Summary

This paper responds to the Constitution Committee’s call for evidence in its inquiry into the future governance of the UK. It responds principally to questions 2 and 5 of the Committee’s call for evidence, which are:

- What are the current challenges for multi-level governance in the UK and how can these be addressed?
- How can the existing constitutional arrangements regarding the governance of the UK be made more coherent and accessible, or should the overall structure be revisited?

Our evidence concentrates on the narrow issue of parliamentary procedure, and it largely reflects evidence we recently gave to the House of Commons Procedure Committee in its inquiry into the procedures of the House of Commons and the territorial constitution. Our evidence proposes:

- The establishment of a permanent inter-parliamentary Body comprised of Members of the four UK legislatures to hold to account the Joint Ministerial Committee or any successor UK intergovernmental organisation.
- Changes to the formal arrangements which enable joint working between Westminster committees and committees of the UK’s devolved legislatures.
- Integration of procedures relating to the operation of the Sewel Convention into the mainstream of each House’s legislative procedures.
- Other measures to enhance interparliamentary co-operation between Members of the UK’s legislatures.

Introduction

1. Any steps that can be taken to foster cooperation between the UK’s legislative bodies is highly desirable, and will contribute to better future governance of the Union. Better cooperation between parliamentarians in Belfast, Cardiff, Edinburgh and London should be attractive both to those who support the continuation of the Union and to those, like Sinn Fein and the SNP, who do not believe in the Union: mechanisms established now, while the Union continues, could form the basis of structures that would be needed if the constitutional position of its component nations were to change.

2. The Dunlop Review and the government’s review of intergovernmental arrangements (IGR) make clear that, in the context of devolution, current systems to manage co-operation and collaboration between the four executives in the UK have lagged behind changes in the devolution settlement and the politics of the four nations. We believe better interparliamentary scrutiny is essential to making IGR more effective.

Interparliamentary oversight of intergovernmental relations

3. Better mechanisms for intergovernmental cooperation are being studied by the Cabinet Office and the devolved administrations, and the UK Government “remains committed to finalising a product at pace”.1 One step along the road
was the publication of the first Quarterly Review of Intergovernmental Relations in March 2021.² Now that the elections to the Scottish Parliament and the Senedd are over, the work can resume. It is crucial: there is wide recognition that before Brexit the mechanisms were unsatisfactory; post-Brexit they urgently needed reform. If we optimistically assume that the Joint Ministerial Committee (JMC) will be reinvigorated in line with the Dunlop Review’s recommendations, and that the process of cooperation and joint decision-making will be improved, it is imperative that there are complementary interparliamentary mechanisms for the oversight and scrutiny of that intergovernmental work.

4. The Interparliamentary Forum on Brexit, which has brought together Members or representatives of all five legislative chambers has been an example of what an informal body can achieve. However, for real accountability for intergovernmental action to emerge, there needs to be a more formal structure with a clearly recognised role, a transparent and accountable way of working and proper reporting mechanisms. In other words, there needs to be clear “buy in” from the governmental and parliamentary sides. We would encourage the Committee to recommend moving swiftly towards the creation of a formal interparliamentary Body of around 20 to 50 parliamentarians that would have responsibility for the scrutiny and oversight of intergovernmental working.

5. Such a Body should –

- be drawn from the membership of both Houses of Parliament and the three devolved legislatures
- be funded jointly by the Houses/legislatures, and have a small, permanent secretariat provided by them jointly, the duties of which would include providing public information
- have powers akin to those of select committees to take evidence and report, to travel and to appoint sub-committees
- aim to work consensually³
- be recognised in the Standing Orders of each House/legislature
- meet frequently enough that Body members get used to working together, but not so frequently that the commitment becomes too onerous⁴: two-day meetings, four times a year would, we believe, be a minimum
- be clearly and directly co-ordinated with the JMC timetable and have a power to call Ministers from that body to give an account of its work and be questioned upon it
- use hybrid virtual and physical meetings as default

6. We have used the term “Body” to denote something more formal than a “Forum” – language is important. We see the Body as akin to an international parliamentary body that is more than just a place for parliamentarians from different institutions to meet and discuss, valuable though these things are – the Body needs to have teeth.

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¹ Commons Written Ministerial Statement, 10 November 2020.
² 2021-03-24 IGR Quarterly Report v2 (OS) [publishing.service.gov.uk]
³ It would be very difficult to agree a voting system that would be acceptable to all parties.
⁴ But it is noticeable that MPs and Peers attend the annual four weeks of the Parliamentary Assembly of the Council of Europe in Strasbourg without complaint, as well as the plenaries of the parliamentary bodies of the OSCE and NATO.
7. There are some international parallels worth studying in this context. The British Irish Parliamentary Assembly and the Parliamentary Assembly of the Council of Europe are familiar. However, the Benelux Parliament is an interesting example in terms of its composition (its Belgian members come both from the national parliament and from the other legislatures in Belgium); and the ways of operating of the Nordic Council (where the autonomous regions of Greenland, the Faroes and Åland are represented in addition to Denmark, Finland, Iceland, Sweden and Norway) and the Baltic Assembly, both of which really do seem to hold Ministers to account, are also worth considering.\(^5\)

**Committee Powers and Structures**

8. At present Lords committees have only power to meet concurrently and share evidence with Commons Committees and have no powers to work jointly with Scottish, Welsh and Northern Irish Committees. In the Commons, it is a formal responsibility of the Welsh Affairs and Scottish Affairs committees to consider relations with the Senedd and Scottish Parliament respectively. There is not a parallel responsibility for the Northern Ireland Affairs Committee. Only the Welsh Affairs Committee has formal powers to invite Senedd Committees to participate in proceedings, though any Commons Committee can exchange evidence with Committees of the other legislatures or of the House of Lords.

9. There is no logic in this. We recommend that the Standing Orders of both Houses be amended so that the powers currently given solely to the Welsh Affairs Committee are extended to all Committees with PPR powers. Joint inquiries by Committees would, as a report from the Institute of Welsh Affairs has argued, “build understanding across multiple political parties and legislatures, and lend legitimacy to any findings and recommendations”.\(^6\) The present inquiry of the Constitution Committee could, no doubt, itself have benefitted from being done in concert with committees of the Scottish and Welsh Parliaments and the Northern Ireland Assembly.

10. The Commission chaired by the former Clerk of the House of Commons, Sir William McKay, in 2013 proposed the creation of a Devolution Committee of the House of Commons.\(^7\) Partly this Committee would deal with Legislative Consent Motions, which we consider separately. But the Commission also saw the Devolution Committee having a wider remit of holding UK Ministers to account for cross-border spill-overs, as well as having the responsibility of looking at devolution policy more widely than the Commons territorial committees could. The Commission mentioned England in the latter context, and the need to scrutinise devolution policy in England is even more pertinent in 2020 than it was in 2013. The Commission also believed that the functions of a Devolution Committee would evolve over time.

11. We believe that the proposal for a Devolution Committee should be revived, and that it may be of particular value in helping rationalise the system of devolution in England. The close interest shown in these matters by the Constitution Committee suggests to us that a Joint Committee of Lords and Commons might be more desirable than the Commons only Committee that McKay envisaged and

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\(^5\) The term “Council” has a relatively clear, internationally-recognised status. Perhaps if the JMC were to be renamed the Council of the United Kingdom it would be clearer that it was a democratically accountable, inter-governmental body. The “Body” we propose would then become the parliamentary assembly of the Council.


\(^7\) Report of the Commission on the Consequences of Devolution for the House of Commons, March 2013, paragraphs 259ff
that we suggested to the Commons Procedure Committee. Membership of the Devolution Committee would, we envisage, be principally drawn from existing committees of the two Houses with a stake in the scrutiny of governance and constitutional arrangements, perhaps along the lines of the way in which the Joint Committee on the National Security Strategy is constituted.

12. The model of the Standing Committee on the Convention/Inter-Governmental Conference on the Future of Europe (of 2002-04) might offer an alternative option to the classic select committee model for consideration, as a potential means of the five chambers coming together to examine Ministers from all four jurisdictions. Careful thought would have to be given to the exact design.

Sewel Convention

13. The Sewel convention (that Parliament will not normally legislate with regard to devolved matters without the consent of the devolved parliaments) found statutory expression in the Scotland Act 2016 and the Wales Act 2017. Despite this, the Supreme Court in Miller decided that it was not its role to enforce this statutory expression of a constitutional convention, fundamental though such conventions might be. The Court might in any case have had difficulty in interpreting what is an unsatisfactory statutory recognition of Sewel. When the Wales Bill was going through the Lords, Lord Judge expressed this succinctly:

The word “normally” in Clause 2 is a weasel word. It does not mean anything very much in legislative terms. I am perfectly well aware that it is in the Scotland Act, but what is this supposed to mean: “the Parliament of the United Kingdom will not normally legislate”? Who decides what is normal? If the Parliament of the United Kingdom decides, the Assembly is ruled out.

14. The Supreme Court did, however, recognise the important role played by the Sewel convention “in facilitating harmonious relationships between the UK Parliament and the devolved legislatures”. If the Convention is not to enforced in the courts, then, in our view, the enforcement duty falls on Parliament. We therefore agree with the views of the Welsh Government in its 2019 Paper Reforming our Union that “when faced with a Bill for which devolved consent has been refused….Parliament should have a specific opportunity to consider the constitutional implications of allowing the Bill to proceed to Royal Assent without consent”.

15. The recent report from the Institute for Government (IfG) on the operation of the Sewel Convention (which is an excellent analysis) recommends that, where one or more of the devolved legislatures has declined to give its consent to legislation, there should be an additional stage in both House in which they decide formally whether or not to continue with the legislation. Following the

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8 [2017] UKSC 5 para 151
9 HL Deb 31 October 2016 col. 465
10 https://gov.wales/sites/default/files/publications/2019-10/reforming-our-union-shared-governance-in-the-uk.pdf. This view was reflected in IWA Report’s recommendation that “the passing of a law by Westminster after consent has been withheld should require formal processes in the UK Parliament and potentially formal inter-parliamentary dialogue”.
recent Report of the Procedure and Privileges Committee, the House of Lords now requires an oral ministerial statement if legislative consent has been refused, or not yet granted, before a Bill is read the third time. This is welcome, and something that the Commons should emulate. However, going a stage further and requiring the House positively to decide whether or not to proceed with a Bill in these circumstances would be desirable. The IfG also recommend that any such refusal of consent should be considered and reported on by the proposed Devolution Committee, which also seems a sensible way of ensuring that such a decision is carefully considered.

Explanatory Memoranda to Bills

16. The jagged edge of devolved responsibility has been lessened in recent years, but still remains. That means that legislation passed at Westminster often has implications for Scotland, Wales and Northern Ireland even when it does not directly apply there. For example, a Bill to privatise an aspect of education in England would have implications for the Barnett formula. One way to remedy this would be for Explanatory Memoranda to Public Bills to be required to contain a Statement by the Member in charge as to the Bill’s relevance, applicability and effects in Scotland, Wales and Northern Ireland. Ideally, a reciprocal practice should be adopted by the other legislatures.

Access and courtesy

17. There are a number of non-procedural steps that could be taken to build better relations with the non-Westminster legislatures. First, Members of those legislatures should have passes that allow them to access the Palace of Westminster. Secondly, UK Ministers should treat correspondence from Members of the legislatures in the same way they would correspondence from MPs. Thirdly, there should be a presumption that UK Ministers should accept suitable invitations to give evidence to committees of the devolved legislatures. All these measures should, of course, also be taken reciprocally in Scotland, Wales and Northern Ireland.

Conclusion

18. The United Kingdom may be a quasi-federal state - Lady Hale has even described it as a federal state – but its territorial constitution is unusual, if not unique. The largest territory in the Union has a piecemeal system of non-legislative devolution but no distinct national legislature, while the territories with legislative powers all have different powers but exercise them subject to the concurrent right of the United Kingdom Parliament to legislate in the areas for which those territories have responsibility. This governance model is inherently unstable, and the tensions within it are exacerbated both by (at worst) chronic power-hoarding and (at best) benign indifference from Whitehall – and Westminster – towards Wales, Scotland, Northern Ireland and, indeed, the regions of England.

19. Enhancing interparliamentary cooperation is an opportunity to help address these issues. We agree with the sentiment of the Institute of Welsh Affairs:

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12 Fourth Report, 13 October 2020, HL 140
13 This was a recommendation (in respect of Wales) of the Commission on Devolution in Wales Legislative Powers to Strengthen Wales pages 161-2
14 Speech to Legal Wales conference, 12 October 2012
An important factor in making progress will be the buy-in of individual parliamentarians, and their recognition that good inter-parliamentary relations contribute to effective governance for the whole UK, not just the devolved nations. In the future, inter-parliamentary collaboration should become a routine part of each Member’s role.15

20. We hope that this view will be echoed by the Constitution Committee, and that interparliamentary cooperation should no longer be regarded as a peripheral issue. However, we are well aware that the call for greater interparliamentary cooperation has been made many times – by the Richard, Calman, McKay, Silk and Smith commissions as well as by parliamentary committees in Lords, Commons, Scotland and Wales – and that little has been done. If that situation continues, despite the best efforts of committees such as the Constitution Committee and the House of Commons Procedure Committee, that will only help to corroborate the view that the legislatures are unable to drive the UK governments to address these issues, and so help chip away at the Union.

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