees and all of that, and what follows from the payment of them. Some see the sharing of risks and benefits in what is described as a social union as extremely important to the union. Is the UK-wide sharing and redistribution of resources seen as continuingly important to Northern Ireland?

Mark Durkan MP: It is for many people, but there is now also concern and confusion about what it means or does not mean. Many people would have been very committed to the principle of parity between benefit systems when devolution was happening, so that there was no risk of a diminution of benefit entitlements or access in Northern Ireland compared with other parts of the UK. In circumstances where we have a welfare reform agenda that many people see as cutting benefits or where some benefits are being disappeared, people could decide that parity in those terms is not what we want if we are to represent people best and if we want to be able to reflect their own particular needs. There is also the peculiar issue around welfare per se, whereby on paper legislative power over welfare was devolved to the Assembly but it was on the basis of parity, meaning that the Assembly's powers of legislation were to pass what I would call karaoke legislation—you had to follow the words and music as set in Whitehall and by Westminster. Of course, when the Assembly did not do that, we ended up with the difficulties and the Treasury then acted, saying, "If you are not passing this legislation in the way we want it passed, we are going to take money out of the block grant. We are, in effect, going to fine your Barnett formula allocation to the value of what we think is roughly your notional overspend on welfare". Even though the Treasury is in a position, particularly now that it has the welfare cap, to control the flow of welfare spend to Northern Ireland, it seems a very clumsy way to go about achieving something that it could have achieved anyway.

From some perspectives in the Scottish point of view, I would have thought that the Scots would have raised concerns about that: if the Treasury can basically intervene using its allocation powers under Barnett as a way of enforcing its will when there is a clear policy disagreement between Whitehall and Stormont, what is to prevent it trying the same thing whenever there is possibly a disagreement between Scotland and Whitehall on welfare? Although the Scotland Bill uses a lot of language about reasonable efforts and best efforts being made to get agreement, and on a lot of things it presumes agreement, it makes no provision for what happens if there is no agreement or if there is a stand-off or stalemate.

Would what has already happened in Northern Ireland come into play, or is there something to prevent that?

Lord Hunt of Wirral: Should there be a minimum level of welfare benefits set across the UK that devolved Governments could supplement but never, ever reduce? Responsibility over welfare would in those circumstances, as has been argued and as some say is in the Scotland Bill, be split between the UK and the devolved legislatures. If that is the case, who should be involved in setting that minimum level and how?

Mark Durkan MP: In essence, what we seem to have arrived at in the context of Northern Ireland is a position that would see benefit rules and rates as determined by Westminster and Whitehall holding for Northern Ireland, with some mitigating measures available to the devolved Administration using moneys from the Northern Ireland block. In some cases that has been easier to establish than others, because for some benefits there have been administrative differences anyway; in Northern Ireland, housing benefit has always been administered differently. In other cases, the idea of such mitigations, differences or top-ups—whichever people want—seemed to cause more choking on the part of Whitehall Ministers, but something has been arrived at. In Scotland, there has been a different course; it has drawn the difference more between classes of benefits. In Scotland, the Smith commission said, “We want to have particular regard for benefits that are going to people with disabilities and long-term conditions and to particularly address their needs”. I think, and have argued in our own context of talks in Northern Ireland, that we need our own conversation about whether we realign our welfare settlement or understanding towards something that is not exactly the same as that but is more akin to it. Inevitably, we will come up against strains and difficulties later on, particularly if in future years the Treasury uses the welfare cap in a very aggressive way. When the welfare cap was introduced, it was bubble-wrapped as a neutral budgetary tool, but things that are bubble-wrapped as neutral tools by the Treasury usually become weapons at some stage. I do not think that we have pre-proofed for some of those consequences. We have overcome and patched up the difficulties that affected us in Northern Ireland when the Treasury’s punishment of Stormont’s recalcitrance on welfare created budget stresses. Those budget stresses became a budget crisis. That budget crisis became part of a political crisis. Although that has been resolved, we are not in a situation where it will not potentially be revisited whenever other serious decisions are being made and used on welfare. We might regret not having more of a colloquy with Scotland, Wales and Whitehall about a more sensible system so that we all know where we stand, and can tell our citizens where they stand. To my mind, the biggest difficulty for all of us in the current situation is that it is very

hard for citizens to understand where power lies and where the buck stops. That is very bad for democracy. We are giving people all sorts of layers of democracy and they cannot understand who is responsible for what. We all appear to point the finger at each other.

The Chairman: You have been very forthcoming, Mr Durkan. Thank you very much indeed. We have a couple of questions that we have not quite reached. If you can undertake to answer them in one minute each, we will ask them in less than one minute each and then we will all go for lunch without missing the one o'clock gong.

Baroness Taylor of Bolton: I think you have answered my question, Mr Durkan. It was about public perception of the arrangements. I was interested in what you said about a charter of representative democracy as a way of clarifying some of that, and which might have other wider implications, but I do not think you need to add anything on that.

Mark Durkan MP: In a devolved context, it is bad whenever politicians standing for election, for instance this year, point the finger at Westminster, and meanwhile Westminster points the finger at devolved politicians. We blame each other and then we wonder why the public are disengaged and disillusioned.

Q311 Lord Brennan: You have made it pretty clear that you think the devolution methods that are being applied legislatively are confused and confusing, and that ordinary people do not understand them. What is your remedy for doing it better?

Mark Durkan MP: We used to have a story at home about a priest in the town who went into one of the boys' schools or classes. He had a very serious throat problem and talked very gutturally. He was explaining an aspect of Catholic teaching and at the end of his presentation he said, "Right, have you all got that?" One young fellow said, "Father, could you say that bit again because I couldn't understand?" The Father said, "You are not supposed to understand; it's a mystery". There is an element of mystery around this issue. People in the British tradition are used to that, with the whole sacrament of the unwritten constitution and all the rest of it. Some of us come at it differently, and we have to work at it. It could be something that tries to present it from a citizen's point of view that makes sense, something that says who is accountable for what and is clear about the different institutions and what their relationships, rules and rights are in respect of each other.

I would like to make a supplementary point to an earlier answer about the Civil Service. One of the issues about the Northern Ireland Civil Service is that it is too departmentalised. In the Northern Ireland Civil Service code of ethics your loyalty is to your Minister. Obviously here it is to the Government because the character of government here is different. We need to change that. In Scotland, the Civil Service operates in more of a faculty system and on a more

collegiate basis, which makes it much more creative. Civil servants are not as bureaucratically turf-defensive and are not orientated policy-wise by what the big department in London is saying.

The Chairman: Mr Durkan, you have made yourself very understandable. We are extremely grateful. You have been forthcoming and extremely helpful to us. I am sorry we had to rush at the end, but it was worth it. Thank you very much indeed.