

United Kingdom Constitution Monitoring Group – written evidence (FGU0031)

House of Lords Constitution Committee Inquiry into the Future Governance of the UK

Introduction

1. The United Kingdom Constitution Monitoring Group (UKCMG) comprises experts and practitioners covering a range of areas of the UK constitution. Its principal purpose is to assess developments – actual and anticipated – in the UK constitution. Areas of interest include – but are not confined to – government accountability; arrangements for the upholding of the rule of law and individual rights; the territorial governance of the UK; and how the key aspects of such issues can be distilled and communicated to the public. We evaluate proposals and initiatives through considering the analysis in which they are grounded, and how far they are likely to deliver the objectives claimed for them. We also identify and assess trends and events that are significant from a constitutional standpoint. The UKCMG is impartial and has no party affiliation.
2. Although we attempt to address all of the Committee’s questions in some form in this submission, we focus in particular on the second of the Committee’s questions – that relating to the challenges for multi-level governance in the UK. It is crucial when considering the future governance of the UK that the changes to the context brought about by Brexit be fully taken into account, especially in relation to arrangements in Northern Ireland, and that past failures to create a culture and machinery of intergovernmental cooperation in the UK be addressed.

Is the current balance of powers within the UK optimal or does power need to be shared differently?

3. How powers are distributed between the different levels of government within a state depends very largely on the constitutional foundations of that state. At present, in the United Kingdom, the devolved institutions in each of Scotland, Wales and Northern Ireland have different sets of powers from one another (with the Northern Ireland settlement the most generous in terms of the powers devolved). This is a distinctive feature of devolution, whereas in federal polities the sub-state entities (for example, Canadian provinces) will each generally enjoy the same broad set of powers and responsibilities.
4. If the Committee were to conclude in favour of a federalisation of the United Kingdom, this would imply, for example, a significant expansion of the responsibilities of the devolved institutions in Wales (and to a lesser degree in respect of Scotland) to bring them into line with those available to the Northern Ireland institutions. Equally, a conclusion in favour of establishing an English Parliament would necessitate substantial enhancement of the powers of the Welsh Senedd in relation to matters currently administered on an England-and-Wales basis. (It is of course arguable that the creation of an English Parliament would destabilise the entire UK constitutional system.) So, the answer to the Committee’s question must ultimately depend on what conclusions are reached as to the best form of constitutional structure for the United Kingdom for the future (and the answer to that question may in turn depend on the territorial

composition of the UK itself: will it in future consist of four, three or two entities?).

5. Assuming however for present purposes that there will be no change in the general character of devolution within a four-territory UK, there will continue to be differentiation in the sets of powers to be made available to each of Scotland, Wales and Northern Ireland. We do not argue here for identical devolution settlements, but any differences between the settlements should be capable of rational (rather than purely historical or purely political) justification. It is not necessarily clear that the current distribution of powers meets this test in all cases. This said, it is crucial that the particularity of governance arrangements and devolved powers in Northern Ireland be understood in relation to the importance of the 1998 Good Friday/Belfast Agreement.
6. So far as Wales is concerned, the 'England and Wales' paradigm in the administration of justice, which survives notwithstanding the advent of Welsh legislative devolution, does not serve the people of Wales well, as the comprehensive report of a Commission chaired by Lord Thomas of Cwmgiedd (a member of our Group) has demonstrated, and there is a strong case for the devolution of responsibilities for policing and justice equivalent to the arrangements for each of Scotland and Northern Ireland. The post-Brexit context may also necessitate reconsideration of the distribution of powers within the UK, for example in relation to the interaction between UK Government-administered immigration policy and labour market policies for which the devolved administrations are responsible.

What are the current challenges for multi-level governance in the UK and how can these be addressed?

Culture and machinery of intergovernmental cooperation

7. The absence of a culture of intergovernmental cooperation within the UK presents a serious challenge for effective multi-level governance. It is a valid criticism of those who established devolution that they paid more attention to the creation of separate political and governmental institutions for the various devolved territories than to putting in place effective machinery to enable the institutions to work effectively together on matters of mutual interest. More recently, this lack of effective intergovernmental machinery may have been exacerbated by the transformation of Unionism from a nuanced governmental practice to an assertive and frequently-articulated ideology which disputes the claims of the devolved institutions to have exclusive, or even primary, responsibility for administration of their territories' interests, and which therefore may not be eligible for a partnership relationship with the UK Government on the basis of parity of esteem.
8. In this low-trust environment, it is difficult to identify ways of improving the situation. Much will depend on exactly how the reforms proposed by Lord Dunlop in his recently-published report are given effect; will they gain the whole-hearted support, both in substance and in public political commitment, of the UK Government at its most senior levels?
9. A recent paper, 'Union at the Crossroads: Can the British state handle the challenges of devolution?' (2021), co-authored by Professor Michael Kenny, a member of the Group, recommends that consultation and engagement between the UK and devolved governments be embedded far more deeply into both the culture and machinery of the British state. In particular, the report suggests that:

the UK government should engage with the devolved administrations as early in the process as possible when developing policies that will impact on devolved responsibilities and interests; reform to the Joint Ministerial Committee should be prioritised by governments across the UK; and Whitehall civil servants should be incentivised to learn about the territorial constitution and gain experience outside Whitehall, either in devolved or local government. When considering the subject of intergovernmental relations as approached by the centre, the Committee may want to have regard to the report's historical analysis and recommendations.

The Good Friday/Belfast Agreement, Northern Ireland Protocol and post-Brexit legal environment

10. Furthermore, it is vitally important that the challenges for multi-level governance (MLG) in the UK are conceptualised and understood in light of the structures of MLG that are established by the 1998 Good Friday/Belfast Agreement. These are across three strands: power-sharing within Northern Ireland, north/south cooperation on the island of Ireland, and British-Irish cooperation. Strands 2 and 3 mean that there is an explicitly 'international' dimension to multi-level governance within the UK. The 1998 Agreement states that 'all of the institutional and constitutional arrangements' in effect across all three strands are 'interlocking and interdependent'. This interdependency must be borne in mind when considering the future of MLG in the UK.
11. The UK's withdrawal from the EU has changed the conditions and the dynamics for multi-level governance in the UK, not least in what it means for Northern Ireland. In and of itself, Strand 3 is changed given that the UK and Ireland are no longer 'partners in the European Union'. This means a new context for the work of the British Irish Council (not to mention British Irish Parliamentary Assembly). The conditions for Strand 2 have also changed, given that it is now cooperation across an external border of the EU.
12. This is notwithstanding the terms of the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement. Article 11 of the Protocol charges the UK-EU Joint Committee with 'keeping under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South cooperation' (Article 11ii). However, (with the exception of the Single Electricity Market) there is no accompanying Annex or even explanatory memorandum on how the conditions 'necessary' for North-South cooperation will be measured, let alone maintained.
13. Post-Brexit there is now also another very important 'international' dimension for multi-level governance within the UK that poses new challenges and needs to be accommodated. The Protocol on Ireland/Northern Ireland in the Withdrawal Agreement Northern Ireland is dynamically aligned to a substantive portion of the EU acquis. This means that its statute book will have to adjust as the legal instruments incorporated into the Protocol are updated and amended at EU level. The EU is to inform the UK of such proposals through the Joint Consultative Working Group (which currently appears to exist in name only). How Northern Ireland officials and elected representatives can scrutinise these and inform the UK's response to them, let alone the process by which they will be incorporated into NI law, is still to be seen.
14. One challenge for MLG relates to the politics around the Protocol. UK authorities are responsible for implementing the provisions of EU law that apply to Northern Ireland through the Protocol (Art 12ii). The EU Withdrawal Agreement Act (2020)

states that a UK Minister or a devolved authority, including a Northern Ireland Executive Minister, 'either acting alone or jointly', may make regulations to give effect to the Protocol. (Sections 21 and 22). What this means in practice is unclear. Also unclear is the matter of what will happen if NI Ministers are unwilling or unable to make regulations necessary to implement the Protocol, or if the Assembly chooses either to annul or not to approve any such regulations that are made. The potential for Stormont/Westminster tensions is evident.

15. In sum, the legal environment for multi-level governance in the UK has changed post-Brexit and post-Protocol. In particular, the legislation that will apply, and the ways it will come to apply in Northern Ireland, will be different in the future. The challenge for policymakers in Northern Ireland has become more complicated. They will increasingly have to consider the possible implications of legislation coming from the UK and EU for its devolved competence, for North-South, and East-West integration and cooperation. And, even where they have no means of shaping the legislation itself, NI policymakers will have to seek to manage its consequences.

Should there be a greater degree of devolution within England and, if so, how should these arrangements relate to the UK as a whole?

16. If devolution in this question means something approximating to what Scotland and Wales currently enjoy, then we doubt whether there is sufficient shared identity to sustain it in the regions of England (as illustrated in the case of the North East, when the option of a devolved assembly was defeated in a referendum in 2004). On a much more limited scale, alongside the arrangements in London, metro-mayors have offered some benefits and gained support in some areas. Their powers are, however, circumscribed, both by Ministers and Whitehall and by local authorities in their area. These are essentially city/urban solutions introduced on a piecemeal basis and covering (including London) some 40% of the population of England. A consistent form of sub-national government is needed which includes a model for county areas.
17. We would not, at least initially, see such a development as necessitating institutional change at the UK level (unless this took the form, as some have suggested, of the creation of a new Upper House of Parliament for the nations and regions). It would however probably lead to the establishment of new associations of local political leaders within England, and this might in time result in new pragmatic relationships being established between these and the devolved administrations in Scotland and Wales.

How well understood in its constituent parts is the UK's common purpose and the collective provision it makes? And what impact does this have on democratic accountability?

18. In our view, the absence of any authoritative statement on the nature of the United Kingdom, whether in the form of a constitutional document or a policy declaration by the UK Government (notwithstanding its commitment to the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) in 2018 to produce one), makes it unsurprising that public understanding of the Union's common purpose, and the collective provision it makes, is generally poor. This is exacerbated by the fact that the UK Government acts for the UK as a whole in certain matters, but only in respect of England in others. UK Ministers'

apparent unwillingness or inability (which is replicated in the media) to explain exactly for which territory or territories they are announcing new policy or taking action only adds to the general lack of understanding.

19. Accountability is inevitably damaged by this. The current arrangements make all too easy the 'buck-passing' of responsibility between levels of government for failures in performance. More fundamentally, if the public has only a limited understanding of which institutions, and politicians, are responsible for what public provision, how can those politicians properly be held to account for the decisions they have taken?

How can the constitutional arrangements regarding the governance of the UK be made more coherent and accessible, or should the overall structure be revisited?

20. Reforms of the current system of devolution could be brought forward to address some of the current difficulties and create greater coherence; in this context, the Committee might want to consider the proposals in the Welsh Government's policy document 'Reforming our Union' (2019). But it would be unrealistic to think that reforms of this nature (which effectively take devolution as a given and seek to make it more able to operate in a Union of co-operation between governments and legislatures across the UK) would be likely to enhance the accessibility of our constitutional arrangements and build greater public understanding of the nature of the UK. The UK tradition of treating constitutional issues primarily as matters for negotiation among political elites does not allow either for significant public input or for education in constitutional fundamentals to create greater public understanding. Only a radical reform, based on a wide-ranging (and continuing) engagement with the public on constitutional issues could begin to address this situation.

How effective are the current funding arrangements for the UK and to what constitutional implications do they give rise?

21. An answer to this question depends on what criteria of effectiveness are adopted. The Barnett Formula, which governs the allocation of resources to the devolved institutions based on changes to public spending in England, operates effectively in the sense of limiting the number of disagreements between central government and the devolved administrations, but is at the same time widely acknowledged to produce unjust outcomes as between the different administrations: is this 'effectiveness'? Furthermore, the Treasury can 'sidestep' the operation of the Barnett Formula when it is convenient to do so; a well-known recent example is the allocation after the 2017 General Election of additional resources to Northern Ireland on devolved matters without making equivalent new allocations to Scotland and Wales. The designation of the HS2 development as an 'England and Wales' project (even though HS2 goes nowhere near Wales), meaning that no consequential additional funding goes to Wales in respect of the relevant England-only expenditure, is another illustration of the arbitrary and perverse consequences of the present arrangements.
22. Recent developments relating to the powers contained in the UK Internal Market Act further demonstrate this point (and the adoption of a more 'muscular' form of Unionism by the present Government). The Treasury announced in February that the "levelling up fund" would be UK-wide and administered centrally. As initially

proposed in the Spending Review, the scheme would have been England only, with extra funds for the devolved governments triggered under the Barnett Formula and distributed at devolved level. This shift in approach represents the latest use of the financial assistance powers in the Internal Market Act, which enable direct UK government spending in devolved policy areas. The Welsh government have launched judicial review proceedings challenging the Act “as an attack on [the Senedd’s] competence”. These developments highlight the capacity for the present system of resource allocation to be overridden in ways that undermine relations between the UK Government and the devolved administrations and that challenge the present distribution of devolved powers.

23. Furthermore, these examples show the extent to which the current funding arrangements rely extensively on Treasury practice rather than on rules agreed by the four governments that are consistently applied. In its ‘Reforming our Union’ paper, the Welsh Government has argued that the operation of resourcing arrangements, including determinations of devolved administrations’ spending power and borrowing limits, should be the responsibility of a public agency accountable to all four administrations jointly. Allocations of financial resources should be based on a set of agreed objective indicators of relative need, rather than the rolling forward of historic baselines. Adoption of reforms of this nature would significantly enhance transparency in decision-making on matters of fundamental importance to all parts of the UK, and could be incorporated in any revisiting of our constitutional arrangements.

24. We recognise, however, the difficulty in achieving such change. According to the Institute for Fiscal Studies (IFS), spending per person in 2019-20 on services that are largely devolved was around 27% higher in Scotland than in England and 13% higher than in Wales where, in the IFS’s words, “the population is older, poorer and sicker than in Scotland”. GDP per head is also higher in Scotland than in six of the nine English regions. We do not believe this outcome to be defensible in terms of equitably meeting the needs of the UK’s citizens. Any change would be contested and be politically unattractive in the context of responding to demands for Scottish independence. If change is to be made, as on the merits of the case it should be, it would need to be phased in over time given the scale of the correction needed.

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United Kingdom Constitution Monitoring Group (UKCMG)

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