

Remaking the British State: For the Many, Not the Few

A report produced on behalf of The Labour Party by

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Dedicated to the memory of John and Anne McGill.

Foreword

2019 was a momentous year in the politics of the United Kingdom. In 2016, the UK voted to leave the European Union, but the question of EU membership divided the nation. England and Wales voted by majorities in favour of leave, while Scotland and Northern Ireland voted to remain. The UK's departure from the EU has added significant strain to the already fraying bonds of the Union and the political crisis Brexit precipitated in Parliament and the subsequent legal wrangling in the Supreme Court has dramatically demonstrated the inadequacies of our current constitutional settlement.

In the aftermath of Brexit, there is renewed demand for a second Scottish independence referendum. In 2014, the Red Paper Collective argued for a 'No' vote to Scottish independence but distanced itself from advocating status quo unionism. Rather, it sought to imagine a radical UK-wide constitutional overhaul.

Brexit has brought into sharp focus the existential crisis facing the British State; it is plagued by huge economic and political imbalances, an inordinate centralisation of power and wealth, vast regional inequalities across the UK, and an empty commitment to devolution. The old constitution is creaking under the weight of competing nationalisms, identity politics, and disconnect between ordinary people and the British political and economic elite centred on Westminster and the City of London.

The Labour Party has an opportunity. It should reject the Scottish nationalism of the SNP in Scotland and the status quo Unionism of the Tories in Westminster. Instead, it should seek to reimagine the UK and posit a new vision of Progressive Federalism, replacing the Union state with a new federal state based on progressive principles including subsidiarity, solidarity, the redistribution of power and wealth, and parity of esteem between our nations and regions.

This work is a first attempt at informing the much-needed debate that is required within the Party. It covers a vast territory of constitutional law and politics and aspires to imagine what a democratic socialist constitution for the UK might look like. Chapters 1-4 focus on Scotland and changes that could be made to Scottish devolution within the current constitutional settlement. Chapters 5-10 offer an attempt to imagine a fully federal UK.

It requires significant further work. It is hoped this is a starting point – a match to light the flame.

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Leader of the Opposition's Office, London, February 2020

Chapter 1

Mapping the British Constitution and the Scottish devolution settlement

The unique and uncodified nature of the British Constitution

Introduction

The constitution of a nation state is usually understood as the body of rules, conventions and practices which describe, regulate or qualify the organisation, powers and operation of government and the relations between private persons and public authorities in a body politic.¹ A constitution may be understood as the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.²

Constitutions of nation states tend to have certain qualities in common, namely they tend to define a territory and a people to which the constitutional order in question applies. Secondly, constitutions assume the existence of certain institutions which will govern the territory and administer the constitutional order. Thirdly, usually it is assumed for the purposes of the constitution that the relationships between different parts of the nation states are fundamentally different to the relationships between non-state actors such as private individuals, businesses and NGOs. Fourthly, constitutions will generally focus on setting the parameters of the relationships between different parts of the state and between the state and non-state actors and generally will not venture into regulating the relationships between non-state actors which is the realm of private law.³

The vast majority of nation states around the world have a written constitution which is codified into a formal legal document. It is normally a definitive declaration of the country's supreme law to which all other laws and institutions within the jurisdiction is subject and subordinate, outlining the basic structure and architecture of the state and containing an expression of fundamental principles and values underpinning the entire body politic.

An example of a typical modern codified constitution in the Western liberal democratic tradition is the Constitution of the Republic of Ireland. Certain Articles of this constitution illustrate the points above:

Article 4. The name of the State is Éire, or, in the English language, Ireland.

Article 5. Ireland is a sovereign, independent, democratic state.

¹ Turpin, Colin and Tomkins, Adam, *British Government and the Constitution*, Sixth Edition, 2008, pp.1

² Bradley, AW, Ewing, KD and Knight CJS, *Constitutional and Administrative Law*, (16th Edition), 2014, pp.4 quoting from a report of the House of Lords Committee on the Constitution (HL Paper 11 (2001-02), Ch. 2)

³ For further discussion of this see Himsworth, CMG and O'Neill, CM, *Scotland's Constitution: Law and Practice*, Third Edition, 2015, pp.10-11

Article 6. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State... These powers of government are exercisable only by or on authority of the organs of the State established by this Constitution.

Article 9. Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.

The United Kingdom has no such codified legal document that might be called the British Constitution. However, the UK does of course possess a body of rules that govern the political system, the exercise of public authority and the relations between citizens and the British state which forms what is understood as the British Constitution.

The British Constitution, although written down in some places, which will be explored in further detail below, is fundamentally different from constitutions which are said to be codified. Some parts of the British Constitution are in written form such in statutes on the subject of constitutional law, but many other important parts of the British Constitution are sourced from the common law, constitutional conventions and other less formal sources. Moreover, the entire body of British constitutional law lacks the same coherence as constitutions of other nation states such as the Constitution of the Republic of Ireland or the United States Constitution, lacks a meaningful statement of overall constitutional ideals and objectives, and also it has never been formally adopted as the Constitution of the United Kingdom either by the Parliament of the United Kingdom or by the people via a referendum.

Arguably one of the most distinguishing features of the British Constitution as compared with constitutions of other nation states is that British constitutional law does not enjoy legal supremacy. It is the lack of supremacy of the British Constitution and, therefore, the lack of judicial power to review the validity of Acts of the UK Parliament, which most clearly differentiates the British Constitution from the arrangements in place in respect of most other codified constitutions around the world. It is for this reason that the British Constitution is considered to be a political constitution rather than a legal constitution; one whose constitutional developments are ultimately in the final analysis a matter of political debate and negotiation by politicians in Parliament as opposed to legal deliberation by professional lawyers and judges in the courts.

Sources

The British Constitution is derived from a number of different sources, some of which are written in various places, albeit not codified in one document, and others which are not written in formal law at all.

The first source is statute as a considerable part of the British Constitution consists of written Acts of Parliament which regulate the system of government and exercise of public power. The most obvious examples of constitutional statutes include the Acts of Union with Scotland and England 1707 which forms the Union between the Parliaments of England and Scotland, the Parliament Acts of 1911 and 1949 which asserts the primacy of the House of Commons over the House of Lords, the European Communities Act 1972 which took the UK into the European Union, and the Scotland Act 1998 establishing Scottish devolution initially, as well as the subsequent amending legislation including the Scotland Act 2012 and Scotland Act 2016. Another constitutionally significant Act of Parliament is the Human Rights Act 1998 which incorporates most of the European Convention on Human Rights into UK domestic law.

In addition to the primary legislation sources, important parts of the British Constitution are also contained within subordinate legislation. For example, certain Orders in Council form the basis of the regulation of the British civil service and are known as the Civil Service Orders. These orders can be used by Ministers of the Crown to dissolve government departments, establish new ministerial offices or transfer functions between ministers. Moreover, subordinate legislation made under the Scotland Act 1998 forms an important part of British constitutional law and are known as Scotland Act Orders. For example, an Order made under s. 30(2) of the Scotland Act 1998 transferred the power to hold the 2014 referendum on Scottish independence to the Scottish Parliament.⁴

Another important source of British constitutional law is the common law. British constitutional law is to a large extent based on the common law developed by the courts rather than statutory provisions. Indeed, Sir Stephen Sedley has said that British constitutional law is “an ocean of common law dotted with islands of statutory provision.”⁵ Part of the constitutional law deriving from the common law includes the royal prerogative, some of which powers continue to be exercised by the Monarch but most of which in modern times tend to be exercised by Ministers of the Crown.

Some of the most important powers which remain currently reserved to the Monarch include the power to appoint a Prime Minister, the power to dismiss a government and the important power of granting royal assent to legislation.

However, it should be noted that most powers which are granted as part of the common law under the royal prerogative have been granted to Ministers of the Crown and are exercised by such ministers rather than Monarch personally. For example, one such power is the power to make international treaties, to conduct international diplomacy, to deploy and manage the operations of the British armed forces, to organise the British civil service, to issue and revoke British passports and to grant executive pardons.

In addition to the express grant of powers to the Monarch under the common law and Ministers of the Crown and therefrom subordinate public authorities including local authorities, the law which controls the exercise of this power is also derived from the common law, namely the law of judicial review. The common law supplies the majority of the legal principles and mechanisms by which the exercise of public power within the UK is qualified, regulated and held to account.

For example, some of the main doctrines of British administrative law are derived from cases decided by the appellate courts of the UK. It is a clear and longstanding principle of British constitutional law that public power cannot be exercised without lawful authority and beyond the legal basis which has been granted to it from the legitimate legal authority.⁶ Any public authority which purports to act beyond such legal authority is acting *ultra vires*.

Furthermore, many of the other grounds of judicial review of the exercise of public power in addition to the principle of *ultra vires* simpliciter have also been developed as part of the common law. For example, acts of public authorities can also be held to be illegal if the decision made by the public authority takes into account irrelevant considerations or improper purposes as part of the decision-making process.⁷

Moreover, the acts of public authorities are also controlled by the principle of irrationality. A decision of a public authority is irrational if the decision is so unreasonable that no reasonable decision maker

⁴ This was agreed in the Edinburgh Agreement 2012

⁵ Sir Stephen Sedley, *The Sound of Silence* (1994) 110 LQR 270, 273

⁶ *Entick v. Carrington* [1765] EWHC KB J98

⁷ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1

could have come to such a conclusion.⁸ This principle is also commonly referred to as *Wednesbury* unreasonableness and has been recast in modern times as a decision taken by a public authority which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his/her mind to the question to be decided could have arrived at it.⁹

In addition to the grounds of judicial review above, the courts have developed further principles through the common law to control executive power, for example in relation to the rules on natural justice and procedural impropriety. It is important to note that these principles of the common law are important parts of British constitutional law, although the detail of these principles shall not be elucidated here.

Another significant source of British constitutional law is that of constitutional conventions. According to Dicey, conventions are principally customary rules that determine the way in which the discretionary or prerogative powers of the executive should be used.¹⁰ In the British Constitution, constitutional conventions are the main political principles which regulate relations between the different parts of the constitution and the exercise of power, but which do not have legal force.¹¹

As discussed above, a key characteristic of the British Constitution is that it is a political rather than a legal constitution and a crucial element which defines it as a political constitution in addition to the inability of the judiciary to invalidate primary legislation from Westminster is the fact the constitution is heavily reliant on constitutional conventions for its operation. These constitutional conventions are the main political principles which regulate relations between different parts of the constitution and the exercise of power but which do not have formal legal force.¹²

Some of these constitutional conventions are extremely important to the British constitutional order including, for example, if a Minister of the Crown knowingly misleads Parliament, he or she will be expected to resign from office as a constitutional convention. If no resignation is forthcoming the minister will be acting unconstitutionally, but he or she will not be acting unlawfully but rather acting in breach of convention.

However, some of these conventions are uncertain and the precise manner in which they arise are subject to debate. For example, the royal prerogative includes the power of the Crown, exercisable by Ministers of the Crown, to declare war or engage the armed forces in military expeditions or armed conflict. As a matter of British constitutional law, there is no requirement for the UK Government to obtain the consent of Parliament to declare war in this way.

However, before embarking on military intervention in Iraq in 2003 the UK Government sought parliamentary approval for decisions on the use of the armed forces. The House of Commons was asked to vote on the Prime Minister's motion requesting approval for the use of necessary means including military force to ensure the disarmament of Iraq's weapons of mass destruction.

Arguably, this course of action by the UK Government has established a new constitutional convention that the UK Government will consult Parliament and seek its approval for military action. The Foreign Secretary at the time, Jack Straw MP, appeared to support the idea of the creation of such a new convention by stating at the conclusions of the House of Commons debate on the subject of the Iraq

⁸ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

⁹ *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9

¹⁰ Dicey, AV, *Law of the Constitution* (1885), pp. 428-9

¹¹ Turpin, Colin and Tomkins, Adam, *British Government and the Constitution*, Sixth Edition, 2008, pp.156

¹² Lord Wilson of Dinton, *The robustness of conventions in a time of modernisation and change*, [2004] PL 408-9

War that it was constitutionally proper in a modern democracy that the UK Government should seek the express approval of the House of Commons for military action.¹³

As can be seen from the above, there are a whole variety of sources of constitutional law in the UK including primary legislation, secondary legislation, the royal prerogative, the common law and constitutional conventions. The British Constitution is not contained in one single codified document, although it is written in some places and in other places it exists merely as conventions with no formal legal force. Collectively they form the sources of the British Constitution.

Fundamental constitutional principles

The British Constitution is made up of a number of fundamental constitutional principles which underlie the operation of the British state. The first and foremost principle of the British constitution is the doctrine of the Sovereignty of Parliament. As discussed above, the courts do not have the power to strike down or invalidate Acts of the UK Parliament, and this is reflective of the doctrine of parliamentary sovereignty. The doctrine is usually expressed in a positive form that the Crown-in-Parliament has the right to make or unmake any law whatever, and secondly in a negative form that no person or body is recognised by the law as having a right to override or set aside primary legislation of the UK Parliament.¹⁴

The Sovereignty of Parliament is the ultimate controlling principle of the British Constitution and means that the UK Parliament is the ultimate source of power in the British constitutional order. This characteristic of the British Constitution is one of the main reasons why the constitution in the UK is viewed as unique as a political constitution. Most constitutional orders do not confer supremacy on statute in this way, and in contrast most constitutional orders confer supremacy on the constitutional codified text itself, - a text which binds the courts and the actions of the executive and legislature.

It has been suggested for a number of years that the pure Diceyan orthodoxy of parliamentary sovereignty should be qualified. For example, it has been suggested by the courts that in the absence of express language or necessary implication to the contrary, the courts will presume that even the most general words were intended to be subject to the basic rights of the individual, thereby preventing interference with fundamental human rights unless the UK Parliament expressly does so.¹⁵

Moreover, it was suggested by the Appellate Committee of the House of Lords in the *Jackson* case that there may be further limits to parliamentary sovereignty in that if the UK Parliament attempted to abolish judicial review or the ordinary role of the courts, the courts may not recognise it, as Parliament is attempting to interfere with a constitutional fundamental that even a sovereign Parliament cannot abolish.¹⁶

In more recent times, the UK Supreme Court has suggested that there may also be limits to the doctrine of parliamentary sovereignty. In the *AXA* case, Lord Hope of Craighead suggested that judges should reserve the right to intervene to quash legislation that, for example, sought to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Lord Hope went on to say whether this is likely to happen is not the point. It is enough that it might conceivably

¹³ HC Deb Vol 401, col 900, 18 March 2003

¹⁴ Dicey, AV, *The Law of the Constitution*, (1885), pp.39-40

¹⁵ *Secretary of State for the Home Department, ex p Simms*, 2000 2 AC 115

¹⁶ *R (Jackson) v Attorney General*, 2006 1 AC 262

do so. According to Lord Hope, the rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.¹⁷

In addition, another potential challenge to the orthodox understanding of the Sovereignty of Parliament is that in Scottish constitutional law, there is an argument that the doctrine is a concept developed by the English courts and is not recognised by the Scottish courts. In the famous case of *MacCormick v. Lord Advocate*,¹⁸ a petition was made to the Court of Session in Edinburgh for declarator that a proclamation describing the Queen as “Elizabeth II of the United Kingdom of Great Britain” was unlawful because it implied that Elizabeth I of England had been Sovereign of Great Britain, and was contrary to Article I of the Treaty of Union which brought about the union of Scotland and England in 1707.

In delivering his judgment in the case, Lord President (Cooper) stated that the principle of unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. The Lord President noted that there are some provisions of the Treaty of Union which expressly exclude the ability of the UK Parliament to modify them, and noted that it was difficult to reconcile these provisions with the pure construction of the Sovereignty of Parliament. It was further held that the Court of Session may be willing to accept that the Treaty of Union constitutes a form of fundamental law, although the Lord President reserved his opinion on the issue in the present case as, in his view, the action was incompetent for other reasons.

Despite these challenges to the doctrine of the Sovereignty of Parliament and others,¹⁹ the principle remains that the UK Parliament is generally a sovereign legislature and that the power of Crown-in-Parliament is unrivalled in any other part of the British Constitution.

Another critical principle of the British constitutional order as alluded to above is that of the rule of law. Whereas the principle of the Sovereignty of Parliament concerns the relationship between the UK Parliament to the law, the rule of law concerns the relationship between the government or executive to the law.

The minimum requirement of the rule of law is that the government is subject to the law and may exercise its power only in accordance with the law. All exercises of public or executive power must be justified and have a basis in the law. For example, in *Entick v. Carrington*²⁰ it was held that a public officer was required to show express legal authority for any interference with a private person or that person’s private property.

Another requirement of the rule of law is that there is equality before the law, meaning that all citizens are equally subject to the law including public officials and officers administered by the ordinary courts.

¹⁷ *AXA General Insurance v Lord Advocate* [2011] UKSC 46

¹⁸ 1953 SC 396

¹⁹ Another important caveat on the principle of parliamentary sovereignty is the UK’s membership of the European Union. The European Court of Justice has insisted that Member States have, in transferring powers to the EU institutions, necessarily limited their own sovereignty. For example, in important ECJ cases, it has been held that EU law has supremacy throughout the EU (*Costa v. ENEL* [1964] ECR 585) and that EU law has direct effect in the legal systems of the Member States (*Van Gend en Loos* [1963] ECR 1). However, given that the UK Parliament reserved the right to leave the EU when passing the European Communities Act 1972 giving effect to membership, the correct legal analysis is that parliamentary sovereignty is partially suspended rather than limited by membership of the EU. Indeed, the UK’s impending exit of the EU testifies to the fact that Westminster remains sovereign despite current membership.

²⁰ *Entick v. Carrington* (1765) 19 St Tr 1029

The scope of the rule of law is often debated and disputed by constitutional lawyers, and many have argued that there is a broader conception of the rule of law which includes broader requirements that the law itself should be general in application, prospective in effect, publicly promulgated, clear and stable.²¹ However, as a bare minimum, the rule of law requires there to be government under the law and equality before the law.

Another important principle of the British constitutional order is of the separation of powers. This doctrine has long been a principle in Western constitutional thinking from John Locke's *Second Treatise of Civil Government* in 1690 in England and in Montesquieu's *The Spirit of the Laws* in 1748 in France, where it was argued that there should be a distinction made between the legislative, executive and judicial functions of government and that these functions should be exercised by different persons in the constitutional order.²²

The principle of the separation of powers in the British Constitution is imperfect because the executive function of government forms an inherent part of the legislative function as members of the British Cabinet must be members of either the House of Commons or House of Lords. However, it is fundamental to the British Constitution that the judiciary is independent both of government and of Parliament.

Judicial independence requires that judges can discharge their judicial duties in accordance with the judicial oath and the laws of the land, without interference, improper influence or pressure from any other individual or organisation. The principal ways in which this is achieved is to bar sitting judges from holding other public offices, for example elected office, in order to have a fair, transparent and independent way of making judicial appointments, while also ensuring that judges have security of tenure in their positions and cannot be easily removed from office.

Security of tenure for judges is critical to ensuring their independence as was highlighted in the case of *Starrs v. Ruxton*²³ in which the High Court of Justiciary in Scotland held that a trial before a temporary sheriff who held office at pleasure, could be removed from office at any time, and the renewal of whose appointment was within the unfettered discretion of the executive was not a fair trial under Article 6(1) of the European Convention on Human Rights.

Lastly, a further important principle of the British Constitution is the political accountability of the government to Parliament, also known as ministerial responsibility to Parliament. The government is held legally to account via the rule of law, but political accountability of the government is achieved primarily through ministerial responsibility to Parliament. Clearly, ultimate political accountability of the government is secured through general elections. However, these are only held periodically and the people entrust holding the government to account for the day-to-day business of government to our representatives in Parliament.

The principle of ministerial accountability to Parliament comprises a number of elements. Firstly, government ministers are answerable to Parliament via a number of different forums including Select Committees, questions in the House of Commons and House of Lords and also direct questions to the Prime Minister. Ministers are required to take questions and provide parliamentarians answers based on the work the government is undertaking. Secondly, ministers are not only answerable to

²¹ Fuller, Lon, *The Morality of Law*, 1964, (second edition, 1969)

²² Meeting Note with Michael Clancy, 4 April 2019

²³ 2000 SLT 42

Parliament but accountable to Parliament. For example, it is a constitutional convention that a minister must resign from office if it is found that the minister has misled Parliament.

Moreover, the government as a whole usually must resign from office if the Prime Minister loses the ability to command a majority in the House of Commons. In this way, Parliament directly controls the very survival of governments, although, it should be borne in mind that this is merely a convention and is not always followed. For example, the UK Government lost several important votes on the UK's future relationship with the European Union in 2019 but the UK Government did not resign.

Thirdly, an important part of the principle of ministerial responsibility to Parliament is access to information. It has been noted that the sheer institutional complexity of the British state obscures who is accountable to whom and for what in the British Constitution.²⁴ As a consequence, in the Nolan Report of 1995, it was stated that holders of public office should be as open as possible about all the decision and actions that they take. They should give reasons for their decisions and restrict information only when the public interest clearly demands.²⁵

Constitutional values and the political battleground

In addition to the fundamental constitutional principles of the Sovereignty of Parliament, the rule of law, separation of powers and ministerial responsibility to Parliament, it should be noted that the British Constitution does not exist as legal theory in a vacuum but rather it embodies certain political and philosophical values and ideals which, although not expressly stated anywhere in the constitutional order, are vitally important for understanding the constitution in its social, economic and philosophical context.

In the UK, two political values underpin our constitutional order more than any others, namely republicanism and liberalism.

Although the UK is of course a constitutional monarchy, the political ideal of republicanism in the sense of civic participation and government exercising non-arbitrary power over its citizens in accordance with and accountable under the law and guided by the will of the people, is a dominant theme in the British Constitution.

Republican values are embodied in the rule of law which underlies the entire British Constitution; that is that the government is subject to the law and equal to its citizens before it. Such values are also embodied in the law of judicial review, the control of the exercise of government power and the limits on executive discretion and arbitrary power such as rules on *ultra vires* and irrationality which are discussed above. Moreover, the whole British Constitution is completely geared towards ensuring the expression of the will of the people through parliamentary representative democracy, political party manifestos and, in certain circumstances, referenda directly consulting the people.

Furthermore, despite its amorphous meaning and hotly contested implications, the dominant political philosophy in the UK is that of liberalism. As a liberal democracy, the UK espouses individual freedom and certain fundamental human rights that are held to be of universal application to all citizens. The British Constitution subscribes to the traditional idea of negative liberty where anything which is not expressly prohibited by the state is permitted for its citizens, and also that the state cannot do

²⁴ Rhodes, Raw, *The hollowing out of the state*, (1994) 65 *Political Quarterly*, 138, 147

²⁵ Committee on the Standards in Public Life, First Report, 1995

anything without lawful authority from Parliament as was discussed above more fully in reference to the rule of law.

Although there is a myriad of different forms of liberalism, Paul Craig identifies three main categories which have been dominant over the 20th and 21st centuries:²⁶

- i.) **Social Liberalism:** Traditional pluralists who tend to favour a conception of equality and distributive justice which entails state intervention to promote greater equality in the resources held by individual citizens, and who stress the connection between political and economic liberty. Social liberals believe a large degree of involvement in social and economic life is required, collectivism should be promoted, Keynesian demand management pursued, full employment should be sought after, egalitarianism encouraged, a comprehensive welfare state established and internationalism supported.
- ii.) **Neoliberalism:** Market-orientated pluralists whose understanding of distributive justice regards existing property rights as sacrosanct holdings that should not be redistributed by the state. Neoliberals believe minimal government in economic life should be upheld, faith invested in the market, inequality accepted, the welfare state reduced to a limited safety net and nationalism promoted.
- iii.) **The Third Way:** Proponents of the Third-Way believe equality of opportunity should be promoted, the most vulnerable protected, freedom should be understood as personal autonomy, rights should be accompanied by strong civic responsibilities and that there can be no authority without democracy.

Despite the significant political, social and economic differences between these three conceptions of liberalism and their consequences, it is generally accepted that the current British constitutional model as currently constructed is capable of facilitating these models within a liberal democratic framework. All three routes may be pursued without significant constitutional change – all models are compatible with the British Constitution as currently constituted.

Whether more radical political positions are compatible with the current British constitutional order is a matter which requires further exploration and will be a subject discussed in further detail below. For present purposes, it is notable that both of the political values of republicanism and liberalism underpin the British Constitution and are of fundamental importance in trying to understand the context in which the constitutional order operates.

Devolution and the structure of the British state

Scotland in the UK 1707-1999 pre-devolution

The UK is a political union of three historic nations comprising England, Scotland and Wales which have existed since the middle ages,²⁷ and also includes Northern Ireland which comprises six counties

²⁶ Craig, Paul, *Administrative Law*, 8th Edition, 2016

²⁷ The Kingdom of England is generally agreed to have emerged from the earlier Anglo-Saxon kingdoms as a sovereign state in the year 927, the Kingdom of Scotland traditionally is thought to have formed into a sovereign state in the year 843 emerging from the Picts and Wales developed into a distinct national entity by the end of the 10th century.

of the historic Irish province of Ulster, formed as part of the UK pursuant to an Act of the UK Parliament known as the Government of Ireland Act 1920 effecting the partition of Ireland.

Despite the fact that the UK is made up of these four distinct units, the UK is not a federal state like the United States or Germany, but rather a unitary union state closer in constitutional character to the unitary states of France, Italy and New Zealand.²⁸ The unitary nature of the British Constitution means that all power and ultimate authority rests with the Crown-in-Parliament at UK level and is consistent with the doctrine of the Sovereignty of Parliament which is discussed more fully above. The British state is governed by this central and singular power; all other sources of power in the constitutional order flow from the centre and do not exist separately or independently of this central power.

The monarchy of both the Kingdom of Scotland and the Kingdom of England were united in the year 1603 but the old Parliament of Scotland and Parliament of England remained completely separate and independent of each other, with Scotland remaining a sovereign state until 1707 when both parliaments joined together to form a new sovereign state called the United Kingdom of Great Britain. Ireland would later join the UK in 1800, and later after the Irish war of independence the official name of the sovereign state became the United Kingdom of Great Britain and Northern Ireland.

After entering the Union with England in 1707, Scotland secured a number of provisions as part of the Act of Union 1707 to ensure that some of the fundamental institutions of Scotland pre-1707 were protected. For example, the Presbyterian religion and the Church of Scotland were to remain as the established church in Scotland, the position of the Court of Session and High Court of Justiciary as the supreme courts of Scotland and Scots private law was to be unchanged as a result of the Union, except for the evident utility of the subjects within Scotland.²⁹

Subsequent to the passage of the Act of Union 1707, the administration of Scottish affairs was absorbed into a central administration of Great Britain in Westminster. The Lord Advocate, as the holder of a historic public office, continued in the position as the Scottish Law Officer but also gained sweeping powers of public administration as part of the new Union settlement. This changed in 1885 when a new Secretary of State for Scotland was created along with a new Scottish Office based in Whitehall which was to take charge of Scottish affairs. This office was largely moved to Edinburgh in 1939 representing arguably the earliest form of Scottish devolution as part of the UK.

Historically, the Labour Party has supported the idea of Home Rule for Scotland within the UK. Keir Hardie's first Scottish Labour manifesto called for Home Rule, a minimum wage and temperance, and he did support the idea of creating a Scottish Parliament.³⁰ However, internal UK constitutional matters were not at the top of the political agenda throughout most of the first half of the 20th century as Britain grappled with two world wars and the Great Depression. In the latter half of the 20th century, there was a surge in nationalist sentiment in both Scotland and Wales and, in 1969, the Labour government of Harold Wilson at Westminster appointed a Royal Commission on the Constitution in order to assess the case for devolution of government functions to the countries and regions of the UK.

The report of the Commission became known as the Kilbrandon Report, as the Commission was chaired by Lord Kilbrandon. The Report was divided on the Scottish question and how to deal with the

²⁸ Walker, *Beyond the unitary conception of the United Kingdom constitution*, [2000] PL 384

²⁹ Act of Union 1707

³⁰ Watson, Dave, *Keir Hardie and the devolution debate*, 4 October 2014,

<http://unisondave.blogspot.com/2014/10/keir-hardie-and-devolution-debate.html>

issue of Scottish devolution, with some of the Commissioners favouring legislative devolution to Scotland while others only supported a limited form of executive devolution.

In response, the Labour government decided to establish elected assemblies in both Scotland and in Wales; in Scotland with legislative power and in Wales only with executive power.³¹ This resulted in devolution Bills for both Scotland and Wales which were passed by Parliament, but as it was a condition of both Bills that the provisions would not take effect unless approved by the electorates of each nation, via a referendum reaching a 40% threshold which ultimately was not reached, the Scotland Act 1978 was repealed and never took effect.

Despite the lack of popular support in 1978, the issue of Scottish devolution remained on the political agenda and grew through the 1980s and 1990s, as a perceived democratic deficit emerged. According to this narrative, Scotland was governed by a political party, the Conservative Party, at Westminster that it overwhelmingly did not vote for and which implemented deeply damaging and unpopular economic policies across the UK.³²

During the 1980s and early 1990s, the twin forces of neoliberalism and globalisation were unleashed in full force across the UK in tandem hitting the industrial base across the country, while catalysing a depression of wages and rapid increase in unemployment rates. The UK Government placed absolute faith in the power of deregulated free market economics and global competition to deliver economic growth and prosperity, with devastating effects on workers and communities across the UK.³³

This was coupled with rigid fiscal conservatism,³⁴ undermining of the trade union movement and privatisation of many state assets which had been nationalised by the social liberalism of the Atlee government after 1945 including British Steel, British Gas, British Telecommunications and British Airways. By the time Thatcher was replaced as Prime Minister in 1990, more than 40 UK state-owned businesses employing 600,000 workers had been privatised, over £60 billion of state assets were sold off, and the share of employment accounted for by nationalised industries fell from 9% to under 2%.³⁵

In Scotland, at the time of the Thatcherite revolution, the economy was reliant to a large extent on heavy industries, often nationalised and unionised, and also a large public sector. The policies of the UK Government at the time were devastating to the Scottish economy, causing mass loss of jobs³⁶ and deindustrialisation,³⁷ and there was a perception in Scotland, whether founded or not, that the UK Government was behaving in a way that was anti-Scottish, deliberately targeting people who lived and worked in Scotland.³⁸

³¹ *Democracy and Devolution: Proposals for Scotland and Wales*, Cmnd 5732

³² In the 1979 UK General Election, Margaret Thatcher's Conservative Party won 22 Scottish seats in the House of Commons against the Labour Party's 44 seats and, by the 1987 General Election, this number had reduced to 10 Conservative seats in Scotland against the Labour's 50 seats.

³³ For further reading Thatcher's economic policy see Letwin, Shirley Robin, *The Anatomy of Thatcherism*, 1992

³⁴ In 1976, public spending as a percentage of GDP sat at 48% and by 1990 this had fallen to 36% according to the Office of National Statistics.

³⁵ Toms, Mike, *Advancing economics in business*, Oxera, https://www.oxera.com/wp-content/uploads/2018/03/The-Thatcher-privatisation-legacy_1-1.pdf

³⁶ By mid-1981, unemployment shot up to 12% of the workforce, levels not seen since the Great Depression according to the Office of National Statistics.

³⁷ In 1970, manufacturing made up over 20% of the UK GDP and by 1990 this had fallen to 15% and by 2010 this had fallen further to under 10% according to the Office of National Statistics.

³⁸ Mitchell, James, *The Scottish Question*, Oxford University Press, 2014

One of the most notable policies adopted by the UK Government at this time was the imposition of the Community Charge, or poll tax, introduced in Scotland a year earlier than elsewhere in the UK, which proved deeply unpopular and was perceived by many Scottish people as unjust.

In addition, vast swathes of Scottish industry were swept away by the neoliberal tide rushing up from Thatcher's government in Westminster, including most notably large parts of shipbuilding on the Clyde, Ravenscraig steelworks in Motherwell, the Linwood car plant in Renfrewshire and British Leyland in Bathgate. Furthermore, in 1984, Thatcher's government announced plans to close 20 coal pits, precipitating one of the largest industrial disputes of the 20th century in the UK involving a year-long strike by the National Union of Mineworkers. The failure of the strike to prevent the closures led to further mass job losses across the country, an industry upon which Scotland was particularly dependent, and further decline in the industry over the next decade.

During the 1980s and 1990s, Scotland was in the grip of this free market revolution because the majority of MPs in England were Conservative and, despite this, there were clear and overwhelming majorities in favour of Labour and other opposition parties within Scotland. This put a very real strain on the Union state and arguably created a link between right-wing economic policy with constitutional politics in the minds of the Scottish electorate. The Union and Westminster became increasingly associated with Toryism and the destructive forces of Thatcherite economic policy.³⁹ Indeed, as Bogdanor has stated, the Thatcher government's policies of competitive individualism and the free market seemed inappropriate to the more communally orientated societies of Scotland and Wales.⁴⁰

As a result of this increasing disconnect between the political mindset of the Scottish electorate and the policies being meted out by the UK Government in Westminster, the arguments for Scottish devolution grew stronger, and culminated in the convening of the Scottish Constitutional Convention in 1989 made up of Scottish Labour and Liberal Democrat MPs. When the Convention published its report, it stated that the need to create a new Scottish Parliament was now too great to deny.⁴¹ The Convention was boycotted by the SNP and the Conservative Party.

This was the backdrop to Tony Blair's landslide general election victory in 1997 ushering in the New Labour era, which began with a bang of constitutional reform. In its election manifesto, the Labour Party had promised to hold a referendum on Scottish devolution and, once in government, produced a White Paper including proposals for a new Scottish Parliament based on the report of the Scottish Constitutional Convention, which was put to a referendum and won in 1997. After the referendum victory, the government introduced a Scotland Bill in the House of Commons to at last bring about Scottish devolution.

Scotland Act 1998 and the current devolution settlement

The Scotland Act 1998 as amended is the cornerstone legislation establishing the Scottish devolution settlement. The 1998 Act fundamentally changed the relationship between Scotland, as a constituent nation of the UK, and the Union state in devolving a plethora of legislative, executive and administrative powers and responsibilities to devolved institutions in Scotland.

³⁹ Marr, A, *The Battle for Scotland*, 1992

⁴⁰ Bogdanor, Vernon, *The New British Constitution*, Hart Publishing, 2009, pp.91

⁴¹ Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right*, 1995

The 1998 Act established a new Scottish Administration, the main arm of which is the Scottish Executive, or the Scottish Ministers,⁴² consisting of the First Minister, ministers appointed by the First Minister and the Scottish Law Officers, namely the Lord Advocate and the Solicitor General for Scotland. The Scottish Ministers must be Members of the Scottish Parliament except from the Law Officers, and there is a Cabinet style of government comparable to the Westminster model.

The Scottish Government is accountable to the Scottish Parliament, mirroring the principle of the ministerial responsibility to Parliament at Westminster, and if the Scottish Parliament resolves that it no longer has confidence in the Scottish Government, the executive must resign.⁴³ Moreover, certain executive functions which were formerly the role of the Secretary of State for Scotland, were devolved to the Scottish Government insofar as they fall within a devolved field.⁴⁴

The Scotland Act 1998 also established the Scottish Parliament, which is the devolved unicameral legislative body comprising 129 Members of the Scottish Parliament. The Scottish Parliament is elected using a form of proportional representation, in contrast to Westminster which combines the First-Past-the-Post system with a party list as is known as the Additional Member system. Parliamentary terms are also fixed to four years.⁴⁵

In terms of section 28(2) of the 1998 Act, a bill of the Scottish Parliament will become an Act of the Scottish Parliament once it has received Royal Assent. An important point to note is that Acts of the Scottish Parliament are amenable to judicial review by the courts and can be invalidated by the courts if the legislation is found to be outwith the legislative competence of the Scottish Parliament.⁴⁶

The Scottish Parliament is, unlike Westminster which enjoys unlimited power pursuant to the doctrine of the Sovereignty of Parliament, a legislative body with limited legislative competence, and such competence is limited to legislating for Scotland on devolved matters only. Section 29(1) of the 1998 Act states that legislation passed by the Scottish Parliament is not law if it goes beyond legislative competence, and section 29(2) goes on to set out the competence of the Scottish Parliament:

(2) A provision is outside that competence so far as any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,

(b) it relates to reserved matters,

(c) it is in breach of the restrictions in Schedule 4,

(d) it is incompatible with any of the Convention rights or with [EU] law,

(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

⁴² The Scottish Government was originally created as the Scottish Executive but was renamed in s.12(1) of the Scotland Act 2012

⁴³ Ss.45,47,48 and 49, Scotland Act 1998

⁴⁴ S. 53, Scotland Act 1998

⁴⁵ Ss.2-8, Scotland Act 1998

⁴⁶ A recent example of this is Advocate General's reference, *the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (Scotland)* [2018] UKSC 64

Points to highlight here are that the Scottish Parliament cannot legislate incompatibly with rights guaranteed by the European Convention on Human Rights, as set out in the Human Rights Act 1998, or with provisions of EU law. Moreover, the Scottish Parliament cannot legislate on reserved matters over which Westminster has retained under Schedule 5 to the 1998 Act. This retained model means the assumption is that policy areas which are not expressly reserved in terms of Schedule 5 are devolved to the Scottish Parliament.

Having said that, the reserved matters include many policy areas including the British Constitution itself, international relations, the EU, the armed forces, immigration and nationality, and employment and industrial relations. This list of matters in Schedule 5 covers many areas but it leaves a wide range of matters falling within the competence of the Scottish Parliament.

It should be highlighted, however, that although Westminster has specifically retained powers as reserved matters, this model of devolution does not affect the power of the UK Parliament to make laws for Scotland.⁴⁷ This reflects that Westminster remains a sovereign parliament with full sovereignty over Scotland.

Although as a matter of strict legal rule Westminster remains sovereign and capable of legislating in Scotland in relation to devolved matters, it was envisaged even at the time the Scotland Bill was going through Westminster in 1998 that this may be politically unpalatable. Nevertheless, there was also recognition that there may be occasions where an Act of Parliament in Westminster may contain provisions that are likely to be replicated in Scotland, and for expediency the provision should also extend in application to Scotland.

It was thought that in such instances the UK Parliament should only legislate on devolved matters in relation to Scotland with the agreement of the Scottish Parliament. This was given expression by Lord Sewel in the House of Lords who stated “we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.”⁴⁸ This convention became known as the Sewel Convention, and remains an important part of the Scottish devolution settlement.

Another important feature of the Scottish devolution settlement is that the electoral system that is used for elections to the Scottish Parliament is a form of proportional representation, in distinction to the First-Past-The-Post system used at Westminster.

The system used at Holyrood is known as the Additional Member system, where 73 constituencies are elected by a First-Past-The-Post system but where a further 56 MSPs are elected using a party list system based on 8 regions across Scotland, which achieves an approximate proportionate number of seats to the popular vote.

The Additional Member system was designed to result in coalition governments, and to make the chances of one party achieving an overall majority in the Scottish Parliament less, arguably for the purpose of preventing a pro-independence party winning an overall majority, thereby preventing the holding of an independence referendum. Moreover, it could be argued that Tony Blair in setting up the devolution settlement did not want a strong left-leaning Labour group in the Scottish Parliament and went so far as to ensure that certain MPs were prevented from being candidates, because they did not meet the level of competence required, for example, Michael Connarty, Ian Davidson and

⁴⁷ Section 28(7), Scotland Act 1998

⁴⁸ HL Deb vol 592

Denis Canavan. This arguably left the Scottish Parliament somewhat neutered or even to an extent depoliticised and lacking in radical voices.

Scotland Act 2012, Independence referendum 2014 and Scotland Act 2016

Speaking in relation to Welsh devolution and prior to the 1997 referendum on devolving power from Westminster to Wales, the then Secretary of State for Wales, Ron Davies, famously said that devolution was a process and not an event.⁴⁹ This is as much true of Welsh devolution as it is for Scottish devolution.

Following the Scottish Parliament Election of 2007 returning a minority SNP government at Holyrood, the Scottish Labour Party succeeded in passing a motion in the Scottish Parliament with the support of other opposition parties to establish a Scottish Parliament Commission charged with a review of Scottish devolution. The Commission was chaired by Sir Kenneth Calman, becoming known as the Calman Commission, and its terms of reference was to review the provisions of the Scotland Act 1998 in the light of experience, and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament and continue to secure the position of Scotland within the United Kingdom.⁵⁰

In December 2008, the Commission published a first report,⁵¹ followed in June 2009 by the publishing of its final report entitled *Serving Scotland better: Scotland and United Kingdom in the 21st century: final report*, in which a series of recommendations were made to give further powers to the Scottish Parliament and Scottish Government.

A new Scotland Bill was introduced into the House of Commons by the then Secretary of State for Scotland, Michael Moore MP in 2010, and was largely based on the recommendations made in the Calman Commission final report.

The 2012 Act gives the Scottish Parliament the power to raise or lower Scottish income tax levels by up to 10p in the pound;⁵² the devolution of stamp duty and landfill tax and provision for replacement with new specific Scottish taxes;⁵³ makes provision for the creation of Revenue Scotland for the collection and administration of the new Scottish taxes;⁵⁴ and devolves executive competence to the Scottish Government in respect of a number of different areas including drink drive limits⁵⁵ and speed limits.⁵⁶ Moreover, the Scottish Government was given increased borrowing powers to borrow for temporary excesses paid out of the Scottish Consolidated Fund,⁵⁷ and up to £2.2 billion for capital expenditure.⁵⁸

⁴⁹ Ron Davies, *Devolution: A Process Not an Event*, 1998, p15.

⁵⁰ The Commission on Scottish Devolution – the Calman Commission, SN/PC/04744

⁵¹ *The future of Scottish devolution within the Union: a first report*, December 2008

⁵² S.80C, Scotland Act 1998 as amended by the Scotland Act 2012

⁵³ SS.80I-80K, Scotland Act 1998 as amended by the Scotland Act 2012

⁵⁴ S.24, Scotland Act 2012

⁵⁵ S.20, Scotland Act 2012

⁵⁶ S. 21, Scotland Act 2012

⁵⁷ S. 66(1), Scotland Act 1998 as amended by the Scotland Act 2012. The Scottish Consolidated Fund was established under s. 64 of the Scotland Act 1998 and is the main fund operated by the Scottish Parliament comprising the block grant from the UK consolidated fund plus the operational receipts of the Scottish Government.

⁵⁸ S.67A, Scotland Act 1998 as amended by the Scotland Act 2012

By the time the Scotland Act 2012 had received Royal Assent on 1 May 2012, there had been a Scottish Parliament Election in 2011 where the SNP had won an overall majority in the Scottish Parliament, thus providing a mandate for a referendum on Scottish independence. Following the Edinburgh Agreement of 2012, it was agreed that the UK Government would give the Scottish Parliament the power to hold a referendum on Scottish independence on a time limited basis on one occasion via an Order in Council in terms of s.30 of the Scotland Act 1998.⁵⁹

The referendum was held on 18th September 2014 and the question on the ballot paper read: “Should Scotland be an independent country? Yes or No.” The people of Scotland voted decisively to remain part of the UK with 55.3% voting against independence and 44.7% voting in favour, on a turnout of almost 85% of the Scottish electorate.

The Scottish Labour party campaigned for Scotland to remain a part of the UK, joining the cross-party alliance, Better Together, with the Scottish Liberal Democrats and the Scottish Conservatives, which jointly promoted the idea of Scotland remaining part of the UK. The Red Paper Collective also had its own campaign against independence, Socialism First, which was focused mainly on the benefits for Scotland of staying in the UK in furthering the cause of socialism. The activists in the Red Paper Collective were largely against participating in the pro-Union Better Together campaign, arguing that sharing a platform with the Scottish Conservatives could be deeply damaging, with focus centring on socialist alternatives to the Scottish independence offered by the SNP, rather than supporting the Union status quo per se.⁶⁰

The full complexity of the different dynamics, forces, patterns and alliances made during the Scottish independence referendum campaign are complex and an explanation will not be attempted here.⁶¹ However, what is certain is that the Yes Scotland campaign attracted large parts of the non-Labour Scottish Left, as well as a significant section of Labour voters who turned their backs on the UK in favour of creating a new independent Scottish state.⁶²

The Radical Independence Conference, which became the Radical Independence Campaign (RIC), was first held in 2012 and drew delegates from the Scottish Socialist Party, International Socialist Group, Socialist Workers Party, the Scottish Green Party, the Scottish Labour Party, and other socialist groups. The opening statement of the conference called on progressive people and organisations to support, attend and participate in a conference to found an extra parliamentary, pro-independence campaign, putting forward a vision for Scotland that is green and environmentally sustainable; internationalist and opposed to Trident and war; for a social alternative to austerity and privatisation; proposes the establishment of a modern republic for real democracy committed to equality; and opposition to discrimination on grounds of gender, race or sexuality. It was further stated that the campaign belongs to everyone who holds a radical vision of an independent Scotland.⁶³

The backdrop to the 2014 Scottish independence referendum was, of course, the most severe financial crisis in 2007/08 since the Great Crash of 1929, and the subsequent years of economic recession both

⁵⁹ Scotland Act 1998 (Modification of Schedule 5) Order 2013

⁶⁰ Kane, Tommy, *Reflecting on the Referendum Campaign*, 16 September 2014
<https://socialismfirst.wordpress.com/>

⁶¹ For further reading see <https://www.britishelectionstudy.com/bes-resources/when-attitudes-and-behaviour-collide-how-a-referendum-can-upset-the-party-system/#.Xl-o3ij7RPZ>

⁶² A poll for Lord Ashcroft following the Scottish independence referendum revealed that 37% of Labour voting respondents backed Scottish independence. 2,047 adults who voted in referendum were interviewed online or by telephone on 18 and 19 September 2014.

⁶³ <https://radical.scot/>

in the UK and around the world, which became known as the Great Recession. For seven consecutive quarters from 2008 to 2009, the UK reported very modest or negative economic growth, and up until the Scottish independence referendum, the UK experienced GDP growth of less than 1%, meaning it was the slowest recovery from an economic downturn on record.⁶⁴

Moreover, since the 2010 UK General Election, the Conservative Party – first in coalition with the Liberal Democrats and then on its own – imposed severe economic austerity on the UK economy. This has included public spending cuts in various areas of policy and has had a devastating impact on almost all aspects of life for the poorest and most vulnerable members of our society, including in health,⁶⁵ fuel and food poverty,⁶⁶ social security⁶⁷ and local government services, particularly adult social care⁶⁸ and child and family poverty.⁶⁹

In his recent visit to the UK, Sir Philip Alston, the United Nations Special Rapporteur on Extreme Poverty and Human Rights, stated:

“The experience of the United Kingdom, especially since 2010, underscores the conclusion that poverty is a political choice. Austerity could easily have spared the poor, if the political will had existed to do so. Resources were available to the Treasury at the last budget that could have transformed the situation of millions of people living in poverty, but the political choice was made to fund tax cuts for the wealthy instead...”

British compassion for those who are suffering has been replaced by a punitive, mean-spirited, and often callous approach apparently designed to instil discipline where it is least useful, to impose a rigid order on the lives of those least capable of coping with today’s world, and elevating the goal of enforcing blind compliance over a genuine concern to improve the well-being of those at the lowest levels of British society.”⁷⁰

The impact of the Great Recession followed by a decade of austerity on British society cannot be overstated, and the fact that the austerity agenda has been driven from Westminster are significant points to note in understanding the reasons for socialists and others on the Left in Scotland siding with Yes Scotland and the idea of Scottish independence.

The view of much of the Left in Scotland in the run-up to the independence referendum was that austerity and the twin forces of neoliberalism and globalisation, which it is claimed were at least partly responsible for the financial crisis and subsequent Great Recession, were ideas synonymous with the British state, and one way to reverse the tide of right-wing economic policy and austerity was to break

⁶⁴ Office of National Statistics, *The 2008 Recession 10 years on*, 30 April 2018, <https://www.ons.gov.uk/economy/grossdomesticproductgdp/articles/the2008recession10yearson/2018-04-30>

⁶⁵ *Health in All Policies, health, austerity and welfare reform*, British Medical Association, September 2016

⁶⁶ *Heating or Eating and the impact of austerity*, SPERI British Political Economy Brief No. 19, University of Sheffield, February 2016

⁶⁷ *Shifting the Place of Social Security: Welfare Reform and Social Rights under the Coalition Government’s Austerity Programme*, University of York School of Law, 2015

⁶⁸ *The costs of the cuts: the impact on local government and poorer communities*, the Joseph Rowntree Foundation, 10th March 2015

⁶⁹ *The Austerity Generation: the impact of a decade of cuts on family incomes and child poverty*, Child Poverty Action Group, November 2017

⁷⁰ Alston, Professor Philip, *Statement on Visit to the United Kingdom*, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights, London, 16 November 2018

up the British state. The politics of right and left were subsumed into constitutional politics, the nature of the British state itself and Scotland's place in it.⁷¹

This was not merely a view shared by socialists and those firmly on the Left but also by many centre and centre left voters in Scotland, who viewed the austerity programme imposed by a Conservative government at Westminster as extreme, thus making an alternative to Westminster increasingly attractive. In addition to many Labour voters, a large number of Liberal Democrat voters also decided to vote for independence (39%), while three-quarters of all Yes voters stated that disaffection with Westminster politics was one of the two or three most important reasons for voting Yes.⁷²

The view that the British state was inherently associated with right-wing economic policy, neoliberalism and anti-progressive forces was arguably exacerbated by the movement of the Labour Party to the right of British politics during the New Labour era in the late 1990s and 2000s. While some great achievements were made during that time including the National Minimum Wage, Sure Start and a significant reduction in child poverty⁷³, as well as constitutional reform including devolution itself, there was a feeling among the working class in Scotland, and across the UK more broadly, that the Labour Party had abandoned its core values and embraced free market capitalism in order to fund some of its ambitious social programmes following the Third Way philosophy.

This was symbolised by the replacement of Clause IV of the Labour Party constitution which had originally read that one of party's objectives was to secure for the workers by hand or by brain the full fruits of their industry and the most equitable distribution thereof that may be possible upon the basis of the common ownership of the means of production, distribution and exchange, and the best obtainable system of popular administration and control of each industry or service.

This clause was traditionally seen as the party's commitment to socialism but was removed in 1995 by Tony Blair. This was viewed by many as the abandonment of the party's commitment to socialism, and was the catalyst for the establishment of the Campaign for Socialism group, which was set up in Scotland in 1994 to advocate for the retention of Clause IV in the Labour Party constitution.

This materialised during the New Labour era with the increased and continued involvement of the private sector in providing public services through policies such as the Private Finance Initiative, promotion and deregulation of financial services and significant increases in income inequality.⁷⁴

Moreover, the New Labour government of Tony Blair was also responsible for the Iraq War in 2003 which was arguably one of the worst foreign policy miscalculations of any UK Government since the Suez Crisis in 1956. The prospectus upon which the UK was taken into war by the UK Government, i.e. the possession of the Weapons of Mass Destruction by the Saddam Hussein regime, was found to be false, accusations were made that Prime Minister Blair had lied to Parliament on the intelligence

⁷¹ Foley, James and Ramand, Pete, *Yes: The Radical Case for Scottish Independence*, Pluto Press, 20 May 2014

⁷² A poll for Lord Ashcroft following the Scottish independence referendum. 2,047 adults who voted in referendum were interviewed online or by telephone on 18 and 19 September 2014.

⁷³ Piachaud, David and Sutherland, Holly, *Child Poverty in Britain and the New Labour Government*, LSE Research Online, <https://core.ac.uk/download/pdf/207562.pdf>

⁷⁴ Goodman, Alissa, *Income inequality: What has happened under New Labour?*, *New Economy*, Vol. 8, No. 2, pp. 92-97

received by the UK Government, and the war resulted in the death of around 1 million Iraqi civilians⁷⁵ and the death of 179 British servicemen and women.⁷⁶

The deep unpopularity of the Iraq War arguably caused a decline in support for the Labour Party over the years following the war in 2003. At the time of the war, the Scottish Parliament passed a motion endorsing Prime Minister Blair's stance on Iraq. However, the SNP voted against the Prime Minister and arguably was proved right by the outcome of the war.⁷⁷ The effect of the Labour Party in Scotland taking a position to support the Iraq War cannot be overstated, and arguably led to the demise of Scottish Labour as a political force in Scotland.⁷⁸

However, arguably the change in political direction of the Labour Party across the UK did something more in the minds of Scottish working-class voters. Labour's move towards Third Way politics and the Iraq War meant that there was no real alternative for socialist and progressive voters to the Tories at Westminster, and therefore the problem became the British state itself, not merely the party forming the UK Government.

In the 2015 General Election, although the Scottish independence referendum resulted in a "No" vote and Yes Scotland lost, the debate around Scotland's constitutional politics was electrified as well as anti-austerity and by proxy anti-Westminster sentiment. This translated into a landslide SNP victory, where the Labour Party saw the loss of 40 seats and the SNP gaining 50 seats, 10 also from the Liberal Democrats.

This huge shift in Scottish politics highlights the extent to which constitutional politics and the subject of Scotland's constitutional future has taken precedence in the minds of the Scottish electorate.

The following year, in 2016, another Scotland Bill was introduced into the House of Commons to bring further powers to the Scottish Parliament, in accordance with the recommendations of the Smith Commission. The establishment of the Smith Commission was announced by Prime Minister David Cameron as part of the "The Vow"⁷⁹ following the result of the independence referendum, and was chaired by Lord Smith of Kelvin in order to convene cross-party talks and facilitate an inclusive engagement process across Scotland to produce Heads of Agreement, with recommendations for a further devolution of powers to the Scottish Parliament.⁸⁰

The Scotland Act 2016 was largely based on the recommendations made as part of the Smith Commission report, and gives further powers to the Scottish Parliament and Scottish Government, including a new constitutional power to allow the Scottish Parliament to amend sections of the Scotland Act 1998 relating to the operation of the Scottish Parliament and Scottish Government.⁸¹

⁷⁵ <https://web.archive.org/web/20150907130701/http://brusselstribunal.org/pdf/lancet111006.pdf>

⁷⁶ [https://web.archive.org/web/20091011220157/http://www.mod.uk/DefenceInternet/FactSheets/Operation sFactsheets/OperationsInIraqBritishFatalities.htm](https://web.archive.org/web/20091011220157/http://www.mod.uk/DefenceInternet/FactSheets/Operation%20Factsheets/OperationsInIraqBritishFatalities.htm)

⁷⁷ <http://news.bbc.co.uk/1/hi/scotland/2665027.stm>

⁷⁸ <https://www.scotsman.com/news/politics/scottish-labour-s-downfall-began-with-iraq-war-1-3808644>

⁷⁹ The phrase "The Vow" was taken from an article published in the Daily Record on 16 September 2014, two days before the independence referendum, <https://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992>

⁸⁰ Terms of Reference, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, 27 November 2014

⁸¹ SS.3-12, Scotland Act 2016

The 2016 Act also devolves 11 benefits to be administered by a devolved agency called Social Security Scotland, as well as the ability to top up certain reserved benefits,⁸² substantial new powers over income tax and borrowing,⁸³ management of the Crown Estate,⁸⁴ abortion,⁸⁵ rail franchising,⁸⁶ and extensions to powers over the oil and gas industry.⁸⁷

In terms of s. 80C(1) of the Scotland Act 1998 as amended by the 2016 Act, the Scottish Parliament has the power to set the basic rate of income tax in Scotland, as well as any other rate under s. 11A of the Income Tax Act 2007. Important to note, however, is that the Scottish Parliament does not have the power to set the income tax personal allowance threshold.

Moreover, in terms of s. 66(1) of the Scotland Act 1998 as amended by the 2016 Act, the Scottish Government has the power to borrow any sums required by them for the purpose of meeting a temporary excess of sums paid out of the Scottish Consolidated Fund over sums paid into that Fund. The Scottish Government may also, with the approval of the Treasury, borrow by way of a loan or the issue of bonds any sums required by them for the purpose of capital expenditure.

The 2016 Act also states that the Scottish Parliament and Scottish Government are now permanent parts of the UK's constitutional arrangements,⁸⁸ although given the doctrine of the Sovereignty of Parliament as discussed more fully above this is a largely symbolic provision, as Westminster could as a matter of law repeal this provision and abolish the entire Scottish devolution settlement with a single Act of Parliament. However, what the provision does show is perhaps the current level of political commitment to Scottish devolution in Westminster, at least on paper, and the realisation that abolishing Scottish devolution would probably be politically impossible without breaking up the UK.

In addition, the 2016 Act also puts the Sewel Convention which is discussed above on a statutory footing. In terms of Section 28 of the Scotland Act 1998, as amended by the 2016 Act, it is stated that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

Despite these reforms, the British State remains one of the most centralised constitutions and imbalanced economies in the developed world. The constitution rests upon the foundational principle of the Sovereignty of Parliament, meaning that the UK Parliament can make or unmake any law whatsoever for the whole UK, and its authority is unchallengeable by any other body in the UK. A sitting UK Government with a majority in the House of Commons virtually has untrammelled constitutional power, and the devolved institutions have very little by way of formal legal protection from this power.

Moreover, all of the principal organs of government are situated in London in the SW1 postcode, including Parliament itself, the Supreme Court, the headquarters of the Prime Minister as well as virtually all of the UK government departments. It is not only the principal organs of government which are concentrated in London. The City is the financial services and banking centre of the UK, and London

⁸² SS.22-35, Scotland Act 2016. The devolved benefits are: Personal Independence Payments, Carer's Allowance, Attendance Allowance, Disability Living Allowance, Winter Fuel Payments, Cold Weather Payments, Severe Disablement Allowance, Industrial Injuries Disability, Funeral Expenses Payments, Sure Start Maternity Grant and Discretionary Housing Payment.

⁸³ Ss.13 and 20, Scotland Act 2016

⁸⁴ S.36, Scotland Act 2016

⁸⁵ S.53, Scotland Act 2016

⁸⁶ S.57, Scotland Act 2016

⁸⁷ S.47-49, Scotland Act 2016

⁸⁸ S.1, Scotland Act 2016

is the location of the central Bank of England, the media centre of the UK and the UK's centre for music and the arts.

Power is concentrated and centralised in Britain geographically in a way that is difficult to imagine in most Western democracies, including the states of the UK's closest allies such as the United States, Canada or Australia.

The broader UK economy is also massively imbalanced. London and the South-East of England are by far the wealthiest parts of the UK, boasting 300,000 millionaires in the region in the year 2010 and set to grow by 35% by 2020, while in the North-East of England that figure is 14,000 and 40,000 for the whole of Scotland. On virtually every economic measure, London and the South-East of England vastly outstrips the rest of the UK in terms of GDP, employment, enterprise figures, household expenditure and number of millionaires.⁸⁹

The Human Rights Act 1998, the EU and Brexit

Human Rights Act 1998

As discussed more fully above, the function of the constitution of a nation state is to provide a declaration of fundamental values and political ideals, and also to provide an organisational chart of government and to clarify the interrelationships between the various parts of the state. However, another important function of constitutions is to guarantee certain rights of the individual citizens against the power of the state and also, in some constitutions, to regulate the relationships of citizens between each other, or more accurately of minorities against majorities.⁹⁰

In democratic systems of government, the nation state is normally governed by a political party or parties which enjoy the support of the majority of the electorate. Clearly this is one of the defining aspects of democratic forms of government. However, there can be certain risks associated with a government ruled by majority opinion in a nation state. In particular, it can create what is known as the tyranny of the majority, in some cases leading to the oppression of minority groups within the nation state.⁹¹

In the United States Constitution, the Founding Fathers sought to prevent the development of a tyranny of the majority through the first ten amendments to the US Constitution, which guaranteed certain rights and freedoms for individual American citizens against the overwhelming power of the newly created American federal state, becoming known as the Bill of Rights.

In England, one hundred years earlier, the English Bill of Rights 1698 was adopted, and separately in Scotland the Claim of Right 1689 sought to guarantee certain rights of Parliament against the Sovereign, shifting power from an absolute monarch to parliament. However, guaranteeing the powers of one organ of the state, the legislature, against the Monarch is very different from guaranteeing the rights of individuals and until the passing of the Human Rights Act 1998 ("HRA"), the UK did not have a bill of rights in the sense of citizens having rights against the state.⁹²

⁸⁹ https://wealth.barclays.com/en_gb/home/research/research-centre/uk-prosperity-map.html

⁹⁰ Bogdanor, Vernon, *The New British Constitution*, Hart Publishing, 2009, pp.54

⁹¹ Mill, John Stuart, *On Liberty*, 1859

⁹² Bogdanor, Vernon, *The New British Constitution*, Hart Publishing, 2009, pp.54

As part of the explosion of constitutional reform heralding the beginning the New Labour era, which included the Scotland Act 1998 and Scottish devolution, the Labour government of Tony Blair introduced a Human Rights Bill into the House of Commons in order to incorporate much of the European Convention on Human Rights (“ECHR”) into UK domestic law.

The ECHR is completely separate and independent of the European Union and instead emanates from a body known as the Council of Europe, which is open to all European democracies to join and currently has 47 members including the Russian Federation. The Council of Europe is an intergovernmental and consultative body and, unlike EU law, the ECHR itself does not form a superior legal order for the UK, and neither is it directly effective in UK law via the UK courts. It is therefore legally binding only as a treaty in international law, and the principal way in which litigants could rely of their rights under the ECHR was by taking their case to the European Court of Human Rights in Strasbourg.⁹³

The HRA was an attempt by the Blair government to incorporate most of the ECHR into UK domestic law while respecting the fundamental principle of the Sovereignty of Parliament. The Convention rights are defined in the HRA and include most of the rights guaranteed under the ECHR, but excludes certain Articles including for example Article 13 ECHR which guarantees a right to an effective remedy.⁹⁴

The Act has a number of main elements, the first of which is that ministers are required, when introducing legislation into the UK Parliament, to certify whether in their view the legislation is compatible with the Convention rights. If the minister in question believes that the legislation is not so compatible then he or she must say so and state that they wish to proceed with the legislation in any case.⁹⁵

Secondly, the HRA imposes an interpretative duty on the courts to interpret all legislation compatibly with the Convention rights, so far as it is possible to do so.⁹⁶

Thirdly, if the court considers that it is not possible to interpret the legislation compatibly with the Convention rights, and the court is satisfied that the legislation is not compatible with the Convention rights, then the court may make a declaration that the provision in question is not so compatible, known as a declaration of incompatibility.⁹⁷ However, the HRA does not give the courts a power to invalidate or strike down legislation which is incompatible with the Convention rights. In this way, the HRA does not compromise the principle of the Sovereignty of Parliament.

It should be noted, however, that the HRA does place a technical restriction on the Sovereignty of Parliament, as the interpretative duty explained above means that the doctrine of implied repeal does not apply to legislation incompatible with the Convention rights. The doctrine states that when two statutes conflict, the later statute prevails even if the later statute does not explicitly repeal the former.⁹⁸ Parliament may still contravene the HRA but in order to do so it must do so explicitly.

⁹³ Ibid., pp. 58

⁹⁴ S.1, HRA

⁹⁵ S.19, HRA

⁹⁶ S. 3, HRA

⁹⁷ S. 4(2), HRA

⁹⁸ *Vauxhall Estates v. Liverpool Corporation* [1932] 1 KB 723

Lastly, the HRA also states that acts of public authorities are unlawful if they contravene the Convention rights, meaning that all public authorities must act compatibly with the Convention rights.⁹⁹

It should be noted that in Scotland, the ECHR is also embedded within the Scottish devolution settlement via the Scotland Act 1998. As was discussed above, in terms of s.29(2) of the Scotland Act 1998, any provision passed by the Scottish Parliament which is incompatible with the Convention rights is outside legislative competence and is not law. It is important to note that this significantly different from the effect of the HRA vis-à-vis Westminster as Acts of the Scottish Parliament, which are incompatible with the Convention rights, can be struck down, whereas only declarations of incompatibility can be made against Acts of Parliament emanating from Westminster. It is also worth noting that not all of the ECHR is embedded in the devolution settlement via the Scotland Act 1998, but rather only those Convention rights as defined by the HRA.

European Union: treaties and principles of EU law

An aspect of the British Constitution which places a more significant restriction on the Sovereignty of Parliament is that of the UK's membership of the EU. The UK joined what was at the time called the European Economic Community ("ECC") in 1972 via the Treaty of Accession 1972, and ratified in UK domestic law by the European Communities Act 1972 which fully came into force on 1 January 1973.

In accordance with the Treaty of Maastricht 1992 ("TEU"), the ECC which was created originally by the Treaty of Rome 1957, was renamed the European Community and became the first of the three pillars of the newly formed European Union. This first pillar (EC) was concerned with economic union, the single market and customs union. The second pillar was known as the Common Foreign and Security pillar (CFSP) and the third pillar was known as the Police and Judicial Cooperation in Criminal Matters pillar (PJCCM). These latter pillars were concerned with political and social union.

The three-pillar model was abandoned in 2009 with the signing of the Treaty of Lisbon ("TFEU"), which consolidated the three pillars into a single EU legal personality.

A full discussion of the EU and its institutions will not be attempted here, but it is important to note that membership of the EU has introduced a whole host of important constitutional principles and changes to the British Constitution through the interpretation of the Treaties by the ECJ in a series of important cases.

Most notably, in the landmark case of the European Court of Justice ("ECJ") of *Costa v ENEL*,¹⁰⁰ it was held that Member States of the EU have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. The ECJ further held that the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty of Rome carried with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.

In other words, the *Costa* case established that EU law enjoyed legal supremacy throughout the whole of the EU and that the domestic law of the Member States was subject to EU law. This clearly represents a challenge to the Sovereignty of Parliament, and shows that the principle of the

⁹⁹ S.6, HRA

¹⁰⁰ [1964] ECR 585

Sovereignty of Parliament has been suspended as a result of EU membership. This was recognised by the British courts not long after accession, as in the *The Siskina*¹⁰¹ case in 1979 it was held by Lord Hailsham that it is the duty of the courts in the UK and other Member States to give effect to EU law, and interpret it in preference to domestic UK law over which EU law prevails.

This principle was dramatically seen in practice in the case of *Factortame (No.2)*¹⁰², where the House of Lords disapplied a provision of an Act of Parliament, the Merchant Shipping Act 1988, because it was inconsistent with a principle of EU law. What in effect had happened was that European Communities Act 1972 had bound a future Parliament in preventing the application of a provision of later Act of Parliament by the doctrine of implied repeal. Parliament remained ultimately sovereign in the sense that it could repeal the European Communities Act 1972, thereby exiting the EU, but for as long as the UK remained a member of the UK, the UK Parliament remained bound by the terms of that Act of Parliament.¹⁰³

Moreover, in the case of *Van Gend en Loos*,¹⁰⁴ it was held by the ECJ that EU law itself may have direct effect in the domestic legal systems of Member States. What this means is that if the EU passes legislation, for example a Directive, independently of the domestic legislation transposing the Directive into the domestic law of the Member State, a litigant may be able to rely directly on the Directive rather than domestic legislation. It was held that independently of the legislation of the Member States, EU law not only imposes obligations on individuals but is also intended to confer upon them rights becoming part of their legal heritage. This is known as the doctrine of direct effect.

In addition, in the case of *Von Colson and Kamann v. Land Nordrhein-Westfalen*,¹⁰⁵ it was held that national courts of the Member States are required to interpret their national law in the light of the wording and purpose of EU law. This is known as the doctrine of indirect effect, and amounts to a duty imposed by the ECJ on national courts to interpret domestic law compatibly with EU law.

Another important doctrine introduced by the ECJ into the British Constitution is that of state liability. It was held in the case of *Francovich*,¹⁰⁶ that Member States in certain circumstances will be liable in damages to individuals who suffer loss as a result of the Member State's failure properly to implement a Directive. It was held that a state must be liable for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible, and this principle is inherent in the EU treaty system.

European Union: the single market

The essence of the EU economic union are the four freedoms which form the core of the internal market, otherwise known as the single market. The legal basis of the single market are Articles 4(2)(a), 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union (TFEU) and its objective is the elimination of trade barriers between Member States, with the aim of increasing economic prosperity and contributing to an ever closer union among the peoples of Europe.

The first of the four freedoms is the free movement of goods and has its legal basis in Articles 26 and 28-37 TFEU. Free movement of goods was initially seen as part of a customs union between the

¹⁰¹ [1979] AC 210, 262

¹⁰² *R. v. Secretary of State for Transport, ex p Factortame Ltd (No.2)* (1991) 1 AC 603

¹⁰³ Wade, Sir William, *Sovereignty: revolution or evolution*, (1996) 112 LQR 568

¹⁰⁴ [1963] ECR 1

¹⁰⁵ [1984] ECR 1891

¹⁰⁶ [1991] ECR I-5357

Member States, involving the abolition of customs duties, quantitative restrictions on trade and equivalent measures, and the establishment of a common external tariff for the EU, but now is concerned with eliminating all obstacles to free movement of goods with a view to completing and perfecting the single market — an area without internal borders, in which goods could move as freely as on a national market.

This means that the freedom of movement of goods does not only prohibit direct restrictions on trade such as tariff charges, but also measures taken by Member States which have an equivalent effect as a quantitative restriction on trade. For example, in the leading ECJ judgement of *Cassis de Dijon*¹⁰⁷, it was held that any product legally manufactured and marketed in a Member State in accordance with its fair and traditional rules, and with the manufacturing processes of that country, must be allowed onto the market of any other Member State. As a consequence, even in the absence of European harmonisation measures (secondary EU legislation), Member States are obliged to allow goods that are legally produced and marketed in other Member States to circulate and to be placed on their markets.

The second freedom of the four freedoms is the freedom of movement of capital, which has its legal basis in Articles 63 to 66 TFEU. The objective of this freedom is the removal of all restrictions on capital movements between Member States, as well as between Member States and third countries, with exceptions in certain circumstances. The free movement of capital underpins the single market and complements the other three freedoms. According to the EU, it also contributes to economic growth by enabling capital to be invested efficiently and promotes the use of the euro as an international currency, thus contributing to the EU's role as a global player. It was also indispensable for the development of Economic and Monetary Union (EMU), and the introduction of the euro.¹⁰⁸

Article 63 TFEU prohibits all restrictions on the movement of capital and payments between Member States, as well as between Member States and third countries. The Court of Justice of the European Union is charged with the task of interpreting the provisions related to the free movement of capital, and extensive case law exists in this area.

The only justified restrictions on capital movements in general, including movements within the EU, are laid down in Article 65 TFEU. These include: (i) measures to prevent infringements of national law (namely for taxation and prudential supervision of financial services); (ii) procedures for the declaration of capital movements for administrative or statistical purposes; and (iii) measures justified on the grounds of public policy or public security.

The third freedom is the freedom to establish business and to provide services. Self-employed persons and professionals or legal persons within the meaning of Article 54 TFEU who are legally operating in one Member State may: (i) carry on an economic activity in a stable and continuous way in another Member State (freedom of establishment: Article 49 TFEU); or (ii) offer and provide their services in other Member States on a temporary basis while remaining in their country of origin (freedom to provide services: Article 56 TFEU).

The Services Directive,¹⁰⁹ which strengthens the freedom to provide services within the EU, was adopted in 2006, with an implementation deadline of 28 December 2009. This directive attempts to

¹⁰⁷ Case 120/78 of 20 February 1979

¹⁰⁸ <http://www.europarl.europa.eu/factsheets/en/sheet/39/free-movement-of-capital>

¹⁰⁹ Directive 2006/123/EC of 12 December 2006

complete the single market and aims to create an open single market in services within the EU, while at the same time ensuring the quality of services provided to consumers in the EU.

According to the EU, the directive is crucial for completing the internal market, since it has a huge potential for delivering benefits for consumers and SMEs. The full implementation of the Services Directive could increase trade in commercial services by 45%, and foreign direct investment by 25%, bringing an increase of between 0.5% and 1.5% in GDP (Commission communication 'Europe 2020').¹¹⁰

The last of the four freedoms is the freedom of movement of workers which has its legal basis in Article 3(2) of the Treaty on European Union (TEU); Articles 4(2)(a), 20, 26 and 45-48 TFEU. This includes the rights of movement and residence for workers, the rights of entry and residence for family members,¹¹¹ and the right to work in another Member State and be treated on an equal footing with nationals of that Member State. Restrictions apply in some countries for citizens of new Member States. The rules on access to social benefits are currently shaped primarily by the case law of the Court of Justice.

Any national of a Member State has the right to seek employment in another Member State, in conformity with the relevant regulations applicable to national workers. He or she is entitled to receive the same assistance from the national employment office as nationals of the host Member State, without any discrimination on grounds of nationality, and also has the right to stay in the host country for a period long enough to look for work, apply for a job and be recruited. This right applies equally to all workers from other Member States, whether they are on permanent contracts, are employed as seasonal or cross-border workers or provide services. Workers may not be discriminated against, for example with regard to language requirements, which may not go beyond what is reasonable and necessary for the job in question.

Directive 2004/38/EC introduces EU citizenship as the basic status for nationals of the Member States when they exercise their right to move and reside freely in EU territory. For the first three months, every EU citizen has the right to reside in the territory of another EU country with no conditions or formalities other than the requirement to hold a valid identity card or passport. For longer periods, the host Member State may require a citizen to register his or her presence within a reasonable and non-discriminatory period of time.

Migrant workers' right to reside for more than three months remains subject to certain conditions, which vary depending on the citizen's status: for EU citizens who are not workers or self-employed, the right of residence depends on their having sufficient resources not to become a burden on the host Member State's social assistance system, and having sickness insurance. EU citizens acquire the right of permanent residence in the host Member State after a period of five years of uninterrupted legal residence.

As regards working and employment conditions in the territory of the host Member State, workers who are nationals of another Member State cannot be treated differently from national workers because of their nationality. Nationals of one Member State working in another have the same social and tax benefits and access to housing as national workers and are entitled to equal treatment in respect of the exercise of trade union rights.

¹¹⁰ <http://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services>

¹¹¹ Directive 2004/38/EC of 29 April 2004

The right to remain in the host country after stopping work is now laid down in Directive 2004/38/EC. Job seekers have the right to reside for a period exceeding six months¹¹² without having to meet any conditions if they continue to seek employment in the host Member State, and have a 'genuine chance' of finding work; during this time they cannot be expelled. After acquiring the right of permanent residence in the host Member State, EU citizens are no longer subject to any conditions (such as sufficient financial means) but can, if necessary, rely on social assistance in the host Member State in the same way as its nationals can.

European Union: customs union, public procurement and State aid

Although the four freedoms represent the core of the single market, the EU has attempted to perfect the single market in other ways, most notably through the establishment of the EU customs union. In terms of Article 28 TFEU, the EU is to comprise a customs union which shall cover all trade in goods, and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

In practice, the Customs Union means that the customs authorities of all 28 EU countries work together as if they were one. They apply the same tariffs to goods imported into their territory from the rest of the world and apply no tariffs internally.

In the case of the EU, this means that there are no customs duties to be paid when goods are transported from one EU country to another. The customs duty from goods imported into the EU makes up around 14% of the total EU budget as part of its traditional own resources.

Customs controls at the EU's external borders protect consumers from goods and products which could be dangerous or bad for their health. They protect animals and the environment by fighting illicit trade in endangered species, and by preventing plant and animal diseases.

Customs authorities work together with policy and immigration services in the fight against organised crime and terrorism. They combat trafficking of people, drugs, weapons and counterfeited goods, and verify that travellers with large amounts of cash are not laundering money, evading tax or even financing criminal organisations. EU customs also tackle tax and duties fraud by businesses and individuals, which deprive national governments of vital revenues for public spending.

Another way in which the EU has sought to perfect the single market is through the regulation of public procurement contracts, which has its legal basis in Articles 26, 34, 53(1), 56, 57, 62 and 114 TFEU.

Prior to the implementation of EU legislation in this area, only 2% of public procurement contracts were awarded to non-national undertakings of Member States. These contracts often play a key role in certain sectors (such as construction and public works, energy, telecommunications and heavy industry), and are traditionally characterised by a preference for national suppliers, based on statutory or administrative rules.

The theory behind regulation of public procurement was that the lack of open and effective competition was one obstacle to the completion of the single market — pushing up costs for contracting authorities and inhibiting, in certain key industries, the development of competitiveness.

¹¹² *Antonissen* Case C-292/89

The EU argued that the promotion of cross-border tendering across the single market would increase competitiveness and lower costs for contracting authorities.

Giving preference to the best-performing undertakings across the European market the EU argues encourages the competitiveness of European companies the EU argues (which are then able to increase in size and develop their markets) and reinforces respect for the principles of transparency, equal treatment, genuine competition, and efficiency, thereby reducing the risk of fraud and corruption.¹¹³

A new public procurement package was adopted in 2014 by Parliament and the Council with the aim of simplifying procedures and making them more flexible in order to encourage access to public procurement for SMEs, and to ensure that greater consideration is given to social and environmental criteria. The legislative framework includes Directive 2014/24/EU of 26 February 2014 on public procurement (repealing Directive 2004/18/EC) and Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (repealing Directive 2004/17/EC).

The new public procurement package is completed by a new directive on concessions (Directive 2014/23/EU of 26 February 2014 on the award of concession contracts), which sets up an appropriate legal framework for the award of concessions, ensuring that all EU economic actors have effective and non-discriminatory access to the EU market, and provides greater certainty as to the law in place.

Another important facet of the single market is the regulation of State aid. EU rules on State aid were put in place to ensure that state-owned resources are not deployed to distort competition or create unfair advantage in the European single market.

A company which receives government support gains an advantage over its competitors. Therefore, the TFEU generally prohibits State aid unless it is justified by reasons of general economic development. To ensure that this prohibition is respected and exemptions are applied equally across the European Union, the European Commission is in charge of ensuring that State aid complies with EU rules.

State aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities. Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by this prohibition, and do not constitute State aid (examples include general taxation measures or employment legislation).

In order to constitute state aid, a measure needs to have these features:

- there has been an intervention by the State or through State resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.);
- the intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions
- competition has been or may be distorted;
- the intervention is likely to affect trade between Member States.

¹¹³ <http://www.europarl.europa.eu/factsheets/en/sheet/34/public-procurement-contracts>

Article 107(2)(a)-(c) TFEU expressly permit the following forms of aid: aid having a social character, granted to individual consumers, provided it is granted in a way which does not discriminate according to the origin of the products concerned; aid to make good the damage caused by natural disasters or other exceptional occurrences; and aid to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required to compensate for the economic disadvantage caused by that division. These categories of State aid are exempted automatically

Article 107(3)(a)-(d) TFEU provide that the following forms of aid may be permitted: aid to promote the economic development of underdeveloped areas of the EU (with abnormally poor living standards or high levels of unemployment); aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; aid to facilitate the development of certain economic activities or areas (provided it does not adversely affect trading conditions to an extent contrary to the common interest); and aid to promote culture and heritage conservation (again provided it does not affect trading conditions and competition in the EU to an extent contrary to the common interest).

Moreover, the EU Commission has considerable discretion in evaluating whether or not an aid measure is compatible under Article 107(3) TFEU. It has adopted block exemptions covering various categories of aid measures to reduce the number of cases that it is required to examine.

The Commission has adopted two block exemptions for certain categories of “horizontal” State aid (i.e. horizontal State aid refers to the rules which cut across all sectors of the economy and are not specific to particular industry sectors):

- the De Minimis Aid Exemption Regulation - covers aid provided to a single undertaking not exceeding €200,000 over any three-year period. Aid that falls within this block exemption is exempt from the notification requirement;
- the General Block Exemption Regulation (GBER) - covers a range of categories of aid including regional, training, SMEs, R&D, infrastructure and environmental. There is no need to notify aid that falls within this block exemption but details of the measure must be published in the Official Journal.

There are also guidelines and special rules from the Commission in relation to particular industries, but this falls outwith the scope of this paper.

Brexit and the repatriation of powers from Brussels

Following the result of the 2016 referendum on EU membership for the UK to leave the EU, the UK has of course exercised its right under Article 50 TEU to withdraw from the EU and is due to leave the EU at some point in 2019. The fluidity of the negotiations between the EU and the UK and the internal political problems in the UK mean that it is not possible at the time of writing to say definitely what the outcome will be for the UK, and what the constitutional implications will be for the British Constitution.

However, withdrawal from the EU in any form, whether a so-called “soft Brexit” by joining the European Free Trade Association (“EFTA”) after exit, or a so-called “hard Brexit” with no trade deal in place between the EU and UK at all after exit, the constitutional implications will be significant, although no discussion will be provided here of all of these consequences as there are too many outcomes still possible including:

- i.) membership of EFTA;
- ii.) remaining part of the single market;
- iii.) remaining part of the single market and customs union;
- iv.) leaving the EU with no deal;
- v.) leaving the EU with the deal negotiated by the UK Government;
- vi.) a second referendum on EU membership;
- vii.) Revocation or extension of Article 50 TEU.

Having said that, one of the consequences which should be noted in relation to Scottish devolution in particular is the repatriation of powers from the EU institutions to the domestic UK institutions. As was discussed more fully above, in passing the European Communities Act 1972, the UK Parliament has ceded a certain level of sovereignty to the EU over certain areas of policy. At the time when the UK joined the EU in 1972, there was no devolution to Scotland and therefore all powers were transferred from Westminster to the EU institutions. The situation is now more complicated since the setting up of the devolved institutions in Scotland in 1999.

As discussed above, the devolved institutions in Scotland are legally bound to comply with EU law. As a result, in some nominally devolved areas – such as environmental regulation, agriculture, state aid for industry, public procurement, and aspects of justice, transport and energy – the policy autonomy of the devolved institutions is significantly constrained in practice compared with Westminster, which is not so constrained.

When the UK leaves the EU, if no changes were made other than to remove the statutory requirement to comply with EU law in the Scotland Act 1998, all of these policy areas would fall completely under devolved control in Scotland. This would allow policy differentiation within the UK in areas such as public procurement where EU law has previously provided a common legal framework.

To prevent or limit divergence, common frameworks may therefore be created to set out a common UK, or GB, approach and how it will be operated and governed. Depending upon the policy area, this may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition.

According to analysis conducted by the UK Government, there are a total of 160 distinct policy areas where EU law intersects with devolved powers in at least one of the three devolved nations. In Scotland, there are 111 such policy areas. New frameworks will not necessarily be required in all these areas. In some cases, full control is expected to be transferred to the devolved institutions, allowing policy divergence between Scotland and the rest of the UK.

The UK and devolved governments announced that they had agreed the principles that will guide the development of common frameworks. Six different reasons were set out for why common frameworks in particular areas might be needed:

1. Ensure that the effective functioning of the UK single market is maintained. For instance, it may be necessary to limit regulatory differences emerging in areas ranging from public procurement, rail franchising which has a significant cross-border element and animal welfare to the management of radioactive waste.
2. Enable the UK to conclude trade deals with other countries. The Government is concerned that regulatory divergence might make it harder for the UK to strike comprehensive trade deals, for instance if the devolved nations created more generous schemes for subsidising farmers or supporting local industry.

3. Ensure that the UK meets international obligations, including in areas relating to devolved policy competences. This might apply, for instance, in relation to international agreements on carbon emissions, management of fisheries in the North Sea or in allowing each other's citizens access to healthcare when abroad.
4. Manage common resources that naturally cross boundaries between the UK nations, including the water and air quality as well as fisheries.
5. Administer and provide access to justice in cases with a cross-border element.
6. Continue cooperation where it is needed to safeguard the security of the UK.

According to the UK Government, there are at least four ways that common policy frameworks could be established. In many cases, a combination of these approaches may be needed.

First, the UK might agree to continue to comply with EU law as part of a new deep and special partnership. For instance, the UK might maintain EU-compliant state aid rules or remain within some arrangements for justice cooperation. Additional policy autonomy would not be devolved, but the UK and devolved governments would need to cooperate on implementation.

Second, in areas where the UK is definitively taking back control, but where regulatory consistency is deemed crucial, new frameworks could be set up by legislation at Westminster for the entire UK. This might apply to management of fisheries or subsidies for agriculture. Since these policy areas are already devolved in principle, the Sewel Convention would apply, meaning that the consent of the devolved bodies should be sought.

Third, there may be areas where coordination is required, but a binding legal framework is seen as unnecessary. In this case, powers might be devolved in full but with agreement about how the different governments will work together, perhaps to share best practice and data or to agree upon minimum standards, for instance in areas such as air or water pollution.

Fourth, the UK and devolved governments could create new intergovernmental structures to take binding decisions for the whole UK. The Welsh Government has proposed a new UK Council of Ministers to oversee issues such as agriculture-related aspects of trade negotiations. The Welsh propose that the UK Government should not be able to override the opposition of all three devolved governments in the event of disagreement.¹¹⁴

All of these models will require to be reviewed in the context of remodelling the British Constitution and the Scottish devolution settlement.

Brexit and the socialist critique

The Left in the UK has been divided on the question of Britain's membership of the EU since the UK joined the ECC in 1972. During the 1975 ECC membership referendum campaign in the UK, the Labour Party took no official position to continued membership of the ECC, because while the Labour membership had voted decisively 2:1 against continued membership of the ECC, the leadership of Harold Wilson was strongly supportive of continued membership. Notwithstanding this, high-profile figures on the Left of the party, including Cabinet ministers Michael Foot, Tony Benn and Barbara Castle, all campaigned for the UK to leave the ECC.

¹¹⁴ <https://www.instituteforgovernment.org.uk/explainers/brexit-devolution-and-common-frameworks>

The Left remains divided on the question of EU membership today. On the one hand, the EU stands for internationalism and cooperation between nations, the promotion of peace in Europe and represents an opportunity for socialists and social democrats across the European Continent to improve workers' rights, strengthen environmental protection, promote human rights and act as a counter-weight against the unwieldy power of global capitalism, in a way that is impossible for the governments of individual Member States. This has taken various forms over the last few decades including the EU Social Chapter¹¹⁵ and EU Charter of Fundamental Rights.

On the other hand, there is an alternative argument that the EU is by definition institutionally wedded to ideas which are problematic for socialists and others on the Left. The core of the European project, economic union, has at its centre the single market, but that single market refers to an internal free market underpinned by the four freedoms which promote private sector competition across the European Continent while actively discouraging state intervention in the economy through State aid rules and rules on public procurement.¹¹⁶

In addition, the European sovereign debt crisis has arguably demonstrated that the EU is also wedded to a strict fiscal conservatism and is prepared to override democratically elected governments of Members States to preserve stability in the EU single market. This could be seen most dramatically in the case of Greece where, in the aftermath of the 2007-2008 financial crisis, Greece suffered one of the worst and prolonged recessions of any advanced economy in modern times.¹¹⁷

In order to bring down the Greek government's inordinately large sovereign debt, a 'troika' of neoliberal forces including the EU Commission, the International Monetary Fund ("IMF") and the European Central Bank offered a series of bailout packages to Greece to avoid a default on the debt, but in return demanded absolute obedience from the Greek government to implement swingeing cuts to public spending, austerity and massive reforms to the Greek state to conform to the Washington Consensus.¹¹⁸ This was part of a larger plan to in order to ensure the Greek government met the repayments on the bailout packages.

When the Greek people elected the left-wing Syriza party in 2015, even the IMF – which is the bulwark of neoliberalism around the world – advocated a reduction in the intensity of the austerity programme,¹¹⁹ while on the other hand the EU institutions demanded a harsher approach to debt repayment and austerity.¹²⁰

Greece was one of the most high-profile casualties of the 2007-2008 financial crisis, which was a crisis created by global free market capitalism. It seems particularly perverse that the EU demanded more obedience to the forces of global capital and neoliberalism in order to fix a problem that that system itself created, precipitating a 21st century humanitarian crisis in an advanced Western democracy.

¹¹⁵ Protocol on Social Policy and the Agreement on Social Policy to the Treaty of Maastricht

¹¹⁶ <https://blogs.lse.ac.uk/brexit/2018/10/19/long-read-how-eu-membership-undermines-the-left/>

¹¹⁷ Oxenford, Matthew and Chryssogelos, Angelos, *Greek Bailout: IMF and Europeans Diverge on Lessons Learnt*, Chatham House, 16 August 2018, <https://www.chathamhouse.org/expert/comment/greek-bailout-imf-and-europeans-diverge-lessons-learnt#>

¹¹⁸ The concept and name of the Washington Consensus were first presented in 1989 by John Williamson, an economist from the Institute for International Economics, an international economic think tank based in Washington, D.C and is a set of 10 economic policy prescriptions considered to constitute the standard neoliberal reform package for crisis-hit economies.

¹¹⁹ Crisis Programme Review, 9 November 2015, <https://www.imf.org/external/np/pp/eng/2015/110915.pdf>

¹²⁰ Oxenford, Matthew and Chryssogelos, Angelos, *Greek Bailout: IMF and Europeans Diverge on Lessons Learnt*, Chatham House, 16 August 2018, <https://www.chathamhouse.org/expert/comment/greek-bailout-imf-and-europeans-diverge-lessons-learnt#>

Perhaps socialists across Europe can support European integration in some form, but all socialists across the Continent should view the EU institutions themselves with the utmost circumspection.

Key Findings and Recommendations

- 1. The current British Constitution is unique in that it has developed organically over a prolonged period of time from a patchwork of different sources and is not contained a single codified legal text.**
- 2. The British Constitution is underpinned by certain fundamental constitutional principles including the Sovereignty of Parliament, the rule of law, the independence of the judiciary and ministerial responsibility to Parliament.**
- 3. The Constitution is also underpinned by certain values including liberalism and republicanism while remaining a constitutional monarchy. The meaning and content of these values are contentious, and the Constitution is therefore a political battleground.**
- 4. The Scotland Act 1998 established the current Scottish devolution settlement and has been amended on a number of occasions since then most notably by the Scotland Act 2012 and Scotland Act 2016.**
- 5. The Scottish devolution settlement is based on a reserved powers model meaning powers which are not specifically reserved or restricted are devolved to the Scottish Parliament.**
- 6. There has been a number of factors contributing to the rise of Scottish nationalism and support for Scottish independence including the overly centralised nature of the British state and the imbalanced nature of the UK economy, the rise of neoliberalism and globalisation and their effect on the Scottish economy, the decline of the Labour Party as a radical political force during the New Labour era, and the 2007 financial crisis and subsequent age of austerity.**
- 7. The Human Rights Act 1998 and membership of the EU are cornerstones of the current British constitution. While the Left supports the general idea of incorporation of human rights standards into UK domestic law, the Human Rights Act 1998 only incorporates civil and political rights and not economic, social or third generation rights, and the Left remains divided on the question of EU membership.**

Chapter 2

The operation of the Scottish devolution settlement Part 1 – 1999-2011

Scottish Devolution 1999-2007

Introduction

In order to chart a course for a way forward for Scotland's future place within the United Kingdom, it is necessary to consider the operation of the current Scottish devolution settlement over the last 20 years since its inception in 1999. As discussed more fully in Chapter 1, the Scottish devolved institutions gained significant powers under the Scotland Act 1998, despite the fact that large areas of policy were reserved to Westminster. This devolution of power from Westminster to the Scottish Parliament in Edinburgh has had an impact on the social and cultural life of Scotland, and it is critical to understand this effect in developing a new a constitutional settlement for the UK going forward.

Scottish devolution has given a voice and physical form to the nature of Scottish politics, and the devolved institutions themselves have been important in giving expression to and reinforcing Scotland's national identity and sense of self.

In the first elections to the Scottish Parliament in 1999, Scottish Labour gained 38.8% of the constituency vote and 34% on the regional list. This gave the party a total of 56 seats, 9 short of an overall majority (the proportional electoral system was not expected to return a majority party). The Scottish National Party gained 35 seats, the Scottish Conservatives 18 and the Scottish Liberal Democrats 17. One independent MSP was also elected, as were single representatives from the Scottish Green and Scottish Socialist parties. Turnout in the constituency vote was 58%, and 57% for the regional list ballot.¹

What this means is that 110 of the 129 seats at Holyrood were occupied by parties which could be described as progressive or centrist, centre-left or left-wing in political hue, including Scottish Labour, the Scottish Liberal Democrats, Scottish Greens and the Scottish Socialist Party. The only centre-right party, the Scottish Conservatives, managed to gain a mere 18 seats in total, along with one independent. This was a dramatic difference from the composition at Westminster, where the spectre of a Conservative government with a powerful majority was in recent memory, and at the last Westminster election in 1997, the Conservative party had still managed to gain over 30% of the popular vote and almost 200 seats in the House of Commons, despite the landslide election victory of New Labour.

Virtually from its inception, Scottish devolution has reflected a distinctive political landscape in Scotland and this has been reinforced over the last 20 years, as the political stripes of the party of government at Holyrood and Westminster have diverged from Labour being in power in both parliaments to the SNP becoming the Scottish Government in 2007 and the Conservatives forming the UK Government since 2010.

¹ Commons Library Research Paper 99/50, Scottish Parliament Elections: 6 May 1999, 8 September 1999

The chasm between the political cultures in Holyrood and in Westminster has widened further, as since 2011 the Scottish Parliament has been composed of a majority of MSPs who support Scottish independence, and at the same time the Tories at Westminster have pursued a programme of savage cuts to public spending, austerity and fiscal conservatism on the back of one of the worst financial crises in living memory, as well as prolonged economic recession (which was discussed more fully in Chapter 1).

Notwithstanding this, although there have been some achievements in some areas, arguably the tangible concrete effects of devolution has been muted and somewhat of a disappointment, and devolution has lacked any real radicalism. Over the last 20 years, the devolved institutions have failed to tackle some of the major issues facing Scotland, including huge disparities in income and wealth, significant levels of poverty across the country, large health inequalities depending on socio-economic status, insecure work and poverty pay, and the concentration of land ownership in the hands of a very few ultra-high net worth individuals.

The almost total failure to address these structural social and economic problems in Scotland comes in spite of the presence of political parties in government which have at least professed to be progressive, and a Scottish Parliament composed mainly of parties of the centre and centre-left. Indeed, many of the major advances in addressing some of these problems were done at Westminster level under Labour governments in the late 1990s and 2000s, such as introducing the National Minimum Wage and massively reducing child poverty.

Post-2010, especially with a Tory government in Westminster dedicated to a right-wing agenda of fiscal conservatism and austerity, the current Scottish devolution settlement has failed to act as a bulwark against these policies under an SNP Scottish Government which talks the language of social justice and progressivism, but often acts in ways which fit in nicely with the UK-wide neoliberal agenda and in some cases goes further than the Tories at Westminster.

Scotland is no exception to the fiscal conservatism and austerity regime dominant at Westminster, even although the powers exist in Scotland to mitigate and avoid the worst effects of it. Instead, the SNP-led Scottish Government in Edinburgh is obsessed with the setting up of a small notionally independent capitalist state wedded to free market principles, attached to a neoliberal agenda, all while portraying itself as a progressive alternative to Tory austerity and a hard-Brexit.

This is evidenced by the SNP's failure to use tax-raising powers available under the Scotland Act 1998 since the inception of devolution in 1999, and only minimally using the further tax powers devolved by the Scotland Act 2016. It is also evidenced by the SNP's vision for Scottish independence in the form of the Sustainable Growth Commission report.²

In order to achieve this, the SNP strategy in government has been to make a conscious decision not to make full use of its current powers, to only address some of the structural problems identified above, and to blame Westminster for these problems while portraying independence as a panacea.

1st Scottish Parliament – 1999-2003

As Scottish Labour had gained 56 seats in Holyrood at the Scottish Parliament Election of 1999, 9 short of an overall majority, it was necessary for Scottish Labour to form a coalition with the Scottish Liberal

² According to the Institute for Fiscal Studies, the report of the Sustainable Growth Commission which was set up by the Scottish Government suggests an independent Scotland would be hit by much harder austerity than Scotland at present inside the UK. See <https://www.ifs.org.uk/publications/13072>

Democrats in a Lib-Lab pact to form a stable Scottish Executive. The Leader of the Scottish Labour Party and former Secretary of State for Scotland, Donald Dewar, became the first First Minister of Scotland, while the Leader of the Scottish Liberal Democrats, Jim Wallace, became the Deputy First Minister.

Some significant achievements were made by the 1st Scottish Parliament between 1999-2003, including most notably the introduction of free universal care for the elderly in 2002.³ As local government is a policy area within the competence of the Scottish Parliament, Free Personal and Nursing Care (“FPNC”) was introduced in Scotland by the Scottish Parliament on 1 July 2002. Prior to 1 July 2002, people could be charged for personal care services provided in their own home, and many residents in Care Homes had to fully fund their care from their own income and savings.

Other areas where the first Scottish Parliament made significant changes was in the area of further education and tuition fees. At Westminster, the Teaching and Higher Education Act 1998 was enacted by the Blair government which allowed universities across the UK to charge tuition fees. A means tested tuition fee of £1,000, representing about a quarter of the total cost of tuition, was introduced in the UK in September 1998.⁴

Devolution brought changes to the funding and support arrangements in higher education across the UK. From academic year 2000-01, tuition fees for eligible full-time Scottish and EU students were abolished in Scotland. For students in Scotland from elsewhere in the UK, they had to pay tuition fees for the first three years of their degree, with the final year paid by the Scottish Executive from the academic year 2001-02.

In place of tuition fees, a system of graduate endowment to pay for tuition was introduced by the Education (Graduate Endowment and Student Support) (Scotland) Act 2001. The level was initially set at £2,000 and was to be repaid in the same way as income-contingent student loans. Various groups including single parents, mature/independent students, disabled students and, importantly, students studying HNC and HNDs were exempt from the Graduate Endowment.⁵

Further changes to the funding of higher education was made by future Scottish governments post-2007 (which will be explored below) but suffice to say that the 1st Scottish Parliament initiated a significant change in direction to the way in which higher education is funded in Scotland compared with other parts of the UK. However, these changes are not necessarily progressive, as there has been a concern that funding the no tuition fees policy in Scotland has meant a reduction in funding for further education, which disproportionately affects working class children, a subject which will be discussed more fully below.

Another important piece of legislation which was introduced during the 1st Scottish Parliament was in the area of local government reform in the form of the Local Government in Scotland Act 2003. The legislation introduced a new performance management and accountability regime for local authorities; in particular it imposes a duty on all Scottish local authorities to secure best value.⁶ This was done in tandem with introducing the Single Transferable Vote as the electoral system for Scottish

³ Community Care and Health (Scotland) Act 2002

⁴ Berry, Kate and Georghiou, Nicki, *Higher Education: Tuition Fees and the ‘funding gap’*, SPICe Briefing, 22 December 2011

⁵ Berry, Kate and Georghiou, Nicki, *Higher Education: Tuition Fees and the ‘funding gap’*, SPICe Briefing, 22 December 2011

⁶ S. 1, Local Government in Scotland Act 2003

councils to arguably depoliticise local government in Scotland, and to introduce a more managerial approach incapable of standing up against the policies of central government.

Moreover, the legislation also removed the requirement for compulsory competitive tendering ("CCT") by Scottish local authorities which, along with privatisation of state assets under Thatcher, was a cornerstone of the neoliberal revolution of the 1980s in the UK. CCT was an initiative whereby local authorities were forced to open in-house services, such as refuse collection and road maintenance, to private competition in the 1980s in a supposed effort to cut costs and improve value for money.

Other significant achievements of the 1st Scottish Parliament was in the area of law reform in Scotland particularly in the area of Scottish private law which arguably was neglected by Westminster as a non-priority area of policy. For example, up until the passage of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (the "2000 Act"), the old system of feudal land ownership existed in Scotland, whereby land was owned subject to an interest in land known as the 'feudal superiority' held by the 'feudal superior'. The 2000 Act replaced feudal tenure with a system of outright ownership in Scotland for the first time.

Related to this piece of legislation was the Title Conditions (Scotland) Act 2003, which reformed the archaic law on real burdens – a form of obligation that either restricts an owner's use of his or her land, or obliges him or her to do something in relation to that land, and which benefits another piece of land in both instances.

Another important piece of legislation passed by the 1st Scottish Parliament was the Abolition of Poidings and Warrant Sales (Scotland) Act 2001, which was introduced to the Scottish Parliament as a Private Members' Bill by the Scottish Socialist MSP Tommy Sheridan. Poidings and warrant sales were a form of diligence which had become particularly politically contentious during the 1980s, as they were the legal method of choice employed by Scottish local authorities to recover debts owed in respect of the Tories' Community Charge, or poll tax. Warrant sales were particularly contentious, as they allowed sheriff officers under instruction from local councils to enter a debtor's home, attach a value to moveable items in the debtor's home, which would later be sold at a public sale to satisfy the poll tax debt.

The Lib-Lab Scottish Executive had at the time of the Bill was introduced to Parliament added an amendment seeking to block the Bill, explaining that the Executive would bring another Bill before the Scottish Parliament to introduce a new version of poidings and warrant sales. However, a number of backbench Labour MSPs threatened to vote against the Executive to defeat the amendment, most notably Johann Lamont MSP and Malcolm Chisholm MSP, to allow Sheridan's Bill to pass. As a result, the Scottish Executive performed a U-turn to withdraw its amendment allowing the Bill to pass.⁷

Following the abolition of poidings and warrant sales, the Scottish Executive introduced the Debt Arrangement and Attachment (Scotland) Act 2002 (the "2002 Act"), which overhauled the law in the area of diligence and the recovery of debt in Scotland, and which also repealed Tommy Sheridan's legislation. The objective of the 2002 Act was to provide a workable but humane alternative to the enforcement procedure of poiding and warrant sale, and to implement the recommendations of the Working Group on a Replacement for Poiding and Warrant Sales.

⁷ Green light for Warrant Sales Bill, BBC News, Thursday 27th April 2000, <http://news.bbc.co.uk/1/hi/scotland/727429.stm>

Another important moment during the 1st Scottish Parliament was the debate on the UK Government's decision to invade Iraq in 2003, which was discussed in Chapter 1. Although Scottish Labour and the Scottish Conservatives supported the position of the UK Government in its decision to go to war with Iraq, the SNP and other opposition parties firmly rejected the idea.

Although the opposition motion condemning the Iraq War was defeated, and the Scottish Parliament gave its endorsement to the war, the debate itself was important because it gave a voice to the deep unpopularity of the war outside of the two main parties at Westminster. It was a historic and important moment when unique Scottish anti-war, anti-imperialist and anti-Westminster sentiments were given a powerful platform.

2nd Scottish Parliament – 2003-2007

The next election to the Scottish Parliament was held in 2003 not long following the initial invasion of Iraq which had commenced in the March of that year. After the tragic death of Donald Dewar and short tenure of Henry McLeish as Labour First Minister, the mantle was taken over by Jack McConnell who led Scottish Labour into the election in 2003.

The 2nd Scottish Parliament is sometimes referred to as the rainbow parliament, as the election resulted in the two main parties, Scottish Labour and the SNP, haemorrhaging votes to the smaller parties, with the Scottish Greens and Scottish Socialist Party increasing their share of the vote. The Scottish Greens gained 6 seats taking their total to 7 seats, while the Scottish Socialist Party gained 5 seats taking their total to 6 seats.

This diversity in the result was largely thanks to the system of proportional representation employed at the Scottish Parliament. Despite the gains made by the smaller parties, Scottish Labour was able to form a second coalition with the Scottish Liberal Democrats with Jack McConnell as First Minister and Jim Wallace as Deputy First Minister.

Some significant achievements were made by the 2nd Scottish Parliament including most notably the ban on smoking in public places in terms of the Smoking, Health and Social Care (Scotland) Act 2005 which took effect on 26 March 2006. This was a significant achievement in promoting the public health of the country, and was followed by other parts of the UK in the years following the ban in Scotland.⁸

The 2nd Scottish Parliament was also able to pass the Stirling-Alloa-Kincardine Railway and Linked Improvements Act 2004, which made provision for the construction of a new rail line linking Stirling, Alloa and Kincardine. After construction commenced in 2005, the line was opened in March 2008 at a time when Scotland had become used to railway station closures and reduced services instigated by the Beeching cuts in the 1960s.⁹

In the area of law reform, the 2nd Scottish Parliament made a major contribution to the reform of Scottish private law in the form of the Family Law (Scotland) Act 2006, which inter alia overhauled the Scots law on marriage and cohabitation, and arguably brought Scots law up-to-date with modern Scotland. The Parliament also made important changes to housing law in Scotland in the form of the

⁸ Health Act 2006 in England, Smoke-free Premises etc. (Wales) Regulations 2007 in Wales and the Smoking (Northern Ireland) Order 2006

⁹ Dr Richard Beeching recommended the closure of over 2,000 stations and 5,000 miles of track across the UK in 1963 which was to a large extent implemented by Westminster.

Housing (Scotland) Act 2005 as well as in the area of property law in the form of the Tenement (Scotland) Act 2004.

Another significant development, which took place during the term of the 2nd Scottish Parliament, was the establishment of the Scottish Human Rights Commission¹⁰, which is the National Human Rights Institution for Scotland, and was charged with the promotion and protection of human rights in areas falling into the devolved competence of the Scottish Parliament.

The Commission also has significant legal powers to conduct inquiries into potential human rights abuses by Scottish public authorities¹¹ and to intervene in civil proceedings.¹² The Commission has a strong reputation internationally and frequently makes contributions directly to the UN Human Rights Council. The establishment of the Commission is a significant achievement for Scotland, and the Commission is currently playing an important role in advocating the incorporation of international human rights standards into Scots law.¹³

3rd Scottish Parliament – 2007-2011

The 3rd Scottish Parliament marked a stark departure from the previous two parliaments, as the 2007 Scottish Parliament election saw a surge in support for the SNP, who gained a total of 20 seats in the Scottish Parliament, with all of the other parties losing seats. This was a significant shift in Scottish politics as, although pro-Scottish independence parties did not have a majority in the Scottish Parliament, a pro-independence majority was edging closer to a reality.

Moreover, it meant that for the first time since the inception of devolution in 1999, the party which had established Scottish devolution, the Labour Party, would no longer be taking part in forming the Scottish Executive and, in addition, the party of government at Holyrood was going to be different to the party of government at Westminster for the first time.

Although a divergence in public policy had begun to emerge between Scotland and the rest of the UK over the course of 1999 until 2007 to some extent, arguably the drift between Scotland and Westminster was accelerated by the election of the SNP as the party of the Scottish Executive, and the difference in the party of government at both Holyrood and Westminster. Up until 2007, the principal differences between Scotland and the rest of the UK arising as a result of Scottish devolution had been universalist policies such as FPNC and the scrapping of tuition fees.

However, post-2007 the focus in Scottish politics began to take the form of constitutional politics, as a pro-independence party came into government. Although Scotland's constitutional position in the UK had been a matter of debate and interest throughout the 20th century, Scotland's politics, like that of England and Wales, had hitherto been focused on the politics of left and right and not on constitutional politics. The only part of the UK with a history and lived experience of the dominance of constitutional politics was Northern Ireland. The 2007 Scottish Parliament Election marked a turning point in Scottish politics, where the politics of left and right began to be subsumed into the maelstrom debate of Scotland's constitutional future.

¹⁰ Scottish Commission for Human Rights 2006

¹¹ Ibid., s.6

¹² Ibid., s.14

¹³ <http://www.scottishhumanrights.com/economic-social-cultural-rights/strengthening-economic-social-cultural-rights/>

Although the SNP had gained 20 seats at the 2007 election, the party did not have an overall majority in the Scottish Parliament and was forced to form a minority government under the leadership of Alex Salmond as First Minister. Perhaps a reflection of the weakness of the minority government at Holyrood, very few of the main achievements associated with Scottish devolution took place during the reign of the SNP minority government between 2007-2011, albeit a large quantity of bills were passed during this parliament.

Abolition of the graduate endowment

One significant piece of legislation which was introduced during the term of the 3rd Parliament was the Graduate Endowment Abolition (Scotland) Act 2008 which abolished the graduate endowment fee which has been discussed more fully above. The graduate endowment was the Scottish replacement to tuition fees, but given that this had now been abolished, it meant that Scottish students could now access higher education courses completely free of charge.

Despite the fact that ostensibly the abolition of the graduate endowment appears to be yet another universalist policy comparable to FPNC, the consequences of the provision of free universal higher education to Scottish students are more complicated than this.

In 2007/08, 31.1% of Scottish school leavers from state schools were destined to enter a higher education institution, and since the abolition of the graduate endowment in 2008, there is no doubt that this percentage has increased quite significantly, with 40.7% of school leavers attending a higher education institution in the year 2016/17. At the same time, however, the percentage of school leavers attending further education institutions has remained static, and in fact over the same period has fallen slightly from 27% in 2008/07 to 26.8% in 2016/17.¹⁴

What has been clear is that the SNP Scottish Government has prioritised increasing the participation in higher education, which in itself is not necessarily to be seen as a negative. Higher education is a social good and where possible it should be made as accessible as possible for everyone in Scotland, but this should not be done at all costs and at the expense of other parts of Scotland's education system.

The consequences of this policy for Scottish entrants to higher education and further education has been mixed. In 2008/09, 11.3% of entrants to full-time first-degree courses at university were from the most deprived SIMD quintile¹⁵, and this percentage increased to 14.6% over the period to the year 2016/17.¹⁶ However, the percentage of Scottish entrants from the same quintile entering university at sub-degree level, such as HNC or HND, fell quite substantially from 16.8% in 2008/07 to 10.5% in 2016/17.¹⁷ Moreover, the percentage of students from the same quintile entering further education colleges has remained virtually static over the same period, evident in the minimal increase from 31.9% in 2008/07 to 33.9% in 2016/17.¹⁸

Further education colleges have seen a significant reduction in funding, particularly since 2011. Grants from the Scottish Funding Council have been reduced from £511.7 million in 2011/2012 to £346.2 million in 2013/2014, a huge reduction of almost a third of the amount of funding going to colleges. There were also further reductions in tuition fees and educational contracts, in addition to other sources. These cuts to funding have been reflected in the number of full-time staff working at Scottish

¹⁴ House of Commons library

¹⁵ SIMD means the Scottish Index of Multiple Deprivation

¹⁶ Scottish Funding Council Report on Widening Access 2016/17

¹⁷ Ibid.

¹⁸ Ibid.

colleges, which has fallen from around 11,300 in 2011/2012 to 10,250 in 2013/2014, a reduction of 9.3%.¹⁹

Furthermore, the Office of National Statistics reclassified colleges as public bodies in 2010, and this has resulted in arm's-length organisations being established to protect the financial reserves of colleges. Scottish colleges have transferred £99m to these organisations, but as independent organisations there is no guarantee that the colleges will be able to access these funds in the future. This move has been criticised by the Educational Institute for Scotland (EIS), which has suggested these funds should have been used to directly support training and teaching of students, especially in a time to cuts in funding.²⁰

The overall number of students attending further education colleges in Scotland has been declining since the SNP came to power in 2007 from 379,239 in 2007 down to 277,828 in 2015, a massive reduction of 151,411, or 40%. Although there was a small increase in the number of students doing higher education courses at college over this period, there was a reduction of almost 50% in the number of students undertaking further education courses below HNC and HND level.²¹

The most significant fall has been in the number of part-time students attending colleges since 2007. The significant fall in part-time students has disproportionately affected female students and students over 25. Many of these students were enrolled on HNCs and HNDs and traditionally these qualifications were offered on a part-time basis, with students gaining them while in work. Overall, part-time students at colleges have reduced by 184,767, or by a huge 52%.²²

There also appears to be a significant decline in the number of part-time students with learning disabilities attending colleges.²³ Moreover, a freedom of information requested by the EIS found that there has been a 27% reduction in the number of students with additional support needs between 2009 and 2013. It has been suggested that the massive reduction in places for part-time students will have disproportionately affected people with disabilities and caring responsibilities, given the flexibility such courses offer.²⁴

The reduction in places for part-time students at further education colleges may also have disproportionately affected those from working-class or disadvantaged backgrounds, as it may be necessary for many students to work while studying and therefore the funding cuts to colleges may have narrowed access to further education for such students.

Given that a very large proportion of the students who attend colleges are from the most deprived SIMD quintile, over a third of all college students, the SNP Scottish Government's cuts to further education could be interpreted as an assault on the working-class and most deprived students in Scotland in order to help fund free higher education. Although there has been some increase in the number of students from this quintile entering higher education, the increase has been tiny compared with the reduction in access for all students to further education colleges.

¹⁹ *The impact of funding cuts to further education colleges in Scotland, Journal of Further and Higher Education*, 2019, Issue 2, Vol. 42, pp. 204

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*, pp. 210

²³ *Ibid.*, pp. 211

²⁴ *Ibid.* pp. 214

Those who have benefited most from free higher education are students from middle-class families and, to a large extent, students from Scotland's most deprived communities have been sacrificed on the altar of the SNP's strategy to win over the support of middle Scotland.

Non-profit distributing model and PFI

During the term of the 3rd Scottish Parliament, another important development was the establishment of the Scottish Futures Trust by the SNP Scottish Government in 2008 as a number of private limited companies as an alternative to the Private Finance Initiative ("PFI").

PFI was developed as a policy in the early 1990s by the Conservative government of John Major as a way of increasing the scope for the private financing of capital projects.²⁵ PFI is a form of procurement for the public sector whereby groups of private investors manage the design, build, finance and operation of public infrastructure works. PFI was expanded under the New Labour government, which came to power in 1997, and since 2010, the Conservatives have confirmed that the party remains committed to the Private Finance Initiative as a way of delivering investment in infrastructure.²⁶

Since 1992, private finance has been the main source of funds for large government projects in Scotland. Some £5.4 billion of private finance has been committed under signed contracts, mostly for new schools, hospitals and water infrastructure. The annual cost of these projects to the Scottish Government will be £660 million in 2009–10, a figure that will rise year on year to 2032, before declining and finally coming to an end in 2042.²⁷

However, the use of private finance in Scotland and the UK as a whole has been controversial. Research has demonstrated that PFI – by far the dominant form of private financing in the UK – has created significant financial problems for public services²⁸, and provides very poor value for money.²⁹ The criticism is that essentially it helps the private sector achieve significant profits from the delivery of public services, while decreasing the quality of public services and imposing significant cost burdens on a public sector that is already facing cuts to spending and swinging austerity.

A second line of argument against PFI is that use of this mode of procurement diminishes the democratic accountability of our public services, and instead hands it over to private contractors in a form of privatisation. It would be naïve to envisage that PFI involves merely the injection of private sector capital into the project, and a subsequent exacting of an increased return for the owners of that capital. In many instances of PFI procurement, the private contractors themselves displace the public sector in the provision of public services. For example, where a school has been procured via PFI, frequently the cleaning and janitorial services are taken over by a private contractor and the staff of the local authority which has responsibility for the school have their employment transferred over

²⁵ Chancellor of the Exchequer, Norman Lamont, HC Deb, 12 November 1992, col 998

²⁶ HM Treasury, Public Private Partnerships – Technical Update, 2010

²⁷ <https://publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/1146/1146.pdf>

²⁸ Gaffney, D., Pollock, A., Dunnigan, M., Price, D. and Shaoul, J. (1999), 'PFI in the NHS: is there an economic case', *British Medical Journal*, 319, 10 July, 116–19; Froud, J. and Shaoul, J. (2001), 'Appraising and evaluating PFI for NHS hospitals', *Financial Accountability and Management*, 17, 3, 247–70; Sussex, J. (2001), *The Economics of the Private Finance Initiative in the NHS*, London: Office of Health Economics.

²⁹ Ball, R., Heafey, M. and King, D. (2000), 'Private finance initiative – a good deal for the public purse or a drain on future generations?', *Policy and Politics*, 29, 1, 95–108; Audit Scotland (2002), *Taking the Initiative – Using PFI Contracts to Renew School Buildings*, Edinburgh: Audit Scotland; Shaoul, J., Stafford, A. and Stapleton, P. (2008), 'The cost of using private finance to build, finance and operate hospitals', *Public Money and Management*, April, 101–8.

the private contractor from the local authority under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”).

This leads on to the third line of argument against PFI schemes, which is that often the schemes result in a diminution in the rights and conditions of the workers who work in our public services.³⁰ From 1995 to November 2004 it is estimated that 35,000 staff transferred from the public to the private sector as a result of PPP/PFI.³¹ Although staff transferred after 2006 would in many cases have benefits from TUPE, this legislation protects employees’ terms and conditions at the point of the transfer. Subsequent changes to employees’ terms and conditions can still be made in a negotiated fashion with employee representatives, which can include compensation for any loss of rights. In addition, TUPE does not protect all terms and conditions; most notably it does not preserve pension rights.³²

Before coming to power in May 2007, the SNP had been a consistent critic of PFI. In December 2007, the SNP administration published draft plans for a Scottish Futures Trust, which it presented as an alternative to PFI. This document outlined proposals for the establishment of a new government-owned company, which would fund projects through bonds and other appropriate commercial financial instruments at rates which would be cheaper than PFI.³³

A more detailed Strategic Business Case for the Futures Trust was subsequently published in May 2008. However, in the revised publication the role for the company had been significantly curtailed, and the Scottish Futures Trust was no longer envisaged as a direct source of finance. Instead, it would be little more than an advisory organisation, the primary role of which would be the co-ordination of programmes of government investment. The capital funds for new projects would come from other public and private sources.³⁴

One reason for this was that if direct funding were sourced from the Scottish Futures Trust, it may fall foul of EU rules on private projects as having excessive investment coming from the public sector. In the event, the NPD model has been found to be in breach of EU rules in any case, as the Scottish Ministers were forced to reclassify the funding of a new children’s hospital in Edinburgh, an acute hospital in Dumfries, and a new blood transfusion service headquarters as public projects after the Office of National Statistics ruled that the Scottish Government’s NPD scheme breached EU rules. All the three projects were forced onto the public accounts after the ONS ruled last year that one of the Scottish Government’s biggest projects, the £1.45bn Aberdeen western peripheral route bypass, was not truly a private project due to the high level of government control.³⁵

A key element of the revised approach was the adoption of the non-profit distributing model (“NPD”), which it was claimed by Cabinet Secretary John Swinney at the time of its introduction in 2008 as the realisation of the SNP’s longstanding policy of abolishing PFI, putting an end to exorbitant profits and eliminating excess profits.³⁶

³⁰ https://www.nao.org.uk/wp-content/uploads/2008/03/0708_protecting_staff.pdf

³¹ Ibid.

³² Ibid.

³³ Scottish Government (2007), ‘Consultation on the role of a Scottish Futures Trust in infrastructure investment in Scotland’, <http://www.scotland.gov.uk/Publications/2007/12/19093017/0> (15/09/08)

³⁴ Scottish Government (2008b), ‘Taking forward the Scottish Futures Trust’, <http://www.scotland.gov.uk/Publications/2008/05/19155435/12> (10/12/08)

³⁵ <https://www.theguardian.com/uk-news/2016/sep/30/scotland-plugs-400m-funding-hole-after-pfi-projects-breach-eu-rules>

³⁶ The Finance Committee published a report on capital investment policy in December 2008, Finance Committee of the Scottish Parliament, 2008

However, in reality, NPD is actually a close relation of PFI. Under both models, a private sector 'special purpose vehicle' is established to take on a number of project tasks, in particular the design, construction, and operation of new or refurbished infrastructure. The SPV is typically composed of a construction firm, a facilities management firm and a private equity group. Projects are mostly financed by private debt, loans from banks, or money sourced through the capital markets, and around 10% private capital from the SPV member companies.

The key difference between PFI and NPD is that, whereas in the former, the SPV capital includes a small element of private equity, in the latter its members invest only loans. In consequence, while SPV shareholders receive returns on their capital in NPD, the level of these returns is in a way 'capped' at the point at which contracts are signed, and any surpluses remaining at the end of the contract are passed to a designated charity. This is distinct from the PFI model, in which surpluses are passed to SPV members as dividends.³⁷

Although returns are capped in this way, they are only capped to the extent that the returns are fixed at the time that the contracts are signed. The contracts still rely on private finance for funding and the prices offered by the private sector during the procurement process are market prices, and the level of those prices will reflect conditions in the market at the time of signing of the contracts.

The rate of return for private sector investment under NPD schemes has been within the range of PFI projects. A study conducted on some of the early NPD schemes showed that the internal rates of return on capital under NPD schemes were well within the range of the rates of returns under PFI schemes.³⁸

Government departments pay an annual unitary charge – a fee for the services it receives from the PFI project. This charge includes the provision of assets and the provision of associated services, such as cleaning, maintenance and security. Unitary charges are agreed when a procurement deal is signed, although in certain circumstances they may be reduced by a limited degree, for example, in the instance of construction delays or the failure to meet specific standards.

There has been a total of 87 PFI projects in Scotland. Unitary charges for these projects total £29.8 billion, with an average of £342 million per project. The total capital value of these projects is £5.7 billion, so the ratio of unitary charges to capital value is 5:2.

In comparison, there have been 51 NPD projects. Unitary charges for these projects total £9.9 billion, with an average of £192 million per project. The total capital value of these projects is £3.2 billion, so the ratio of unitary charges to capital value is 3:1.³⁹

Local government in Scotland

Local government in Scotland has undergone significant changes over the past few decades. The period prior to 1975 saw the development of county councils and the burgh authorities, which had existed since the 19th century.⁴⁰ These local authorities were elected and performed multipurpose functions. They were financed both from grants from central government and from taxes collected locally.

³⁷Hellowell, Mark, and Pollock, M Allyson, *Non-Profit Distribution: The Scottish Approach to Private Finance in Public Services*, 2009, Cambridge University Press

³⁸ Ibid.

³⁹ Note on PFI and NPD, SPICe, 13 May 2019

⁴⁰ Local Government (Scotland) Act 1889

Following the Wheatley Royal Commission of 1969, it was clear that the system of local government was not working as it should, and this led to a major overhaul in the form of the Local Government (Scotland) Act 1973. The aim of the reforms was to increase democratic participation in local decision-making and to increase the effectiveness and efficiency of local government. The 1973 Act established 9 regional authorities taking responsibility for functions including education, social work, roads, structure planning and water supply, as well as 56 district councils with responsibility for housing, environmental health and local planning.

At this time, local authorities were critical in the delivery of frontline public services, and there were significant tensions between local government and central government particularly in relation to the funding of local services. This tension has become particularly acute, especially since Thatcher came to power in 1979, as the Conservative government at Westminster sought to curtail the political independence of local authorities, restrict their autonomy to spend money and to diminish the power of local authorities.

Thatcher's governments also sought to diminish the status of local authorities via the privatisation agenda, where local authorities came not to be seen as essential providers of public services, but rather shells to facilitate the delivery of services through the private sector. This was seen most dramatically in the introduction of Compulsory Competitive Tendering, which was abolished in Scotland by the 1st Scottish Parliament, as discussed more fully above.⁴¹

On the back of this tension, local government was again reformed under the Local Government (Scotland) Act 1994, and power was centralised further whereby the three unitary island councils were retained, while the remaining mainland 9 regional councils and the 53 district council were replaced with 29 unitary authorities, meaning Scotland since 1996 comprised 32 unitary authorities. Scotland's local authorities had gone from 400 at the end of the Second World War to only 32 in 1996 when the 1994 Act reforms took effect.⁴²

As well as being creatures of statute, Scotland's 32 unitary authorities derive their powers also from statute principally from Acts of Parliament at Westminster but also, since the devolution of local government, from Acts of the Scottish Parliament. The powers conferred on local authorities are very discretely defined, and local authorities must only act within the powers which have been conferred on them, or else they will be acting *ultra vires* and their decisions can be challenged by way of judicial review in the Scottish courts.

Some of the principal pieces of legislation, which confer powers and responsibilities on local authorities, include the Education (Scotland) Act 1980, which makes local councils education authorities, and also the Roads (Scotland) Act 1984, which makes local council roads authorities. Other important pieces of legislation include the Social Work (Scotland) Act 1968, which gives local authorities responsibilities over social work services, and the Town and Country Planning (Scotland) Act 1997, which gives local authorities powers over planning in their local areas. Moreover, the Local Government (Scotland) Act 2003 confers a power on local authorities to do anything which the local authority considers is likely to promote or improve the well-being of its area and/or persons within that area.

⁴¹ Himsworth, CMG and O'Neill, CM, *Scotland's Constitution: Law and Practice*, Bloomsbury Professional 2015, pp. 226

⁴² <https://www.ft.com/content/233779de-a7f5-11e5-955c-1e1d6de94879>

In terms of finance, the 32 unitary authorities are funded in a number of different ways. Firstly, some revenue is generated by local councils from charges imposed for the services it performs.⁴³ Secondly, councils impose a local Council Tax on domestic properties based on the value of the property. Thirdly, councils receive annual grants from central government, and since devolution in 1999, from the Scottish Government according to the need in the local authority area by reference principally to their population size among other factors, and proportionate to their tax raising power.

There has been a strained constitutional relationship between local government in Scotland and elsewhere in the UK with central and/or devolved government, both in the form of individual councils and in acting collectively through Scottish local authorities through the Convention of Scottish Local Authorities (“COSLA”).

It has been observed that generally over the 20th century the status, power and role of local government has been significantly diminished and centralised, and local authorities have been in general decline over this period. As discussed above, since 1979, Conservative governments since 1979 removed functions from local government, for example, water services, and children reporter services were removed by the Local Government (Scotland) Act 1994 and the reorganisation itself was designed in such a way to undermine the power of local government.⁴⁴ In addition, the mismanagement of local government taxation in the form of the disastrous poll tax had meant that significant resentment and distrust in local government had built up towards central government, and this was the local government context to the establishment of Scottish devolution in 1999.

As a result of the transfer of power from Westminster to the devolved institutions in Scotland, it was anticipated that this would create a new dynamic relationship between local government and devolved government in Scotland as distinct from the relationship with central government in Whitehall. The UK Government therefore established the Commission on Local Government and the Scottish Parliament under the tutelage of Neil McIntosh.

Reporting in June 1999, the Commission considered how to build effective relationships between local government and the Scottish Parliament, and also how councils could best make themselves responsible and democratically accountable to the communities they serve. The Commission made a number of recommendations, including the establishment of a covenant between the Scottish Parliament and the 32 local councils, that there should also be a separate formal agreement between local government and the Scottish Government. The Commission also recommended a review of local government finance.

Following the Commission, a Partnership Framework was agreed between the Scottish Government and COSLA in May 2001 based on principles of parity of esteem between the devolved governments and local government, and a principle of subsidiarity.⁴⁵ This committed the Scottish Government to consultation with local authorities, the exchange of information and meetings on matters of local government concern.

In relation to local government finance, the Birt Committee reported in 2003 recommending the replacement of the Council Tax with a new local property tax. However, this proposal was rejected by

⁴³ This is a controversial area of public law as there is uncertainty over the power of local authorities to trade. However, it is generally accepted that local authorities do have a power to trade in the sense of making charges for services but only to the extent that is required for the recovery of the costs associated in providing the service and not in order to make a profit.

⁴⁴ Himsworth, CMG and O'Neill, CM, *Scotland's Constitution: Law and Practice*, Bloomsbury Professional 2015, pp. 230

⁴⁵ Based on the European Charter of Local and Self-Government.

the Scottish Ministers. When the SNP took over the Scottish Government in 2007, there was an initiative to abolish the Council Tax altogether and replace it with a local income tax, which would be a single rate fixed nationally across Scotland and therefore depriving local authorities of all discretion to set tax rates on their own.

The measure was dropped because of lack of support in the Scottish Parliament, but this proposal would have been the most centralising proposal in relation to local government finance since the poll tax introduced by Thatcher at Westminster in the 1980s.

On 26 November 2014, First Minister Nicola Sturgeon included in her *Programme for Government* a commitment to work with COSLA to set up an independent commission to find a replacement to the Council Tax. The cross-party commission reported in 2015 recommending its replacement with a system based both on property values and on income. However, the plans were shelved by the First Minister instead opting for tweaks to the Council Tax and maintaining the Council Tax freeze. However, replacement of the Council Tax may be back on the agenda if the SNP can win support in the Scottish Parliament.⁴⁶

Local government finance and the Council Tax freeze

Local government in Scotland and the financing thereof are in crisis in Scotland. Demand from council services is increasing for a number of reasons including a fast-growing population in some local authority areas, as well as an ageing population. As an example, Midlothian is the fastest growing council area in Scotland. The population in 2018 was 90,090. By 2026, it will be 100,410, and this will clearly put extra demand on the council for services. Moreover, the number of older people is also increasing, resulting in extra pressure on vital services such as health and adult social care. The number of people in Midlothian aged 65 or over is 16,392. By 2026, this will be 20,236. The number over 75 is also expected to rise by around 40% over the same period – from 6,804 in 2018 to 9,565 by 2026.⁴⁷

This increase in demand for services has been coupled with a concomitant reduction in funding for council services, particularly since the financial crisis in 2007-2008 and the age of austerity. Due to the large-scale centralisation projects and reorganisations of local government diminishing their power and status over the last 40 years (discussed more fully above), councils are now heavily reliant on funding from the Scottish Government. Turning to Midlothian Council again as an example, most of the council's money comes as grant funding from the Scottish Government. This currently makes up more than three quarters (76.5%) of what the council spends on services, while the Council Tax pays for less than a quarter (23.5%) of what the council spends on local services.⁴⁸

The decrease in council funding together with the rising demand for council services in Scotland is known as the “jaws of doom” (taken from the shape of the lines on the graph showing the increasing budget pressures, coupled together with the decreasing funding). These twin forces are squeezing council finances in a pincer movement, damaging the ability of councils to provide frontline public services and leading to huge reductions in staffing across the Scottish public sector, as well as an increase in the involvement of the private sector in running Scottish councils.

To put the local government finance crisis picture into context, while from 1999-2000 to 2007-08, the local government budget (+58.5%) increased in real terms by 1.2 percentage points less than that of

⁴⁶ <https://www.ft.com/content/5f7d279a-2579-11e9-8ce6-5db4543da632>

⁴⁷ https://www.midlothian.gov.uk/info/591/your_council/384/our_spending_choices/2

⁴⁸ https://www.midlothian.gov.uk/info/591/your_council/384/our_spending_choices/2

the Scottish Government (+59.7%); from 2008-09 to 2015-16 the local government budget (-8.5%) decreased by 3.0 percentage points more than the Scottish Government (-4.5%).⁴⁹ This means that since the SNP came to power in 2007, the budget for local authority spending has decreased at almost double the rate at which the Scottish Government's budget has fallen.

Particularly since 2010, the Scottish Government has systematically undermined and taken a sharp axe to the funding of Scottish local authorities. In the year 2010-2011, local government funding from the Scottish Government decreased by 0.5% in real terms amounting to a £64 million real terms drop in funding for Scottish local authorities from the Scottish Government.⁵⁰

In the year 2011-2012 the state of local government finance went from bad to worse, as Scottish Government funding to local authorities was slashed by a massive 5.1% in real terms, amounting to a massive cut to funding of almost £680 million in real terms. The cuts continued in a similar way thereafter up to 2013-2014, when Scottish councils faced a funding cut of 15.4% in real terms, amounting to a colossal cut to funding of over £1.9 billion.⁵¹

In addition to this huge decrease in funding, Scottish councils have been put in an economic straight-jacket by the SNP-led Scottish Government. When the SNP came to power in Holyrood in 2007, one of its earliest acts in government was the introduction of the deeply damaging and regressive Council Tax freeze in 2008.

The Council Tax freeze has cost the Scottish Government £2,520 million since its inception in 2008-09 (to 2015-16). This funding is intended to compensate local authorities for a foregone annual rise in Council Tax, and the Scottish Government argues that the freeze is fully funded. Estimates carried out by SPICe show that the money provided by the Government to freeze the council tax has resulted in local authorities receiving more income than they would have done by increasing rates by Retail Price Index. In total, over the six years to 2013-14, this has resulted in an estimated £164.9m extra going to local government as a result of the Council Tax freeze.⁵²

Notwithstanding this, as SPICe rightly acknowledges, there is no way of knowing how Council Tax powers may have been exercised by Scottish councils had the freeze not being imposed, hence the reason why estimates were based on RPI. It is suggested that it is precisely in times of economic necessity, when funding for public spending as a whole is being cut at Westminster-level, that progressive administrations in local authorities may be attracted to raising Council Tax levels to plug the gap in the finances to protect vital public services.

In a further diminution in the status and power of local authorities, the SNP-led Scottish Government in Holyrood, which disabled Scottish councils from being able to find local solutions to problems being caused at higher levels of government by implementation of the Council Tax freeze, made this impossible.

The freeze, in addition to being damaging to local government finances, is itself a deeply regressive policy, because those who pay the most in tax tend to be those living in high banded and high value properties, whereas those who rely most on public services provided by local authorities tend to be the poorest and most vulnerable people in our society.

⁴⁹ http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-58_Local_Government_Finance_-_facts_and_figures_1999-2016.pdf

⁵⁰ Campbell, Allan, *Local Government Finance: facts and figures, 1999-2017*, 10 March 2016, SPICe

⁵¹ Ibid.

⁵² Ibid.

By freezing the Council Tax, the Scottish Government assisted some of the wealthiest home owners in Scotland by helping them avoid paying more Council Tax, while the poorest people in our society who often rely heavily on the public services provided by local authorities have been hit hardest through the ending of many services, diminution in staffing and service levels and, in some cases, councils failing to discharge their statutory duties.⁵³

One of the most high-profile casualties of this pincer movement in cuts to funding together with increasing demand for services has been the City of Edinburgh Council, which since 2015 has been forced to ask staff to take voluntary redundancies of up to 2000 workers,⁵⁴ and in the past year announced plans to ask a further 300 staff to take voluntary redundancy packages.⁵⁵

Other proposals aimed at meeting the challenges in the City of Edinburgh's budget include a cut in funding of £250,000 to public toilet maintenance, which would mean toilets being staffed by part-workers rather than full-time workers. The City Council is also considering consolidating some of the city museums to have exhibitions in one venue. The Council has also proposed to cut funding to Police Scotland by £1.5 million, which currently funds 53 police officers in the city. The Council has also proposed to cut funding to the Marketing Edinburgh agency by £500,000, which promotes Edinburgh around the world.⁵⁶

Economic performance and inequality

In its Programme for Government in 2007, the SNP-led Scottish Government stated that it will take steps to achieve its own economic targets, including a target of raising Scotland's economic growth rate to the UK level of growth by 2011.⁵⁷

Between 2007 and 2017, the Scottish economy has grown, on average, at 0.8% per year, compared to 2.5% over the 2000 to 2006 period. The poorer economic performance reflects the effects of the financial crisis and the impact of the economic downturn in the oil and gas sector. Scotland's annual average growth rate compared to the UK and small EU nations has been mixed, and lower than both since around 2014.⁵⁸

Moreover, over the year to 2011Q2, GDP in Scotland increased by 1.1%, whilst UK GDP increased by 1.5% - this resulted in a gap of 0.4 percentage points in favour of the UK.⁵⁹

In relation to unemployment, from the end of 2007 the rate of unemployment in Scotland started to increase steadily from around 4%, and by the end of 2009 had doubled to 8%, overtaking the UK

⁵³ It has been found that Scottish councils have been unable to discharge their statutory duties in some cases, for example in relation to housing of the homeless: <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-42988881>

⁵⁴ <https://www.heraldscotland.com/news/13767993.edinburgh-city-council-may-have-to-change-redundancy-policy-to-find-thousands-of-job-cuts/>

⁵⁵ <https://www.edinburghnews.scotsman.com/news/business/41m-slashed-from-edinburgh-council-budget-as-300-jobs-set-to-go-1-4859102>

⁵⁶ http://www.edinburgh.gov.uk/meetings/meeting/4645/city_of_edinburgh_council

⁵⁷ *Principles and Priorities: The Government's Programme for Scotland*, Scottish Government, September 2007, pp. 9

⁵⁸ Scotland's Economic Performance, Trends and Challenges, Scottish Enterprise, 20 November 2017

⁵⁹ Scottish Government and ONS, <https://www2.gov.scot/Topics/Statistics/Browse/Economy/TrendLongerGDP>

average. The rate of unemployment continued to increase to 8.5%, and remained above the UK average up until the 2011 Scottish Parliament Election.⁶⁰

In relation to pay, average rates of increase in earnings started to fall sharply from the end of 2007 in Scotland, from almost 5% dipping to around 0.1% below the UK average by 2011.

Since 2007 over the period to 2011, Scotland's economic performance was poor, and this was largely the consequence of the global financial crisis and subsequent economic downturn in the UK as a whole. However, what is clear is that Scotland's economic performance was below that of the UK as a whole, and the SNP failed to emulate the performance of the UK economy as a whole on key economic indicators, including on economic growth, unemployment and pay.

In the same 2007 Programme for Government, the SNP Scottish Government stated that it wished to make Scotland fairer as well as wealthier.⁶¹ However, Scotland became a less equal society after the SNP took over power in 2007.

Based on a 90:10-ratio measure of income inequality,⁶² Scotland's income inequality scored a ratio of approximately 6.3 in 2007, while the rest of the UK (excluding London) scored approximately 6.5. Over the period from 2007 to 2011, Scotland's score rose to almost 7, and above that of the rest of the UK (excluding London). Scotland therefore went from being more equal than the rest of the UK (excluding London), to more unequal in terms of income over the period between 2007-2011.⁶³

Turning to household inequality rather than income inequality, this changes the focus from the labour market to the incomes that families use to purchase goods and services, including the effect that taxes and benefits have on household incomes. Using the Gini Coefficient⁶⁴ to measure household inequality, it can be seen that while overall the Gini remained fairly static across the UK, Scotland's household net income Gini ratio increased slightly faster than that of the rest of the UK, including London, over the period from 2007 to 2011, from around 0.33 and eventually hitting a high of 0.35.⁶⁵

Despite the relative static Gini measure, it should be highlighted that inequality across the UK in an international context is quite severe. The UK experienced relatively rapid increases in inequality between 1975 and 1990. Since the late 1990s, inequality has increased more rapidly among other OECD countries than it has in the UK, and inequality grew most rapidly among the traditionally low-inequality Nordic countries.

⁶⁰<https://www.webarchive.org.uk/wayback/archive/20180516193007/http://www.gov.scot/Publications/2011/08/09172458/17>

⁶¹ *Principles and Priorities: The Government's Programme for Scotland*, Scottish Government, September 2007, pp. 9

⁶² The ratio of the 90th percentile of the income distribution to the 10th percentile is a common and relatively easily understood measure of inequality. This '90/10' measure is simply the ratio of the weekly earnings of the worker whose income is greater than 90 per cent of all other workers to the weekly earnings of the worker whose pay is greater than only 10 per cent of other workers. The larger this ratio, the greater the spread between rich and poor, and hence the greater level of inequality.

⁶³ Bell, David Eiser, David, *Inequality in Scotland, trends, drivers and implications for the independence debate*, University of Stirling, pp.10

⁶⁴ The Gini Coefficient is an overall measure of inequality that is affected by all incomes rather than those at a specific position in the income distribution. No matter where they occur in the distribution. It effectively measures the area between the actual income distribution and an idealised distribution where all incomes are equal: the larger its value the more unequal is the distribution. The higher the value the less equal the income.

⁶⁵ Bell, David Eiser, David, *Inequality in Scotland, trends, drivers and implications for the independence debate*, University of Stirling, pp.15

Despite this evidence, inequality in the UK remains high relative to other OECD countries, and the UK is ranked 7th most unequal of 35 OECD countries in relation to net income inequality. As has been discussed, inequality in Scotland is lower than it is in the UK as a whole, largely because of the fact that inequality is particularly high in London. What is clear, however, is that since 2007 and since the inception of devolution in 1999, inequality in Scotland has not been reduced, and in fact in some areas has been exacerbated compared with the rest of the UK.⁶⁶

Scotland remains one of the most unequal countries in the Western world, despite 20 years of devolution. According to figures from the Office for National Statistics, the most affluent households in Scotland are 273 times richer than the poorest households.⁶⁷ Further, in 2012, the richest 100 men and women in Scotland saw their combined wealth increase from £18 billion in 2011, to £21 billion in 2013.⁶⁸

Linked directly with inequality is Scotland's entrenched problem of poverty. By any measure, Scotland remains a society that continues to be scarred by poverty. The recent poverty statistics from 2013 show us that 870,000 people in Scotland still live in poverty, which accounts for 17 per cent of the population and 240,000 children in Scotland still live in poverty, which accounts for nearly 25 per cent of all children.⁶⁹ Poverty in Scotland, and across the UK, is significantly higher than in many other European countries. In Denmark and Norway, for example, 10 per cent of children or fewer live in poverty, while the Netherlands has an overall poverty rate of 11 per cent.⁷⁰

The problem of poverty in Scotland and in the UK as a whole has been exacerbated by the austerity regime which has been in place in the UK since 2010, as has been discussed more fully elsewhere. Austerity has involved the slashing of public spending, public services and also pensions and other welfare benefits. These cuts impact most adversely on those who are already among the most disadvantaged in society, but also have a disproportionate impact on women, both as public sector workers and as users of publicly provided services that are now being reduced.⁷¹

Recent independent modelling forecasts that there will be massive rises in child poverty, in particular in the coming years, following the decade of austerity. In Scotland alone, forecast trends suggest around 65,000 more children being pushed into poverty by the end of 2020, with this figure increasing from 200,000 in 2013, to 240,000 in January 2020.⁷²

Furthermore, the spread of low pay is one of the hallmarks of this latest period of austerity. According to the Resolution Foundation, the economic crisis has pushed a further 1.4 million workers below the living wage, the rate seen as necessary for a basic standard of living. In its Low Pay Britain 2013 report, the Foundation highlights that 4.8 million workers in Britain (20 per cent of all employees) earn below the living wage – a leap from 3.4 million (14 per cent) in 2009, at the height of the recession.⁷³

⁶⁶ Bell, David Eiser, David, *Inequality in Scotland, trends, drivers and implications for the independence debate*, University of Stirling, pp.16

⁶⁷ T Peterkin, 'Britain's wealthiest families 500 times richer than the poorest', *The Scotsman*, 13 July 2012

⁶⁸ F MacGregor, 'Rich List: fortunes soar 60% for wealthiest Scots', *The Scotsman*, 12 April 2013

⁶⁹ <http://www.healthscotland.scot/media/2607/child-poverty-scales-and-trends.pdf>

⁷⁰ Poverty in Scotland 2014, the independence referendum and beyond, Child Poverty Action Group, 2014, pp. 5

⁷¹ G Mooney, 'Scotland, the CSR and Public Sector Cuts', in *In Defence of Welfare: the impacts of the Spending Review*, Social Policy Association, 2011, <http://www.social-policy.org.uk/downloads/idow.pdf>

⁷² Child Poverty Action Group in Scotland Response to the Local Government and Regeneration Committee Call for Evidence on 14/15 Draft Budget, 27 September 2013

⁷³ Resolution Foundation, *Low Pay Britain 2013*, 2013

In Scotland, between 2008 and 2013, the numbers living in in-work poverty increased from 255,000 to 280,000.⁷⁴ Alongside this, the number of people in part-time work but seeking full-time employment increased by 50,000 over the same period.⁷⁵ As of January 2020, there were also approximately 700,000 workers earning below £10 an hour in Scotland, as exposed in a recent Labour Party investigation.⁷⁶

Related to economic inequality and poverty are inequalities in health outcomes in Scotland. In the 2007 Programme for Government, the SNP Scottish Government stated that tackling health inequalities, with a sharper focus on identifying at-risk communities and people with multiple and complex needs, was one of the government's priorities.

In 2009, under 75 deaths amongst those living in the most deprived decile were 3.7 times more likely than those living in the least deprived decile. Whilst inequalities have been stable in absolute terms (as demonstrated by the absolute range), improvements observed in deprived areas have not been as great as those observed elsewhere in Scotland resulting in a widening of inequalities in relative terms.⁷⁷

Moreover, there is a clear difference in mean mental wellbeing (WEMWBS) scores in terms of deprivation. Those in the most deprived decile reported a lower mean score (indicating lower mental wellbeing) than those in the highest decile (a difference of 4.5 between the lowest and highest deciles).

In 2009, the rate of admission to hospital for people living in the most deprived decile for coronary heart disease was 104.8 per 100,000 population, compared to a rate of 37.5 in the least deprived decile – a difference of 67.3. Although both absolute and relative measures reflect higher rate of hospital admissions in deprived areas, the extent of these inequalities decreased consistently from 2003 to 2008, but increased slightly in 2009.

There were around 19,700 new cases of cancer diagnosed in 2009. Rates have decreased by 2% since 1996 but fluctuated year on year with no clear trend since 1997. In 2009, the rate in the most deprived decile was 413 per 100,000 population compared to a rate of 305 in the least deprived decile – a difference of 108. Inequality measures (both absolute range and RII) have remained stable since 1996.

Between 1997 and 2009, there has been a 17.2% decrease in rates of death from cancer amongst those aged 45-74 years as a whole. In 2009, around 7,500 people aged 45-74 died from cancer. Cancer deaths in this age group are more common in deprived areas (586 per 100,000 population) than in areas of low deprivation (238 per 100,000 population) – a difference of 348.⁷⁸

What this shows is that as well as entrenched income and wealth inequalities in Scotland, there are also entrenched health inequalities too which have remained largely static if not worsened since the inception of devolution in 1999 and particularly since the SNP took over power in 2007.

In the 2007 Programme for Government, the SNP Scottish Government stated another key part of its economic strategy was the enhancing of the key building blocks for faster, more sustainable economic

⁷⁴ See K Trebeck and S Francis, *Our Economy: towards a new prosperity*, Oxfam, 2013, <http://policy-practice.oxfam.org.uk/publications/our-economy-towards-a-new-prosperity-294239>

⁷⁵ H Aldridge, P Kenway and T MacInnes, *Monitoring Poverty and Social Exclusion in Scotland 2013*, Joseph Rowntree Foundation, 2013, <http://www.jrf.org.uk/publications/monitoring-poverty-scotland-2013>

⁷⁶ Sam Harney, *Real Living Wage Working Report* (October 2019); *Scottish Labour Party Manifesto* (2019), p.9

⁷⁷ *Long-Term Monitoring of Health Inequalities*, the Scottish Government, 2011

⁷⁸ *Ibid.*

growth, including education, transport, planning and housing.⁷⁹ This included a commitment to bring forward a comprehensive series of measures on housing, including proposals for reform of the social housing sector so that it is better placed to meet the needs of tenants.⁸⁰

However, over the years from 2007 to 2010, new housing supply (new build, refurbishment and conversions) decreased by 16% between 2008-09 and 2009-10, from 22,368 to 18,836 units. This includes houses completed by or for housing associations, local authorities or private developers for below market rent or low-cost home ownership; houses completed for market sale by private developers and houses acquired by housing associations and refurbished either for rent or low-cost home ownership. Refurbishment of private dwellings funded wholly or partly through the Scottish Government's Affordable Housing Investment Programme. Moreover, at 31 March 2010, there were 323,100 local authority dwellings in Scotland, a 1% decrease from the previous year.⁸¹

⁷⁹ *Principles and Priorities: The Government's Programme for Scotland*, Scottish Government, September 2007, pp. 9

⁸⁰ *Ibid.*, pp.19

⁸¹ Housing statistics for Scotland 2010: Key Trends Summary, the Scottish Government, August 2010.

Chapter 3

The operation of the Scottish devolution settlement Part 2 – 2011-2019

4th Scottish Parliament – 2011-2016

Introduction

As has been discussed above more fully in Chapter 2, the 2010 UK General Election saw the Conservative Party, led by David Cameron, gain the highest number of seats in the House of Commons, but short of an overall majority. As a result, the Tories entered into a coalition agreement with the third largest party, the Liberal Democrats, led by Nick Clegg, in order to form a workable governing majority.

The Coalition Government, as it became known, implemented a savage programme of cuts to public spending, with the stated aim of reducing the size of the UK Government's budget deficit. The deficit had grown to almost 10% of National Income during the years following the financial crisis, compared with 2% pre-crisis, largely as a result of the bailout of the UK's banking sector¹. It was the stated aim of the Coalition Government to reduce the deficit by implementing a swinging austerity programme to public spending.

As an indication of the cuts to public spending between 2010 to 2013, departmental spending, which is the spending afforded to central UK Government departments, fell by £41 billion, meaning that spending per head by the UK Government has gone down from pre-2010 levels of £6,500 to less than £5,500 in real terms. Moreover, this is expected to continue to fall to around £5,370 by 2019-2020.²

The impact of austerity and the financial crisis has been discussed in more detail in Chapter 1. However, another element to this is whether and to what extent the Scottish devolution settlement has offered any protection by way of mitigation of the austerity regime, or an alternative to it with the powers that the Scottish Parliament has under the Scotland Act 1998 – especially since the increase in powers provided by the Scotland Act 2012 and Scotland Act 2016.

The 2011 Scottish Parliament Election was a significant moment in Scottish politics, and UK-wide politics more generally, as the pro-independence SNP secured an overall majority in the Scottish Parliament, winning 69 seats out of the 120 seats available. Scottish Labour won 37 seats, while the Scottish Conservatives won 15 seats. The Scottish Liberal Democrats won 16 seats and the Scottish Greens won 2 seats.

The result was significant for a number of reasons. First of all, the SNP had won an overall majority in the Scottish Parliament under the Additional Member System, which was supposed to prevent the formation of overall majorities and to encourage coalition or minority governments. Secondly, the win for the SNP meant that there was now a majority of MSPs in the Scottish Parliament who favoured Scottish independence, and therefore a mandate for the holding of a referendum on Scottish

¹ Emmerson, Carl, *Two Parliaments of Pain: the UK public finances 2010-2017*, Institute for Fiscal Studies, 2 May 2017

² Ibid.

independence. Thirdly, it was also significant, as Scottish Labour had lost control of the Scottish Parliament and the Scottish Government for the first time since the inception of devolution in 1999.

However, rather than providing a bulwark against Tory austerity from Westminster, the Scottish Government under the SNP has under-used its powers, ran budget surpluses in a time of need, and has become obsessed with a policy of centralisation as part of its nation-building agenda. The abject failure to offer a real alternative to the failed neoliberal model, and to use the powers of the Scottish Parliament for radical ends, has been one of the defining themes of Scottish devolution over the period especially from 2010 to 2019.

Under-occupancy charge

One of the main ways in which the Coalition Government sought to reduce the size of the UK Government deficit was by making reforms to social security. One of the earliest policies introduced in this area was the under-occupancy charge, introduced as part of the Welfare Reform Act 2012, which became known as the deeply unpopular and controversial “bedroom tax”.

The bedroom tax was given the Orwellian title of the “removal of the spare room subsidy” by the Coalition Government, and involved tenants in social housing having their housing benefit entitlement reduced by 14% if they had a spare room in their property, and by 25% if they had two spare rooms or more. The policy objective according to the government was to cut the housing benefit bill, and free up housing to help 300,000 people living in overcrowded accommodation, by encouraging tenants with a spare room to downsize to a smaller property. The Department for Work and Pensions set a target of 30% of social housing tenants affected by the changes to move home by 2017.

However, the bedroom tax has arguably become one of the defining policies of the post-financial crisis and austerity era, during which many of the most vulnerable members of society have been forced to bear the cost of a crisis created by global free market capitalism and the UK banking sector.

In September 2013, the United Nations Special Rapporteur on Housing, Raquel Rolnik, suggested that the UK government should suspend the introduction of the bedroom tax immediately, as it could represent a violation of the human right to adequate housing³, while initial figures showed that over 50,000 people faced eviction from their social housing within only four months of the measure being introduced.⁴

In Scotland, at May 2014, 71,292 housing benefit claimants had a reduction applied to their housing benefit because of the bedroom tax. This represents almost 19% of social sector housing benefit claimants – higher than the 14% for Great Britain as a whole (excluding Northern Ireland where the measure only came into effect in 2017).⁵

There has been particular concern about the impact of the bedroom tax on disabled tenants. Disabled tenants may live in properties that have been adapted for their particular needs, or may need an additional room to store medical equipment. As such, moving to another smaller property suitable for their needs may be problematic.

³ A Gentleman, ““Shocking” bedroom tax should be axed, says UN investigator”, the Guardian, 11 September 2013

⁴ See E Dugan, ‘50,000 people now facing eviction after bedroom tax’, The Independent, 19 September 2013; and False Economy, ‘Our research in The Independent: bedroom tax: 50,000 people face eviction’, 2013, <http://falseeconomy.org.uk/blog/our-research-in-the-independent-bedroom-tax-50000-people-face-eviction>

⁵ Berry, Kate, *The Bedroom Tax*, SPICe, 6 October 2014

As outlined above, in certain circumstances, an additional bedroom is allowed for disabled children and overnight carers. However, apart from that there are no other exemptions for disabled tenants or occupants. Therefore, for example, a disabled tenant who relies on their partner for care, and where they cannot share a room, will not be allowed an additional bedroom. Similarly, a young disabled adult being cared for at home by their parents will not be allowed an additional room, meaning that a care worker could not stay to give the parent carers a break from providing overnight care. The DWP Equalities Impact Assessment estimated that around 56% of working age social sector housing benefit claimants affected by the bedroom tax would be disabled, higher than the 37% of social sector housing benefit claimants not affected by the measure.⁶

The Scottish Government opposes the bedroom tax but does not have the power to abolish it. Instead, it has chosen to mitigate its impact by providing local authorities with additional discretionary housing payment (“DHP”) funding. Local authorities make DHP payments to tenants who they consider need help to pay their rent.

Evidence suggests that tenants affected by the bedroom tax are reluctant to move. Tenants who cannot, or who do not want to, move still need to pay the shortfall in their rent caused by the bedroom tax, otherwise they will start to build up rent arrears.⁷

The UK Government provides local authorities with funding for DHPs. From 2011, it substantially increased the DHP budget to help tenants cope with various welfare reforms, including the bedroom tax. Local authorities can “top up” their DHP allocation from their own funds. However, legislation limits this to 1.5 times the DWP allocation.⁸

In September 2013, the Scottish Government announced it would provide £20m funding to local authorities to allow them to top up their DWP allocations. The Scottish Government also made a commitment to provide funding in 2014-15 and requested that the DWP lift the legislative cap on DHP spending.

On 2 May 2014, the UK Government agreed to devolve the power to Scottish Ministers to set the statutory cap on DHPs, enabling the Scottish Government to make a further order to lift the cap on spending, thus allowing the Scottish Government to provide £35m in 2014-15 which, combined with DWP funding, makes a total budget of £50.2m for DHPs. Between April 2013 and March 2016, local authorities have made 321,000 DHP awards totalling £129 million.⁹ In addition to the DHPs, many Scottish local authorities have adopted a policy of not evicting tenants who fall into rent arrears due to the bedroom tax, including Dundee City Council and Renfrewshire Council.¹⁰

However, despite these efforts to mitigate the effects of the bedroom tax in Scotland, it is argued that much more could have been done, and could now be done, to assist those who are affected by the policy. The Scottish Housing Regulator conducted research into the impact of welfare reforms on social landlords. Its report from 2014 found that total rent arrears for all responding social landlords were rising. Arrears were £79 million at the end of December 2013. This equates to 4.2% of the total rental income due for 2013-14 – an increase from 3.6% in December 2011 and 3.7% in December 2012.¹¹

⁶ Berry, Kate, *The Bedroom Tax*, SPICe, 6 October 2014

⁷ Ibid.

⁸ Article 7 of The Discretionary Housing Payment (Grants) Order 2001

⁹ <https://news.gov.scot/news/bedroom-tax-mitigation>

¹⁰ <https://www.tcyoung.co.uk/blog/2013/social-housing/rent-arrears-tenant-eviction-bedroom-tax>

¹¹ Berry, Kate, *The Bedroom Tax*, SPICe, 6 October 2014

The Scottish Government's additional DHP funding is intended to prevent tenants falling into arrears because of the bedroom tax in 2014-15. However, many tenants have significant outstanding bedroom tax arrears from 2013-14, and the Scottish Government has done nothing to address those arrears, and they instead remain hanging over many tenants in Scotland. In evidence to the Scottish Parliament Welfare Reform Committee in 2014, then Deputy First Minister Nicola Sturgeon MSP stressed that it is for local authorities to decide how to deal with outstanding arrears from previous years.

Moreover, although some Scottish local authorities have adopted a policy of non-eviction for those who fall into rent arrears solely due to the bedroom tax, it remains lawful for councils to evict tenants solely on that basis. In early 2013, Scottish Labour argued that emergency legislation should be brought before the Scottish Parliament to prevent tenants being evicted as a result of bedroom tax rent arrears. As suggested by Mike Daily of the Govan Law Centre, this would have involved an amendment to section 16 of the Housing (Scotland) Act 2001 to prevent 'bedroom tax rent arrears' being used to establish or justify eviction, and instead the landlord could obtain a payment decree for these types of arrears, and pursue them as an ordinary debt.¹²

However, First Minister Nicola Sturgeon refused arguing it was unnecessary despite the Scottish Parliament having the legislative competence to do so as housing policy is a devolved matter.¹³

Land reform and community empowerment

Scotland has one of the most inequitable distributions of land ownership of any country in the developed world, and has the most concentrated pattern of land ownership in Europe. Half of the entire country is owned by just 608 owners, and a mere 18 of these owners hold 10 per cent of the land in Scotland. Of Scotland's private land, 30% is held by 103 owners, each with 9,000 hectares or more, and 50% by 343 owners. A tiny 0.025 per cent of the Scottish population owns 67 per cent of the privately-owned rural land and 30 owners have more than 25,000 hectares each.¹⁴

Recent research has shown that private estates have a number of local economic impacts, including job creation, direct spend in the local economy and indirect economic impacts. An in-depth study of the local impacts of differing scales of rural landownership found that landownership is one of many factors that influence the economic, social and environmental development of rural communities.¹⁵

Ownership gives control over land use decisions and benefits, with decisions generally reflecting the interest of the owners of land, and this leads to limited accountability of land use choices and has been described as having a monopoly effect giving landowners a form of monopoly power. This monopoly also acts as a barrier to participation of local communities in decision-making about the utilisation of land in their area for sustainable and equitable development.¹⁶

A recent study by the Scottish Land Commission found in its call for evidence that the most frequently identified issue in relation to land ownership was that land ownership patterns frustrated the ability of rural communities to realise their economic potential. In areas of concentrated land ownership, landowners have the power to control the environment, deciding whether and on what terms to make

¹² <http://www.parliament.scot/ResearchBriefingsAndFactsheets/Petitions%20briefings%20S4/PB13-1468.pdf>

¹³ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-21945242>

¹⁴ Hunter, Jim, *Scottish land reform to date: By European standards, a pretty dismal record*, 3 June 2013

¹⁵ Thomson et al (2016)

¹⁶ *Investigation into the Issues Associated with Large Scale and Concentrated Land Ownership in Scotland*, Scottish Land Commission, 20 March 2019

land available, and if the landowner does not want something to happen, generally speaking it will not happen.¹⁷

The study also found that concentrated land ownership was damaging to community and social cohesion. As part of the call for evidence, more than half of respondents reported poor engagement between landowners and the local communities, and also fear of acting against the wishes of the landowner and the perceived ability of landowners to inflict consequences such as eviction or blacklisting for employment or contracts on residents should they so wish.¹⁸ In addition, the study also found that around a quarter of respondents felt that Scotland's current pattern of land ownership has a negative impact on the ability to meet local housing needs.¹⁹

Land ownership is a matter devolved to the Scottish Parliament and although some reforms have been made in this area, it is suggested that Scottish devolution has failed almost completely to address this national scandal.

One of the most significant reforms in relation to land since the inception of devolution in 1999 came in the form of the Land Reform (Scotland) Act 2003. Perhaps the most radical part of the Land Reform Act is Part 3 of the Act, which entitled crofting communities to opt for community ownership irrespective of whether or not their landlords wished to sell. Part 2 of the Act was less radical, applying to all communities across Scotland, not merely crofters, in that it confined itself to giving such communities a right to register an interest in acquiring particular pieces of land – this right to be exercised (provided the requisite purchase price can be raised) only if or when the land in question is put on the market.

As a result of these reforms, very little by way of land ownership has been redistributed and, as has been noted by land reform campaigner Jim Hunter, has given rise to a uniquely Scottish solution to the concentration of land ownership by community buyout as opposed to an owner-occupier orientated solution promoted by land reforming programmes, both historically (as in Denmark or Ireland), and currently (as in post-Communist Eastern European countries dealing with the legacy of state-imposed collectivisation of agriculture).²⁰

A second significant reform in this area is the Community Empowerment (Scotland) Act 2015, which was introduced into the Scottish Parliament by the SNP Scottish Government. The 2015 Act introduced a new power for communities to buy abandoned, neglected or detrimental land which forms Part 3A of the Land Reform (Scotland) Act 2003 as amended. It also expanded the right to buy under Part 2 of the 2003 Act to include urban areas and places with populations in excess of 10,000.

Since then the Scottish Government has further expanded its programme of land reform by the passage of the Land Reform (Scotland) Act 2016, which has added a new power of the right to buy land to further sustainable development.

Despite these reforms, the practical effect on the distribution of land ownership has been virtually zero, with a few exceptions. In the summer of 2018, there was a completion of the transfer to the North West Mull Community Woodland Company of the Island of Ulva. North West Mull Community Woodland Company is a Community Body which purchased the island for the market value of £4.65 million. The acquisition was backed by the Scottish Land Fund award of almost the whole price - £4.415

¹⁷ *Investigation into the Issues Associated with Large Scale and Concentrated Land Ownership in Scotland*, Scottish Land Commission, 20 March 2019, pp. 3

¹⁸ *Ibid.*, pp. 4

¹⁹ *Ibid.*, pp. 4

²⁰ Hunter, Jim, *Scottish land reform to date: By European standards, a pretty dismal record*, 3 June 2013

million. This purchase took place under the Part 2 right to buy under the Land Reform (Scotland) Act 2003. As discussed above, this power originally only applied to areas with a population of less than 10,000, but since the coming into force, the 2015 Act has applied to all areas regardless of the population size.

Although the Island of Ulva is somewhat of a success story for the recent land reforms, overall Scotland's land ownership distribution has barely changed after 20 years of devolution and over 10 years of an SNP-led Scottish Government. Far more radical action should and could have been taken by the Scottish Government within the current powers of the Scottish Parliament, but it chooses not to do so.

Police Scotland and policing centralisation

Police Scotland is the national police agency of Scotland with a jurisdiction for the whole of Scotland, and formed in April 2013 as part of a merger between Scotland's 8 police forces pursuant to the Police and Fire Reform (Scotland) Act 2012. As a result of the merger, Police Scotland is now the second largest police force in the UK in terms of number of police officers, second only to the Metropolitan Police, at 17,170 officers, and also has the second highest annual budget of any police force in the UK at almost £1.1 billion.²¹ In addition, in terms of the area size covered by Police Scotland, it is by far the largest area covered by any police force in the UK at almost 79,000 km².

The formation of Police Scotland represents a significant centralisation of power in amalgamating previously operationally autonomous local police forces, alongside the creation of a very powerful Chief Constable position. Since its inception, Police Scotland has been dogged by a number of problems and high-profile scandals.

In 2013, less than a year after the creation of Police Scotland, and under the leadership of the force's first Chief Constable, Sir Stephen House, a Standing Firearms Authority policy was adopted allowing officers to carry handguns and tasers on routine patrol and at all times while on duty. This policy was in contrast to the previous position which involved officers arming themselves in order to respond to specific incidents such as firearms incidents or where there is a threat to life.

The move was harshly criticised at the time by many opposition party politicians, as the policy ran contrary to the model of civilian policing in the UK, in contrast to police forces elsewhere in Europe such as the Gendarmerie in France or the Guardia Civil in Spain, which are more akin to military policing. To make matters worse, it had emerged that Chief Constable House had failed to consult the civilian watchdog of policing in Scotland, the Scottish Policing Authority, before the policy was rolled out across the country.²² The policy appeared to be completely disproportionate and unnecessary, especially given the fact that in the year 2012-2013 the number of firearms offences had declined by 32% to the lowest number in 10 years.²³

Police Scotland eventually performed a U-turn on the policy and reverted back to only arming police officers in response to specific incidents where there is a threat to life. However, the policy itself and the way in which it was implemented without proper consultation with stakeholders revealed a top-down authoritarian approach to policing not previously seen in Scottish policing in modern times.

²¹ <https://www.scotland.police.uk/assets/pdf/138327/187365/scottish-police-authority-three-year-financial-plan>

²² <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-28875408>

²³ <https://www.bbc.co.uk/news/uk-scotland-48023220>

The calamity over armed officers was followed by a more serious scandal in the form of the abuse of consensual non-statutory stop and search powers by Police Scotland, including on juveniles under the age of consent. Non-statutory stop and search was prohibited in England and Wales in 2003 amidst concerns that informed consent was unlikely to be secured in this type of encounter, while it continued to be used by Police Scotland.²⁴

A total of 519,213 searches both statutory and non-statutory were carried out in Scotland between April and December 2013. This figure is almost two times higher than the 312,645 searches conducted by the Metropolitan Police for all 2013, which polices a population much greater than that of Scotland. 2,912 of these searches related to children. 79% of the searches of children were conducted without any statutory basis or reasonable suspicion of a crime.²⁵ There has also been reports that the Scottish Police Authority has also been left out of the monitoring of this important part of policing, as it had not been aware of stop and search figures before reported in the mainstream media.²⁶

In June 2014, Police Scotland agreed to stop non-statutory searches of children under 12. However following an official information request from the media, it released figures showing that 356 children under 12 were stopped and searched by police officers during the second semester of 2014. It transpired that this figure was incorrect and the figure was much lower.²⁷

Non-statutory stop and search is premised on verbal consent and does not require reasonable suspicion. Police Scotland provides guidelines that a consensual search is appropriate where there is insufficient suspicion for a legislative search. Where an officer wishes to conduct a consensual search on a person who is not acting suspiciously, nor is there any intelligence to suggest that the person is in possession of anything illegal, then this search is consensual, and the officer must ask the subject if they can search them. Where a person refuses a consensual search, it is good practice to note the person's details and request them to sign the officer's notebook. Where a person refuses a consensual search, this factor cannot be used to justify a legislative search.²⁸

Scotland's National Human Rights Institution, the Scottish Human Rights Commission, raised serious concerns regarding the legality and proportionality of non-statutory stop and search powers by Police Scotland. The exercise of power by public officials must be governed by clear and publicly-accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, malice, predilection or purpose other than that for which the power was conferred, and the exercise of public power must not be arbitrary. This was particularly concerning in the case of children and other vulnerable people.

The lack of procedural protection inherent in non-statutory stop and search raises a number of concerns in relation to police fairness and proportionality. Without reasonable suspicion, officers may search people on the basis of more general beliefs about the behaviour of a particular group, and may also legitimately 'fish' for evidence, given that the object of the search is not specified.

²⁴ Police and Criminal Evidence Act 1984 (Codes of Practice) (Statutory Powers of Stop and Search) Order 2002, SI 2002/3075

²⁵ Quiroz, Diego, *Submission to the United Nations Human Rights Council*, NHRI report on the United Kingdom's 7th periodic report under the International Covenant on Civil and Political Rights (ICCPR), Scottish Human Rights Commission May 2015, para. 6.1

²⁶ Official Report, Justice Sub-Committee on Policing, Thursday 19th February 2015, Col. 5

²⁷ *Ibid.*, para. 6.2

²⁸ Murray, Kath, *Stop and search in Scotland: an evaluation of police practice*, University of Edinburgh, January 2014, pp. 23

In the *Gillan*²⁹ judgement, the European Court of Human Rights implied that Article 5 ECHR, the right to liberty, would be engaged due to the coercive nature of stop and search, however they declined to rule on the point. As such, the law in relation to the Article 5 remains ambiguous and open to interpretation in relation to the threshold between restriction of movement and deprivation of liberty.

Stop and search was however, held to engage with Article 8 ECHR in *Gillan*, the right to a private life, which requires that any restriction on privacy by state authorities must be 'in accordance with law'. In other words, the ability to search people should have a clear and accessible legal basis. It is arguable that the lack of legal structure and clarity inherent in non-statutory encounters, together with the lack of duty to inform a person of their right to refuse a search, is unlikely to meet these standards. As such, it is plausible that a legal challenge could be raised on these grounds. The use of non-statutory stop and search may also potentially breach Article 14 ECHR, the prohibition on discrimination, given that younger age groups are disproportionately more likely to be searched using this power than older age-groups.³⁰

Since the adoption of a new code of practice in 2017, consensual non-statutory stop and search has been banned entirely in Scotland, which is to be welcomed.³¹

Perhaps one of the most high-profile scandals associated with the new Scottish police force was the handling of the fatal car crash of Lamara Bell and John Yuill on the M9 near Bannockburn in the summer of 2015. Despite the incident being report to the police at the time of accident, the victims, Lamara Bell and John Yuill, lay in the car by the side of the road for three days before the police attended. It was reported that Police Scotland had received a call reporting the incident, yet no action was taken, and blame was levelled against the centralised Police Scotland call centre and an out-of-date computer system.³²

Another high-profile incident at the hands of Police Scotland was the death in custody of a black 31-year old man, Sheku Bayo, after police officers had used CS gas, pepper spray, batons and leg and arms restraints as they arrested him. His family insist Bayoh died from positional asphyxia as a direct result of the use of incapacitants and being crushed on the pavement by up to five officers. Post-mortems showed dozens of bruises, cuts and a type of haemorrhaging around his eyes consistent with being asphyxiated. No prosecutions have taken place of the police officers involved, and the Police Investigations Review Commissioner ("Pirc") has cleared the police of wrongdoing. However, the family disagree and have taken action in the civil courts against the new Chief Constable of Police Scotland, Ian Livingstone, in respect of the botched handling of the case.³³

In addition to these serious operational issues, Police Scotland has also been rocked by a series of internal matters including accusations of bullying by two of the force's former Chief Constables. Under the stewardship of Sir Stephen House, it was reported by the Association of Scottish Police Superintendents, that a staggering 85% of officers believe there are "cliques and in-crowds" within the force, while 37% say there is bullying from the Chief Constable team towards the lower ranks.³⁴

²⁹ *Gillan & Quinton v. the United Kingdom*, Application No. 4158/05 (2010)

³⁰ Mead, D. (2002) 'Informed consent to police searches in England and Wales: a critical reappraisal in the light of the Human Rights Act', *Criminal Law Review*, pp. 791-804.

³¹ Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland, *Laid before the Scottish Parliament on 11 January 2017*

³² <https://www.theguardian.com/uk-news/2015/jul/28/lamara-bell-police-left-voicemail-days-after-she-died>

³³ <https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-43942266>

³⁴ The Association of Scottish Police Superintendents, Member's Resilience Survey, 2015, <http://asps.org.uk/wp-content/uploads/2015/07/ASPS-Resilience-Survey-2015.pdf>

Moreover, the successor to Sir Stephen House, Phil Gormley, was subject to a string of accusations of bullying in his role as Chief Constable, which was made subject to an investigation by the Pirc. He later resigned amid the allegations in early 2018.³⁵

Scottish policing is in a permanent state of crisis, and it is difficult to resist the conclusion that Police Scotland is in meltdown, although this fact is hardly surprising given the cuts to police funding meted out by the Scottish Government and the forced efficiency savings required by the same. A recent paper by the Scottish Police Authority reveals a £56.2 million gap between the police's proposed capital spending and the funding from the Scottish Government in 2019, with an underlying budget deficit of £24.6 million.³⁶ The Scottish Government is cutting £1.1 billion from police budgets by 2026 – and the protection of police officer numbers means that police staff like control room operators, crime analysts, and criminal justice staff are losing their jobs, precisely the kind of jobs responsible for responding to reports such as the Lamara Bell incident.³⁷

Rail franchising and nationalisation

ScotRail is the nation-wide rail service of Scotland which is currently franchised to the national Dutch rail company, Abellio, which has operated the Abellio ScotRail franchise since 1 April 2015. Prior to the Abellio franchise, ScotRail had been operated under a number of different franchises, including by FirstGroup from 2004 and previously by National Express from 1997 after the privatisation of British Rail in the same year. Scotland has therefore not had a nationalised rail service for over 20 years.³⁸

After a public procurement process and winning the contract, Abellio has come under intense public scrutiny for the performance of the ScotRail rail services. In its first year of running in 2015-2016, only 56% of trains operated by ScotRail arrived at the right time, falling by 1.4% on the previous year, and 10% were at least 5 minutes late.³⁹ The percentage of trains arriving on time fell again the following year 2016-2017 by 1.5% to 54.9%.⁴⁰

In the first half of 2018, the service provided by Abellio ScotRail deteriorated significantly, showing 81.8% of services arriving within five minutes of the scheduled time between 16 September and 13 October 2018, while ScotRail's moving annual average for punctuality also hit a franchise low of 87.5%, below the agreed breach level of 88.22%.⁴¹

Customer satisfaction has fallen to 79% in the most recent National Rail Passenger Survey (NRPS) results, and Transport Focus, the watchdog behind the national survey, pointed to delays and cancellations as the main reasons for unhappy passengers.⁴²

Moreover, as a result of the chronic poor performance, Abellio has incurred a substantial level of penalties by the Scottish Government under the franchise agreement, as a result of failing to meet performance targets as agreed in the contract documents – totalling approximately £13.6 million. In

³⁵ <https://www.scotland.police.uk/whats-happening/news/2018/february/chief-constable-tenders-resignation>

³⁶ <http://www.spa.police.uk/assets/128635/547126/budget201920>

³⁷ <http://www.unison-scotland.org/service-groups-and-sectors/police/>

³⁸ *National Express pledges new trains for ScotRail*, Rail Magazine, issue 300, 12 March 1997, page 14

³⁹ https://orr.gov.uk/_data/assets/pdf_file/0019/22384/scotrail-factsheet.pdf

⁴⁰ https://orr.gov.uk/_data/assets/pdf_file/0015/25116/scotrail-factsheet-1617.pdf

⁴¹ <https://www.bbc.co.uk/news/uk-scotland-45991467>

⁴² National Rail Passenger Survey, Main Report, Autumn 2018, Transport Focus, <http://d3cez36w5wymxj.cloudfront.net/wp-content/uploads/2019/01/05111216/New-Main-Report-Autumn-2018.pdf>

addition, in the first quarter of 2019, the Scottish Government has already issued two contract improvement notices, as the company is failing to meet contractual targets.⁴³

To make matters worse, Abellio is running at a substantial loss, and the ScotRail service is heavily subsidised by the government and receives the second largest subsidy of any rail service in the UK, receiving £588 million in the year 2016-2017, second only to Northern Rail, which received £650 million in the same year.⁴⁴

One pertinent question may be to ask why after the expiring of the First ScotRail franchise in 2015, the rail service was not taken into public ownership by the Scottish Government and operated by the Scottish Government. After all, Abellio is a wholly owned subsidiary of Nederlandse Spoorwegen, itself a company wholly owned by the Dutch state.

Before the passage of the Scotland Act 2016, the Scottish Government was under a duty in terms of section 23(1) of the Railways Act 1993 from time to time to designate ScotRail services to be provided under a franchise agreement. Section 25(1) prohibited public sector operators from being franchisees, and this would have prevented the Scottish Government from entering a public sector bid into the procurement process when Abellio won the contract in 2015.

However, this restriction on public sector bidders was removed by section 57 of the Scotland Act 2016 and section 25(2A) of the 1993 Act, as inserted by the 2016 Act, now clarifies that section 25(1) no longer prevents a public sector operator from being a franchisee in relation to Scottish franchises, which would include the ScotRail franchise.

Given the extremely poor performance of Abellio, the Scottish Government could exercise the break clause in the current franchise agreement bringing the current contract to an early termination, following which a new procurement process could be run including a public sector bid. It is understood that the franchise agreement states that a breach of the target in two consecutive years would be marked as a continuing and material event of default allowing early termination. However, rather than taking this course of action, the Scottish Government has chosen to reprieve Abellio of further fines until June 2019, in a bid to allow an interval for the franchise to recover.⁴⁵

The prohibition of domestic Scottish public sector bids in railway franchises hitherto and the shielding of a foreign public sector organisation from its own failures in running our national railway service is symptomatic of the perversity of neoliberal Britain in the 21st century. Rather than standing up to it and offering an alternative, the SNP Scottish Government has so far facilitated this perversity, and, while talking the language of nationalisation, acts in quite a different way in practice.

Adult social care and health and social care integration

One of the principal achievements of the 1st Scottish Parliament was the introduction of free personal care for the elderly under the Community Care and Health (Scotland) Act 2002. Although a well-intentioned universalist policy, it has come under strain in recent years as a result of the current dominant austerity agenda.

⁴³ <http://www.railtechnologymagazine.com/Rail-News/scotrail-issued-second-formal-warning-over-performance-in-two-months-by-scottish-government>

⁴⁴ https://orr.gov.uk/data/assets/pdf_file/0008/25757/rail-finance-statistical-release-2016-17.pdf

⁴⁵ <https://www.railnews.co.uk/news/2018/11/12-scotrail-franchise-faces-early-termination.html>

The Public Bodies (Joint Working) Act 2014 created a number of new public organisations, known as integration authorities, with a view to breaking down barriers to joint working between NHS boards and local authorities. It places a requirement on NHS boards and local authorities to integrate health and social care budgets, and puts in place nationally agreed outcomes, as well as a requirement on partnerships to strengthen the role of clinicians and care professionals, along with the third and independent sectors, in the planning and delivery of services.

Despite the achievements of health and social care integration, adult social care in Scotland remains a significant concern. As has been discussed more fully above, local government finance has come under increasing pressure, particularly since 2010, as the twin forces of increasing demand for council services and cuts to local government funding have bitten across the Scottish public sector. One of the council services, which have been particularly badly affected as a result of this funding crisis, has been adult social care, and health and social care integration has not been able to avert this crisis.

The local government revenue settlement decreased at a much faster rate (-7.1% or £744.7m) compared with the Scottish Government revenue budget (-1.8% or £547.3m) in real terms⁴⁶, and the local government revenue settlement as a proportion of the Scottish Government revenue budget decreased by 1.9 percentage points between 2013-14 and 2017-18, showing that in Scotland local government has borne the brunt of cuts to public spending. Even when the additional monies for Health and Social Care Integration were to be included alongside the local government revenue settlement, there would have been a 3.7% fall in real terms in revenue funding for local government between 2013-14 and 2017-18.⁴⁷

What this means is that local government in Scotland is taking the brunt of austerity in Scotland, and the SNP-led Scottish Government is making the austerity medicine, although prescribed by Westminster, much more difficult to swallow for Scottish councils.

Taking the City of Edinburgh Council as an example, a recent report before the Governance, Risk and Best Value Committee showed a gross overspend of £11.9m for the coming year on health and social care. This forecast position took account of the delivery of £3.9m of savings, but also included £6.03m of slippage on planned savings.

According to the Committee report, in addition to the failure to deliver the savings of £6.03m, the growth in demand for care at home services, coupled with increases in direct payments and individual service funds, has resulted in projected expenditure exceeding budget in these areas by £3.8m, after the application of £2.2m of recurring funding from the Social Care Fund approved by the Edinburgh Integration Joint Board.⁴⁸

As a result of the shortfall in funding for health and social care, it was said at the Committee meeting that the potential impact of failure to manage the risk effectively could include direct harm to people, safeguarding breaches, inappropriate or insufficient care packages being offered and significant reputational damage to the council.⁴⁹

Social care in Edinburgh is in crisis, and is a microcosm for the rest of Scotland. It has been reported that more than 75,000 'bed days' have been lost, known as so-called 'bed-blocking' due to Edinburgh residents being stuck in hospital when they are actually ready to go home, and figures released

⁴⁶ Burn-Murdoch, Aisla, *Local Government Finance: facts and figures 2013-14 to 2018-19*, SPICe, May 2018, pp.10

⁴⁷ *Ibid.*, pp. 11

⁴⁸ *Ibid.*, pp.5

⁴⁹ <https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-46358199>

recently by the NHS showed that 87.9 per cent of those days resulted from problems in health and social care.⁵⁰

In a recent joint inspection report between Care Inspectorate and Health Improvement Scotland in Edinburgh, it was found that overall limited progress towards improving the outcomes and experiences of many older people had been made, key areas for improvement had not been progressed by the partnership, and many older people and their carers did not have the appropriate support when they needed it. It was also not uncommon for large numbers of older people to wait for lengthy periods before getting the support they needed.

From the time of the original inspection to the progress review, the partnership's performance in important areas of service delivery had in fact deteriorated. This included increases in delays in hospital discharge levels, as well as in the number of people waiting for services, and there had not been the necessary shift towards older people accessing services in the community.⁵¹

After the financial crisis and subsequent bank bailout, it is clear that the austerity regime is forcing some of the most vulnerable members of society to pay the price of a crisis caused by global free market capitalism. This is being exacerbated by the SNP Scottish Government in Scotland, as local councils are bearing the brunt of the austerity onslaught, undermining key public services such as adult social care.

5th Scottish Parliament – 2011-present (2019)

Introduction

The 2016 Scottish Parliament election was significant, as it was the first parliamentary election in Scotland's history in which 16 and 17-year olds were able to vote following the Scottish Elections (Reduction of Voting Age) Act 2015. Scottish Labour lost 13 seats bringing their total seats in the Scottish Parliament to 24, while the SNP also lost 6 seats bringing their total to 63, as well as the Liberal Democrats remaining unchanged on 5 seats. The Scottish Conservatives gained 16 seats, bringing their total up to 31 seats, while the Scottish Greens also saw a rise of 4 seats bringing their total to 6 seats.

The result of the election meant that the Scottish National Party lost its overall majority in the Scottish Parliament but, including the support for the Scottish Greens which increased, there remained a majority in the Scottish Parliament in favour of Scottish independence and a mandate for the holding of a second Scottish independence referendum.

The 2016 election was also significant as it was the first election after the Scottish independence referendum in 2014, and after the Smith Commission had delivered its recommendations on the future of Scottish devolution. The 5th Parliament would gain sweeping new powers both under the Scotland Act 2012 and the Scotland Act 2016. The 2016 election was also significant as by this point the UK-wide austerity regime had been in full flight for a significant period of time, and austerity measures continued to be imposed across Scotland and the rest of the UK.

⁵⁰ <https://www.edinburghlive.co.uk/news/edinburgh-news/more-75000-bed-days-lost-16079037>

⁵¹ <http://www.careinspectorate.com/index.php/news/4686-joint-inspection-of-services-for-older-people-in-the-city-of-edinburgh-progress-review-december-2018>

Social security and the Social Security (Scotland) Act 2018

One of the main achievements of the Scotland Act 2016 was the devolution of 11 social security benefits to the Scottish Parliament including Personal Independence Payments Carer's Allowance, Attendance Allowance, Disability Living Allowance, Winter Fuel Payments, Cold Weather Payments, Severe Disablement Allowance, Industrial Injuries Disability Benefits, Funeral Expenses Payments (to be replaced by Funeral Expense Assistance), Sure Start Maternity Grant (to be replaced by Best Start Grant) and Discretionary Housing Payments.

The 2016 Act also gives the Scottish Parliament the power to create certain new benefits in certain areas⁵², and also gives the Scottish Parliament power over certain elements of Universal Credit, including the person to whom universal credit is paid and the timing of such payments.⁵³

Further to the devolution of these powers, the Scottish Parliament passed the Social Security (Scotland) Act 2018 which establishes the new Scottish social security system for the devolved elements of social security. The 2018 Act made some important achievements including recognising social security itself as a human right and critical for the realisation of other human rights,⁵⁴ albeit the legislation falls short of incorporating international human rights standards with a duty on public authorities to have due regard to those standards included in the domestic law.⁵⁵

Moreover, the Scottish Government has also been placed under a duty by the 2018 Act to promote uptake by claimants in the devolved social security system, and are also required to publish a strategy to promote uptake by claimants.⁵⁶

Another important step forward by the 2018 Act was the restriction placed on private-sector involvement in the carrying out of assessments on people claiming benefits. S.12(1) of the 2018 Act states that individual may not be required, in order to be given assistance through the Scottish social security system, to undergo an assessment of physical condition or mental health that is carried out by another individual who is not acting in the course of employment by a public body.

This has been a controversial issue, as private sector contractors have been used by the Department for Work and Pensions for carrying out medical assessments on claimants, including most notably Atos and Capita, particularly in relation to Personal Independence Payments (PIP) and Employment Support Allowance (ESA). This has come under scrutiny in recent years for discriminatory practices, a culture of fear and intimidation, for significant inaccuracies and failures to get the right decision, and for prioritising profit-making over providing a good service.⁵⁷

Notwithstanding these important achievements, there have been a whole host of difficulties in setting up the new social security system. One of the most high-profile of these issues has been the delay in Social Security Scotland, the new Scottish social security agency, taking over the administration of Severe Disablement Allowance and Industrial Injuries Disablement Benefit. Both of these benefits will continue to be delivered by the DWP under agency agreements with Social Security Scotland until

⁵² Scotland Act 2016, s. 28

⁵³ *Ibid.*, ss. 29 and 30

⁵⁴ Social Security (Scotland) Act 2018, s.1

⁵⁵ The Scottish Human Rights Commission tabled amendments to this effect but they were not included in the final Bill. See SHRC Stage 2 Briefing, Amendments to the right to social security.

⁵⁶ Social Security (Scotland) Act 2018, ss. 3 and 8

⁵⁷ House of Commons, Work and Pensions Committee, PIP and ESA assessments, Seventh Report of Session 2017-19, HC829 <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/829/829.pdf>

Spring 2020.⁵⁸ After years of the SNP calling for powers over social security to be devolved, the administration of these two important benefits is being outsourced to the DWP.

Moreover, there are reports that Social Security Scotland is struggling to meet the demands of the Scottish Government, as it is having difficulty in recruiting appropriately skilled staff to the organisation, and is lacking in around a third of staff to deliver the 11 devolved benefits. The agency is also relying heavily on agency staff to plug the gap in the skills shortage at the organisation.⁵⁹

One of the most controversial benefit reforms to be introduced in the post-financial crisis and austerity era has been the 2-child cap in relation to Universal Credit. From April 2017 onwards, claimants will no longer receive the child amount for a third or subsequent child born on or after the 6 April 2017 unless certain exceptions apply, i.e. the child element of universal credit will only be payable in respect of the first two children, an effective 2 child cap, unless the child falls into one of the exceptions.

The exceptions where a third or subsequent child will be paid for is when the child is born as part of a multiple birth e.g. twins, apart from one child in the multiple birth - is likely to have been born as a result of a non-consensual conception, which for this purpose includes rape or where the claimant was in a controlling or coercive relationship with the child's other biological parent at the time of conception.⁶⁰ This last exception became known colloquially as the "rape clause".

On 2nd April 2018, 3,780 households in Scotland were affected by the two-child limit and a further 200 hundred would have been if they had not been granted an exception. 85% of exemptions were granted due to a multiple birth, 10% due to children living with family or friends who would otherwise be at risk of going into care and 5% due to the child having been conceived as the result of rape or a coercive/controlling relationship.⁶¹

Although the Scottish Government does not have the power to amend the 2-child cap or rape clause, there are certain measures which could be taken by the Scottish Government to mitigate or negate completely the effects of the cap. For example, under the Scotland Act 2016, the Scottish Government could introduce a top-up benefit in relation to Universal Credit to make up for the shortfall or a new benefit could be created in its entirety to make up for the loss of income. However, the Scottish Government response has been negligible and families affected by the 2-child cap have so far received little from the Scottish Government.

NHS Scotland

Health is a policy area which is almost wholly devolved to the Scottish Parliament⁶², and the Scottish Government is responsible for NHS Scotland. According to Audit Scotland, the NHS in Scotland is not in a financially sustainable position and NHS boards are struggling to break even, relying increasingly on Scottish Government loans and one-off savings.⁶³

⁵⁸ <https://www.gov.scot/policies/social-security/benefits-disabled-people-ill-health/>

⁵⁹ <https://www.thetimes.co.uk/edition/scotland/staff-may-quit-over-workload-to-deliver-new-benefits-system-2hdwrmwlf>

⁶⁰ Universal Credit: detailed guidance on the policy to provide support for a maximum of 2 children, Detailed guidance for stakeholders, Department for Work and Pensions, 1 February 2019

⁶¹ <http://www.cpag.org.uk/sites/default/files/uploads/CPAG-Scot-EWS-two%20child%20limit-Jul2018.pdf>

⁶² Certain areas of health are specifically reserved including xenotransplantation, embryology and some aspects of medicines.

⁶³ NHS Scotland 2018, Audit Scotland, October 2018, pp. 5

The performance of NHS Scotland is falling far short of the standards expected, with performance against the eight key national performance targets continuing to decline. No health board in the whole of Scotland met all of the key national targets, only three boards met the 62-day target for cancer referrals and the number of people on waiting lists also continues to increase. The only target met nationally in 2017/18 was for drug and alcohol patients to be seen within three weeks. Some of the main areas of pressure facing NHS boards include recruitment and retention of staff, rising drugs costs and a significant maintenance backlog.⁶⁴

Between 2008/09 and 2017/18, increases in health funding in Scotland have averaged 0.8 per cent per year in real terms. The Scottish Government's five-year financial strategy, published in May 2018, sets out a potential annual real terms health funding increase of 1.1 per cent between 2018/19 and 2022/23.

At the same time, health costs are projected to increase more quickly. Scotland's ageing population means that more people will be living longer with multiple long-term conditions, leading to greater costs for the NHS. Other cost pressures, such as increases in drug spending, are also projected to intensify. The Fraser of Allander Institute has predicted that the health resource budget is likely to have to increase by around two per cent per year in real terms to 2030 just to stand still.⁶⁵

Currently, NHS boards need to make savings to break even at the end of the financial year, to close the gap between the funding they receive and how much it costs to deliver services. In 2017/18, 50 per cent of all savings were one-off (non-recurring), up from 35 per cent in 2016/17, and 20 per cent in 2013/14. However, according to Audit Scotland, relying on one-off savings is not sustainable as it is becoming more and more difficult to identify areas in which NHS boards can make one-off savings, NHS boards that make high levels of one-off savings have to find more savings in future years, and non-recurring savings do not address the need to change the way NHS boards provide services.⁶⁶

What is clear is that the status quo is no longer sustainable, and radical action must be taken by the Scottish Government to stop a crisis in the NHS in Scotland turning into a catastrophe in the coming years. So far, the Scottish Government has not offered any radical solutions to deal with this funding crisis in the NHS in Scotland.

It is critical that the NHS in Scotland is fully supported given the great health and wellbeing needs faced by many Scots linked directly with socio-economic deprivation. Scotland has amongst the lowest life expectancy of any part of the United Kingdom and there is a clear link between life expectancy and deprivation in Scotland. In particular, women in the most deprived areas can expect to live 9.6 years fewer than those living in the least deprived. For men, the difference is 13 years.⁶⁷

Figures from December 2018 show that life expectancy fell for the first time in 35 years to only 77.0 years for men and 81.1 for women.⁶⁸ The prevalence of cardiovascular conditions, diabetes, and strokes continued to be higher in more deprived areas.⁶⁹

Mental wellbeing is significantly lower in more deprived areas. In 2014-17, the prevalence of two or more depressive symptoms was much higher in the most deprived areas compared to the least

⁶⁴ Ibid., pp. 7

⁶⁵ Ibid., pp. 14

⁶⁶ Ibid., pp. 13

⁶⁷ <http://www.healthscotland.scot/health-inequalities/measuring-health-inequalities>

⁶⁸ <https://www.gov.scot/news/life-expectancy-improvements-have-stalled-in-scotland/>

⁶⁹ Scottish Health Survey, 2018, <https://www.gov.scot/publications/scottish-health-survey-2018-volume-1-main-report/>

deprived areas (20% to 5%).⁷⁰ Suicide is strongly linked to deprivation in Scotland. In 2013-17, individuals in the least affluent communities were almost three times more likely to take their own lives than those in the most affluent areas (21.9 deaths per 100,000 population, compared to 7.6).⁷¹ Mortality rates for all cancers combined are 74% higher in the most deprived areas, compared with the least deprived.

Scotland cannot afford to have a mismanaged and underfunded NHS. Health and the NHS must be prioritised in order to tackle Scotland's massive health inequalities directly linked with poverty and deprivation.

Secondary schools

Another area which has borne the brunt of austerity in Scotland, in addition to adult social care and local government services, has been secondary school education. Since 2010, it is estimated that £350 million of cuts have been deducted from the budget for Scotland's high schools.⁷² While nurseries and primary schools in Scotland saw an increase in spending, secondary spending has fallen from £2.25bn to £1.9 bn last year, and the number of high schools themselves have fallen by 200 to 2,524.⁷³

These unprecedented swingeing cuts to secondary schools in Scotland are having concrete effects in many Scottish secondary schools with some schools even suggesting cutting the length of the school week from 5 days to 4 and half days in order to meet savings targets. For example, Neil McNeil of Balwearie High in Kirkcaldy warned the only way the school could make the £347,000 savings target imposed by Fife Council would be to move to a four-and-a-half-day week or reduce the number of subjects on offer.⁷⁴

In Falkirk Council, head teachers have been asked to identify £2.5m of savings leading to potentially larger class sizes and fewer subjects on offer.⁷⁵ It also been reported that Falkirk Council plans compulsory redundancies at schools in the Council area in order to absorb the cuts to funding.⁷⁶

Again, secondary education in Scotland is completely within the devolved responsibility of the Scottish Government. Scottish secondary schools have been targeted by the Scottish Government and rather than try to find ways of ameliorating the cuts to public spending have made sure that high schools in Scotland suffer the full wrath of austerity Britain.

Moreover, spending per pupil has plummeted under the Tories and the SNP. Analysis of the Local Government Benchmarking Framework by Scottish Labour reveals that real terms spending per primary pupil has fallen by £427 per head between 2010/11 and 2017/18, and £265 per head for secondary pupils.⁷⁷ In the nine attainment 'Challenge Authorities' (Glasgow, Dundee, Inverclyde, West Dunbartonshire, North Ayrshire, Clackmannanshire, North Lanarkshire, East Ayrshire and

⁷⁰ Scottish Health Survey, 2017, <https://www.gov.scot/publications/scottish-health-survey-2017-volume-1-main-report/>

⁷¹ Suicide statistics for Scotland, NHS Scotland, 2018, <https://www.isdscotland.org/Health-Topics/Public-Health/Publications/2019-06-26/2019-06-26-Suicide-Summary.pdf>

⁷² <https://www.scotsman.com/news/politics/spending-on-scots-schools-falls-by-400m-in-a-decade-1-4779195>

⁷³ Ibid.

⁷⁴ <https://www.thecourier.co.uk/fp/news/local/fife/855424/kirkcaldy-secondary-school-latest-to-propose-cutting-school-week-amid-budget-cuts/>

⁷⁵ <https://www.bbc.co.uk/news/uk-scotland-tayside-central-46318307>

⁷⁶ <https://www.heraldscotland.com/news/17244890.parents-warned-of-unprecedented-school-cuts-and-redundancies/>

⁷⁷ SPICe, 2019

Renfrewshire), between 2010/11 and 2017/18, there was an average real terms cut of £406 for every child in primary school and £209 for every child in secondary school.⁷⁸

Economic ownership and the structure of Scottish capitalism

As has been discussed in Chapter 1, economic ownership has changed dramatically since the 1970s in Scotland and in the UK as a whole as a result of the Thatcherite revolution, which saw a radical privatisation programme rolled out across the country and the selling off of many of the UK's state-owned enterprises. What this meant for economic ownership was that public control was smashed, while ownership by the private sector and corporate Britain increased principally through individual shareholdings.

However, economic ownership has morphed again from the domination of corporate ownership of the British economy post-Thatcher up to around 2003, to a new mode of ownership. In Scotland, there was traditionally a high level of privately Scottish-owned industry, and a heavily Scottish-owned banking sector, which were both key to Scotland's economic success.

By 2005, most of these Scottish companies were sold off or floated on the London Stock Exchange and had a diverse ownership which was not necessarily Scottish. This has replaced the largely autonomous Scottish industrial and business sector. Since 2005, the decline of Scottish ownership of the Scottish corporate sector has declined even further, and Scotland's core corporate sector has essentially vanished.⁷⁹

Rather than simply Scottish industry being held in private hands as opposed to public ownership, there has been a financialisation of corporate ownership, which means the large global investment companies own many UK companies, as opposed to ownership by ordinary shareholders.

To make matters worse, these investment companies are in direct competition with each other, and have to maximise the return on their investments by way of dividends for international investors. Due to this fierce competition between the investment companies, average dividends for major UK companies have increased from approximately 10% of company profits to approximately 70% of company profits since the financialisation of corporate ownership.⁸⁰

These structural characteristics of the UK and Scottish economies result in certain problems, including the facilitation of the extraction of capital and wealth from UK companies to often-offshore destinations, which is resulting in sudden collapses of many UK companies. UK companies are subordinate to these international funds and investments companies. Corporate Britain is enslaved to global capital in this way.

Moreover, this structure means that the UK economy is 'short-termist' in its outlook – with private firms, through financial intermediaries, weighing near-term outcomes too heavily at the expense of longer-term opportunities, and thus forgoing valuable investment projects and potential output.⁸¹ Because of this, Britain has low rates of investment and productivity relative to other countries of similar levels of development. This has become particularly stark in recent times: from 2000-2005

⁷⁸ SPICe, 2019

⁷⁹ Foster, John, *Planning for Scotland's Economic Future*, Red Paper 2019

⁸⁰ Meeting Note with John Foster, 31 May 2019: The Scottish Economy and Scotland's Political Future, Red Paper 2019

⁸¹ Davies, R., Haldane, A., Nielsen, M., & Pezzini, S. 2014. "Measuring the costs of short-termism". *Journal of Financial Stability*, 12: 16-25

Britain's productivity rate (output per worker) was almost the same as the other G7 economies, but since then the gap between Britain and these nations has widened considerably, with Britain's GDP productivity rate now 18% lower than the average for the remaining members of the G7.⁸²

This model of ownership also facilitates huge increases in economic inequality both in terms of income and wealth (as discussed more fully in Chapter 2) as well as an increase in insecure work.⁸³ Such patterns of economic ownership also raises important questions around the democratic control and accountability of the UK economy, as the economy is no longer even in diversified private ownership, but is instead often centred in the hands of an elite group of ultra-high net worth individuals via such financial institutions registered abroad.

The relationship between Westminster and Holyrood

Sewel Convention

As has been discussed in Chapter 1, the establishment of the Scottish Parliament by the Scotland Act 1998 did not affect the sovereignty of the UK Parliament, and section 28(7) of the 1998 Act makes clear that the grant of legislative competence to the Scottish Parliament does not affect the power of Westminster to make laws for Scotland.

Despite the retention of this sovereign power by Westminster, during the passage of the 1998 Act through Parliament it was stated by Lord Sewel in the House of Lords that it would be expected that a convention would be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.⁸⁴ This became known as the Sewel Convention and was put on a statutory footing in terms of section 28 of the Scotland Act 2016.

The normal process followed in cases where legislation at Westminster falls within the scope of the convention is that there is consultation between the UK and Scottish Government before publication of the legislation. When the bill is introduced, devolved ministers set out their view of whether and why consent should be given in a 'legislative consent memorandum'. In some cases, this leads to amendments being made in the UK Parliament to deal with devolved concerns. The Scottish Parliament then votes on a 'legislative consent motion', which can either grant or decline to grant consent to the bill. The UK Parliament has the power to ignore the denial of devolved consent, and to legislate regardless, but has very rarely taken this option.

The Sewel Convention has been used frequently across a wide range of areas over the course of the 20-year period since the inception of devolution, including 155 bills in the case of Scotland.⁸⁵ In the vast majority of cases it has operated without controversy. In total, out of more than 350 legislative consent motions, on just 10 occasions has consent been denied, in part or in full across the devolved nations. On other occasions, however, concerns raised by devolved ministers have led to amendments or other commitments at Westminster to resolve devolved objections.

⁸² Alternative Models of Ownership, Report to the Shadow Chancellor of the Exchequer and Shadow Secretary of State for Business, Energy and Industrial Strategy, the Labour Party, pp. 6

⁸³ *Ibid.*, pp. 7

⁸⁴ HL Deb vol 592, col. 791, 21 July 1998

⁸⁵ Cheung, Aron; Paun, Akash; and Valsamidis, Lucy, *Devolution at 20*, Institute for Government, 2019

For example, the Public Pensions Act 2013, as originally introduced, would have applied to certain pension schemes under devolved control. The Scottish Government argued that it had not been consulted sufficiently and informed the UK Government that it would not recommend consent. The bill was amended to take out the Scottish provisions, and no consent motion was ever debated.⁸⁶

Notably, the Scottish Parliament withheld consent in relation to the European Union (Withdrawal) Bill in 2018 because of the way in which the bill repatriates powers in devolved areas from Brussels back to Westminster after the UK leaves the EU.

In response, both the Scottish and Welsh Governments called for reform of the Sewel Convention to make it more difficult for Westminster to override the will of the devolved bodies. The Scottish Government proposed an amendment to give the convention legal force, by inserting a provision in the Scotland Act 2016 that the UK Parliament “must not” rather than “will not normally” legislate in devolved areas without consent.⁸⁷

The UK Government has not responded to these proposals, and for now the Scottish Government has declared that it will not recommend consent for any of the other Brexit bills.⁸⁸ This raises the spectre of ongoing conflict between Westminster and Holyrood over the implementation of Brexit, and consequently how the two governments should work together after Brexit.

Memorandum of Understanding and Concordats

The Scotland Act 1998 as amended is of course the foundational document of the Scottish devolution settlement. However, the primary legislation is complemented by a Memorandum of Understanding (MOU)⁸⁹ and a series of Concordats. The MOU provides for the establishment of a Joint Ministerial Committee (JMC) as a consultative forum for ministers of the UK Government, Scottish Ministers, Welsh Secretaries and Northern Ireland ministers.

The JMC considers matters of common interest or overlapping responsibilities and seeks to resolve inter-governmental disputes. Meanwhile, the four Concordats deal respectively with arrangements for cooperation on EU business, international relations, financial assistance to industry and UK-wide statistical work.⁹⁰

The JMC as a forum for consultation, mediation, discussion and dispute resolution continues to meet, but it has been the subject of criticism as only meeting occasionally and becoming somewhat ceremonial in character, rather than an executive decision-making body. In the early years of devolution, it was also a criticism that the Concordats themselves were barely used by civil servants and officials.⁹¹

⁸⁶ Cheung, Aron; Paun, Akash; and Valsamidis, Lucy, *Devolution at 20*, Institute for Government, 2019

⁸⁷ Russell, M, ‘Strengthening the Sewel Convention: letter from Michael Russell to David Lidington’, Scottish Government, 2018, retrieved 15 April 2019

⁸⁸ Committee on Procedures, Northern Ireland Assembly, Review of Private Members’ Bills, Northern Ireland Assembly, 2016

⁸⁹ *Memorandum of Understanding*, Cm 5420

⁹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf

⁹¹ House of Lords Select Committee on the Constitution, *Devolution: Inter-Institutional Relations in the United Kingdom*, HL 28 of 2002-03

Given the way in which the relationships between the UK Government and the Scottish Government has broken down in recent times, particularly since the beginning of the Brexit process,⁹² any new constitutional model will be required to find better ways for the UK Government and devolved administrations to work collaboratively.

Indeed, the House of Commons Scottish Affairs Committee published a report on intergovernmental relations between the Scottish and UK governments in June 2019, which noted that the relationship between the two governments had deteriorated significantly at a time when goodwill and cooperation between the governments is needed most in the run up to and aftermath of Brexit.⁹³

The Committee report recommends a review of the role of the Scotland Office and the Secretary of State for Scotland, including exploring the option of replacing the Territorial Offices of Scotland, Wales and Northern Ireland with a single department responsible for managing constitutional affairs and intergovernmental relations.

The Committee report also states that the JMC is in urgent need of reform to provide a forum which is robust enough to cope with different governments and divergent policy objectives. The report also states a JMC sub-committee on Common Frameworks should be established, charged with facilitating agreement between the two governments in policy areas being returned to the devolved administrations after the UK leaves the EU.

Some of the other recommendations made by the Committee report include a new requirement on all UK government departments to publish devolution impact assessments, outlining how policies could affect the devolved governments, and also that the UK Civil Service should provide more effective devolution training to staff.

Reforms proposed by Institute for Government

The Institute for Government has suggested that there are certain measures which could be implemented immediately in this regard to ameliorate Scottish-Westminster relations in the absence of a wholesale overhaul of the constitution.⁹⁴

This includes strengthening the Sewel Convention, thus preventing the UK Government from taking away competence from the Scottish Parliament without the consent of the latter. This would involve wording to the effect that Westminster must not diminish the competence of the Scottish Parliament, which would in effect bind a future parliament and suspend the doctrine of implied repeal.

It is suggested that intergovernmental relations and the role, powers and functions of the JMC should be enshrined in legislation, and also that the Barnett Formula should be replaced with a statutory calculation agreed with the devolved administrations and enshrined in legislation to effectively redistribute power and wealth. This is discussed further in Chapter 4.

⁹² 2018 saw the first legal battle between the UK Government and Scottish Government being taken to the Supreme Court over the legislative competence of the Scottish Parliament in the form of the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (Scotland)* [2018] UKSC 64 which may be seen as a failure of joint working and a sign of things to come.

⁹³ House of Commons Scottish Affairs Committee, *The relationship between the UK and Scottish Governments*, June 2019

⁹⁴ Meeting Note with Akash Paun, 9 April 2019

Key Findings and Recommendations

1. Since 1999, the Scottish devolution settlement has embodied a distinctive political landscape in Scotland but despite the superficial progressive composition of the Scottish Parliament, devolution has failed to address Scotland's structural economic and social problems.
2. The 1st and 2nd Scottish Parliaments saw some advances in the delivery of progressive policies such as the abolition of poindings and warrant sales, the abolition of feudal tenure, the abolition of tuition fees and free personal care for the elderly. However, the early years of devolution lacked any real radicalism to make material change to Scottish society.
3. Since 2007 and the beginning of the SNP's time in power, many of the Scottish Government's flagship policies which are ostensibly progressive are in fact regressive in effect and despite the SNP's persistence in talking the language of social justice and progressivism have failed to provide an alternative to neoliberal Britain and the age of austerity but rather have in fact reinforced it.
4. The Scottish Government has introduced policies such as the Non-Profit Distributing ("NPD") model to replace PFI, the abolition of the Graduate Endowment and the Council Tax freeze which it claims are progressive when in fact the NPD is a close relation to PFI, the abolition of the Graduate Endowment has been at the expense of further education funding which disproportionately affects working class students and the Council Tax freeze has starved local government of much-needed finance during the age of austerity.
5. Since 2007, the Scottish Government has presided over an increase in income inequality in Scotland as compared to the UK as a whole; has forced local government to bear the brunt of austerity causing a crisis in adult social care amongst other frontline services; abjectly failed to redress Scotland's grotesque distribution of land ownership although a stated priority of the administration; and failed to protect vulnerable people living in Scotland from Tory cuts to social security within current powers.
6. The Scottish Government is deliberately under-utilising the powers currently available to it under the current Scottish devolution settlement in order to pursue an agenda of portraying Westminster and the British State as the cause of all of Scotland's economic and social problems despite having the powers available to make a difference in most areas of domestic policy.
7. A future radical Scottish Government led by Scottish Labour should make full use of current powers to make real change to Scottish society, including tackling income inequality and inequitable land distribution, reinvigorating local government and increasing its financing, and protecting people living in Scotland adequately from adverse changes to social security changes made at Westminster by the current Conservative UK Government.
8. The Scottish Government should also make full use of its current borrowing powers which as discussed more fully in Chapter 4 are not being utilised to their full extent. In the age of austerity, it is critical a radical Scottish Government makes full use of these powers.

9. **Once made available from a radical Labour UK Government in Westminster, a radical Scottish Government led by Scottish Labour should abolish PFI/NPD models of financing public projects and utilise to its full extent the opportunities under the National Investment Bank and National Transformation Fund.**

Chapter 4

More Powers for a Purpose for Scotland

Introduction

As has been argued above, the British Constitution is in desperate need of overhaul, and this radical constitutional transformation will be discussed further in later chapters. However, in the short-term, there are certain measures which could be adopted now to strengthen the Scottish devolution settlement within the current British state and constitutional model as presently structured, i.e. the UK union unitary state and the Scotland Act 1998.

It is suggested there should immediately be a new Scotland Bill introduced into the House of Commons to devolve certain further powers to the Scottish Parliament from Westminster, and a reframing of the devolution settlement. These include reform of funding arrangements, lifting the restrictions on borrowing powers available to the Scottish Government and increasing the financial and fiscal responsibility of the devolved institutions by devolving further tax raising powers. Other powers which could also be devolved include certain aspects of employment law and industrial relations, social security, misuse of drugs policy and certain immigration powers.

The second aspect of the new Scotland Bill should be focused on improving and strengthening the relationships between the UK Government and Scottish Government, as well as between the Scottish Parliament and Westminster. There are a number of immediate measures that could be taken, for example in relation to reform of the Sewel Convention, as well as reform of the intergovernmental institutions such as the Joint Ministerial Committee.

Funding the Scottish devolution settlement

The Block Grant and the Barnett Formula

The devolved administrations in Scotland, Wales and Northern Ireland receive funding grants from the UK Government, which fund the majority of their spending. The largest of these grants to Scotland is known as the block grant. Section 64 of the Scotland Act 1998 created the Scottish Consolidated Fund, and states that the Secretary of State for Scotland shall from time to time make payments into the Fund out of money provided by Parliament of such amounts as he or she may determine.

In the Scottish Government's draft budget from 2018-2019, the block grant received by the Scottish Government from the UK Government in the form of the block grant was around £30.6 billion, with additional Barnett consequential of around £1.2 billion, meaning the total block grant for 2018-2019 from the UK Government was £31.8 billion. However, in order to reflect the further devolution of certain tax powers to the Scottish Parliament, an adjustment of reducing the block grant by around £12.4 billion was made which was made up by the devolved taxes collected by the Scottish Government.

The Scottish Government receives additional funding from Scottish income tax, Land Buildings Transaction Tax, Scottish Landfill tax as well as some non-tax income. In addition, it receives a net

resource budget adjustment as well as capital borrowing, taking the overall figure of Scottish Government funding for 2018-2019 to around £32.6 billion.¹

Much of the Scottish Budget continues to be funded by grants from the UK Government. In 2017/18 the block grant made up around 59 per cent of the total Scottish DEL budget. This is expected to fall to less than half of the Scottish Budget once the full range of the powers in the 2016 Act are devolved.²

The Barnett formula determines how the block grant changes from one year to the next. It aims to give each devolved nation the same pounds-per-person change in funding as the change in funding for comparable government services in England. It is important to stress that the formula does not calculate the absolute level of the block grant, only changes to the block grant to reflect spending decisions by the UK Government.

For example, if the funding for education in England increases by the equivalent of £100 per person, the devolved administrations' block grants will increase by £100 per person. In general, if a service is devolved it is considered to be comparable. The devolved administrations can spend the Barnett-formula determined block grant as they wish. If block grants increase because education spending has increased in England, the devolved administrations do not have to spend the additional money on education.³

In practice, the Barnett formula is mainly used at spending reviews, where the UK Government set their departments' budgets. The formula uses the change in UK Government departments' budgets to calculate the annual change in the devolved administrations' budgets. The UK Government may change departments' budgets outside of the spending review at other fiscal events such as the Budget. If this happens, the Barnett formula is again used to calculate changes to the block grant, but the formula is applied to the individual spending programme rather than at the department level.

The UK Government provides other grants outside of the block grant, but these grants are for less predictable demand-driven spending changes, in that these grants are negotiated by the UK Government and devolved administrations; the Barnett formula is not used to determine their change.

Despite the significant changes to Scottish devolution made by the Scotland Act 2012 and the Scotland Act 2016, the Barnett Formula continues to be used for the calculation of changes to the block grant to the devolved administration in Scotland, but block grants are being adjusted to accommodate the new powers. Additional spending powers will see block grants increase, while additional tax powers will see block grants decrease. Such adjustments aim to ensure that neither the UK Government nor the devolved administration are made worse off simply from the power being devolved.

The Mechanics and Constitutional Status of the Barnett formula

The Barnett formula takes the change in a UK Government department's budget, specifically their DEL,⁴ and applies two figures that take into account the relative population of the devolved administration (population proportion) and the extent to which the UK department's services are devolved (comparability percentage).

¹ Scottish Government: Draft Budget 2018-2019, pp. 6

² Scotland's New Financial Powers, Operation of the Fiscal Framework, Audit Scotland, October 2018, pp. 10

³ Keep, Matthew, *The Barnett Formula*, House of Commons Library Briefing Paper, 23 January 2018, pp. 4

⁴ Departmental Expenditure Limits are departmental budgets and represent the amounts which UK Government departments have been allocated to spend set at the Spending Review.

Comparability percentages capture the extent to which spending by a UK Government department corresponds to services provided by devolved administrations. It measures the extent to which the UK department's services have been devolved. Comparability percentages range from 0% to 100%. Broadly speaking, a department's comparability percentage is 0% if none of its services have been devolved to the devolved administration. A department's comparability percentage is 100% if all of its services have been devolved.⁵

For example, the comparability percentage for Scotland in relation to the Department for Culture, Media and Sport was 76.9% in the 2015 Spending Review, while the percentage for the Department for Education was 100%, and the percentage for the Department for Work and Pensions was 1.4%.⁶ These percentages reflect the fact that education is wholly devolved to the Scotland while culture, media and sport is partially devolved and social security and pensions are almost completely reserved, albeit this changed somewhat after the Scotland Act 2016.

Furthermore, in order to ensure that each of the devolved administrations receives the same pounds-per-person change in funding, the Barnett formula also incorporates population proportions. The populations used are the latest mid-year estimates from the ONS. The population proportions used in the formula depend on the coverage of the UK Government department concerned. In most cases this is England only, so the proportion of the English population is used.

Therefore, the second percentage in the formula is normally Scotland's population as a proportion of the population of England which, in the 2015 Spending Review, was 9.85%, although sometimes it can be Scotland's population as a percentage of England and Wales, depending on the service concerned which in the same year was 9.31%.⁷

The formula therefore takes the form as follows:

Change to the UK Government department's budget	<i>Multiplied by</i>	Comparability percentage	<i>Multiplied by</i>	Appropriate population proportion percentage
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An example of the formula being applied in practice would be if UK Government spending on health were to be increased by £100 million, the Barnett calculation would be as follows:

£100 million x 99.4% [health comparability % for Scotland] x 9.85% [Scotland's population proportion] = £9.8 million.

The final value of £9.8 million from the calculation is known as the 'Barnett consequential', and at the spending review the calculation is carried out for each department; these 'Barnett consequentials' are then added together to come up with changes in the block grant to the Scottish administration.

The Barnett formula is non-statutory – it is not set out in legislation. It is a policy of HM Treasury and it is set out in the Statement of Funding Policy which is updated and published alongside the spending review.⁸ In practice the Treasury dictates how the formula works and how it should be applied,

⁵ Keep, Matthew, *The Barnett Formula*, House of Commons Library Briefing Paper, 23 January 2018, pp. 5

⁶ HM Treasury, Statement of Funding Policy, Spending Review 2015

⁷ *Ibid.*, pp.6

⁸ HM Treasury, Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: Statement of Funding Policy, November 2015

although there is a policy for dispute resolution but in theory the formula can be used or changed by the UK Government as it wishes.

Although the Barnett formula represents normal procedure, changes to the block grant to Scotland and the other devolved nations can be made outside it – a process often referred to as ‘formula bypass’ – highlighting the inadequacies and uncertainties around the current funding arrangements.

The Fairness of Current Funding Arrangements

Overall public spending per head in the devolved nations of Scotland, Wales and Northern Ireland is higher than public spending per head in England and all of the English regions. In England, public spending is just over £8,000 per person on average, with the people in the South-East of England receiving the least (£8,000), and those in London receiving the most (almost £10,000). For those in Wales that figure is just over £10,000, in Scotland the figure is closer to £11,000 while for those in Northern Ireland the figure is over £11,000 per person.⁹

This apparent inequity in the distribution of public spending across the UK has attempted to be justified by the Scottish Government in various ways. For example, it has been argued that the population in Scotland, Wales and Northern Ireland is more sparsely spread throughout the country, and more concentrated in England, making the cost of providing the same level of public service higher in the devolved nations.

It has also been argued that the size of the public sector is larger in Scotland per head of the population than in England as, for instance, the water industry is nationalised in Scotland whereas it is privatised in England. Lastly, the demand and need for public services due to deprivation may be higher in Scotland, and other the devolved nations than in England.¹⁰

The Barnett formula does not, however, take any of these factors such as population density, the size of the public sector or socioeconomic need into account and, indeed, the size of population is the only consideration of need within the formula as was discussed above. This means that if the Barnett formula is applied strictly, it should lead to convergence in overall public spending per head across the UK’s countries proportionate to population size only.

Given that Scotland receives a relatively large share of UK public spending per head of population, this could lead to an equalisation of public spending per head, with other parts of the UK and result in a so-called ‘Barnett squeeze’ on Scottish Government finances.

This clearly is not a satisfactory operating model for public spending across the UK, given that need within different parts of the UK may change over time, as well as the cost of providing public services and the relative size of the public sector in different parts of the UK.

Having said that, it has been argued that the Barnett formula plays a relatively small role in determining total spending per head in the devolved administrations, and therefore its impact on the fairness of the funding arrangements is limited. Overall public spending in the devolved nations

⁹ Keep, Matthew, *The Barnett Formula*, House of Commons Library Briefing Paper, 23 January 2018, pp. 11

¹⁰ Scottish Government, GERS 2013-2014, March 2015

includes direct spending by the UK Government, which is clearly outside of Barnett¹¹, and the Barnett formula only determines the change in the block grant, not its absolute level.¹²

Nevertheless, it is critical to arrive at a fair and equitable funding settlement for every part of the UK and it is suggested that the current model for public spending is not fit for purpose. Not only are the current arrangements unfair for the devolved nations but, also, they are hugely inequitable for many of the English regions which, despite having greater need than parts of the devolved nations, have a smaller share of UK public spending per head of the population.

Regional Inequalities in the UK

As has been discussed more fully in Chapters 1-3, the UK is one of the most centralised states and imbalanced economies in the world. London and the South-East of England are by far the wealthiest parts of the UK, boasting 300,000 millionaires in the region in the year 2010 (and set to grow by 35% by 2020), while in the North-East of England that figure is 14,000 and 40,000 for the whole of Scotland. On virtually every economic measure, London and the South-East of England vastly outstrips the rest of the UK in terms of GDP, GVA per head, employment, enterprise figures, household expenditure and number of millionaires.¹³

In terms of overall GDP, London and the South East of England accounted for between 35% and 40% of total UK GDP from 1966 to 1994, while Scotland accounted for around 8% on average, Northern Ireland around 2% and Wales around 4%. In terms of GDP per head, if the UK average is taken as 100, the average GDP per head for Greater London is almost 130, while Scotland is equal to the UK average of 100 and Wales and Northern Ireland around 80.¹⁴

In terms of GVA per head in 2016, if the UK average is given a value of 100, GVA per head in London is almost 180 while the South East is 110. Every other part of the UK, including Scotland, has a GVA per head which is lower than the UK average of 100, with Scotland sitting in third place after London and the South East on around 95, with Wales faring the worst on around 75.¹⁵

In terms of employment rates for 16-64-year olds, the UK average is 75.8% while the rate in the South East of England is almost 79%. In Scotland and Wales, the employment rate is around 75%, while in the North East of England there is a rate 71.7%, and a shockingly low 69% in Northern Ireland.¹⁶

In terms of household expenditure, the average UK household expenditure for an average-sized household of 2.4 persons is around £551.00 per week, while the average in London and the South East is around £658.00 per week. The lowest household expenditure is in Wales, with an average spend of £470.00, while in Scotland that figure is around £492.00.¹⁷

The median average income in the highest-income region in the UK (the South East of England) is 25% higher than in the lowest-income region (West Midlands). Average incomes in the south of England

¹¹ While spending by the Scottish Government accounts for around 40% of overall public spending in Scotland, direct spending by the UK Government account for 35% while the remainder (25%) is spent by Scottish local authorities (House of Commons Library).

¹² Keep, Matthew, *The Barnett Formula*, House of Commons Library Briefing Paper, 23 January 2018, pp. 12

¹³ https://wealth.barclays.com/en_gb/home/research/research-centre/uk-prosperity-map.html

¹⁴ Nguyen, David, *Regional Economic Disparities and Development in the UK*, National Institute of Economic and Social Research, 15 January 2019, pp. 4

¹⁵ *Ibid.*, pp. 5

¹⁶ Regional labour market statistics in the UK: January 2019, ONS

¹⁷ Household expenditure by countries and regions: Table A33, ONS, 2016-2018

(excluding London) have grown as a whole over the last 40 years. This means the South East is now nearly twice as far above the national average as it was in the 1970s (13% compared with 7%). The Midlands have fared worst in terms of income growth over the last 40 years. Having had slightly higher incomes than average in the mid-1970s, average incomes in the East and West Midlands are now 6% and 9% below the national average respectively.¹⁸

In terms of infrastructure investment, in 2017 there was a total of £20 billion of infrastructure investment across Great Britain, which excludes Northern Ireland. Scotland received £3.1 billion of this investment while London and the South East of England received £5.3 billion with, London alone accounting for almost £3 billion of this investment while the whole of Wales only received £1 billion of this investment and the West Midlands £0.6 billion.¹⁹ What this means is that in terms of per capita spending on transport infrastructure £215 is allocated to the South West, £246 to the North East, £303 to Yorkshire and Humberside and a staggering £4895 to London.²⁰

In addition to these significant disparities in economic performance and development, the imbalances within the UK and internally within regions and nations of the UK manifest themselves in broader social, economic, wealth and health inequalities. For example, child poverty is hugely concentrated in the UK with one in four poor children living in the 10% most deprived local authority areas in the UK.²¹

A major 2009 study²² of economic inequality in advanced democracies found that economies which have higher levels of economic inequality tend to suffer a potent cocktail of social problems, including higher incidence of poor physical and mental health, lower life expectancy, obesity levels, poor educational attainment, higher levels of teenage pregnancy, higher levels of incarceration and less social mobility.

In relation to infant mortality, there is a clear trend between higher rates of infant mortality and higher levels of income inequality. In countries with low levels of income inequality such as Finland, Norway and Sweden, the infant mortality rate is approximately between 3-4 infant deaths per 1,000 of the population. In contrast, in countries with the highest levels of income inequality such as the USA, Ireland, the UK and New Zealand, that figure doubles to around 6 infant deaths per 1,000.²³

Life expectancy also follows a similar trend, with countries having lower levels of income inequality tending to have higher average ages of life expectancy of between 79-80 for the Scandinavian countries, while countries such as the USA, Ireland and the UK having lower average ages of between 77-78.²⁴

In relation to mental health, countries such as Japan, Belgium and Germany, which have lower levels of income inequality have between 10%-13% of the population suffering from a mental illness while in countries with higher levels of income inequality such as the USA, the UK and Australia, there is a significantly higher rate of mental illness of around 25%.²⁵

¹⁸ Living standards, poverty and inequality in the UK: 2017, Institute for Fiscal Studies, 19 July 2017

¹⁹ Infrastructure and Investment Policies, Briefing Paper, House of Commons Library, 10 July 2018

²⁰ Raikes, Luke, *Future Transport Investment in the North*, Institute for Public Policy Research, January 2018

²¹ Nguyen, David, *Regional Economic Disparities and Development in the UK*, National Institute of Economic and Social Research, 15 January 2019, pp. 4

²² Wilkinson, Richard and Pickett, Kate, *The Spirit Level Why More Equal Societies Almost Always Do Better*, Penguin Books, 2009

²³ Ibid. pp. 82

²⁴ Ibid.

²⁵ Ibid., pp. 67

A similar trend is repeated in relation to obesity levels, education attainment, teenage pregnancy rates, higher incarceration rates and opportunities for social mobility.

Although this study is an international comparison of countries around the world, and works from a measure of income inequality of the UK as a whole, it is suggested that the principle that greater economic inequality produces poorer social outcomes can be extrapolated to regional differences within the UK. Given the imbalances within the UK itself, it is suggested that the regional inequalities are likely to result in poorer social outcomes for the poorest regions of the UK.

It is therefore critical that constitutional arrangements around the funding of public spending across the UK are devised in a fair and equitable way.

Reform of Funding Arrangements

The need to overhaul the funding arrangements for devolution and public spending generally in the UK is long overdue. As elucidated above, there are a number of fatal flaws in the current arrangements and the Barnett formula. Indeed, the namesake of the formula, Joel Barnett, who devised the formula as a temporary solution while Chief Secretary to the Treasury in the Callaghan government in order to quell Cabinet disagreements in the run-up to the devolution referendums of 1979, later himself criticised the funding arrangements and the formula itself, confessing that he did not believe it would last a year never mind up until the present day.²⁶

The call to reform funding arrangements and the Barnett formula is not new. In the Calman Commission report in 2009, Recommendation 3.1 stated that “the block grant, as the means of financing most associated with equity, should continue to make up the remainder of the Scottish Parliament’s Budget but it should be justified by need.”²⁷

In 2010 the Holtham Commission, which considered funding for devolved government in Wales, recommended that a need-based formula should determine the block grant.²⁸ Lords Committees in 2009²⁹ and 2015³⁰ recommended replacing the Barnett formula with a needs-based formula. Similar recommendations were put forward by the House of Commons Justice Committee in 2009³¹ and by other Parliamentary committees in the past.³²

There are three principal criticisms of the current funding arrangements and how they are adjusted according to the Barnett formula. The first is that the arrangements themselves and the formula have no legal basis or legal certainty, and the formula has no democratic justification whatsoever. Section 64 of the Scotland Act 1998 creates the Scottish Consolidated Fund, and states merely that the Secretary of State for Scotland shall from time to time make payments into the Fund out of money provided by Parliament of such amounts as he or she may determine. This means the block grant and

²⁶ Treasury Committee, HM Treasury, evidence to the Treasury Committee, *The Barnett Formula*, second report HC 341 1997-98, Q.1

²⁷ *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, Final Report, June 2009, para. 206

²⁸ The Holtham Commission, Final Report., July 2010, para A1.2

²⁹ HL Committee on the Barnett Formula, *The Barnett Formula*, 17 July 2009, HL Paper 139, conclusions and recommendations

³⁰ HL Economic Affairs Committee, *A Fracturing Union? The Implications of Financial Devolution to Scotland*, 20 November 2015, HL Paper 55

³¹ Justice Committee, *Devolution: a decade on*, 24 May 2009, HC 529-I 2008-09, pp. 4

³² HL Select Committee on The Constitution, *Devolution: Inter - Institutional Relations in The United Kingdom*, 17 December 2002, HL Paper 28

the funding of the Scottish devolution settlement is at the mercy and whim of the Secretary of State and the UK Parliament.

Secondly, as mentioned above, the arrangements are completely non-transparent and unreliable. The Barnett formula is merely the policy of HM Treasury and has never been passed in legislation at all. Therefore, it can be suspended unilaterally by the Treasury without even consulting the UK Parliament, far less the Scottish Government or Scottish Parliament. This is clearly unsatisfactory and there have been occasions in the past when there has been a perception at least that the devolved administrations have lost out.

For example, in 2007 the UK Government unilaterally decided not to pass on Barnett consequential, so-called Barnett bypass, in respect of around £7 billion of public spending used to deliver the London Olympics, even although a large part of that public spending was used to deliver regeneration programmes and transport infrastructure investment in the East End of London.³³

The third main criticism of the funding arrangements and the Barnett formula is the fact that they are inequitable and not determined on any needs-based assessment of funding for public spending across the UK, as has been discussed above.

Scotland hugely benefits from the current funding arrangements, as per capita spending is much higher in Scotland (approximately £11,000) than in England (approximately £8,000). If the Barnett formula is applied strictly, it should (in theory) lead to convergence in overall public spending per head across the UK's countries, proportionate to population size only. Given this, the Barnett formula in fact has a tendency to reduce the benefit Scotland derives from higher public spending, albeit only to a limited extent.³⁴

Nevertheless, given the huge disparities in income and wealth across the UK and the significant differences in economic performance and development, Scotland and other parts of the UK may in fact be losing out under the current funding arrangements and the application of the Barnett formula, despite the fact public spending is already higher in Scotland than the average in England.

The overall funding arrangements in relation to public spending will be addressed in further detail in later Chapter 6 as part of the consideration of federalism. However, it is suggested that certain reforms are required now in relation to the funding arrangements in relation to Scotland.

Firstly, the financial provisions in the Scotland Act 1998 should be reformed to ensure that the Scottish Consolidated Fund is operated independently of the UK Parliament, Scotland Office and the Secretary of State for Scotland. A new independent commission could be established, the Devolved Funding Commission, which is responsible for administering the Scottish Consolidated Fund and a legal mechanism inserted into the Scotland Act 1998 to ensure payment to the devolved administration. The block grant should continue to be the main way in which the Scottish administration is funded, but the funding of the devolved administration should not be dependent on decisions taken in either the UK Parliament or in Whitehall government departments.

Secondly, the Devolved Funding Commission should explore and assess potential future replacements to the Barnett formula and should be charged with developing a new mechanism for making changes and adjustments to the funding of the Scottish administration based on a needs-based assessment.³⁵

³³ <https://www.dailyrecord.co.uk/news/politics/alex-salmond-wants-compensation-for-london-1059694>

³⁴ Professor David Bell, *The Barnett Formula and Needs Assessment*, November 2000

³⁵ Meeting Note with Professor David Bell, 7 August 2019; Meeting Note with Professor Gerry Holtham, 11 September 2019

This new mechanism will require to take into account relative population sizes across the UK, population density factors, medical need, social and economic conditions, the size of the public sector and its importance to the local economy, as well as Human Development Index measures in different parts of the UK, and recommend levels of expenditure on the basis of these factors. This new funding mechanism should be put on a statutory footing, and inserted into the Scotland Act 1998, and the Devolved Funding Commission should be under a legal obligation to calculate changes to the block grant pursuant to it.

These changes to the basic funding arrangements to the Scottish administration will be complemented by the National Investment Bank and National Transformation Fund, which will form the key planks of the Labour Party's industrial strategy across the UK. The National Investment Bank will bring in private capital finance to deliver £250 billion lending power across the UK over a ten-year period and Scotland will benefit hugely as a part of this investment plan.³⁶

The National Investment Bank will have a two-tier structure with a Supervisory Board including representatives including representatives from unions, business and local government, and an Operating Board responsible for day-to-day management. The second tier will be formed of twelve regional development banks will be allocated funding centrally in line with the aims and mandate of the National Investment Bank and Scotland will have its own regional bank.

The regional branches of the National Investment Bank, acting under regional boards and with autonomy with regard to the direction of on-lending, will be regional development banks but regional branch funding will be allocated centrally.³⁷ In the first year, it is estimated that Scotland alone would benefit from approximately £1.7 billion of investment through the National Investment Bank.³⁸

In addition to the National Investment Bank, the Labour Party will set up a National Transformation Fund. The intention is that £400bn will be invested over ten years to upgrade the infrastructure that underpins the UK economy. The aim is to use infrastructure investment to boost the economy by speeding the movement of people, goods and information, but because just about all infrastructure investments have a specific location the Fund's spending can be expected to have important regional and local impacts as well.³⁹

In Scotland, transport and infrastructure is a devolved matter. Therefore, the current Labour proposal is for the devolved administration's share of the National Transformation Fund to be allocated through the Barnett formula.⁴⁰ It is suggested, as discussed above, that the Barnett formula is flawed and is not fit for the purpose of allocating funding for the National Transformation Fund.

One suggestion may be for funding from the National Transformation Fund to be allocated via the new needs-based mechanism suggested above in relation to devolved matters. However, rather than passing all of the funding to the Scottish Government, it may also be possible to give the Scotland Office a role in directing investment to Scotland using monies from the National Transformation Fund

³⁶ A National Investment Bank for Britain: Putting dynamism into our industrial strategy, The Labour Party, pp. 7

³⁷ Ibid., pp. 14

³⁸ It's Time for Real Change, *The Labour Party Manifesto 2019*, p.13

³⁹ Ibid.

⁴⁰ Strong Economies, Better Places, *Local and regional development policies for a Labour government*, January 2019, pp. 20

to fund projects which are in a reserved area of competence, for example in relation to nuclear energy projects,⁴¹ oil and gas projects,⁴² broadband and internet projects⁴³ and rail projects.⁴⁴

Tax Raising and Varying Powers

In addition to the changes to the funding arrangements of the Scottish devolution settlement outlined above, it is suggested that further tax powers should be devolved to the Scottish Parliament, in order to enable a radical Labour Scottish Government to redistribute wealth in Scottish society, invest in the Scottish economy and stimulate economic growth.

The Scottish Parliament currently has certain tax raising and tax varying powers in terms of the Scotland Act 1998 as extended by the Scotland Act 2012 and Scotland Act 2016. Scottish Landfill Tax and Land and Buildings Transaction Tax, for example, are fully devolved taxes in terms of ss.80I, 80J and 80K of the Scotland Act 1998, although they make up a relatively small proportion of the Scottish Budget.

The Scottish Parliament is also now able to set non-savings, non-dividend income tax rates and bands for Scottish taxpayers for the first time, though it does not have power to adjust the personal allowance.⁴⁵ Income tax is not a devolved tax and HMRC continues to be responsible for the collection and management of income tax in Scotland, which includes the identification of Scottish taxpayers. The Scottish Income Tax collected by HMRC is paid to the Scottish Government.

This contrasts with Scottish Landfill Tax and Scottish Land and Buildings Transaction Tax which are now collected by Revenue Scotland, a non-ministerial department of the Scottish Government. Also, unlike those taxes, Scottish income tax represents a considerable share of the overall Scottish Budget.

The Scotland Act 2016 also devolved Air Passenger Duty.⁴⁶ However, on 23 April 2019, the Scottish Government deferred the introduction of the Scottish replacement to Air Passenger Duty, Air Departure Tax, beyond April 2020 until issues have been resolved regarding the tax exemption for flights departing Highlands and Islands airports. Air Passenger Duty will continue to apply to flights departing Scottish airports, and HMRC will continue to have responsibility for administering APD in relation to Scottish flights.⁴⁷

The Scotland Act 2016 also devolved the Aggregates Levy.⁴⁸ However, the timetable for devolving the tax to the Scottish Parliament is dependent on the conclusion of the current EU and domestic legal proceedings around state aid in relation to the UK Aggregates Levy.⁴⁹

It is suggested that devolution of further tax powers could be made as part of a new Scotland Bill and the overall reform of funding arrangements. It is suggested that in certain areas it will be necessary to retain powers at Westminster to preserve uniformity across the UK, and to avoid tax competition between parts of the UK and a subsequent 'race to the bottom'. In that regard, it is suggested that the personal allowance element of income tax should be reserved to Westminster as is currently the case,

⁴¹ Paragraph D4, Head D, Schedule 5, Scotland Act 1998

⁴² Paragraph D2, Head D, Schedule 5, Scotland Act 1998

⁴³ Paragraph C10, Head C, Schedule 5, Scotland Act 1998

⁴⁴ Paragraph E2, Head E, Schedule 5, Scotland Act 1998

⁴⁵ Ss. 80C-80HA, Scotland Act 1998

⁴⁶ S. 80L, Scotland Act 1998

⁴⁷ <https://www.revenue.scot/air-departure-tax>

⁴⁸ S. 80M, Scotland Act 2016

⁴⁹ <https://www.gov.scot/policies/taxes/aggregates-levy/>

corporation tax should also be reserved, and VAT and the capital taxes should also continue to be reserved. National Insurance Contributions should also continue to be reserved to Westminster

However, there are a number of specific changes to the tax system that could be made to give more financial responsibility to the devolved institutions, and would enable a radical Labour-led Scottish Government to pursue important social objectives.

Firstly, it is suggested that excise duties which apply to alcohol and tobacco should be devolved, but not those which apply to road fuels. This would allow the Scottish Parliament to increase the cost of alcohol and tobacco products to benefit public health, while ensuring fuel prices are relatively stable across the UK.

Secondly, it is suggested that betting and gaming levies should also be devolved to enable the Scottish Parliament to deal with the issue of problem gambling in Scotland.

Thirdly, in terms of s. 80B of the Scotland Act 1998, the UK Government has the power to specify new devolved taxes, and this can be a tax of any description. It is suggested that the UK Government should exercise this power to create a new Scottish Wealth Tax, and to devolve the setting and administration of the tax to the Scottish Government. This would allow a Labour Scottish Government to introduce its wealth tax plan of a 1% windfall tax on the wealthiest 10% of individuals in Scotland.⁵⁰

Borrowing powers

Public Sector Borrowing in the UK

In the UK, there are a number of different types of borrowing powers available to the public sector at different levels of government, from central UK Government, to devolved institutions, to local authorities.

Firstly, bonds are used by the UK Government to finance medium-long term borrowing. In the UK, bonds constitute almost all UK government borrowing. Bonds are interest bearing certificates of UK Government liability in sterling. These can be bought from the UK Debt Management Office (DMO), which issues them on behalf of HM Treasury, and investors managing pension funds typically buy them. The attraction of bonds to buyers is their security: governments can choose to raise taxes or print money so interest, and principal payments, on bonds are almost always paid.

Secondly, Sterling Treasury bills are used by the UK Government to finance short term borrowing. Alongside gilts, they play an important role in managing cash requirements. These are zero coupon debt securities which can be bought from the DMO and do not pay interest, but instead are issued at a discount and redeemed at face value upon maturity. Similar to bonds, Treasury bills are attractive to buyers because of the low risk of default.

Thirdly, the UK Government uses the National Loans Fund (“NLF”) to lend money to local authorities and other prescribed bodies. It is operated by the Public Works Loan Board, which sits within the DMO. Loans are offered at low interest rates, compared to those offered by commercial banks, and are provided with either a fixed rate or a variable rate of interest. Fixed rate loans have a maximum

⁵⁰ Leonard, Richard, *How We Will Rebuild Scotland by redistributing power and wealth*, <https://scottishlabour.org.uk/media/how-we-will-rebuild-scotland-by-redistributing-power-and-wealth/>

repayment period of 50 years, with repayments due at half-yearly intervals. Variable rate loans have a maximum repayment period of 10 years and repayment intervals are chosen when the loan is issued.

Lastly, within UK public authorities there has been rapid growth in the use of private borrowing to finance capital investment. Typically, in private finance projects (PFPs), a private sector consortium forms a special purpose vehicle (SPV), which enters a contract with a public authority. The SPV usually agrees to build and maintain a capital project, e.g. a bridge or a hospital, over a fixed period of time in return for fixed annual payments or user charges when construction is complete.

The SPV finances its construction by borrowing (usually 85–90%) and owners' equity (10–15%). There are now about 800 PFPs in being in the UK, with a capital value of about £64 billion.⁵¹ PFPs cover all forms of public-private partnerships (PPP), with the most widely used model being the Private Finance Initiative (PFI). Other models have been used more recently as alternatives to PFI including the non-profit distribution (NPD) model. The cost of debt for PFPs pre-credit crunch was typically about one percentage point above the nominal cost of government borrowing.⁵² The higher cost of debt reflects risks carried by the private sector and a margin for profit. Since the credit crunch, the cost of private finance has risen significantly.

Commercial banks are a key source of finance for PFPs, but not the only source. For example, the European Investment Bank, which lends on a not-for-profit basis, is a very significant finance provider and has lent €3–4 billion of funding for PFPs in the United Kingdom since 2005. The financial crisis has increased the EIB's attractiveness as a source of funding.⁵³

Scottish Government Borrowing Powers

The Scottish Government can borrow for capital and resource purposes. Capital spending is on assets that last for a number of years (such as infrastructure or vehicles). Resource spending concerns expenditure on things that are used up (such as salaries, grants, public services, administration).

Generally speaking, resource borrowing is available for cash management of the Scottish Government's budget – including dealing with volatility in devolved tax receipts – rather than allowing for more to be spent on services than the income received from HM Treasury and tax receipts. Put another way, resource borrowing cannot be used simply to run an unbalanced budget.

Scotland's borrowing powers are set out in its fiscal framework.⁵⁴ Capital borrowing is covered in paragraphs 54-60 of the fiscal framework document, and resource borrowing in paragraphs 61-70. Scotland has an annual capital borrowing limit of £450 million and total (accumulated) capital borrowing limit of £3 billion.

The Scottish Government can borrow a cumulative total of £1.75 billion for resource purposes. Annually it can borrow up to £600 million for the following specific reasons:

- up to £500 million for in-year cash management
- up to £300 million for forecast error of devolved taxes, welfare spending and the block grant

⁵¹ UK Parliament House of Lords Select Committee on Economic Affairs, 2010

⁵² National Audit Office, 2009

⁵³ http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_11-37.pdf

⁵⁴ The agreement between the Scottish Government and the United Kingdom Government on the Scottish Government's fiscal framework, February 2016

- up to £600 million to manage Scotland-specific economic shocks

Borrowing for Scotland-specific economic shocks will be available when annual growth in Scottish GDP is less than 1% and is also 1% point below UK GDP growth. This applies to either actual growth data or forecasts. The borrowing will be available in the financial year in which it was triggered and the two following years. The resource borrowing powers are summarised in the table below from Audit Scotland:

Resource borrowing limits in the Fiscal Framework
 Resource borrowing is limited by statute and is available for certain purposes only

Resource borrowing power	Purpose	Annual limit
In-year cash management	For example, if cash is needed because of timing differences between devolved revenues and spending commitments	£500 million
Forecast error	To account for errors in forecasts of devolved taxes or welfare spending, and errors in the forecasting of the block grant adjustment	£300 million
Economic shock	Access to the borrowing is triggered when onshore Scottish GDP is below one per cent in absolute terms on a rolling four-quarter basis, and one percentage point below UK GDP growth over the same period. The shock may be triggered from outturn data or forecasts.	£600 million
Overall annual limit on resource borrowing		£600 million
Overall statutory limit on resource borrowing		£1,750 million

Audit Scotland’s report into Scotland’s new financial powers gives a good summary of the borrowing powers (see paras 37-44 for capital borrowing and paras 45-46 for resource borrowing). The report covers the use of the powers.

Scotland’s resource borrowing must be funded from the National Loans Fund (NLF). Capital borrowing can be funded from the NLF, commercial loans or the issue of bonds.

By the end of 2018/19 the Scottish Government had accumulated capital debt of £1.46 billion, which is within its £3 billion limit.⁵⁵ The Scottish Government is expecting to borrow a further £450 million in its 2019/20 Budget. Analysis from the Scottish Parliament Information Centre (SPICe) suggests that the Scottish Government could continue to borrow the maximum of £450 million per year until 2022-23 before it would breach the £3 billion limit, assuming that the repayment terms for future borrowing are similar to those for existing borrowing.

The Scottish Government has not had need to use its resource borrowing powers. This is not necessarily surprising, as the borrowing is restricted to very specific circumstances – largely to do with cash management and volatility – and does not detract from the requirement for a balanced Scottish Budget each financial year.⁵⁶

⁵⁵ See: Scottish Government’s Fiscal Framework Outturn Report

⁵⁶ House of Commons library, July 2019

Although the Scottish Government has capital borrowing powers via the NLF, commercial loans and the issuing of bonds, capital borrowing has been made by the Scottish Government only via NLF. The Scottish Government expects to draw down £450 million from the NLF in 2019/20, as it did in 2017/18. Although it planned to draw £450 million from the NLF in 2018/19, the Scottish Government in fact drew down £250 million.

Prior to this, the Scottish Government reached an agreement with HM Treasury that allowed it to use its capital borrowing limit to accommodate the impact of some classification changes made by the Office for National Statistics (ONS). This didn't involve the Scottish Government actually borrowing, as is explained by Audit Scotland, as in 2015/16 and 2016/17 the Scottish Government used its capital borrowing limit to accommodate the impact of decisions by the ONS to reclassify some major Non-Profit Distributing investment projects as public-sector projects. The Scottish Government agreed with HM Treasury that these amounts would be recorded against its capital borrowing limit.

This notional borrowing was £283 million in 2015/16 and £333 million in 2016/17. This notional borrowing will be treated as if it is being repaid over 30 years for the purposes of the overall limit. As no actual borrowing occurred, no repayments need to be accommodated in future year's budgets.⁵⁷

Therefore, the Scottish Government is not utilising the borrowing powers available to it to their full extent. In an era of austerity and restraints on public spending, the Scottish Government is refusing to exhaust all of the borrowing powers available to it to mitigate the worst effects of austerity. Much more could be done now by the Scottish Government with the current powers available to it to invest in the Scottish economy, to stimulate economic growth and create jobs but it refuses to do so, instead blaming Westminster and the UK for all of Scotland's economic woes.

Reform of Borrowing Powers

It is suggested that in order to give real financial responsibility to the Scottish Parliament and the Scottish Government, the restrictions on resource and capital borrowing should be lifted in their entirety.

In the view of Angus Armstrong, Chief Economic Adviser to the Lloyds Banking Group, without the ability to issue its own bonds uncapped by Westminster, the Scottish Government will not take responsibility for its finances, and there is significant moral hazard within the Scottish devolution settlement that the Scottish Government can act in any way it chooses, and always be bailed out by Westminster if disaster happens.⁵⁸

The Scottish Government should therefore be given an ability to borrow and issue bonds for both resource and capital spending without any restriction. All of the units of the constitution including Wales, Northern Ireland and the English regions should also be given the same power, and this will be discussed in further detail in later chapters. This will enable the nations and regions to take responsibility for its finances.

In addition, consideration may be needed on whether borrowing via the National Loans Board should be restricted for the devolved institutions, in order to encourage borrowing via the issue of bonds or commercial loans. This will further increase financial responsibility for the devolved institutions rather than hiding behind the UK Government.

⁵⁷ House of Commons library, July 2019

⁵⁸ Meeting Note with Dr. Angus Armstrong, 5 June 2019

These changes will allow a radical Scottish Government in the future to invest in the Scottish economy to stimulate economic growth, create jobs and tackle poverty across the country.

Other powers

Employment Law

Most of employment law and industrial relations are reserved under Head H, Schedule 5 to the Scotland Act 1998. However, it is suggested that at least aspects of this area of competence could be devolved to the Scottish Parliament.

First of all, it is suggested that a common base-framework should be agreed between the Scottish Government and the UK Government on employment law standards under UK law. However, employment law improvement-only powers should be devolved wholesale to the Scottish Parliament. What this means is that the Scottish Parliament would be able to legislate on certain aspects of employment law, but only insofar as and to the extent that such legislation strengthens rights in favour of workers and does not diminish them.

Taking control of aspects of employment law would allow the Scottish Parliament to reverse the anti-trade union legislation enacted under successive Tory governments and lift the restrictions against trade unionism which have been in place across the UK since the Thatcher's reign as Prime Minister. Particular areas that could be devolved include the subject matter of the Trade Union and Labour Relations (Consolidation) Act 1992.

In so doing, this would enable the Scottish Parliament to legislate to make recognition of trade unions and the right to strike compulsory for every employer in Scotland, and would resurrect closed shop agreements, making membership of trade unions a requirement of having a job. Moreover, the law could give absolute protection to the right to strike with no requirements for balloting or notice to employers of timing or personnel. In addition, solidarity strike action could also be legalised, allowing unions in one industry to join in strike action in another industry. The Scottish Parliament could also legislate to make collective bargaining compulsory for every employer.

The devolution of employment law could also allow the Scottish Parliament to challenge the so-called gig economy by ending insecure work. For example, zero-hour contracts could be outlawed (which in itself would benefit over 70,000 Scots), and significant restrictions could be imposed on the ability of employers to use agency staff. The Scottish Parliament could also set up a Single Employment Status⁵⁹ and could outlaw the exploitation by employers of forcing workers to work on a self-employed basis rather than giving them a permanent contract. The rules around unfair dismissal could also be amended to allow actions to be brought at any time during a term of employment, not waiting for the current 2-year service period.

Misuse of Drugs

Scotland is in the grip of a drugs crisis and the health problems associated with drugs misuse is on an epidemic scale. Scotland's drugs death rate is the highest in Europe, and the numbers remain on the

⁵⁹ See discussion on Single Employment Status in Chapter 8.

rise.⁶⁰ However, the subject matter of the Misuse of Drugs Act 1971 is reserved in terms of Head B, Schedule 5 to the Scotland Act 1998. The power to legislate in relation to the misuse of drugs could also be devolved to the Scottish Parliament, which may allow the Scottish Parliament to legislate to legalise the setting up of safe drug consumption rooms in Scotland.

The Scottish Drugs Forum has publicly supported calls for the setting up of safe drugs consumption rooms⁶¹, and a majority of MSPs in the Scottish Parliament has voted to back a Scottish Government motion calling on the UK Government to allow the setting up of such a facility in Glasgow.⁶² Given the level of public support for this measure, alongside Scotland's acute drugs crisis, it is suggested that the Scottish Parliament should be empowered to deliver these facilities.

Devolution of misuse of drugs could also allow the Scottish Parliament to consider potential solutions to the drugs crisis other than outright criminalisation, which may include considerations of legalisation of certain classified drugs for medicinal use on prescription and under medical supervision, for example. Given the level of misuse, evidence would suggest that outright criminalisation means that police resources are drained into dealing with the problem with no hope of resolution, with serious and organised criminals continuing to benefit from sales on the black market.⁶³

The Scottish Government could be given the power to move the misuse of drugs away from being a matter of criminal justice to being turned into a public health issue, with the NHS and local authorities being given primary responsibility for tackling Scotland's drug problem working in conjunction with the police and other authorities.⁶⁴

Immigration

Scotland's population was in terminal decline up until the early 2000s, but since that time has experienced somewhat of a renaissance.⁶⁵ Up to the year 2018, for the 8th year running, Scotland's population continued to increase and stands at a record high of 5.42 million, according to statistics published today by the National Records of Scotland (NRS).⁶⁶ According to the same report, the reason why Scotland's population has reversed its terminal decline is due to positive net migration, with 23,900 more people coming to Scotland than leaving (from both overseas and the rest of the UK) over the year to mid-2017. In contrast, natural change (births minus deaths) has not contributed to Scotland's population growth.

As a consequence, Scotland is hugely reliant on migrants coming to Scotland to prevent a return to depopulation. In addition to its reliance on migrants coming to Scotland to prevent population decline, Scotland also has a significant demographic problem in relation to its ageing population. The pension age population in Scotland will grow by 25% by 2041, and the population of over-75s in Scotland will increase by 79%. Critically, the working age population in Scotland is essentially flat, growing by only

⁶⁰ https://www.audit-scotland.gov.uk/uploads/docs/report/2019/briefing_190521_drugs_alcohol.pdf

⁶¹ <http://www.sdf.org.uk/wp-content/uploads/2018/04/SDF-Briefing-Drug-Consumption-Rooms.pdf>

⁶² <http://www.sdf.org.uk/msps-support-scottish-governments-pursuit-of-drug-consumption-facilities/>

⁶³ <https://www.independent.co.uk/news/uk/home-news/labour-drug-policy-reform-government-jeff-smith-thangam-debbonaire-a8440476.html>

⁶⁴ Meeting Note with Neil Findlay MSP, 1 April 2019

⁶⁵ <https://www.gov.scot/publications/uk-immigration-policy-leaving-eu-impacts-scotlands-economy-population-society/>

⁶⁶ <https://www.nrscotland.gov.uk/news/2018/scotlands-population-continues-to-increase>

1% in under most projections. If lower migration is assumed after Brexit, Scotland's working age population actually falls. That is not true for the rest of the UK or the UK as a whole.⁶⁷

What can be inferred from Scotland's demographic make-up is that the country relies on migration for its continued prosperity and economic vitality. Therefore, it is critical that Scotland continues not only to attract migrants to come to Scotland to live, work and study, but to *maximise* such migration. Without it, Scotland could easily slip back into a depopulation trend and be faced with severe economic consequences due to its ageing population.

Particularly after Brexit, it will be necessary to ensure that migration continues into Scotland at the same rate if not a higher rate than has been hitherto. If migration stays at its current level, Scotland's population is projected to increase by 8% over the next 25 years, but with reduced migration from the EU, it would only increase by between 5%-6%.⁶⁸

Consequently, there is an imperative to ensure that Scotland has the right tools to continue to attract migrants to come to the country. The devolution of immigration powers and immigration policy wholesale to the Scottish Parliament is not desirable as it would be extremely difficult to implement while maintaining the integrity of the UK single market and the UK border.

However, the Scottish Parliament could be given powers to attract foreign nationals to come and take up employment in Scotland by various means including, for example, by allowing international students graduating from Scottish colleges and universities to take up employment with a graduate employer in Scotland for a set period after graduation, for example a 2-year graduate work visa.

There was previously a post-study work visa which applied to Scotland but was abolished by the UK Government in 2012. In its submission to the Smith Commission, the Scottish Government noted its concern at the abolition of the visa and noted there had been a concomitant reduction in migration to Scotland for formal study ever since.⁶⁹

Meanwhile, in its submission Colleges Scotland noted that the post-study work visa encouraged international students to come to Scotland, as the ability to stay, and work, is an important factor when choosing a place to study. Colleges Scotland noted that the demographic patterns over recent years, and the varying impact of migration, are not uniform across the UK. As such, there is logic in having a different approach in different parts of the UK.⁷⁰

Therefore, it is suggested that a special power to grant graduate visas should be devolved to the Scottish Parliament, in order to facilitate the issuing of special Scottish graduate visas to encourage international students to come to Scotland to study and work.

Social Security

The Scottish Parliament has recently gained a number of powers in relation to social security under the Scotland Act 2016, as has been more fully discussed above. The Scottish Parliament could be given responsibility for more elements of social security, although it is important that consistency is

⁶⁷ Immigration and Scotland, House of Commons, Scottish Affairs Committee, Fourth Report of Session 2017-19, pp. 7

⁶⁸ UK Immigration Police After Leaving the EU, Impact on Scotland's Economy, Population and Society, Expert Advisory Group on Migration and Population, 28 February 2019

⁶⁹ <https://www.smith-commission.scot/wp-content/uploads/2014/10/Scottish-National-Partysubmission.pdf> (page 26)

⁷⁰ <https://www.smith-commission.scot/wp-content/uploads/2015/01/B00231.pdf> (page 2)

maintained across the UK in order to be consistent with the solidarity principle across the UK, and the redistribution of power and wealth. If power and wealth is to be redistributed fairly and transparently across the UK by a socialist government at Westminster, the policy in relation to the main UK benefits should continue to be made at UK-level.

However, the administration of social security as opposed to policy decisions could be devolved to the Scottish Parliament, including giving Social Security Scotland responsibility for the administration of all benefits in Scotland, including Universal Credit. This would mean that the internal working practices of the Department for Work and Pensions could be replaced in Scotland, including the sanctions regime and benefits targets in relation to sanctions and appeals.

International Treaties

Currently, international relations is a reserved matter pursuant to paragraph 7 of Schedule 5 to the Scotland Act 1998. This includes relations with territories outside the United Kingdom; the European Union and their institutions; all other international organisations; regulation of international trade; and international development assistance and co-operation. An exception to the reservation is observing and implementing international obligations, obligations under the European Convention on Human Rights and obligations under EU law, which are devolved to the Scottish Parliament.

It is suggested that this reservation is overly restrictive and could be liberalised to allow greater flexibility in respect of the way in which Scotland relates to the world outside the UK. The Scottish Parliament should have the power to legislate to allow the Scottish Government to negotiate and enter into international treaties, conventions and other international instruments provided that the treaty in question relates to a matter within the devolved competence of the Scottish Parliament.

For example, this would allow the Scottish Government to negotiate and enter an international agreement in relation to environmental standards, because the environment is a devolved matter. In addition, if employment law is devolved to the Scottish Parliament, as has been argued above, then similarly the Scottish Government would be able to enter into international agreements or treaties in relation to minimum employment rights for all workers in Scotland. However, the Scottish Government would not be able to negotiate or enter into an international agreement in relation to nuclear weapons, for example, because defence is a reserved matter.⁷¹

It would be competent under international law for a sub-sovereign state actor, like Scotland, to enter into such international treaties and agreements, provided that the UK constitution made allowance for different parts of the UK to enter into such agreements.⁷² It is suggested that the power of the Scottish Government to negotiate and enter international treaties should be made subject to ratification by the Scottish Parliament, and the Scottish Parliament would be required to pass primary legislation in order to give effect to the treaty in Scots law.

The Limitation of Further Powers

The powers discussed above are some of the main powers which could still be devolved to the Scottish Parliament under the current UK union unitary state. However, what should be obvious is that the powers which are left to be devolved are limited. As presently constituted, the Scottish Parliament is

⁷¹ Scotland Act 1998, Schedule 5, paragraph 9

⁷² Meeting Note with Aidan O'Neill QC, 20 September 2019

one of the most powerful devolved institutions in the world, especially when the powers under the Scotland Act 2016 are taken into account.

The current SNP-led Scottish Government appears to be determined not to utilise them to their full extent, in order to maximise their own independence agenda and to play a blame game of holding Westminster responsible for all of Scotland's social and economic woes. Scotland's politics have become bogged down in misplacing faith in the chimera of a constitutional solution to very real economic and social problems, and all the while Scotland continues to suffer from the scourges of gross income and wealth inequality, the biting wind of austerity and the intractable problem of poverty and poorly-paid and insecure work.

A far more radical solution is required which redistributes power and wealth across the whole of the UK, and one that brings power closer to the people, which will be discussed in further detail in later chapters.

Scotland and Westminster

Sewel Convention

The devolved institutions in Scotland in this time of constitutional uncertainty have a dysfunctional relationship with Westminster, and such a relationship is no longer suitable. The relationships have to be fundamentally altered or ordered to provide for better governance across the UK.

The establishment of the Scottish Parliament by the Scotland Act 1998 did not affect the sovereignty of the UK Parliament, and section 28(7) of the 1998 Act makes clear that the grant of legislative competence to the Scottish Parliament does not affect the power of Westminster to make laws for Scotland.

Despite the retention of this sovereign power by Westminster, during the passage of the 1998 Act through the UK Parliament, it was stated by Lord Sewel in the House of Lords that it would be expected that a convention would be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.⁷³ This became known as the Sewel Convention, and was put on a statutory footing in terms of section 28 of the Scotland Act 2016.

In the vast majority of cases it has operated without controversy. Most notably, however, the Scottish Parliament withheld consent in relation to the European Union (Withdrawal) Bill in 2018 because of the way in which the bill repatriates powers in devolved areas from Brussels back to Westminster after the UK leaves the EU.

In response, both the Scottish and Welsh Governments called for reform of the Sewel Convention to make it more difficult for Westminster to override the will of the devolved bodies. The Scottish Government proposed an amendment to give the convention legal force, by inserting a provision in the Scotland Act 2016 that the UK Parliament "must not" rather than "will not normally" legislate in devolved areas without consent.⁷⁴

⁷³ HL Deb vol 592, col. 791, 21 July 1998

⁷⁴ Russell M, 'Strengthening the Sewel Convention: letter from Michael Russell to David Lidington', Scottish Government, 2018, retrieved 15 April 2019

The UK Government has not responded to these proposals, and for now the Scottish Government has declared that it will not recommend consent for any of the other Brexit bills.⁷⁵ This raises the spectre of ongoing conflict between Westminster and Holyrood over the implementation of Brexit and how the two governments should work together after Brexit.

It is suggested that the Scottish Government's proposal should be followed in the new Scotland Bill, and the Sewel Convention should be reformed so that the UK Parliament is bound not to legislate on devolved areas of competence without the consent of the Scottish Parliament. Of course, due to the doctrine of the Sovereignty of Parliament, it would still be possible for the UK Parliament to legislate on devolved areas, but it would require the implied repeal of Sewel Convention in the new Scotland Bill.⁷⁶

Given that the Scottish Parliament is a democratically elected institution representative of the people of Scotland, it is suggested that the courts would be constitutionally bound to suspend the doctrine of implied repeal in this regard in much the same way as the courts have done in relation to the European Communities Act 1972 and supremacy of EU law.⁷⁷ This means it would only be possible to get around the Sewel provision if it was explicitly repealed by the UK Parliament.

However, there ought to be certain exceptions to the legally binding Sewel requirement which should be set out in law. These should include exceptions to allow the UK Government to legislate in relation to devolved matters where there is a need to do so in the interests of national security, to preserve diplomatic relations or to preserve the integrity of the UK single market.

Intergovernmental and interparliamentary relations

The repatriation of powers element to the Brexit process powerfully demonstrates the weaknesses of the current British state and constitution. The lack of joint working between the different parts of the constitution, the ability of one part of the constitution to override other parts of the constitution without any checks or balances, consultation or negotiation, and the lack of legal protection for the devolved institutions, means the state as presently constituted is no longer sustainable and must be overhauled to adequately represent all of the views of the nations and regions of the UK, not one where all power is concentrated in SW1.

The new Scotland Bill should put the Joint Ministerial Committee ("JMC") on a statutory footing, with legal requirements for the JMC to be consulted when decisions of the UK Government have an impact on devolved areas of competence. All UK Government departments should be required to carry out Devolution Impact Assessments to establish how the devolved settlement in Scotland may be affected by a policy and, based on this assessment, the JMC should be consulted.

The meetings of the JMC should be held frequently and the meetings should be chaired by each of the four administrations in the UK on a rotating basis, with each member having equal status in the meetings. If following the meetings, one or more administration is not content with the policy being carried forward which affects devolved areas of competence, each administration should have the right to refer the point of dispute to a dispute resolution procedure, such as arbitration. The arbiter

⁷⁵ Committee on Procedures, Northern Ireland Assembly, Review of Private Members' Bills, Northern Ireland Assembly, 2016

⁷⁶ Meeting Note with Akash Paun, 9 April 2019

⁷⁷ *Thoburn v. Sunderland City Council* [2003] QB 151

should be independent and appointed by the Supreme Court, and the decision of the arbiter should be final and binding on all parties to the dispute subject only to judicial review.⁷⁸

In addition to this executive body, there should be an Interparliamentary Committee established at Westminster made up of MPs, MSPs, MSs and MLAs who are not a member of the executives, to facilitate joint working between the legislatures. The Interparliamentary Committee should have the ability to conduct inquiries and hold the JMC and the devolved administrations to account.

It has been suggested that by the Scottish Affairs Committee that the role of the Territorial Offices should be reformed, and in particular, has argued for the reform of the Scotland Office.⁷⁹ It has been suggested that the Territorial Offices should be abolished as discrete offices and replaced with a single government department responsible for constitutional affairs and intergovernmental relations.

It is suggested that it would be a mistake to abolish the Territorial Offices completely and to set up a single department with all of the responsibilities of each of the Scotland Office, Wales Office and Northern Ireland Office. It is suggested that this department would not be viable and would be pulled in different directions with competing interests for each part of the UK. The role of any Secretary of State for the Union would also be a ministerial portfolio with too large and complex a remit to be able to be done successfully.

However, it is suggested that the Territorial Offices ought to be reformed. In particular, in relation to the Scotland Office, the Scotland Office's role should be strengthened and given specific powers in relation to reserved matters for Scotland. For example, it is suggested that the Secretary of State for Scotland should be given the powers in relation to Scotland over central government funds such as the National Transformation Fund, for example, to direct investment in the Scottish economy⁸⁰ over and above the investment by the National Investment Bank and local boards of trade and industry.⁸¹

Key Findings and Recommendations

- 1. A new Scotland Bill should be introduced into the House of Commons as a matter of urgency to devolve further powers to the Scottish Parliament and to overhaul intergovernmental and interparliamentary relations between the UK Government and Scottish Government as well as between Westminster and Holyrood.**
- 2. An independent commission should be established to assess potential future replacements to the Barnett formula. A new needs-based calculation should be devised for Scotland to take into account regional economic and social inequalities when calculating the block grant. This new calculation should be placed on a statutory footing and HM Treasury should be under a legal obligation to comply with it.**
- 3. New tax powers should be devolved to the Scottish Parliament including power over excise duties as they apply to alcohol and tobacco products as well as betting and gaming levies.**

⁷⁸ Meeting Note with Akash Paun, 9 April 2019

⁷⁹ The relationship between the UK and Scottish Government Inquiry, Scottish Affairs Committee, 10 July 2019

⁸⁰ Meeting Note with Jordan Agnew, 11 June 2019

⁸¹ The operation of the National Investment Bank will be discussed further below.

The UK Government should also create a new devolved Scottish Wealth Tax which should be set and administered by the Scottish Government.

4. The National Investment Bank and National Transformation Fund should seek to redistribute wealth and capital investment across the UK according to a needs-based approach.
5. The Scotland Office should be given responsibility over National Transformation Fund capital to invest in infrastructure in reserved areas of competence including nuclear energy projects, internet and broadband services, rail projects, and oil and gas projects.
6. The Scottish Government should be given the ability to borrow and issue bonds for both resource and capital spending without any restrictions.
7. Consideration should be given as to whether borrowing via the National Loans Board should be restricted for the devolved institutions to encourage borrowing via the issue of bonds or commercial loans in order to increase the financial responsibility of the devolved institutions.
8. Certain aspects of employment law should be devolved to the Scottish Parliament including the subject matter of the Trade Union and Labour Relations (Consolidation) Act 1992, the power to give absolute protection to the right to strike with no requirements for balloting or notice to employers of timing or personnel, the power to allow solidarity strike action, the power to make collective sectoral bargaining compulsory for every employer, and also the power to ban insecure forms of work including zero hours contracts.
9. The subject matter of the Misuse of Drugs Act 1971 should be devolved to the Scottish Parliament.
10. A special immigration power to issue a Scottish Graduate Visa should be devolved to the Scottish Parliament.
11. The administration of all social security should be devolved to the Scottish Parliament including Universal Credit.
12. The Scottish Government should be given the power to negotiate and enter international treaties in areas of devolved competence.
13. The Sewel Convention in s.28 of the Scotland Act 2016 should be amended to remove the words “not normally” and replaced with the words “must not” and the convention should become a binding legal obligation, not merely a constitutional convention.
14. The Joint Ministerial Committee should be put on a statutory footing with legal requirements for the JMC to be consulted when decisions of the UK Government have an impact on devolved areas of competence.

- 15. All UK Government departments should be required to carry out Devolution Impact Assessments to establish how the devolved settlement in Scotland may be affected by a policy and based on this assessment, the JMC should be consulted.**
- 16. An Interparliamentary Committee established at Westminster made up of MPs, MSPs, MSs and MLAs responsible for joint working between the UK Parliament and the devolved legislatures.**
- 17. The role of the Scotland Office should be strengthened and given specific powers in relation to reserved matters for Scotland. For example, the Secretary of State for Scotland should be given the powers in relation to Scotland over central government funds such as the National Transformation Fund to invest in the Scottish economy.**

Chapter 5

Two English Questions

Two English Questions on the Governance of England

The problem with the British State and Britishness

The British state and British identity both suffer from an inherent problem. British identity was closely built up upon the foundation of the ideas of the British Empire. As the British Empire entered a twilight zone and began to disintegrate in the middle of the 20th century, the idea of British identity also began to fade.¹

The British state itself is also in essence an imperial state; it was founded in 1707 by the Treaty of Union as an imperial project between the Kingdoms of Scotland and England. Indeed, the Kingdom of Scotland entered into the Treaty explicitly with the purpose of alleviating the financial stresses of the failed colonisation of the Isthmus of Panama in the Darien Scheme, and joining in a new British Empire.²

The UK is now stuck with the relic of an imperial state in a post-imperial world. The UK is on a journey, for some a painful journey, from being an imperial state to becoming a non-imperial, middle-sized European country. To preserve the Union in this context, the UK must be re-founded on the idea of four unique nations with unique national identities working together in partnership.

Over the last two decades, there has been significant democratic and constitutional reform in the UK. However, that reform has focused heavily on Scotland, Wales and Northern Ireland and, to a large extent, the governance of England has been neglected. Scotland, Wales and Northern Ireland have developed their own institutions, but England lacks its own institutions and is still governed by the old imperial government in Westminster.

The fact that England lacks its own political space causes two main problems: firstly, discontentment within England to the way in which England is governed and represented, and resentment towards the devolved institutions in Scotland, Wales and Northern Ireland; and secondly, a view from outside England that England is running the rest of the UK, which engenders discontentment with England within Scotland, Wales and Northern Ireland.³

The neglect of England and how England is currently governed causes a further problem when attempting to envision a new constitutional settlement for the UK as a whole. Currently, the UK Parliament and the UK Government is the legislature of the entire UK and executive of the entire UK respectively, while simultaneously acting as the legislature of England and the executive of England. A proper constitutional reform programme must open up a political space for England to disentangle its governance from the sole grip of the UK Government and UK Parliament in Westminster.

England's size, importance and wealth means that it is critical that any reimagining of the British state ensures England is adequately accommodated within it, both in terms of sufficient regional autonomy

¹ Meeting Note with Professor John Denham, 24 September 2019

² See *The Union: England, Scotland and the Treaty of 1707*, Michael Fry, 2013

³ Meeting Note with Professor John Denham, 24 September 2019

within England and ensuring that England, the nation as a whole, is accommodated within the constitutional order.

This gives rise to two questions on the governance of England. Firstly, how can regional autonomy in respect of the English regions be achieved to ensure better governance for England and to decentralise power away from Westminster, while representing the English regions at Westminster? Secondly, how can England as a nation be governed more effectively at Westminster to give expression to English national identity?

Combined Regional Authorities for England

One way in which England could achieve a level of regional autonomy for the English regions would be to divide England up into administrative regions, with their own regional assemblies and regional administrations. However, when this concept was put to the people in the North-East of England in a referendum in 2004 it was emphatically rejected.⁴

Moreover, there are issues with splitting up England into regions. Although some parts of England may have strong regional identities, English regional identity does not exist in the popular imagination generally across the country, and therefore constitutional reform must treat England as one distinct unit in its own right, rather than seek to impose artificial borders and governance structures which are unpopular with and mean nothing to the local people.⁵

Having said that, there are voices within England that support the idea of formally splitting the national unit into distinct regions, with regional assemblies and regional executives. For example, Billy Bragg argues that the English regions should each be given assemblies with the same status and importance as the Scottish Parliament with Holyrood-style powers but not necessarily the exact same powers. These regions should be broken down by adhering to the boundaries used for the EU Parliament elections, as it is the fairest way to do so by population size but ensuring each region is large enough to be able to exercise significant powers in their areas. The English regions would not have to be symmetrically formed, but what is important is to ensure the maximisation of the agency of the people in these nations and regions.⁶

However, it is suggested that the lack of popular demand and the artificiality of these regions would be fatally problematic to impose by a government in Westminster. For these reasons, it is suggested that formally dividing up England into regions with regional assemblies should not be pursued as a serious policy option.

An alternative would be to use a combined authorities model based on the current combined authorities in England. English regional autonomy should be based on and build out from what is already there in terms of local government and the combined authorities model, but it is also important to find a way to include the towns and rural areas which do not fit within the major conurbations in England.

Every local authority in England should be given the option to combine into newly constituted Combined Regional Authorities (CRAs), and there should be a designed suite of powers and funding

⁴ Meeting Note with Peter Robbins, 21 October 2019;
<https://www.theguardian.com/society/2004/nov/05/regionalgovernment.politics>

⁵ Meeting Note with Professor John Denham, 24 September 2019; Meeting Note with Professor Mike Kenny, 10 October 2019; Meeting Note with Professor Nick Pearce, 8 October 2019

⁶ Meeting Note with Billy Bragg, 14 May 2019

arrangements which could be drawn down by each CRA depending on population size, geography and regional demand. The model of powers devolved to these combined authorities should be variable according to such factors. Once local authorities have decided to opt to combine, there should be an automatic constitutional right for that CRA to draw down on a specific suite of powers.⁷

Certain issues will require to be explored in further detail including the criteria for setting up a CRA, how many local authorities can join one CRA, and how many CRAs there can be in total across England. However, these issues fall outside the scope of this work.

Powers which should be devolved to the CRAs include strengthened powers over: spatial and planning issues; transport; housing; health and social care integration; education including secondary schools; tax powers including perhaps a “tourist tax”⁸ and the ability to create new forms of local taxation such as a Land Value Tax to replace the Council Tax.⁹ Social security and its administration may also be an area which could be devolved to CRAs.¹⁰

If powers and resources are made available, there is evidence from discussions with Council leaders from across England that the vast majority of local authorities would be positive about taking on those powers and resources, and for them to be administered locally. However, Council leaders have made clear that if power is to be devolved to local authorities, there has to be resources directed to support this, as councils have been hollowed out during the austerity era.¹¹

In addition to the hard powers of the CRAs, there is evidence that the soft power of the CRA and/Mayor is very important. For example, homelessness in Manchester is the role of the district council, but Andy Burnham as Mayor took an interest in homelessness and brought various strands and different bodies together to work collaboratively to tackle this issue, using soft power to achieve this. Homelessness was raised as a local concern and highlighted by the Mayor’s office, and it helped to bring different groups together to help to alleviate the homelessness crisis in Greater Manchester.¹²

The delivery side of the CRAs will be very important and there must be a delivery unit for each CRA, and it has to make sure that devolution is making a difference so that people can see the tangible effects of it.¹³ There could be national outcomes and standardised measures set at Westminster level, but local councils could be enabled to handle the delivery services themselves with a reserved power for national government to intervene if necessary.

The combined authority in Greater Manchester is made up of 10 Council Leaders and the Mayor, so it is a different model from Greater London where the Mayor appoints deputy Mayors who are held accountable by the London Assembly. The combined authority in Manchester is held accountable by regular public meetings where there is a Mayor’s question time in each district in Greater Manchester. This was devised by the combined authority itself. There is also accountability of the combined authority via the council scrutiny committees. There are different decision-making methods used by the combined authority depending on the area of policy in question, including unanimity voting,

⁷ Meeting Note with Peter Robbins, 21 October 2019

⁸ The City of Edinburgh Council is planning to introduce a tourist tax in Edinburgh which is officially known as the Transient Visitor Levy (TVL) which will introduce a £2-per-night charge added to the price of any hotel room for the first week of a stay.

⁹ Meeting Note with Professor Nick Pearce, 8 October 2019

¹⁰ Meeting Note with Peter Robbins, 21 October 2019

¹¹ Meeting Note with English Council Leaders, 31 October 2019

¹² Meeting Note with Kevin Lee, 4 November 2019

¹³ Ibid.

simple majority voting and qualified majority voting. This could be a model to be adopted for CRAs across England.¹⁴

Although this model of CRAs may be suitable for metropolitan and urban areas in England comparable to Greater Manchester, for example, in respect of areas outside the major conurbations in England, for example in the shires, there may have to be different models available in contrast to the metropolitan areas like Manchester. Bundles of power packages should be created which could be made available to the combined authorities depending on the size, geography and local needs of the area in question.¹⁵

It is important to note that in Greater Manchester where there is an example of a successful combined authority in operation, the precursor to the Greater Manchester Combined Authority was the 10 local authorities in the Manchester area, which started working together in the 1980s during the premiership of Margaret Thatcher. In 2012, the Combined Authority for Manchester was created based on those already joint working structures, and a new Mayor role was created, which meant that only one new politician position was created.

Manchester therefore benefited from pre-existing local government structures, which made the transition to a combined authority model easier. It is important to note that this may mean it is more difficult and challenging to establish a form of combined authority in other parts of England, but not impossible.¹⁶ It is also important to consider how the CRAs will be represented at Westminster level and this will be discussed more fully below.

England and Westminster

An English Parliament?

The second of the two English questions, namely, how can England as a nation be governed more effectively at Westminster to give expression to English national identity, is equally important to the question of how regional autonomy can be achieved for the English regions.

There have been suggestions that England should have its own national parliament equivalent to the Scottish Parliament, Welsh Senedd and Northern Ireland Assembly to give expression to England's nationhood. However, the problem with an English Parliament is that it would prove too significant a distraction from and rival to Westminster, and would imbalance and destabilise the UK further due to the size and importance of England.¹⁷

The idea of the creation of an English Parliament has also suffered from a lack of public support. Support for an English Parliament peaked at 29% in 2009, but had fallen back to 19% by 2015, when it was overtaken by support for regional assemblies (22%).¹⁸ It is suggested that the creation of English Parliament should not be a policy preference, but rather English representation at Westminster should be achieved by alternative means.

¹⁴ Ibid.

¹⁵ Meeting Note with Peter Robbins, 21 October 2019

¹⁶ Meeting Note with Kevin Lee, 4 November 2019

¹⁷ Meeting Note with Professor Mike Kenny, 10 October 2019

¹⁸ Options for English Parliament, Meg Russell and Jack Sheldon, <https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/179-options-for-an-english-parliament.pdf>, pp. 26

Senators for the English Regions

One of the main ways in which CRAs of the English regions could be represented at Westminster could be through ensuring the representation of the CRAs in the Senate of the Nations and Regions. The Senate is discussed more fully in Chapter 9, but insofar as it pertains to England, English local government could be represented in the Senate while also representing the devolved institutions in Scotland, Wales and Northern Ireland.

Each CRA in England could return Senators to represent that English region in the Senate of the Nations and Regions. Each political party represented in the CRA could nominate candidates for election as Senator, and the number of nominations allowed for each party would be determined by the number of councillors that party had in the local authorities making up the CRA. Each local authority making up the CRA would then vote using a proportional system of election such as the Single Transferable Vote to elect Senators for that CRA.¹⁹

Local authorities that have decided not to combine into a CRA would essentially be excluded both from the local regional autonomy that the CRA offers and from the election of Senators to the Senate of the Nations and Regions. While this may be unfortunate, it is suggested that this is a compromised position from the policy discussed above of coercing local authorities to join regional bodies and imposing regional boundaries across England.

Minister for England

A new position could be created in the Cabinet as Minister for England, equivalent to the Secretaries of State for Scotland, Wales and Northern Ireland. It is suggested that the role of the Minister for England would be to provide a direct linkage between the Cabinet in Westminster and the CRAs across England. The function of Minister would be to represent the interests of the English regions in the British Cabinet and also the Minister for England would also participate in the Council of the Union which is discussed more fully below.

UK Government as the Government for England

Rather than setting up a brand-new executive for England, it is suggested that the UK Government should continue to be the government for England as well as for the UK as a whole. However, there should be special rules for where ministers are acting in an England-only capacity, and other rules where they are acting in a UK-wide capacity, and there must be a much clearer separation.²⁰

For example, where the Secretary of State for Health and Social Care is making a statement to Parliament on the NHS, it must be made clear that the issue is an England-only issue and what it said and debated only applies to England, and not to the rest of the UK. Furthermore, when speaking to the media or making public speeches, again it should be made clear that the Secretary of State is acting in an England-only capacity.

¹⁹ Meeting Note with English Council Leaders, 31 October 2019

²⁰ Meeting Note with Professor John Denham, 24 September 2019; Meeting Note with Professor Nick Pearce, 8 October 2019

UK Parliament as the Parliament for England

As discussed above, it is suggested that an English Parliament should not be established. Rather the UK Parliament should continue to be the Parliament for the whole of the UK as well as for England. However, English Votes for English Laws (“EVEL”) should be made part of the constitution and it should be reformed and extended significantly.²¹

Currently, for the scrutiny of a particular piece of legislation to be affected by the EVEL procedures, it must be ‘certified’ by the Commons Speaker as relating exclusively to a relevant part of the UK. Legislation can only be certified as relating exclusively to one of the following three territories:

- England;
- England and Wales; or
- England, Wales and Northern Ireland (but this applies only on Finance Bills, which implement the budget).

Both primary legislation (i.e. bills, which if approved become Acts of Parliament) and secondary legislation can be certified. The Commons Speaker is required to consider for certification most government-sponsored bills that are before the House of Commons, as well as some secondary legislation. The procedures do not apply to private members’ bills.

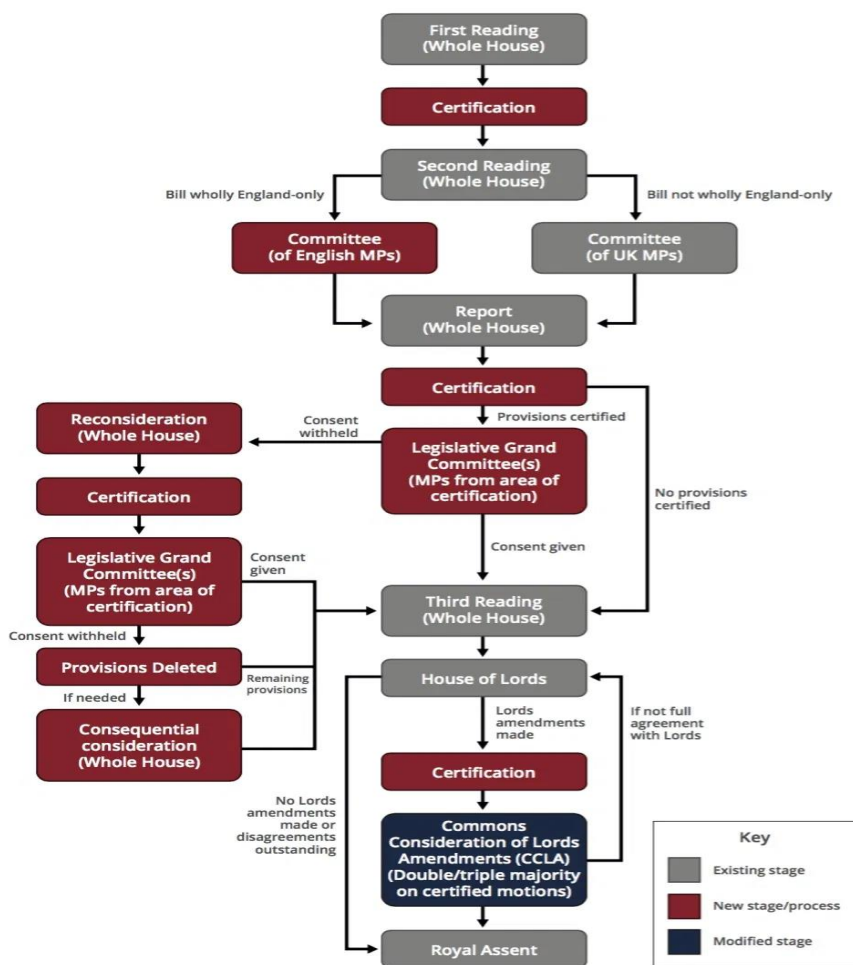
On primary legislation, the bill is broken down into its clauses, and each of these is considered separately for certification. On secondary legislation, only the instrument in its entirety can be considered. To be certified, the relevant piece of legislation (e.g. the clause, or the whole bill, or the statutory instrument) must in its entirety meet both parts of a two-part test. These are:

- first, it applies exclusively to the relevant part of the UK (excluding minor or consequential effects); and
- second, that it would be within the power of at least one devolved legislature in a different part of the UK to make comparable provision.

So, for example, for a clause to be certified as relating exclusively to England and Wales, the Speaker must be satisfied that the entire clause applies only in England and Wales, and that the Scottish Parliament and/or the Northern Ireland Assembly would have the power to make equivalent legislation. If the Speaker concludes that both parts of the two-part test are met, he or she will issue a certificate confirming this.

Once the Speaker has issued a certificate for any bill (which may relate only to particular clauses), its passage through the House of Commons is then slightly different from usual. The EVEL procedures do not in any way alter the passage of legislation through the House of Lords.

²¹ Meeting Note with Professor John Denham, 24 September 2019; Meeting Note with Professor Nick Pearce, 8 October 2019



As shown, once a bill has been introduced, the Speaker conducts his or her initial certification. The bill then passes through most of its stages in its usual way (with the potential exception of committee stage, described below). This means that MPs from across the UK are entitled to speak and to vote – including to amend and vote against the bill if they wish.

At the conclusion of report stage (the final stage during a bill’s initial Commons passage at which it may be amended), the Speaker must re-examine the bill and certify any provisions that meet the two-part test. If at this point the bill includes any provision certified by the Speaker, this triggers the need for new ‘legislative grand committee’ stages, which are the mechanism through which English (and/or English and Welsh) MPs may veto those provisions.

The legislative grand committees consider ‘consent motions’ (which are roughly analogous to the consent motions considered by the devolved legislatures). If the legislative grand committee(s) approve(s) its consent, the bill passes to the third reading as usual. But if consent is withheld, this triggers a series of new stages to resolve any disagreement. If consent is withheld a second time, the English (or English and Welsh) veto is automatically applied, and the affected provisions are deleted from the bill. Any surviving provisions of the bill then pass to third reading stage, at which MPs from the whole UK may vote on whether or not to approve the bill in its final form.

After third reading, the bill may pass to the House of Lords. If the Lords amends the bill, its amendments must be approved by the Commons (known as ‘Commons consideration of Lords amendments’ stage). The Speaker must examine all motions relating to Lords amendments at each

CCLA stage, and certify any that meet the two-part test. If any such motion is put to a 'division' (i.e. vote), a 'double majority' is required. This means that, in any division, a majority of both UK MPs and those representing constituencies in England (or England and Wales) must vote in support of a proposal for it to be approved.

If every clause and schedule of a bill is certified by the Speaker as relating exclusively to England, its Commons committee stage will be taken by a committee composed only of MPs representing constituencies in England and reflecting the party balance in that part of the UK. No comparable provision is made for England and Wales-only bills. This aspect of the EVEL system does not constitute a veto right for English MPs, because any changes made by this committee may in principle be overridden by UK-wide MPs at the subsequent report stage.

It is suggested that EVEL suffers from a number of problems, not least that the process is excessively complex and protracted. It is also a weak way in which to give special recognition to England in the UK Parliament. Without having a parliament of its own, it is suggested that the EVEL rules have to be overhauled in order to ensure that the English voice is heard in the UK Parliament.²²

It is suggested, therefore, that rather than only offering English MPs a form of veto, once a bill or clause has been certified as England-only; or England and Wales-only; or England, Wales and Northern Ireland-only, that legislation should follow a completely different legislative process through the UK Parliament. Rather than going through First Reading, Second Reading and Third Reading in the House, the legislation should go straight to a Grand Committee of MPs made up from the relevant territories to consider the legislation.

After First Reading and Second Reading in the Grand Committee, the legislation should then pass to a Committee made up of MPs from the relevant territories and then report back to the Grand Committee for a Third Reading. If the bill then passes the Third Reading in the Grand Committee, the legislation should then pass to the Senate of the Nations and Regions, where similar voting rules should apply in respect of legislation that only applies to England, England and Wales, or England Wales and Northern Ireland.

In the Senate of the Nations and Regions, legislation which only applies to England, or England and Wales, or England, Wales and Northern Ireland, should be considered only by Senators from the relevant territories in a Senate Grand Committee. Following First Reading and Second Reading in the Senate Grand Committee, the legislation should be considered in a Senate Committee made up of Senators only from the relevant territories.

It is suggested that, without a radical change in the rules to ensure England is given a strong distinct voice at Westminster, the present arrangements could further destabilise the UK. Without England having its own parliament, stricter rules must be applied in the House of Commons and the new Senate of the Nations and Regions to ensure that England's voice is heard, and England as a nation is accommodated at Westminster.

²² Meeting Note with Professor Mike Kenny, 10 October 2019

The Council of the Union

In addition to the creation of a new Senate of the Nations and Regions in the UK Parliament, which will provide a form of interparliamentary machinery at the heart of Westminster, a new intergovernmental body should also be established to replace the current Joint Ministerial Committee, which was discussed in Chapter 4.

There must be an intergovernmental body at the heart of Westminster, which is not merely consultative, but is also based on co-decision and could use different voting methods depending on the issues at stake. It may also be possible to employ dispute resolution methods, such as adjudication and arbitration, to resolve disagreements at an executive level. The idea would be of a UK Council of Ministers which could make decisions on issues such as the UK internal market, common frameworks, the repatriation of powers from the EU, and potentially future trade deals with other states.²³

The Council would be composed of the heads of governments of all parts of the UK including the Prime Minister, the First Minister of Scotland, the First Minister of Wales, the First Minister and Deputy First Minister of Northern Ireland, and the Minister for England. Both the First Minister and Deputy First Minister of Northern Ireland would be required to join the Council because both hold equal status under the Good Friday Agreement, and both communities are required to be represented given Northern Ireland's special circumstances.

The Council would be required to meet frequently throughout the year and would be charged with a number of tasks. Firstly, the Council would act as an intergovernmental conference for the heads of government of each part of the UK, similar to the First Ministers' Conference in Canada.²⁴ As a forum, the Council would discuss the strategic objectives of the UK as a whole; discuss points of disagreement between the UK Government, Scottish Government, Welsh Government and Northern Ireland Executive; and consider issues such as amendments to the constitution.

Secondly, the Council should be given a co-decision function where on certain issues the Council could make decisions such as in relation to the regulation of the UK internal market; common frameworks on issues such as environmental standards; foreign affairs; and war. Depending on the issue at stake, there may be simple majority voting, qualified majority voting, or unanimity voting – similar to the Council of the EU.

It could also be possible for the Council of the Union to meet in a plenary form, or to facilitate bilateral or trilateral meetings between the governments of different parts of the UK, such as a meeting between the First Minister of Scotland and First Minister of Wales, where there is an issue which only affects Scotland and Wales at stake.

²³ Meeting Note with Professor Mike Kenny, 10 October 2019; Meeting Note with Professor John Denham, 24 September 2019; Meeting Note with English Council Leaders, 31 October 2019; Meeting Note with Mark Drakeford MS, 31 July 2019

²⁴ Meeting Note with Emmet Milne, 1 October 2019

Key Findings and Recommendations

- 1. There are two questions regarding the governance of England which require to be answered. Firstly, how can regional autonomy in respect of the English regions be achieved to ensure better governance for England, and to decentralise power away from Westminster while representing the English regions at Westminster? Secondly, how can England as a nation be governed more effectively at Westminster to give expression to English national identity?**
- 2. Local authorities in the English regions can be empowered to voluntarily combine into Combined Regional Authorities with significant powers and resources. The CRAs can also return Senators to the Senate of the Nations and Regions.**
- 3. There should not be an English Parliament, but instead there should be an overhaul of English Votes for English Laws in the UK Parliament, and a clear delineation when the UK Government is acting only in respect of England and in respect of the whole UK.**
- 4. A new Council of the Union should be established which will be the intergovernmental body of the UK for consultation and co-decision bringing together the Prime Minister and all of the First Ministers of the devolved administrations, as well as the newly created Minister for England.**

Chapter 6

The Concept of Federalism

Introduction

In Chapter 7, an attempt is made to imagine what a federal constitution for the UK might look like to replace the current constitutional settlement. In Chapter 8, the content of a codified federal constitution for the UK is explored, and in Chapter 9, the primary federal institution for the UK, the Senate of the Nations and Regions, is studied in detail. However, before attempting this, it is important to understand exactly what is meant by the term “federalism”.

Below in Chapter 6, federalism as a political concept is explored in detail in historical and economic context. In addition, what a federal constitution means for fiscal arrangements within the state, macroeconomic policy, intergovernmental relations and the law of judicial review is also studied. This chapter examines federalism in the abstract while the following chapters attempt to extrapolate the abstract and apply it to the UK.

The Political Idea of Federalism

The Foundations of the Federal System of Government

Federalism is a constitutionally established system of government which has at least two orders of government with varying degrees of autonomy from one another, and which are usually directly accountable to their electorates.¹

The essence of federalism is a constitution which has at least these two distinct orders of government within the same overarching system of government, one of which is usually known as the federal government and the other constituent-unit government. It is also possible, however, for there to be additional orders of government within the same federal system, including municipal and local government, as seen in some federal states including Brazil, India, Nigeria and South Africa.²

Another principal characteristic of federations includes a formal constitutional distribution of legislative and executive authority, as well as an allocation of revenue resources between the two orders of government while maintaining a level of autonomy from each other.

In addition, provision is typically made within the federal constitution for the representation of distinct regional or state level views within the federal policy-making and law-making institutions, usually taking the form of a federal second chamber in the federal legislature.

A federal state is only federal when it meets the requirements of having a supreme codified and legally entrenched constitution, which is not unilaterally amendable by the federal government, or by any

¹ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 1

² Ibid.

constituent part of the federal state, alongside amendments usually requiring supermajorities and support from the constituent units.

Related to this foundational constitutional document is the need to have a guardian of the constitution, which usually takes the form of the courts, but may also employ the use of referenda or special powers reserved to the federal second chamber.³

There are currently, among the 193 sovereign states recognised by the United Nations, 25 functioning federations or constitutions which claim to be federal in nature, comprising around 2 billion people, or 40% of the world population.⁴ Federal systems of government are typically used in single countries with large territories and large populations, such as the United States, Canada and Australia or in countries which may have ethnically or religiously diverse populations such as Bosnia and Herzegovina or Switzerland.⁵

Academics have identified certain principles that underpin the federal constitutional model. Firstly, there must be mutual respect of authoritative decision-making at each level of government within the federal state. This mutual respect may take the form of guarantees contained within the codified constitution, which allocates powers and responsibilities clearly between the federal and other levels of government, or may also take the form of intergovernmental agreements setting out the powers and responsibilities of each level of government within each policy field.

Secondly, within the federal constitution there must be significant areas of autonomous decision-making and administration at each level of government.

Thirdly, the federal constitution should seek to match legislative responsibility with fiscal capability. It is critical that the constitution does not confer significant levels of legislative responsibility without providing the fiscal powers to deal adequately with these responsibilities. It is therefore important that constituent units of the federal state are given appropriate fiscal levers concomitant to the legislative responsibility they have under the constitution, including tax raising and borrowing powers.

Lastly, the federal constitution should make provision for adequate intergovernmental relations in order to maintain a balanced federal system. Intergovernmental relations facilitate the coordination of federal and state policies but can also help to facilitate state-to-state cooperation and coordination without the involvement of the federal government.⁶

Federalism in the Modern World

The traditional concept of the nation-state is often said to have its origins in the Peace of Westphalia 1648, as well as giving birth to the ideas of national sovereignty and the territorial integrity of nation states under international law.⁷ Following the Thirty Years' War between 1618 and 1648, a series of

³ Watts, L. Ronald, *Comparing Federal Systems*, Third Edition, Institution of Intergovernmental Relations, 2008, pp. 9

⁴ *Ibid.*, pp. 5

⁵ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 1

⁶ *Federalism and the Role of States: Comparisons and Recommendations*, Third Report on the Inquiry into Overlap and Duplication 1999, Federal-State Relations Committee, Parliament of Victoria, pp. 185-186

⁷ In particular, Article 2 of the United Nations Charter states that all members of the UN shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

peace treaties were signed between warring European states establishing a new political order recognising the right of nation states to political independence and territorial integrity.

It is true that since the end of the Second World War, the number of independent states has nearly tripled. In the last thirty years, over thirty new states have become members of the United Nations, while separatist movements routinely receive strong support in regional and national elections.⁸ The most salient example of this near to home is of course Scotland which has had a devolved Scottish Government led by a party which advocates separation from the United Kingdom, and the eventual formation of an independent Scottish state. Such a government has dominated the Scottish Parliament since 2007 and held a referendum on Scottish independence in 2014.

There are examples all over the world of this trend being repeated, including successful and unsuccessful attempts at setting up small breakaway states. Such examples include Catalonia and the Basque Country in Spain, South Sudan (which has received its independence from Sudan), Quebec in Canada and Kurdistan. On one analysis, therefore, it would appear that the modern world is becoming more fractious in favour of the nation-state model and becoming more inward-looking and isolationist.

However, the paradox is that the correct analysis is quite the opposite. It is notable that the world appears to be moving away from a world dominated by discrete nation states along the 17th century model to a world of diminished national sovereignty and increased interstate connections of a constitutionally federal character⁹.

The most prominent example of such statal interconnectivity nearest to home is most obviously that of the European Union, which combines federal and confederal elements to form one of the largest global supranational organisations in the world, where nation states suspend national sovereignty in deference to the laws and precedents set by this international body. The world is increasingly moving towards blocs of nation states with strong cooperation on matters of trade, security and international affairs. In the case of Scotland, this is reflected in that although the Scottish Government led by the Scottish National Party supports Scottish independence from the UK, it supports full membership for Scotland in the EU.

There have been several drivers for the move away from constitutionally isolated nation states towards increased state interconnectivity and constitutional pooling of national sovereignty.

Firstly, modern developments in transportation, communications, technology and organisation have required nation states to cooperate and work more closely together. Common goals of improved living standards, cooperation on international trade and integration of markets has required ever-closer constitutional relationships. The increasingly globalised nature of the world economy and the global marketplace has meant that economic and political forces have driven nation states to become more closely aligned in constitutional formations in order to manage the complexities of the modern world.

Secondly, the growth and dominance of market-orientated economies, especially since the decline and eventual collapse of the Soviet Union in the last quarter of the 20th century, has also driven nation states to cooperate and pool national sovereignty in supranational organisations. The market-based economy demands that nation states break down barriers and work together to facilitate smooth and seamless free trade and business-friendly uniform regulation. Markets thrive on interjurisdictional

⁸ <https://www.e-ir.info/2015/11/09/whats-happening-to-the-number-and-size-of-nations/>

⁹ Watts, L. Ronald, *Comparing Federal Systems*, Third Edition, Institution of Intergovernmental Relations, 2008, pp. 4

mobility, and both on competition and cooperation, and work on the basis that peoples from different nations do not necessarily have to like each other to benefit economically from each other.¹⁰

Lastly, the federal constitutions of the classical federal states including the United States, Switzerland, Canada, Australia and Germany have proved extraordinarily resilient, long-lasting and successful in operating in the modern world. The United Nations has consistently ranked 8 of the world's federations in the top 21 of sovereign states in the world in terms of economic welfare, respect for rights and quality of life.¹¹ Therefore, federal states and federal constitutions remain a popular mode of government for many successful states around the world.

Federalism and Capitalism

In Europe, at least, there has been a suggestion that the forces of neoliberalism and globalisation, which were discussed more fully in Chapter 1, have been so powerful in driving forward the integration agenda that they have in fact become the constitutionalised ideologies of the UK and other Western democracies. It has been suggested that the rules of the World Trade Organisation in governing global trade, the Council of Europe in protecting the sacrosanctity of property rights, and the rules of the European Union in particular¹², have become so powerful that notions of national sovereignty and even democracy itself have become questionable.¹³

The modern founder of the ideas of neoliberalism, Friedrich A von Hayek, insisted that democracy should in fact be limited so as to constitutionalise the tenets of neoliberal thought and to prevent the rise of socialism and social democracy.¹⁴ To a significant extent, this has come to pass in the UK through international commitments such as the General Agreement on Tariffs and Trade ("GAAT"), the rules of the WTO, the EU single market and its rules on public procurement, state aid and free movement, and also Article 1 Protocol 1 to the European Convention on Human Rights protecting private property, to form a kind of interwoven federalised capitalist system of government.

Hayek himself noted the advantages of the constitutional idea of federalism in order to further the cause of neoliberalism in a 1939 essay entitled *The Economic Conditions of Interstate Federalism*. In it, he said:

"It is rightly regarded as one of the great advantages of the interstate federation that it would do away with the impediments as to the movement of men, goods, and capital between the states and that it would render possible the creation of common rules of law, a uniform monetary system, and common control of communications. The material benefits that would spring from the creation of so large an economic area can hardly be overestimated, and it appears to be taken for granted that economic union and political union would be combined as a matter of course."

Hayek goes on to make a positive case for a common foreign policy; common defence policy; the absence of tariffs on goods, services, capital and workers; a common monetary unit; a common central bank; and the common control of imports and exports.

At the foundation of the European Union are the four fundamental freedoms of the free movement of goods, services, capital and workers, and the EU constitutionalises a free single market across the

¹⁰ Watts, L. Ronald, *Comparing Federal Systems*, Third Edition, Institution of Intergovernmental Relations, pp. 6

¹¹ United Nations Development Programme, *Human Resources Report*, Oxford University Press, 2006

¹² Article 1, Protocol 1 to the European Convention on Human Rights

¹³ Nicol, Danny, *The Constitutional Protection of Capitalism*, Hart Publishing, 2010

¹⁴ *Ibid.*, pp. 159

whole of the 28 Member States. The EU also has a single currency in the form of the Euro with the European Central Bank as the central bank along with a customs union that exercises common control over imports and exports, and in more recent times has adopted a common foreign policy in the form of the Common Foreign and Security Policy.

It could be said therefore that the quasi-federal model of the European Union is living testament to the legacy of Hayek, as it attempts to deploy a certain version of constitutional federalism to facilitate and concretise the doctrines of neoliberalism and globalisation.

The fact of federalism being a facilitator of capitalism is not confined to Europe in the 20th century with the rise of the EU but has its roots much further back in time and in other parts of the world. Writing in the 18th century, the US Founding Father, Alexander Hamilton, recognised the twin revolutions happening at the same time of the rise of republican government around the world and the demise of agrarian and feudal economies, coupled with the economic rise of modern capitalism, with its globalizing networks of production, trade, and finance.

In the *Federalist Papers*, Hamilton endeavoured to create a plan for government-led economic development and the creation of a state that could facilitate, encourage, and guide the process of economic change. His writings greatly influenced the drafting of the US Constitution and helped to shape the US federal state and its institutions, and Hamilton's financial revolution brought secure government debt, fluid securities markets, and a modern banking system to the United States. He has thus been touted as the father of American capitalism, and it is notable a federal mode of government was used to achieve it.¹⁵

In developing a federal constitution for the UK, it is important, therefore, to be mindful of the fact that codified, legally entrenched, federal constitutions have historically been associated with Enlightenment ideas of republican government as well as promoting ideas of the free market, capitalism and property-owning democracies typified by the United States and in more recent times the quasi-federal EU.

There is no reason, however, to suggest that all federal constitutions must follow in this tradition and it is therefore imperative to explore in what ways the governance model of federalism can be combined with the progressive ideas of democratic socialism, equality, solidarity and the agency of all citizens. This will be the subject of the discussion in Chapters 7 and 8.

Division of Powers

Introduction

As discussed above, one of the defining elements of federal systems is the way in which it seeks to balance the unity of the federation for certain purposes, while concurrently aiming to accommodate strong autonomous regional government at the same time. Thus, a key part of the federal state is the division of powers between the central federal government and the regional constituent unit governments.

In federal systems with common law legal systems, there tends to be a less strict division of powers between the federal and constituent unit level of governments, and therefore an important role for

¹⁵ <https://fee.org/articles/alexander-hamilton-and-the-perils-of-state-capitalism/>

the courts through judicial review to uphold the division of powers under the federal constitution. In contrast, in civil law systems, there tends to be a stricter division of powers and a less important role for judicial review.

In addition, the division of powers can be affected by the system of government adopted in the federation. For example, presidential-congressional federal systems, such as that present in the United States, have a different division of powers compared with parliamentary systems such as Canada or Germany.¹⁶

It is also important to appreciate the difference between legislative powers and executive powers. In common law or Anglo-Saxon systems, each order of government in the federation tends to have executive powers assigned to them in the same fields as the legislative powers. In contrast, in civil law systems or Continental European systems, administrative and executive powers do not necessarily coincide with legislative powers. The latter arrangement allows the federal government to legislate for the whole federation in a uniform way, while allowing constituent unit governments to administer the policies according to regional needs and differences.

Models of Distribution of Powers

There are four principal models for distributing powers across the federal state:

1. ***Exclusive Legislative Competence*** – In virtually all federal systems, certain legislative powers will be exclusively reserved to the federal government, which means that constituent unit governments have no power in relation to such areas.
2. ***Concurrent Legislative Competence*** – Many powers in federal systems are concurrent in nature, which means that legislative competence between the federal government and the governments of the constituent units overlaps in relation to certain areas. Such a division of powers allows flexibility within the federal system, thus allowing the constituent units to pursue their own agendas in certain areas until it becomes of federal importance, at which point the federal government can intervene and introduce common measures across the federation.
3. ***Shared Legislative Competence*** – Certain legislative powers are shared between the federal government and the constituent level governments. This is different from concurrent legislative powers because it denotes powers that are held by the constituent unit governments and the federal government but are distinct. For example, if the federal government has an exclusive power to regulate energy projects in certain ways, while the constituent unit government also has an exclusive power to regulate such projects in other ways, and both orders of government have to consent to the project before it can go ahead.
4. ***Residual Legislative Competence*** – Residual legislative competence relates to legislative matters that are not specifically dealt with under the constitution but are residual and sit with one order of government as residual power. In some federations, this could include a significant number of powers if few powers are enumerated in the constitution. In other

¹⁶ Watts, L. Ronald, *Comparing Federal Systems*, Third Edition, Institution of Intergovernmental Relations, 2008, pp. 85

federations, residual legislative competence can be limited if the constitution is very specific in enumerating powers.

5. **Emergency Powers** – In some federal constitutions, the federal government is given special emergency powers which are capable of overriding the normal division of powers under the constitution for certain purposes, such as the maintenance of peace and order or, in certain circumstances, such as during wartime.

The allocation of powers varies in different federal states. However, in most federal systems, there are certain areas of policy and certain policies that are within the exclusive competence of the federal government. These include:

1. International relations;
2. Defence;
3. Economic strategy and monetary policy;
4. Customs and excise;
5. International trade and interstate trade;
6. Major tax powers;
7. Interstate and interregional transportation and infrastructure;
8. Pensions.

Furthermore, in most federal systems, there are certain powers and areas of competence that are reserved exclusively to the constituent unit governments. These include:

1. Primary, secondary and higher education;
2. Healthcare services;
3. Social welfare;
4. Industrial relations;
5. Law enforcement and security;
6. Local government.

Clearly there are exceptions to the rule of the above. However, this is the general trend in most federations. There are other areas, however, where there is wider variety in the allocation of powers, including agriculture, natural resources, the environment and energy.¹⁷

In most federal systems, the division of powers is in accordance with certain principles. The English jurist, A.V. Dicey stated: "Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several states."¹⁸

The activities of government whose costs and benefits can readily be contained within local boundaries should remain with the constituent units, while those activities whose costs and benefits may spill over into neighbouring states and regions should be transferred over to the constituent units.¹⁹

¹⁷ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 90

¹⁸ Dicey, A.V., *An Introduction of the Law of the Constitution*, 8th Edition, Macmillan, pp. 139

¹⁹ Hueglin O., Thomas; Fenna, Alan, *Comparative Federalism A Systematic Inquiry*, Second Edition, 2015, pp. 137

Fiscal Federalism

Introduction

The discussion above has focused on defining federalism as a political idea and system of government. However, in addition to the political and constitutional structures, federalism also tends to involve particular arrangements in relation to the raising, borrowing and spending of revenues within the federal system.

The focus here is not on the political institutions themselves, but rather on questions of who or which body has the authority to raise various kinds of taxes in the federation; does the allocation of tax raising powers affect the actual tax policies adopted by one part of the federation or another; does the authority to raise money match expenditure responsibilities; should rich parts of the federation be taxed more to provide revenues for poorer regions; and which governments should have what rights to borrow money?²⁰

Other questions have to be considered too, including do the constituent units of the federal state have adequate authority to raise their own revenues to meet their spending responsibilities, and if not, what arrangements should be put in place for them to share taxes with, or receive transfers from, the federal government? If such transfers are made, do these federal transfers include conditions, and if so, what do these imply for constituent-unit autonomy and policy coherence across the federation? Also, is spending by different constituent parts of the federation centralised or decentralised, and how might such arrangements affect relationships and policymaking with the federation?²¹

Other considerations include how the internal single market for the federation is to be managed, and how regulation of goods, services, labour and capital is to be done within the federation. If the various different units of the federal state are able to make regulation in relation to these matters, how can they be harmonised to ensure the integrity of the federation's internal market. The importance of this particular issue has been highlighted recently in relation to the Brexit process and especially the place of Northern Ireland in the UK.

Other matters which are required to be considered as part of the federal state are how decisions are made, are fiscal decisions made separately, jointly or cooperatively; are there major tensions or consensus around revenue raising and spending between the different parts of the federal state; and are there joint administrative and political arrangements for delivering programmes or raising revenues?

It is important to note, however, that while some of the basic fiscal and broader economic arrangements, such as tax raising powers and market regulation, are codified in the federal constitution, many important features of the fiscal and economic structures of the federation are not, in order to allow flexibility within the system. This flexibility means that such arrangements are often resolved through politics and political debate rather than through the operation of the federal constitution.²²

²⁰ Hueglin O., Thomas; Fenna, Alan, *Comparative Federalism A Systematic Inquiry*, Second Edition, 2015, pp. 2

²¹ *Ibid.* pp. 3

²² Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 5

In designing fiscal and broader economic arrangements for a federal state, there are evaluation criteria that ought to be used to judge the efficacy of fiscal arrangements, including:

1. **Economic efficiency** – systems should be designed to utilise scarce economic resources in a non-wasteful manner, and with maximum utility. However, pure efficiency may be distorted by, for example, some parts of the federation implementing policies to favour local suppliers such as in public procurement rules and the use of fiscal advantage to attract investment into one part of federation such as by decreasing corporation taxes.
2. **Equity** – systems should be designed in a fair way for all parts of the federation. Firstly, this means vertical equity between the central federal government and the constituent units, and secondly, there should be horizontal equity amongst the constituent units. Thirdly, the federal fiscal and economic arrangements should also be designed in such a way as to ensure equity between citizens across the federation, which may require a direct interventionist role for the central federal government.
3. **Adequacy** – the fiscal and economic arrangements of the federation ought to find a reasonable match between spending responsibilities and revenue raising powers.
4. **Predictability and stability** – the arrangements must ensure that each part of the federation enjoys predictable and stable economic functioning. For some parts of the federal state, which have limited access to a broad tax base or debt markets, this may require heavy dependence on the federal government for support, and this should be made available to them.
5. **Accountability** – the arrangements must have clear lines of accountability. Federal governments often raise revenue that they can then transfer to the constituent units. It should be clear to whom the constituent units are accountable for the spending of such funds, i.e. the federal government, the public in that part of the federation, or both?

Public Expenditure in Dualist Federalism v. Integrated Federalism

The constitutions of the majority of federal states usually focus on assigning legislative functions to different parts of the state and not public spending responsibilities. This is because normally expenditure decisions and the power to administer public spending programmes flow from legislation, and is therefore intrinsically linked with the legislative competence of the federal government and the constituent units.²³ The constituent units in federal systems normally have symmetric fiscal and spending powers, but in some cases there may be asymmetric devolution of powers to different constituent units.²⁴

Deciding the allocation of spending powers and the assigning of the responsibilities for public expenditure between the constituent units of the federal state and the federal government are very important considerations in the design of any federal system of government.

²³ There are exceptions to this, however, in federations such as Germany where the German constitution in some instances stipulates that the constituent unit governments administer certain areas of policy where there is concurrent legislative responsibility between the constituent unit and the federal government.

²⁴ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 84

On the one hand, arguments for devolving spending decisions to the constituent units of the federal state include the maximisation of public choice; accommodation of local needs and differences; greater accountability because sub-national units of government tend to be closer and more responsive to local populations; constituent units can act as laboratories for spending decisions and there can be cross-pollination between them; and greater devolution of spending power to the constituent units can guard against the concentration of power at the central federal government and abuses of that power.

On the other hand, in order to achieve greater equality and to maximise the welfare of every citizen of the federal state, it may be necessary to have a strong central federal government which is able to make spending decisions according to need across the whole of the federation. Given that federations tend to be large states in terms of population size and geography, and also tend to be diverse, ensuring there is a powerful central government at the centre of the federation is important.

An important distinction between federal models in this regard is between the dualist federal model and the integrated federal model. In the former, each order of government normally administers its own laws through its own civil service or agencies in their own areas of legislative competence, which also includes expenditure decisions within that legislative competence.

In integrated federal models, constituent units tend to have significant administrative or spending responsibilities and are charged with administering federal laws in specified areas but are constrained in decision-making and policy setting in relation to such areas. In contrast, in dualist federal systems, the constituent units do not have the responsibility of administering federal laws or programmes.

The dualist model tends to be common in some of the former British colonies which became federations, including the United States, Canada and Australia, as well as the federations in Latin America, which mean that in these federal states there are federal departments and agencies throughout the country which are charged with delivering and implementing federal programmes.

In the United States, example of such bodies include the Federal Bureau of Investigation charged with domestic intelligence and security services, the Federal Emergency Management Agency charged with coordinating responses to disasters, and the Environment Protection Agency charged with environmental protection. In such dualist models, there tends to be concurrent powers shared between the federal government and the constituent units where federal and constituent-unit bodies work side by side, such as in agriculture in Canada.²⁵

In contrast, the integrated model tends to be common in the European continental federal systems such as in Germany, Switzerland and, although not technically a federation, Spain. As discussed above, in such systems, the constituent units tend to administer programmes even in areas of concurrency between the federal government and the constituent unit governments – albeit the latter are significantly constrained in decision-making and policy setting. The federal government only tends to be directly involved in delivery and implementation in areas of federal competence.

There are arguments for and against both the integrated and dualist models of federalism. The integrated model, such as the federal model in Germany, allows for national policy frameworks and a level of uniformity across the federation, while allowing some level of flexibility for the constituent unit governments to deliver services or programmes according to local needs.

²⁵ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 12

A criticism of this model, however, is that frequently the federal laws that provide for such programmes are very prescriptive and leave very little by way of discretion to the constituent units in terms of delivery. In Germany, this is to some extent mitigated by the role of the Bundesrat as part of the federal system of government by representing the German Länder directly in the passing of federal legislation. This is discussed in further detail in Chapter 9.

In most federations there is a distinct division of legislative powers between each order of government, federal and constituent unit, meaning each order of government cannot in general legislate in relation to another order of government's area of competence. However, in relation to expenditure powers, in most federal systems there is a provision that allows for federal governments to retain a power to spend on any object even in areas in which it cannot legislate. Central governments frequently use this spending power to influence the government programmes of constituent units in areas beyond the legislative competence of the federal government.²⁶

Other than this direct federal spending power, federal governments tend to use spending powers in three principal ways. Firstly, to make general-purpose financial transfers to constituent unit governments, so as to increase their fiscal capacity to meet their responsibilities. Secondly, to make conditional programme transfers to the constituent unit governments requiring them to implement certain programmes in a defined way. Lastly, federal governments may use their spending power to create directly administered federal programmes in an area normally viewed as within the exclusive competence of the constituent units.

In relation to the specific division of spending powers between the federal government and the constituent units by policy area, certain areas of policy are almost always exclusively federal, such as defence and foreign affairs; some areas are almost always exclusively in the realm of the constituent unit such as education; and other areas can be concurrent between the federal government and the constituent unit such as infrastructure. Infrastructure, for example, may relate to local roads or could relate to motorways or national train lines and in the latter will have concurrent jurisdiction for the constituent unit and federal government.

Tax Regimes and Fiscal Arrangements in Federal Systems

Federal revenue regimes are comprised of three principal elements. Firstly, own-source revenue-raising for each order of government in the federal state; secondly, shared revenue-raising which is shared between the orders of government; and lastly, federal transfers which are made by the federal government between different constituent units of the federal state.

In relation to the first, own-source revenue-raising, this relates to revenues which are raised by each order of government, using its power under the federal constitution to impose taxes and charge fees within its jurisdiction. Such revenue-raising may be exclusive for one order of government to impose a tax on a particular source, or it can be concurrent, meaning that different orders of government can impose taxes on the same source.

In relation to the second element, shared revenue raising, this relates to taxes which are typically federally legislated for and collected, but then distributed among the constituent units of the federal state using a clear formula for such distribution.

²⁶ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 13

In relation to the final element, fiscal transfers, this will typically involve the federal government redistributing tax revenues across the federal state, which may also be based on a formula calculation or may take the form of unconditional transfers by the federal government to the constituent unit governments.

Decentralising tax powers to enable the constituent units of a federal state to raise revenues has the advantage of increasing direct political accountability responsive to local needs and preferences, but devolving too much by way of tax raising power to the constituent units brings risks, as this could hinder the economic efficiency of the federal state as a whole, create an overcomplicated administrative tax regime, while also potentially hampering the ability of the federal government to ensure a fair distribution of wealth across the federal state through transfers.

It is therefore important to strike a balance between having a strong central federal government to promote economic efficiency across the federal state, while promoting fairness and equity for all citizens regardless of where they live in the federation, at the same time ensuring there is local accountability for tax and spending in different parts of the federal state.

In assigning the individual revenue sources between the federal and constituent unit governments, it is important for the federal constitution to have regard to different factors including the regional politics at play, historical context in addition to other factors such as efficiency of the federal state as a whole, equity and fairness, and administrative simplicity for businesses and citizens.

It is also necessary to determine if certain sources are to be exclusive for one order of government within the federation or concurrent between the constituent units and the federal government to allow both orders of government to raise revenue from that source.

It is an important consideration when designing the federal tax regime that if significant tax powers are to be devolved to the constituent units, this could promote tax competition between constituent units and a lack of tax harmonisation both vertically between the constituent units and between the constituent units and the federal government.

In respect of the administration of the tax regimes, there are broadly three different models that can be used for tax administration in the federal state. Firstly, each government of the constituent units and the federal government collect their own taxes. In most federal states, at least some taxes are collected by each order of government. Secondly, the federal government may collect all taxes, including on behalf of the constituent unit governments as their agent. Thirdly, the constituent unit government collect all taxes including those imposed by the federal government as the agent of the federal government.

Taxes and Revenue Sources: Federal, Devolved or Local

In designing a federal tax regime, it is important to determine which specific taxes ought to be assigned to each order of government. In most federations, a few major revenue sources typically dominate government incomes, and normally the federal government will have access to all major revenue sources while the constituent units may be limited to less important sources, albeit there are exceptions to this general rule.²⁷

In most advanced federations, the following are the principal sources of income for the federal state:

²⁷ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 30

1. Personal income taxes;
2. Corporate taxes;
3. Sales, value-added and turnover taxes;
4. Social insurance contribution and payroll taxes;
5. Property taxes;
6. National resource revenues; and
7. Licences and user-charges, e.g. taxi licences or toll roads.

In respect of personal income taxes such as Income Tax in the UK, in advanced developed economies, these are very important sources of income, and in federations for the most part personal income taxes are levied and collected by the federal government. However, in some instances, they are wholly or partly devolved to constituent unit government or even local government. Where this is the case, it is important that the taxes operate within a framework of the federal government's tax regime.

Where there is a desire for the federal government to lead the way in achieving fairness and equity within the federal system, given the importance of personal income taxes to overall revenue, it may be important to ensure these taxes are centralised with the federal government, which will allow for the federal government to effect a redistribution of wealth across the federal state.

In relation to corporate taxes, such as corporation tax in the UK, these taxes are also a very important source of income for governments in advanced economies. There are strong arguments for ensuring that corporate taxes are centralised, levied and collected by the federal government in that corporate taxes on company profits tend to be closely related to personal income taxes, such as capital gains tax and other taxes on income. Moreover, given the administrative complexity of administering corporate taxes on company profits, it is important that there is tax harmonisation across the federal state in relation to corporate taxes to encourage economic efficiency.

In addition, if corporate taxes are devolved to lower orders of government, corporate taxes are particularly vulnerable to tax competition between constituent units of the federation, which can result in a race to the bottom where each constituent unit attempts to undercut the other units of the federal state, resulting in lower overall revenues for the federal state.

In respect of sales and value-added taxes, such as VAT in the UK, due to the way in which they are levied it is normally the case that the federal government should levy and collect such taxes. Value added taxes normally involve a tax on the consumption of a final product or service which is levied at each transaction in the chain of production, as businesses along the supply chain buy inputs and sell their outputs onward to other businesses, until the final product reaches the consumer. Each business collects the tax at its point of sale but is then credited for the tax it has already paid on its inputs. Thus, on any one transaction, the net new tax is only on the value added at that stage in the chain. Ultimately, it is the consumer who pays the last business the full amount of the value-added tax.

From the way the tax is levied, it is important there is compliance by all businesses along the chain, but there are problems if the value-added tax is significantly devolved, as it can become difficult to track the taxes being levied along the chain and can give rise to fraud problems in relation to value-added taxes, as is the case in the European Union which has quasi-federal arrangements but devolved VAT in the Member States.²⁸ It is therefore generally preferable for there to be a centralised VAT system in federal states.

²⁸ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 38

In relation to social insurance contributions such as National Insurance Contributions in the UK, these are normally deducted as a payroll tax and although they can be administered by both federal and constituent units of government in the federal state, although they are largely reserved to the federal government in most federations. Given they are normally used to fund federal programmes, it normally is sensible for them to be levied and collected by the federal government - such as national health insurance schemes for the purposes of administrative simplicity.²⁹

In respect of property taxes such as Stamp Duty Land Tax or Council Tax in the UK, these taxes are the most suitable types of tax for being devolved to the constituent unit order of government, or even to a local level, and in most federations these taxes are important sources of tax revenues for constituent unit and local governments. The nature of the source of property taxes makes them the most suitable tax to be devolved given that property is immobile, fixed and the yield from such sources are relatively stable.³⁰

In relation to natural resources revenues, such as Petroleum Revenue Tax in the UK, there is no real trend in federations as to what order of government such taxes should sit within the constitution. The main natural resources which are usually subject to such taxes include oil and natural gas reserves, coal, metallic minerals and in some federations, diamond.

Although natural resources are fixed and immobile like property, it is rational for taxes in relation to natural resources to be levied and collected by the federal level of government, because natural resources tend to span many different parts of the federation which can give rise to conflict between the constituent units of the federal state. Moreover, offshore resources are almost always federally owned and controlled given that they all lie outside the constituent units but rather within the territorial waters of the federal state.

In relation to licences and user charges, such as taxi licences or motorway tolls in the UK, some such licences are best placed to sit with the constituent unit or local governments in the constitution, as they usually relate to the provision of local services. However, some forms of charges are more suitably levied and collected by the federal government if, for example, it relates to a principal trunk road toll that cuts across different constituent units of the federation.

There are a number of other forms of taxation and revenue raising and, in particular, import and export levies, excise duties and environmental levies. Normally, these will be under the control of the federal government in order to preserve the integrity of the internal market of the federation. However, there may be other forms of tax which are more suitably levied and collected at a constituent unit or local level such as alcohol, tobacco and betting levies, taxes on hotel rooms and parking.

Revenue Sharing and Fiscal Transfers

A key critical characteristic of being part of a federal state is the benefits that come from being able to share and pool resources across the federation. Federal governments tend to raise more in revenue than it directly spends in federal programmes, which enables it to make fiscal transfers across the federation, while the federal government will share in revenues with constituent units.

²⁹ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 39

³⁰ *Ibid.*, pp. 41

Usually the legal basis for revenue sharing and fiscal transfers is found in the constitution of the federal state, but also can be found in federal laws and intergovernmental agreements between the federal government and the constituent units.

Tax sharing between the federal government and the constituent units and fiscal transfers from the federal government to the constituent units are the two principal ways in which constituent units receive revenues from federal governments. Tax sharing designates a part of federal taxes, or taxes for allocation, to the constituent units, while fiscal transfers are made from the federal government's general revenues.³¹

There are three approaches to both tax sharing and fiscal transfers. The first relates to the divide between the general-purpose versus programme-specific purposes. In respect of tax sharing, this is almost always done by federal governments in federations in order to provide general revenues to constituent units, and not for specific purposes. In respect of fiscal transfers, these are frequently made by federal governments also to provide general revenues to the constituent, but in some cases the federal government may make a transfer to a constituent unit for a specific purpose.

The second approach relates to the approach of using a set formula for the purposes of tax sharing and fiscal transfers on the one hand, and on the other hand the use of discretionary measures. Such formulas are normally legally entrenched in the constitution of the federal state. However, the federal government may also be given a power to make discretionary transfers outwith the normal transfer arrangements.

The third approach relates to the divide between capped and uncapped tax sharing and fiscal transfers. Tax sharing arrangements are normally left uncapped by the constitution and may rise and fall depending of the tax yield. By contrast, fiscal transfers are more likely to involve specific amounts, which are sometimes tied to need or a ceiling on the size of the transfers.

In relation to tax sharing, the constitution should make specific provision for how the tax revenues are to be shared, and there has to be a balance struck between the principle of derivation, which is that some or most of all revenues should stay in the constituent unit in which they are raised, and the principle of equity which seeks to promote fairness in the federal state. Different federations will have different approaches to striking this important balance, taking into account various factors, and it may also be relevant to consider the degree to which the federal state is imbalanced economically.

The sharing of taxes must take account of how the taxes are to be shared vertically between the federal government and the constituent units, as well as how they are to be shared horizontally between the constituent units. The formulas used to calculate this may be simple, such as based on population share only, or may be complex and involve taking into account various factors including derivation or origin of the taxes, population size and sparsity, territory, equality between constituent units, as well as other measures of fiscal capacity and need.

As an alternative way to increase the fiscal capacity of the constituent units of the federal state, the federal government may make direct fiscal transfers to the constituent units. Such transfers may have conditions imposed upon them or be made unconditionally by the federal government.

The fiscal transfers in question may be legal entitlements of the constituent units under the constitution, or they may be discretionary on the part of the federal government. In relation to the former, the governments of the constituent units may be able to take the federal government to court

³¹ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 52

in order to enforce them, while in the latter the federal government may be allowed the freedom to decide whether to grant the transfers.

In some instances, conditional fiscal transfers may be either cost-shared or contributory. In the former case, constituent unit governments may be required to match the funding being directed by the federal government, as a condition of the transfer being made while in the latter case, the federal government only makes a fiscal transfer contribution to the extent required to complete one part of a government programme.

Redistribution of Wealth in Federal States

Within federal states, the fiscal capacity and wealth of the constituent units can vary substantially between very deprived, economically depressed and fiscally constrained parts of a country, to very prosperous parts with vibrant and broad tax bases. In order to encourage a sense of solidarity and equality between citizens in different parts of the federation, it is important that there are mechanisms built into the constitution of the federal state that provides for redistribution to poorer regions. There are various arguments for such redistribution, some of which are philosophical and others purely pragmatic and economic in nature.

For a federal state to cultivate a sense of nationhood, civic cohesiveness, solidarity, equity, and belonging for its citizens, it is important that the federal state provides something to its citizens, which is integral to what it is to be part of the federation. It is therefore important that citizens of the federation, regardless of what part of the federation that they live in, enjoy the benefits of the federation and that there are not significant disparities in wealth between one part of the polity and the others.

There are also economic arguments for avoiding significant regional wealth inequality across the federal state. If there are significant regional disparities, this can result in an inefficient allocation of labour and reduced productivity in the overall federal economy, as the wealthier regions may create more attractive tax regimes, have better infrastructure and better public services.³²

Generally, there are three principal ways in which federal systems can seek to redistribute wealth amongst its constituent units:

Firstly, the federal government's direct spending on federal government programmes across the federation can have a distributive effect when most of the revenue to fund such programmes is raised from the wealthier parts of the federation, while spending on programmes tends to be equal or even targeted at the poorer regions of the federation, which has an equalisation effect.

Secondly, there can be tax sharing between the federal government the governments of the constituent units and fiscal transfers from the federal government to the constituent unit governments. Such transfers and tax sharing can be calculated according to population size but also other factors such as need, which will result in an equalising effect across the federal state.

Thirdly, the federal government can set up equalisation programmes which seek to increase the fiscal capacity of the poorer constituent units by taking into account relative need in those units, in order to

³² Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 61

bring the poorer regions up to a nationally defined standard, or potentially even to bring poorer regions up and richer regions down to a nationally defined standard.³³

In a federal state, municipal and local governments tend to be the responsibility of the constituent unit level of government, but in some cases can in fact be a constitutionally established and protected third order of government. In either case, the tax base of the local government tends to be very limited even where significant tax raising powers are devolved to the local government, and therefore local government requires significant transfers which is usually from the constituent unit government but can also be from the federal government directly.³⁴

In addition to tax sharing and fiscal transfers, the federal government can play an active role in regional development in the constituent units of the federal state, to ensure that regional disparities are equalised. These may be special programmes over and above the normal tax sharing and fiscal transfers between the federal government and the constituent units.

Macroeconomic Management in Federal Systems

Introduction

The unique nature of federal systems in dividing powers and responsibilities clearly between different orders of government can make economic management within such systems complex. The central federal government tends to lead and have the main responsibility in managing the overall economy of the federation, but the constituent units can have an important role to play in shaping the direction of the national economy.

Given the decentralised and bifurcated nature of government in federal systems, it has been argued that federal states can give rise to uncoordinated macroeconomic management. However, as discussed above, federal states tend to be very successful economically, and therefore it is questionable to what extent this criticism is warranted. Notwithstanding this, there are a number of weaknesses with federal systems in respect of economic management because of its division of powers, and responsibilities between the different orders of government.

Firstly, the central and constituent unit governments may pursue contradictory fiscal and economic policies, and the fact that the powers and responsibilities of the federal and constituent unit governments are constitutionally protected, means that the federal government may not be able to coordinate economic policy centrally. This is particularly a problem if one order of government is applying fiscal stimulus, while another order of government is trying to apply a fiscal brake on the economy.

Secondly, the governments of the constituent units could be locked into a structural incentive to make deals or behave in certain ways to procure more than their fair share of resources from the federal government, and this could in turn drive up public spending across the federal state.

Lastly, another potential weakness of federal systems is that if significant borrowing powers are devolved to the constituent unit governments, they tend to incur irresponsible levels of debt, because

³³ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 64

³⁴ *Ibid.* pp. 67

they tacitly rely on the federal government to bail them out, thus creating potential moral hazard. However, there are ways in which this risk can be managed.³⁵

Central banks and Monetary Policy

The central federal government is always responsible for monetary policy, but this does not necessarily mean that the federal government has the direct power to set such policy, as in some cases the central bank is independent of the central government.

It is important to note that in most federations, monetary policy can have a significant effect on the fiscal position of the constituent units, but that the governments of the constituent units have limited influence on the way in which monetary policy is formulated.

The reverse is also true; namely that the fiscal policies of the constituent unit governments can have an impact on monetary policy formulation, but the central bank does not have a direct say in the formulation of the fiscal policy of the constituent units.

Fiscal Policy Coordination

As discussed above, it is important to understand that in federal systems, fiscal policy is bifurcated between the different orders of government. It is important, therefore, to have a way in which fiscal policy is coordinated across the federal state both vertically between the federal government and the constituent units, as well as horizontally between the governments of the constituent units.

The principal objective of fiscal policy in market-based economies is to stabilise the economy during economic cycles by reducing net demand in the economy through a reduction in public borrowing and surpluses, also known as economic austerity. The federal government usually plays an important role in this regard, but fiscal managements across the federation also requires common fiscal frameworks and regular negotiation, consultation and dialogue between the federal government and the constituent units. However, fiscal policy in states with more interventionist governments not only are attempting to stabilise the economy but potentially also stimulate economic growth, create jobs and invest in the economy.

There are different ways in which an economy can be stabilised during periods of economic downturn. There are certain automatic economic stabilisers such as unemployment insurance and social assistance but there can also be direct fiscal stimulus directed by the federal government which can be equally or even more important.

In terms of joint working between the different orders of government, government budgets should be made well in advance and there should be a technical forum for coordination of budget plans between the different orders of government within the federal state.

Debt Management

Federal systems, like all democratic nation states, face the twin disciplines of capital market forces and voters in elections that punish or reward federations for its debt management. However, as

³⁵ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 69

alluded to above, there is an added complexity in federal systems because different orders of government may have the power to borrow from the financial markets.

Especially in federal systems in which the constituent unit governments rely heavily on federal tax sharing and fiscal transfer arrangements, there may be an assumption by the capital markets that the debt of the constituent unit governments is tacitly and impliedly underwritten by the federal government, and there is an effective guarantee that the constituent unit government will be bailed out by the federal government in the event of the former defaulting on its debt repayments. This can give rise to significant moral hazard within the federal system and encourage reckless borrowing by the constituent unit governments.

The federal government normally applies certain debt management controls in order to avoid such a situation arising. For example, the federal government may impose a cap on total debt, or debt servicing in relation to revenues for constituent unit governments. It may also permit borrowing to finance capital expenses rather than revenue, there could be a requirement to obtain federal government consent for certain types of borrowing, or there may be a requirement for borrowing to be done via the federal government rather than directly with the capital markets.

Regulation of the Internal Market

A key part of any federal system is the management of the internal market within the federation and between the constituent units, to ensure barriers to the free movement of goods, services, labour and capital are either limited or completely eliminated. It is generally thought that open and free markets promote economic growth and the efficient use of resources.³⁶

However, in some federations, the governments of constituent units can often try to promote local interests and give themselves a competitive advantage within the federation, particularly where the constituent units have significant powers in relation to economic matters or tax.

Internal barriers can be limited in three main ways in federations. Firstly, provisions can be included in the constitution that set down principles relating to the internal market of the federal state, which permit trade barriers within the federation to be challenged in the courts.

Secondly, the constitution of the federal state can empower the federal government to pass laws that constrain or override constituent unit laws in areas of policy relevant to the internal market of the federation. In this context, the laws of the federal government will take precedence over the laws of the constituent unit.

Thirdly, there can be intergovernmental working between the federal government and the constituent unit governments to work towards reducing trade barriers within the federation.

Fiscal Federalism and the Institutions of the Federal State

Given the complex nature of fiscal and economic management arrangements in federal systems, it is necessary for the federal state to have institutions that are capable of providing forums for consultation, negotiation and agreement on fiscal and economic management issues. The major

³⁶ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 76

political institutions at federal level shape relations and the dynamic of fiscal management in a federation.

Most federal systems follow either the parliamentary Westminster style system or a presidential-congressional style system, and this can significantly affect the way in which fiscal and economic matters are managed at federal level, as well as between the federal government and the constituent units.

In parliamentary systems, the federal government usually requires the support of the lower house of the federal parliament to pass its main programmes, including its budget. Budgets in parliamentary systems are a matter of the confidence of the lower house, and so there are usually very strict limits on the extent to which they can be altered, whereas in presidential systems, the federal legislature can revise the budget without causing the government to resign.³⁷

Moreover, in parliamentary systems, budget deal-making is largely done prior to the budget being proposed, and this process is driven by the Finance Minister or Cabinet at federal level, and not by the federal parliament, although the parliament must approve the budget once presented by the Finance Minister. As such, there is normally extensive consultation with the constituent unit governments. Meanwhile in presidential systems, the executive may have to negotiate extensively with the legislature in order to get budgets passed.³⁸

These institutional differences can have a significant impact on the way in which fiscal and economic management matters are managed within the federal state. In presidential systems, the constituent units tend to attempt to influence the federal legislature, whereas in parliamentary systems the constituent units tend to focus their efforts on trying to influence the federal government directly.

It is important in this regard to recognise that the federal state has strong intergovernmental machinery to resolve these fiscal and economic management matters, so to provide forums for both vertical joint working between the federal government and the constituent, as well as horizontally between the constituent units themselves. The courts may also be involved in settling disputes between the federal government and the constituent units in relation to fiscal and economic management matters.

There may also be a role in this regard for the upper house in the federal parliament, although the role of the upper house varies considerably between federal systems. In federal systems, the upper house will normally have equal representation of all the constituent units of the federation, and in this way, they tend to have a bias towards the smaller constituent units of the federation.³⁹ In presidential-congressional systems, the upper house normally will have a strong role to play in relation to fiscal and economic arrangements matters whereas in parliamentary systems their role might be weaker.⁴⁰ The role of federal second chambers will be discussed in further detail in Chapter 9.

³⁷ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 80

³⁸ For example, under the separation of powers created by the United States Constitution, the appropriation and control of government funds for the United States is the sole responsibility of the United States Congress. Congress begins this process through proposing an appropriation bill aimed at determining the levels of spending for each federal department and government program. The finalised version of the bill is then voted upon by both the House of Representatives and the Senate. After it passes both chambers, it proceeds to the President of the United States to sign the bill into law. If the bill is not passed, the US Federal Government can be shutdown.

³⁹ Anderson, George, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, 2010, pp. 81

⁴⁰ However, a significant exception to this is in the German system where the German Bundesrat, which represents the Länder, which has a significant role to play in both legislative and budgetary matters.

Intergovernmental Relations

The main functions of intergovernmental institutions are, firstly, to provide a forum for dispute, resolution and, secondly, to provide a forum for consultation, cooperation and coordination to adapt to changing circumstances. There are two principal forms of intergovernmental relations important to all federal systems. Firstly, there should be vertical intergovernmental relations between the federal government and the constituent units and, secondly, there should be horizontal intergovernmental relation between the constituent units themselves.

To foster intergovernmental relations, some powers under the constitution may be made concurrent between the federal government and the constituent units. Also, formal intergovernmental institutions may be established, as well as the development of formal intergovernmental agreements and concordats for joint working between the federal government and constituent units, and between the constituent units.⁴¹

When developing intergovernmental relations, it is important to consider the subject matter of the joint working between the constituent units and the federal government, and whether it is seeking cooperation in policy making or cooperation in policy administration. When it is cooperation on administration, this tends to be done by civil servants and like-minded policy experts, whereas when it is cooperation on policy making, this can result in complicating factors such as ideological differences, regional diversity, and questions over the source of funding for government programmes.⁴²

It is also important to consider whether the intergovernmental relations are in the form of consultation or in the form of executive joint decision-making. There should always be regular consultation across the federal state between the federal government and the constituent units, as well as between the constituent units themselves. However, in certain circumstances, there may be a need for joint decision-making in certain areas of policy by a specially constituted intergovernmental institution.

Judicial Review

Federal systems of government require a constitutional framework that goes beyond the normal processes of government and law making because it is required to demarcate the different roles of each order of government. As a result, the interpretation and upholding of that constitutional framework is critical to the success of the federal state. Although intergovernmental bodies and processes can be built into the federal system, the ultimate arbiter on constitutional questions must be judicial in the form of the courts.

This inevitably gives the judiciary significant constitutional power, but in order to find a neutral, balanced and final way in which to ensure the effective operation of the constitutional framework of the federal state. The power of judicial review and interpretation of the constitution acts in this way as a constitutional safeguard of the federal system.

⁴¹ Watts, L. Ronald, *Comparing Federal Systems*, Third Edition, Institution of Intergovernmental Relations, 2008, pp. 117

⁴² Hueglin O., Thomas; Fenna, Alan, *Comparative Federalism A Systematic Inquiry*, Second Edition, 2015, pp. 240

There are a number of different approaches adopted by constitutional courts around the world in interpretation of the constitution. Firstly, the original intent method seeks to attempt to understand the meaning of the constitution that was likely to have been the intention of the original drafters of the constitution. This method poses certain problems, as it may be impossible to determine the original intent of the framers, disagreements over the nature of the intent, no way of proving the original intent, and also limiting the constitution to an anachronistic meaning from history.

Secondly, the approach taken by the courts may be literalist, which means the constitution should be understood as meaning what the words in the document literally mean. There may also be problems with this approach, as it could result in absurd outcomes and also may lack legitimacy if the outcome was not what the framers intended.

Thirdly, the courts may adopt a progressive approach to interpretation of the constitution, meaning that the courts will look outside the literal words of the constitution to interpret its meaning. However, rather than retrospectively looking backwards to what the framers may have originally intended, the courts will assess what the constitution should mean given current needs and in the present context. This means that the constitution is effectively a “living tree”⁴³, or a “living instrument”⁴⁴ which develops and adapts over time.⁴⁵

Overview of Federal Systems

Canada

Canada is one of the largest federations in the world, second only to Russia in terms of territorial size, and became a federal state in 1867. Originally, the federation was a union of four provinces; Canada has now grown to comprise ten provinces and three northern territories, with a population of over 30 million people.⁴⁶

The Canadian Constitution is designed to balance the interests of all of the main historical and cultural regions of Canada within which the provinces are contained. Those historical regions are as follows:

- 1) Maritime (comprising Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland and Labrador);
- 2) Quebec;
- 3) Ontario;
- 4) Prairies (comprising Manitoba, Saskatchewan, and Alberta);
- 5) British Columbia;

⁴³ The “living tree” metaphor was originally used by Lord Sankey of the JPC in *Edwards v. Attorney General of Canada* (1930) AC 124

⁴⁴ In reference to the European Convention on Human Rights, see Pieter Van Dijk, G. J. H. Van (Godefridus J. H.) Hoof, G. J. H. Van Hoof, A. W. Heringa, *Theory & Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998), pp. 77

⁴⁵ Hueglin O., Thomas; Fenna, Alan, *Comparative Federalism A Systematic Inquiry*, Second Edition, 2015, pp. 314-315

⁴⁶ Watts, L. Ronald, *Comparing Federal Systems*, Third Edition, 2008, pp. 32

6) Northern Territories.⁴⁷

One of the most distinguishing features of the federal state in Canada is that one of the provinces, namely Quebec, has a strong French-Canadian majority, and almost 80% of Canada's French-Canadian population lives in the city of Quebec, where they make up over 80% of the Quebecois population. Arguably two of the defining features of the Canadian federation are this French-English duality and the strong regionalism expressed through the provinces. Given the strength of that regionalism, the Canadian federal state is relatively decentralised both legislatively and administratively.⁴⁸

The Canadian Constitution specifically lists three forms of legislative powers: exclusively federal, exclusively provincial, and concurrent, with some major residual powers reserved to the federal government. This is in contrast to the American and Australian constitutions, which enumerate a specific list of powers for the federal government and leaves the rest of the powers to the states.⁴⁹

Unlike other federations such as the United States or Switzerland, which tend to emphasise the importance of a strict separation of powers between the legislature and the executive, the Canadian federation was the first federation in the world to incorporate a parliamentary executive responsible to its parliament, in which the executive and legislature are fused. This is a model that was subsequently adopted by other federations including Australia.⁵⁰

Commonwealth of Australia

The federal state of Australia consists of six states of which the two most populous, New South Wales and Victoria, comprise 59% of the federal population; one capital territory, Canberra; the Northern Territory; and seven administered territories, and has a total population of over 25 million people. Unlike Canada, which has a significant French-speaking population, Australia has a relatively homogenous English-speaking population, although the country still has a significant indigenous population.

Although Australia followed the Canadian model in the sense of having a parliamentary executive in the federal parliament, Australia rejected the Canadian model of reserving most powers to the federal government and enumerating the powers of the states and the federal government. Instead, Australia followed the American model of federalism in enumerating the powers of the federal government and leaving the residual powers to the states.⁵¹

Australia also adopted a powerful elected Senate at federal level, with equal representation of the states. It important to note, however, that as a result of the adoption of the parliamentary system in Australia, the Senate has become dominated by party politics rather than representing the regionalism of Australia.

United States of America

The United States of America was the first modern federal republic adopted as the organising principle of its government after the Philadelphia Convention in 1787 and ratified in the US Constitution in

⁴⁷ Meeting Note with Emmet Milne, 1 October 2019

⁴⁸ Watts, L. Ronald, *Comparing Federal Systems*, Third Edition, 2008, pp. 32

⁴⁹ Meeting Note with Emmet Milne, 1 October 2019

⁵⁰ Watts, L. Ronald, *Comparing Federal Systems*, Third Edition, 2008, pp. 33

⁵¹ *Ibid.*

1788, consequently coming into effect in 1789. Although the US is relatively ethnically diverse, the population is relatively homogenous in the sense that none of the ethnic minorities constitute a majority in any of the states, unlike in Canada where Quebec has a significant French-speaking majority.

The federation is relatively decentralised and the jurisdiction of the 50 states is symmetrical. An important feature of the division of powers is that the constitution enumerates a list of powers that are under federal authority either on an exclusive or concurrent basis with the states and then leaves the rest of the powers to the states.

Under the US Constitution, there is a strict separation of powers between the legislature and the executive, unlike in the parliamentary systems of Australia, Canada and Germany, and the federal state involves a system of checks and balances on constitutional power. The legislature, Congress, also includes a Senate in which the states are represented equally with members being elected directly.

Federal Republic of Germany

Following the end of the Second World War and the Allied Occupation of Germany in 1949, Germany was divided between East Germany and West Germany. At this time, West Germany became the Federal Republic of Germany, comprising 11 'Länder', and in 1990 the reunification of Germany allowed for 5 new Länder from East Germany to accede to the federation. The federation now consists of 16 Länder with a total population of over 80 million people.⁵²

The German federation is of particular interest in that it is comprised of interlocking relationships between the federal and state governments. The federal government has a broad range of exclusive, concurrent and framework legislative powers but the Länder have a mandatory constitutional responsibility for applying and administering a large portion of such laws.

The Länder governments are also significantly involved in the federal government decision-making process through the representation of their first ministers and designated cabinet ministers in the federal Bundesrat, with an effective veto on all legislation affecting the Länder. The Bundestag is a key component in the interlocking nature of the German federal state.

Germany follows the parliamentary system, and both the federal institutions and the Land institutions are parliamentary in form with the Federal Chancellor and Cabinet responsible to the Bundestag, which is effectively the lower house of the two main federal parliamentary chambers, the Bundestag and the Bundesrat.

Key Findings and Recommendations

- 1. The essence of federalism is a constitution which has at least these two distinct orders of government within the same overarching system of government, one of which is usually known as the federal government and the other constituent-unit government.**

⁵² Watts, L. Ronald, *Comparing Federal Systems*, Third Edition, 2008, pp. 35

2. Federal systems have a formal splitting or sharing of national sovereignty whereby a codified federal constitution divides legislative and executive powers between the various orders of government.
3. The federal constitution will also make provision regarding the division of fiscal and revenue raising responsibilities, namely who or which body has the authority to raise various kinds of taxes in the federation; does the allocation of tax raising powers affect the actual tax policies adopted by one part of the federation or another; does the authority to raise money match expenditure responsibilities; should rich parts of the federation be taxed more to provide revenues for poorer regions; and which governments should have what rights to borrow money.
4. Fiscal federalism involves the division of tax raising powers between the different orders of government but also building in the potential for redistributive policies across the federation as well as revenue sharing and fiscal transfers.
5. The federal state will normally share a central bank and monetary policy will be set centrally. There also normally be fiscal coordination between the different orders of government, debt management, and regulation of the internal market of the federation.
6. The federal state will also require strong intergovernmental institutions to consultation and co-decision, helping to foster good relations between the different orders of government.
7. The federal constitution will allow for judicial review of the exercise of executive functions and legislative acts to ensure they are compatible with the constitution. If they are not, they should be invalidated by the constitutional court of the federal state.

Chapter 7

Towards Progressive Federalism for the United Kingdom

A Labour Vision of Progressive Federalism

The UK Constitutional Moment

Despite the fact that the UK is made up of the four distinct units of England, Scotland, Wales and Northern Ireland, the UK is not a federal state like the United States or Germany, but rather a unitary union state closer in constitutional character to the unitary states of France, Italy and New Zealand.¹ The unitary nature of the British Constitution means that all power and ultimate authority rests with the Crown-in-Parliament at UK level, and is consistent with the doctrine of the Sovereignty of Parliament. The British state is governed by this central and singular power, with all other sources of power in the constitutional order flowing from the centre. They do not exist separately or independently of this central power.

The British state and the constitution have developed in this way organically over a prolonged period of time, and not as a result of a constitutional moment.² A constitutional moment can be understood as a point in history which defines the constitution of a body politic. The constitution and institutions of the state in most democracies were formed as a result of seismic political and social upheaval, and large-scale exercises of popular sovereignty and in the participation of forging a forward trajectory for the state. International examples include the American Revolution, the French Revolution, German Reunification, and Irish independence.

England arguably had a constitutional moment in the 17th century with the English Civil War, culminating in the execution of Charles I and the establishment of the republican Commonwealth under the leadership of Oliver Cromwell. Although the republican Commonwealth was short-lived, between 1649 and 1660, the republican constitution of the Commonwealth lived on, as the Sovereignty of Parliament became the foundation of the constitution replacing the Monarch as the sovereign power. Although the monarchy was restored in 1660 under Charles II, England retained much of its republican constitutional character, albeit with a constitutional monarchy attached.³

When Scotland joined the Union in 1707 with the Union of the Parliaments, Scotland was largely subsumed into the already existing English constitutional model, and there was no constitutional moment in the creation of the UK as we know it today. The principal doctrines of the English constitution became British constitutional law, most notably the Sovereignty of Parliament, and there was no codified and entrenched constitutional text adopted to govern the new Union settlement. The

¹ Walker, *Beyond the unitary conception of the United Kingdom constitution*, [2000] PL 384

² The concept of the “constitutional moment” was developed principally by the American constitutional law professor, Bruce Ackerman, of Yale Law School in his book *We the People: Foundations* (1991) where Ackerman argues that the real US Constitution can be understood through three major exercises of popular sovereignty, or constitutional moments, namely that of the founding federalists in 18th century, Reconstruction Republicans of the 19th century, and the New Deal Democrats of the 20th century.

³ See Tomkins, Adam, *Our Republican Constitution*, Hart Publishing, 2005

Union was merely given effect by the Acts of Union in both the Parliament of Scotland and Parliament of England. The UK never had its constitutional moment like other Western democracies such as the United States after the American War of Independence or in France after the French Revolution.

Having said that, there have been suggestions that the UK is not a unitary state, or even a unitary union state at all, and in reality never has been, but rather has been a quasi-federal state from its inception in 1707, especially given the provisions of the Treaty of Union under which Scotland retained a significant level of self-governance and autonomy, as well as distinctive institutions such as the Church of Scotland and a distinct legal system.⁴

However, it is suggested that the recent Brexit process and the way in which it has been handled by the UK Government has demonstrated that the UK is indeed a unitary state, and *not* federal or even quasi-federal in nature. This has been demonstrated most starkly and dramatically by the UK Government's approach to the repatriation of powers from the European Union to the UK post-Brexit, as well as the treatment of the devolution settlements.

Particularly in relation to Scotland, the European Union (Withdrawal) Bill, as introduced, would have converted existing EU law into UK law on the date of the UK's exit from the EU, and restricted the Scottish Parliament from legislating contrary to this body of law. This would have given the UK Parliament exclusive competence over retained EU law, which would cover all areas of decision-making being repatriated from Brussels.

The UK Government stated that the restriction on the competence of the Scottish Parliament was intended to be a transitional arrangement, and the Bill was to include a process for releasing policy areas from the restriction, which requires the approval of both Houses of Parliament and the Scottish Parliament.⁵

Significant criticisms were levelled against the Bill at the time it was introduced in 2017 by the Scottish Government, which described the Bill as a "naked power grab"⁶, and also by Professor Jim Gallagher who said "where the Bill goes wrong is in failing to respect the assumption that, unless there is a good reason to reserve something, it should be devolved"⁷ and by Professor Michael Keating, who concurred with Gallagher, and said the Bill raised problems "about the assumption that powers should be devolved if they are not expressly reserved."⁸

In the end, the Bill was amended before being passed as the European Union (Withdrawal) Act 2018 (the "2018 Act") to the effect that all powers would not be automatically repatriated to Westminster, but rather a restriction was placed on the Scottish Parliament so that it would not be able to modify, or confer power by subordinate legislation to modify, retained EU law, so far as the modification is of a description specified in regulations made by a Minister of the Crown.⁹ This means that rather than the powers returning to Westminster until the UK Government determines otherwise, powers will now return to the devolved administrations, except in areas where UK ministers will use statutory instruments to say otherwise.

This was sufficient to get the agreement of the Welsh Government. However, the Scottish Parliament withheld legislative consent under the Sewel Convention for the passage of the 2018 Act. This was

⁴ Meeting Note with Professor Tom Mullen, 29 August 2019

⁵ Q10, Oral evidence taken on 24 October 2017, Work of the Scotland Office, HC 376

⁶ Scottish Government, Defending devolution, 19 September 2017

⁷ Q3, Oral evidence taken on 24 October 2017, Work of the Scotland Office, HC 376

⁸ *Ibid.*, Q5

⁹ S. 12, European Union (Withdrawal) Act 2018

only the second occasion in the history of the Scottish Parliament that legislative consent was withheld.¹⁰ Furthermore, it was held in the *Miller* case that the Sewel Convention is a constitutional convention that is a rule of political practice, and not a rule of law, and the policing of its scope and effect does not lay within the constitutional remit of the judiciary. The fact that legislative consent was withheld by the Scottish Parliament did not therefore affect the ability of the UK Parliament at law to pass the 2018 Act.¹¹

It is argued that this episode of the Brexit process, the UK Government's handling of the repatriation of powers and the view taken by the Supreme Court in relation to the Sewel Convention reaffirms and reinforces the Sovereignty of Parliament as the ultimate controlling principle of the current UK constitution, and demonstrates the unitary nature of the British state.

It has been suggested that the UK's imminent departure from the European Union and the Brexit process itself may be precipitating a constitutional moment for the first time for the whole of the UK.¹² Presented before the British people are fundamental questions about who we are, our identity, our place in the world and, most importantly, how we relate to each other on these islands and the sustainability of our current constitutional arrangements. These questions need answers, and the Labour Party, as the biggest driver of progressive change that the UK has ever known, must supply them.¹³

The Crisis of Democratic Legitimacy

The British state is suffering from a much deeper malaise in the form of a crisis in democratic legitimacy, of which Brexit is merely a symptom, or one part. It is almost half a century on since Jimmy Reid delivered his *Alienation* Rectoral Address to the University of Glasgow in 1972, where he described how ordinary people feel themselves victims of blind economic forces beyond their control, excluded from decision making processes, and despairing at the fact they have no real say in shaping or determining their own destinies.¹⁴

That sense of alienation described by Jimmy Reid all those years ago preceded the rise of the Thatcherite revolution, financialisation, neoliberal economics writ large, globalisation, deindustrialisation and the destruction of the trade unions. Since the Reid address, that sense of alienation has grown exponentially to the extent that ordinary working people are now so disconnected from the levers of power and decision-making processes, they are questioning the very basis of democracy and the democratic legitimacy of the state itself.

This crisis of democratic legitimacy has produced disenchantment with representative democracy, traditional political institutions, political parties and distrust of the political class more generally. According to British Social Attitudes, back in 1986, only 38 per cent said that they trusted governments "to place the needs of the nation above the interests of their own political party". By 2000, this had more than halved to just 16 per cent. Back in 1987, that year's British Election Study found that 76 per

¹⁰ Before the Brexit crisis, the Scottish Parliament's only previous vote to deny legislative consent was on aspects of the Welfare Reform Bill in 2011: <https://www.instituteforgovernment.org.uk/explainers/brexit-sewel-legislative-consent-convention>

¹¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, paras 136- 152

¹² Bryan, Pauline, *Creating a Constitutional Moment*, Time for a Radical Scottish Parliament, Red Paper Collective, March 2019.

¹³ Meeting Note with Daniel Greenberg, 29 July 2019 on the need for The Labour Party to develop a new constitutional settlement

¹⁴ Reid, James, *Alienation*, Rectoral Address, University of Glasgow, 1972, pp. 5

cent believed that "it's everyone's duty to vote". When we revisited the issue in 1991, only 68 per cent were of that view, falling to just 56 per cent by 2008.

Back in 1983 only 34 per cent per cent believed that "some change" was needed to the House of Lords. But by 1994 that proportion had already grown to 58 per cent, and it now stands at 63 per cent, even though in the interim most hereditary peers were removed from the chamber. Only 18 per cent favour having a House of Lords that is wholly or primarily appointed, as the chamber is now. Most think at least half the membership should be elected.

Having said that, political interest is actually slightly higher now than it was in the mid-1980s. In 1986, 29 per cent said that they had "a great deal" or "quite a lot" of interest in politics, and the figure has remained at or around 30 per cent most years since then, and now stands at 36 per cent. The increase in interest in politics accompanied by declining trust in the democratic process and political institutions underlines the crisis in democratic legitimacy of our institutions, the political party system and the way in which we are governed.¹⁵

It is no coincidence that there have been increasing levels of public distrust in political institutions and the democratic process, alongside concurrent demands for colossal constitutional upheaval, including increased support for Scottish independence and also for UK withdrawal from the European Union. If the view taken by large parts of the public is that politics and our political institutions are broken, it is a rational response to seek to reject those institutions when given the opportunity to do so.

This perhaps at least partially explains why, although turnout for general elections has been in steady decline in recent times,¹⁶ turnout for the Scottish independence referendum in 2014 and the EU referendum in 2016 was relatively high at 84.5% and 72.2% respectively. Although of course voters in Scotland chose to remain part of the UK, a substantial percentage of 44.7% voted for Scottish independence.

Brexit itself has inflamed the problem of democratic legitimacy, because of the way in which the political institutions and the political class have handled the process. A recent study by Hope Not Hate found that the percentage of people who feel that none of the main political parties speak for them has risen dramatically – from 61% in December 2018 to 68% in July 2018. By May 2019 it had risen to a staggering 73% meaning almost three-quarters of people surveyed say they are not represented by any political party.¹⁷

Unfortunately, this political terrain is a fertile breeding ground for the politics of right-wing populism and authoritarianism to take root. While support for the far-right is limited,¹⁸ a recent study by the Hansard Society found that amid the Brexit chaos, overall public faith in the political system has reached a nadir not previously seen, and the public appeared to be welcoming to the idea of a strongman or authoritarian leader as an alternative to our democratic process.

The study found that when people were asked whether "Britain needs a strong ruler willing to break the rules", 54% agreed and only 23% said no. 42% of respondents agreed with the idea that many national problems could be dealt with more effectively "if the government didn't have to worry so

¹⁵ British Social Attitudes Survey, Key Findings, How and why Britain's attitudes and values are changing, 2013, https://www.bsa.natcen.ac.uk/media/1144/bsa30_key_findings_final.pdf

¹⁶ Dempsey, Noel and Loft, Philip, Turnout at elections, House of Commons Library, Briefing Paper, 5 July 2019

¹⁷ Fear & Hope 2019, How Brexit is Changing Who We Are, Hope Hate Charitable Trust

¹⁸ Ibid.

much about votes in Parliament. Moreover, almost three-quarters of those asked said the system of governance needed significant improvement.¹⁹

It is argued that an authoritarian leader is not the solution to the crisis of democratic legitimacy. Rather than solve the problem, it would indeed be the death knell of democracy. However, there is a need for democratic renewal and large-scale constitutional reform to address the disaffection and the sense of disenfranchisement and disconnection from the democratic process felt by millions of people across the UK.

Codification, Entrenchment and Brexit

As has been discussed above, the UK does of course have a constitution and in many places the constitution is written down, such as in constitutional statutes and in the common law, but it is important to stress that the UK does not have a codified constitution in a single legal text. Moreover, as well as not being codified, the British constitution is also not entrenched in the way most constitutions of Western democracies are ingrained parts of the legal order of the country.

Entrenchment of a legal document means that the entrenched legal provisions form a special form of basic law which is fundamental to the entire legal order, which also makes it either more difficult to amend, making such amendments inadmissible. Alternatively, typically amendments may only be made with a supermajority, a referendum or with the explicit consent of a minority group within the state.

Entrenchment is generally not possible under the current British constitution, because of the doctrine of the Sovereignty of Parliament. Given that Parliament can in theory make or unmake any law whatsoever, one Parliament cannot bind its successors. A corollary of this is that Parliament cannot entrench legal provisions to form a basic law, as a future Parliament can simply repeal that previous law with another Act of Parliament.

This is why in theory at least if not practically and politically the UK Parliament can not only amend but repeal the Scotland Act 1998 completely and sweep away the entire Scottish devolution settlement with the stroke of a pen in a new Act of Parliament. This also applies to all of the main constitutional statutes including the Human Rights Act 1998, European Communities Act 1972 and the Parliament Acts of 1911 and 1949.

Creating a new constitution for the UK will provide the opportunity to firstly codify the constitution in a single legal text, and also entrench that constitution in the UK's legal order. It is argued that this is not only desirable but necessary to achieve a federal constitutional model for the UK.

The doctrine of the Sovereignty of Parliament will therefore be required to be supplanted by the idea of popular sovereignty of the peoples across the whole of the UK as given expression to and protected under the basic law. This would require a significant shift in constitutional power away from Westminster under a new constitutional model, where sovereignty rests with all of the peoples of the UK as embodied in their various institutions across the country, including the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly, as well as new Combined Regional Authorities of the English regions and the Greater London Assembly.

This popular sovereignty would be protected under a constitutional text and would be guarded by the Supreme Court as the constitutional court. What this means is that primary legislation of the UK

¹⁹ Audit of Political Engagement, the 2019 Report, Hansard Society

Parliament could be invalidated and struck down as unconstitutional if the legislation contravened the fundamental provisions of the new constitution as interpreted by the Supreme Court. This would involve a fundamental change in the way in which the law of judicial review in the UK operates and would allow individual citizens as well as the devolved institutions and local councils to challenge the exercise of power by other parts of the constitution, including Acts of the UK Parliament.

This clearly involves a significant shift in constitutional power away from Westminster and entrusts the Supreme Court with guarding the interests of all the peoples of the UK and the status of their institutions across the country, as given expression to in the new constitution.

The necessity to codify and entrench the constitution has become apparent in recent times during the political crisis in the UK precipitated by Brexit. Commentators and the media in the UK have frequently referred to Brexit as a 'constitutional crisis'. However, it is argued that this is not technically accurate, as the current political constitution of the UK in its uncodified and non-entrenched form underpinned by the Sovereignty of Parliament has so far worked exactly as it is designed to operate, and therefore there is no constitutional crisis in the technical sense of breakdown in the function of the constitution.

As discussed in Chapter 1, following the result of the 2016 referendum on EU membership for the UK to leave the EU, the UK has of course exercised its right under Article 50 TEU to withdraw from the EU, and is due to leave at some point in 2019. The initial deadline for leaving the EU was set as 29 March 2019 and the UK Parliament has voted in favour of the exit in the form of the European Union (Notification of Withdrawal) Act 2017 and the European Union (Withdrawal) Act 2018. The UK's departure from the EU is therefore provided for by Parliament and will happen unless this legislation is repealed.

However, as was seen this precipitated a political crisis in the Spring of 2019 as the UK Government was unable to pass the trade deal negotiated between the UK Government and the EU in the House of Commons. The UK Government attempted to pass the deal on three separate occasions and failed each time to win a majority in the Commons in favour of the trade deal.

The refusal of the House of Commons to approve the trade deal meant that if the initial deadline of the 29 March 2019 were to be followed, the UK would have left the European Union without a deal in place, a so-called 'no deal' Brexit, which was viewed as politically unpalatable by the UK Government, the EU as well as the UK Parliament which expressed its opposition to a no deal scenario.

Following the failure of the UK Government to get a deal with the EU passed the House of Commons, Prime Minister Theresa May sought an extension to the Brexit deadline until 12 April 2019. However, on 8 April 2019, the European Union (Withdrawal) Act 2019 was passed in Parliament which required the Prime Minister to seek a further extension to 31 October 2019. Exit day was changed to that date under the 2018 Act.

It is therefore constitutionally necessary for the UK Parliament to have a say and provide for legislation on the trade deal negotiated between the UK Government and the EU, and far from being a constitutional crisis, the inability of the UK Government to pass the deal in Parliament is in fact the constitution working exactly as it is designed to operate, evident in the blocking of a politically unpalatable trade deal negotiated by the government from becoming part of UK law. Moreover, it should be noted that although the forming of international treaties is of course part of the royal prerogative, it is a constitutional convention that treaties will not be ratified until the passing of a suitable statute law by Parliament to give the treaty effect in UK law. Therefore, what has been legislated for is nothing novel or radical.

The default is therefore that the UK will leave the EU on 31 October 2019 with a deal or without a deal pursuant to the 2017 Act and the 2018 Act. It is a political crisis in the sense that although the UK Parliament has legislated for Brexit, Parliament has rejected the deal negotiated by the UK Government with the EU while, simultaneously expressing its opposition to a no deal scenario thereby ostensibly contradicting itself. To add to this complexity, the UK Parliament also has refused to vote in favour of triggering an early general election under the Fixed Term Parliaments Act 2011.

The UK is therefore in uncharted political and constitutional territory, because the UK Government does not have the confidence of the House of Commons for its flagship policy, Brexit, while not being able to hold a general election to break the deadlock due to the Fixed Terms Parliaments Act 2011.

However, it is arguably not a constitutional crisis because it has been agreed universally, up until recently, that Parliament requires to have the final say and must agree the trade deal before becoming part of UK law according to the constitutional convention governing the exercise of the royal prerogative power to form international treaties. Having said that, it is possible that this political crisis has the potential to morph into a constitutional crisis if the role of Parliament is brought into question.

This has begun to happen, and arguably the Brexit process is entering a new stage of constitutional crisis rather than merely political crisis. There were suggestions made by a number of the candidates of the 2019 Tory leadership contest that it should not be ruled out that the UK Parliament should be prorogued in order to ensure Brexit takes place, including by Dominic Raab²⁰ and frontrunner Boris Johnson²¹, which means Parliament is suspended. Indeed, this is exactly what Boris Johnson as Prime Minister did when he advised the Queen to prorogue Parliament on 28 August 2019.

The official position taken by the Prime Minister was that prorogation was standard and necessary to enable the UK Government to prepare its domestic legislative agenda.²² However, at the ending of the parliamentary session, the Speaker of the House of Commons, John Bercow, claimed that the prorogation was not normal but rather a constitutional outrage, and claimed that the true purpose of the prorogation was to prevent Parliament from debating Brexit, and that shutting down Parliament would be an offence against the democratic process and the rights of parliamentarians as representatives of the people.²³

There was widespread cross-party feeling from many parts of the UK that the UK Government was attempting to undermine parliamentary democracy, as well as the constitutional principle of the government accountability to Parliament:

“I am appalled at the recklessness of Johnson’s government, which talks about sovereignty and yet is seeking to suspend parliament to avoid scrutiny of its plans for a reckless No Deal Brexit. This is an outrage and a threat to our democracy.” – Jeremy Corbyn MP, Leader of the Opposition

“Shutting down parliament...is not democracy, it’s dictatorship. I think today will go down in history as the day democracy died, if it’s allowed to happen.” – Nicola Sturgeon MSP, First Minister of Scotland

²⁰ <https://www.theguardian.com/politics/2019/jun/08/suspending-parliament-should-not-be-ruled-out-says-dominic-raab>

²¹ <https://www.thetimes.co.uk/article/boris-johnson-won-t-rule-out-suspending-parliament-3v2mcjbcz>

²² Letter from the Rt Hon Boris Johnson MP to Members of Parliament, 28 August 2019

²³ <https://www.bbc.co.uk/news/av/uk-politics-49643858/john-bercow-this-is-not-a-normal-prorogation>

“Make no mistake, this is a very British coup. Whatever one’s views on Brexit, once you allow a Prime Minister to prevent the full and free operation of our democratic institutions you are on a very precarious path.” – John McDonnell MP, Shadow Chancellor of the Exchequer

“It would be a constitutional outrage if Parliament were prevented from holding the government to account at a time of national crisis. Profoundly undemocratic.” – Philip Hammond MP, former Chancellor of the Exchequer²⁴

“Boris Johnson fought a referendum campaign to put power back in the hands of parliament and now he wants the Queen to close the doors on our democracy.” – Mark Drakeford MS, First Minister of Wales

Judicial reviews of the Prime Minister’s decision to advise the Queen to prorogue Parliament were launched in the High Court in England led by businesswoman Gina Miller, in the Court of Session in Scotland led by Joanna Cherry QC MP and in the High Court in Northern Ireland led by Raymond McCord. All three cases at first instance were dismissed as being matters of high policy and of a ‘political’ nature.²⁵ However, the *Cherry* case was appealed to the Inner House of the Court of Session where it was successful on appeal in front of a bench led by Lord Drummond Young.²⁶

The *Cherry* case was appealed to the Supreme Court by the Advocate General for Scotland and the *Miller* case was also appealed by Gina Miller to the Supreme Court. In a landmark judgment delivered by eleven Justices of the Supreme Court, it was held that the advice given by the Prime Minister to the Queen to prorogue Parliament was unlawful, in that it was outside the powers of the Prime Minister to give it. The advice was therefore null and of no effect. The Order in Council which was the legislation providing for the prorogation was also null and of no effect and should be quashed. In addition, the prorogation itself was unlawful, null and of no effect.²⁷

The Supreme Court developed a standard against which to judge the exercise of the prerogative power to prorogue Parliament based on two fundamental principles of the British Constitution, which were discussed in Chapter 1. The first of those principles was the Sovereignty of Parliament, and the Supreme Court asked itself how then is the limit on the power to prorogue Parliament to be defined to ensure compatibility the principle of Parliamentary sovereignty? The second of those principles was Parliamentary accountability, and the Supreme Court asked itself what is the legal limit upon the power to progue to ensure compatibility with Parliamentary accountability?

Based on these two principles, the Supreme Court found that the relevant limit upon the power to prorogue Parliament is that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful, if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.

The Supreme Court found that the prorogation advised by Prime Minister Boris Johnson exceeded this limit and therefore was unlawful.

²⁴ <https://www.commonspace.scot/articles/14641/uk-government-prorogue-parliament-reaction-round>

²⁵ *Gina Miller v. the Prime Minister* [2019] EWHC 2381; *Cherry v. Advocate General for Scotland* [2019] CSOH 70; *McCord (Raymond) v. the Prime Minister and Others* [2019] NIQB 78

²⁶ *Reclaiming motion by Joanna Cherry QC MP and Others Against the Advocate General* [2019] CSIH 49

²⁷ *R (on the application of Miller) v. the Prime Minister, Cherry and Others v. Advocate General for Scotland* [2019] UKSC 41, pp. 24

It is argued that both of these episodes in the Brexit saga have demonstrated the weaknesses in the current British constitution. Firstly, the political crisis and deadlock over the failure to pass a deal between the UK and the EU in the House of Commons and, secondly, the constitutional crisis of the prorogation controversy both dramatically demonstrate the urgent need for the UK to now adopt a codified and entrenched constitution.

The political crisis over the failure to secure a deal with the EU could have been averted if the constitution clearly stipulated the terms of the UK's membership of the EU, as well as the internal method for withdrawal. An example of this can be found in the Republic of Ireland, EU Membership is constitutionalised in the Third Amendment to the Irish Constitution. Secondly, the controversy over prorogation could have been averted if the constitution had clear rules on prorogation, dissolution and adjournment of Parliament, and was not rooted in the arcane and poorly defined royal prerogative.

The Brexit process has demonstrated the weaknesses in the British constitution, and it is suggested that now is the right time to consider renewal, including codification and entrenchment.

Socialism, the Labour Party and the Constitution

However, it should be noted that there is a view on the Left that socialists should resist calls for a legally codified and entrenched constitution, and it is important to consider this view. For example, Professor Danny Nicol argues²⁸ that codification and entrenchment will empower and politicise the judiciary in an unprecedented way. Giving power to unaccountable and unelected judges will always in general tend to be against the interest of the working-class, especially as the judiciary and its membership are overwhelmingly sourced from one part of society, mainly white middle-class males.

Nicol cites the experience in the United States where the US Supreme Court sought to hamper progressive reforms as part of the New Deal via the utilisation of the US Constitution, such as in *Lochner v. New York*²⁹, where the US Supreme Court held that a New York law requiring that bakery employee hours had to be less than 10 hours a day and 60 hours a week violated the due process clause, which in their view contained a right of freedom of contract.

Nicol is also sceptical of the entrenchment and incorporation of human right standards into the UK constitution. He cites examples where human rights law has acted against working class interests and in the interests of neoliberal capitalism, including the case of *Young, James and Webster v. UK*³⁰ from the European Court of Human Rights, where it was held that the right to freedom of association under Article 11 ECHR gave people the right to join a trade union, but also the right not to join a trade union, an effective right to opt out of closed shop agreements.

Moreover, Professor Keith Ewing is also sceptical of the UK adopting a legally codified and entrenched constitution.³¹ The constitution should be a vehicle for social change to facilitate it, not to hold it up or restrict it, according to Ewing. The focus should therefore be on removing restraints, rather than creating traps that a potential radical Labour government could fall into. Otherwise, a Labour government could get trapped in the courts for years. In Ewing's view, the current British constitution is the most progressive in the world in the sense it is the least restrictive to any socialist government.

²⁸ Meeting Note with Professor Danny Nicol, 12 June 2019

²⁹ 198 U.S. 45 (1905)

³⁰ (1981) 4 EHRR 38

³¹ Meeting Note with Professor Keith Ewing, 11 September 2019

This view has been echoed by others who argue that the priority for any radical Labour government should be winning a parliamentary majority in the House of Commons, taking control of the commanding heights of the British state and economy and driving through a radical manifesto using Parliamentary Sovereignty to accomplish it.³²

While there is significant merit in such views, it is suggested that they fail to appreciate the in-built reactionary and conservative bias of the sclerotic British state itself, and that winning a majority in the House of Commons is insufficient to accomplish the degree of social transformation that socialists demand.

The capture of the British state by the British Establishment and the interests of capital has been total.³³ There is a shared establishment psychology which places faith in untrammelled free markets and neoliberalism. There is a revolving door exclusive for use by elite individuals to glide seamlessly between the corporate, media and political worlds. There is a Monarchy at the summit of the constitution and a landed aristocracy with a House in Parliament reserved for them, namely the House of Lords. The professions, the civil service and the judiciary are dominated by people educated in fee-paying schools from the higher strata of society. The state protects, cements and promotes the status quo and is inherently resistant to progressive change and socialism.³⁴

This is particularly important to understand for the Labour Party, as it is a political party committed to parliamentary democracy. As was noted by Miliband, of all the parties in the UK claiming socialism to be their aim, the Labour Party is “one the most dogmatic – not about socialism, but about the parliamentary system” as the means of achieving it.³⁵ Miliband also noted that the Labour Party was never a socialist party, but that it had always contained socialists within its ranks. Although arguing for the party to make a decisive leftward turn, Miliband abandoned Labour in May 1965 on the grounds that it would never become a socialist party.

The Labour Party is now at an historic point in its history with Jeremy Corbyn MP being elected leader of the party in 2015 and John McDonnell MP appointed as Shadow Chancellor of the Exchequer. Not only is the leadership of the party now avowedly socialist³⁶, but for the first time in the history of the party the governing apparatus of the party, including the National Executive Committee, is also committed to the socialist leadership.³⁷

Given that taking control of the state through winning a parliamentary majority is to be the preferred method of the Labour Party to drive forward its socialist agenda, the party should seek to use the constitution as a tool to achieve the social transformation which they seek. Socialists should seek to reorder the British state and hardwire the constitution in favour of socialist objectives.³⁸ This must be a central plank of the Labour Party’s vision to transform the UK.³⁹

For the Labour Party, constitutional reform should firstly seek to advance socialist values in this way but that cannot be the exclusive consideration. A second consideration must be the promotion of better governance of the UK as a whole including of all its nations and regions. In order to achieve

³² Meeting Note with Lord Bew, 29 July 2019

³³ Meeting Note with David Jamieson, 31 May 2019

³⁴ See Jones, Owen, *The Establishment and how it gets away with it*, 2015

³⁵ Miliband, Ralph, *Parliamentary Socialism, A Study in the Politics of Labour*, Merlin, 2009

³⁶ Both Jeremy Corbyn and John McDonnell are self-described democratic socialists.

³⁷ <https://www.theguardian.com/politics/2016/aug/08/labour-must-allow-all-members-leadership-vote-court-rules>

³⁸ Meeting Note with Professor Michael Keating, 26 August 2019

³⁹ Meeting Note with Dr. Pete Ramand, 5 August 2019

both of these aims, it is suggested the UK needs a new constitutional settlement, and codification and entrenchment of that new settlement.

There are concerns that the adoption of a codified constitution and the empowerment of judges to strike down primary legislation would politicise the judiciary and simultaneously juridify politics, which is best left to our elected representatives in Parliament. However, it is argued that this phenomenon has already taken place. Over the last half century, the courts in the UK have become far more creative, aggressive in taking on the government and politics has increasingly become more juridified.

In the third of his Reith lectures delivered in 2019, former Justice of the Supreme Court, Lord Sumption, observed that in adjudicating disputes fairly and in accordance with settled law, courts help uphold the rule of law and instantiate reciprocity between rulers and ruled. This does not involve or require authority to override government policy or Parliament's law-making choices.

However, Sumption notes that in the last thirty years courts have increasingly deployed "a broader concept of the rule of law which greatly enlarges their constitutional role". They have asserted "a wider supervisory authority over other organs of the state" and "have inched their way towards a notion of fundamental law overriding ordinary processes of political decision-making", which has "carried them into the realms of legislative and ministerial policy."⁴⁰

Lord Sumption makes the point that this movement in the UK courts is politically and constitutionally questionable because it is the courts making a claim to political power without the democratic legitimacy to do so. Judges are completely unaccountable and unelected to ordinary people and therefore lack the legitimacy to make such a constitutional intrusion.

It is argued that it is naive to suggest that the judiciary will become politicised, as it is already undergone a massive amount of politicisation. However, Lord Sumption is right in that the courts currently lack the democratic and political legitimacy to make political decisions. This problem of democratic legitimacy can be ameliorated by a new constitutional settlement based on the principles of progressive federalism, with a codified constitution guarded by judges who are independently appointed and gone through political screening by the Senate of the Nations and Regions. This function is discussed in further detail in Chapter 9.

The Principles of Progressive Federalism

The current foundational principle of the British constitution, the Sovereignty of Parliament that was discussed in detail in Chapter 1, is not compatible with the new constitutional model of progressive federalism and therefore must be replaced by new principles which are discussed more fully below.

However, the other main principles of the current British constitution including the rule of law, the separation of powers, and ministerial responsibility to Parliament and which were all discussed in Chapter 1 are still as relevant in a progressive federal model as under the current constitution. Therefore, all of these principles will continue to have an important role to play in the new constitutional settlement. In addition, the constitutional values of democracy, republican government and liberalism - also discussed in Chapter 1 - will also continue to form part of the progressive federal constitution.

The UK is enriched by various identities, cultures, languages, histories and distinct legal systems. But the British state and its constitution are relics of Britain's imperial past. The UK is stuck with an imperial

⁴⁰ Lord Sumption, Human Rights and Wrongs, the Reith Lectures, 2019

state in a post-imperial world.⁴¹ The British state must therefore be reconstructed in a way that binds the peoples of these islands together in a spirit of unity strengthened by its diversity, and not divided because of it. The British state must take cognisance of the fact that it is a multi-national state made up of four distinctive but unified nations⁴² and the constitution governing the relationship between these nations must be based on the principles of solidarity, parity of esteem, tolerance and respect.

The traditional way in which nations seek to strike a balance between promoting unity on the one hand while accommodating diversity within the state on the other is by the adoption of a federal constitution, where each part of the state is given equal recognition and status within the constitutional order and given legal protection of that recognition and status to form distinct constituent units within the nation state.⁴³

Crucially, what federalism involves is a splitting of the sovereignty of the nation state and sharing of that sovereignty across the country. As has been discussed, the current UK state is a unitary union state meaning that all power and ultimate authority rests with the Crown-in-Parliament at UK level and is consistent with the doctrine of the Sovereignty of Parliament. The British state is governed by this central and singular power and all other sources of power in the constitutional order flow from the centre and do not exist separately or independently of this central power.

The first principle of progressive federalism therefore would be the idea of federalism itself. Federalism would involve splitting this sovereignty and sharing it across the whole of the UK, diffusing power downwards away from Westminster to the nations, regions and local communities of the UK. Institutions in the nations, regions and communities would be given their own rightful share in this sovereign power and no longer would it be wielded solely by Westminster. The status of these national, regional and local institutions would also be legally protected, and their status would be upheld by the courts as independent sources of sovereignty across the UK.

Moreover, in a progressive federal model, the distribution of power in the UK should be based on the principle of subsidiarity which is that decisions affecting people's lives should be taken at the lowest possible level of government closest to the people whom the decisions affect most directly. The principle is designed to guarantee a degree of independence for lower authorities in relation to a higher body or for a local authority in relation to central government. It therefore involves the sharing of powers between several levels of authority, a principle which forms the institutional basis for federal states.

By way of comparison, the EU has at its core the principle of subsidiarity which states in terms of Article 5(3) TEU there are three preconditions for intervention by the EU institutions in accordance with the principle of subsidiarity: (a) the area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence); (b) the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity); (c) the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e. added value).

The principle of subsidiarity does not only involve sovereign power being shared more effectively by Westminster with the national or regional institutions in the UK such as the Scottish Parliament but

⁴¹ Meeting Note with Professor John Denham, 24 September 2019

⁴² The UK is a political union of three historic nations comprising England, Scotland and Wales which have existed since the middle ages, and also includes Northern Ireland which comprises six counties of the historic Irish province of Ulster formed as part of the UK pursuant to an Act of the UK Parliament known as the Government of Ireland Act 1920 effecting the partition of Ireland.

⁴³ Meeting Note with Professor Nicola McEwen, 24 April 2019

also implies a strengthening of local democracy and local government to bring power as close to the people as possible. This may indeed involve bypassing current devolved institutions and giving more power directly to local councils.

A third important principle of progressive federalism is solidarity and to ensure that the federal state effectively redistributes power and wealth across the country. Although this principle has a similar fundamental objective to that of subsidiarity in trying to empower ordinary people and enable them to live more fulfilling lives, the principle of solidarity may in fact be in tension with the principle of subsidiarity in some instances.

Although it is recognised that a principle of subsidiarity is important for bringing power and decision-making closer to the people whose lives the decisions affect most, it is equally important to ensure the retention of strong central levers of power at central government level to ensure effective redistribution takes place across the whole country. This is particularly true given that the UK is a hugely imbalanced and unequal nation.

Without the retention of strong powers at the centre it will not be possible for one region or nation in need, for example the North-East of England, to adequately redistribute wealth from another wealthier region, for example the South-East of England. A progressive federal constitution would require a rebalancing of the UK economy with redistribution of powers at the centre and obligations to redistribute wealth across the country built-in to the constitution and state machinery.

One potential mechanism which could be utilised to effect this redistribution is the Labour Party's idea of the National Investment Bank which could become a permanent feature of the British constitution and given constitutional status equal in importance to the Bank of England as the UK's central bank. The National Investment Bank would be legally obligated to ensure that investment in the UK economy is directed across the country according to need.

The objective of the National Investment Bank from a constitutional perspective would be to ensure investment is spread across the nations and regions and in some ways to effect a distortion in the market to channel investment to certain parts of the country according to need and not merely based on rates of return on capital and market demand.

National Investment Bank investment decisions would require to be taken at the centre in order to ensure the redistribution can be effected across the whole of the country and not just in one part of it and that this redistribution must be done in a fair and transparent way.⁴⁴ The National Investment Bank is discussed in further detail in Chapter 8.

As discussed in Chapters 1-4, the UK suffers from significant regional inequalities principally between London and the South-East of England compared with the rest of the country. Constitutional reform must therefore attempt to redress the imbalances in the British state and the UK economy. However, it is important to note that while constitutional reform based on the redistribution of power and wealth will provide political and economic empowerment for those living in the poorest nations and regions, we also need to ensure that such reform fosters and reflects the economic and social solidarity between working class people across the UK who although live in different parts of the country share the same class interests.

The solidarity principle therefore is not only concerned with redistribution of power and wealth between the nations and regions of the UK but also with upholding and reflecting the solidarity

⁴⁴ Meeting Note with Ewan Gibbs and Rory Scothorne, 3 April 2019

between working class people who live in different parts of the country. Constitutional reform must also take this aspect of solidarity into account.

Another important principle underlying progressive federalism is agency⁴⁵ and the maximising thereof for all citizens. In an age dominated by the power of free market capitalism, multinational faceless corporations and globalisation, many people feel disconnected from the sources of power and decision-making, they feel atomised and alienated from the society around them and sense a lack of control over their own lives. Although the causes of these phenomena are complex, a progressive federal constitution should seek to address some of these concerns by plugging people back into the democratic process more effectively.

In order to achieve this, a strengthening in the powers and status of local government is vital in this endeavour, and giving local councils constitutional status legally protected from devolved and central institutions of government is critical. It will also be necessary to make constitutional commitments to improve economic democracy as part of the progressive federal settlement by increasing public ownership of the UK's key assets and industries, strengthening the trade union movement and giving the right to strike constitutional protection as well as increasing workplace democracy by giving workers constitutional rights to buy out their employers and to adopt cooperative models of ownership.

Fifthly, a fundamental principle which must underlie the federal constitution must be parity of esteem between Westminster and the different nations and regions of the UK and among those nations and regions themselves as well as the related principle of the protection of minority groups. It must be recognised that the UK is a multi-national state which is comprised of different national identities, ethnicities, cultures and institutions. All of the peoples and institutions of the UK must treat each other based on a principle of mutual appreciation and respect, and the institutions themselves must give each other due deference befitting the roles, functions and various democratic mandates of those institutions.

Lastly, the geographic location of the institutions themselves is also important. At the moment, the UK's political, judicial, financial and media life is centred on London. As part of the new progressive federal settlement, it will be necessary to disperse many of the institutions currently based in the UK capital city throughout the country. For example, moving the Supreme Court to Manchester, the Senate of the Regions and Nations to Glasgow and basing the National Investment Bank in Birmingham or Sheffield. This will ensure that different parts of the country become hubs for different parts of the UK's public life.

Key Findings and Recommendations

- 1. The UK as a whole has lacked a constitutional moment when the institutions of the state and the constitution were at once established. Instead, the British constitution has developed organically over many centuries.**

⁴⁵ Meeting Note with Billy Bragg, 15 May 2019

2. **The British state is facing a crisis of democratic legitimacy where people in the UK are growing increasingly disenchanted with the UK's politics institutions while remaining interested and engaged in politics.**
3. **The political crisis over Brexit has dramatically demonstrated the inadequacies of the current UK constitutional settlement based on an uncodified constitution. Not only is the Union under strain between Westminster and the nations and regions, but the basic foundations of our constitution including the rule of law are under attack and are vulnerable to it.**
4. **The Labour Party is completely committed to parliamentary democracy and achieving socialism using the British state as the vehicle. The Party should therefore advocate a radical reordering of the state based on the principles of progressive federalism in to achieve its socialist objectives.**
5. **The Sovereignty of the UK Parliament is not compatible with a progressive federal model and this principle should be replaced with a codified constitution based on the principles of progressive federalism.**
6. **The main principles of progressive federalism are federalism itself, subsidiarity, solidarity, the redistribution of power and wealth, agency of all citizens, and parity of esteem between the different institutions of a federal UK.**
7. **The institutions of a federal UK should be widely geographically dispersed and not all based in London.**

Chapter 8

The New Constitution

The New Constitution

The new constitution should seek to achieve certain specific objectives, based on the principles of progressive federalism discussed in Chapter 7:

1. To create a codified and legally entrenched constitution which incorporates international human rights standards into UK domestic law on a permanent and constitutionally entrenched basis, extend economic and industrial democracy to key parts of the UK economy, enshrine environmental protections and to ensure a fair and equitable redistribution of power and wealth across the UK;
2. To create a new federal settlement between the central British State and the devolved settlements in Scotland, Wales and Northern Ireland, including incorporation of the Good Friday , as well as the introduction of regional autonomy to the English regions, with executive powers and representation at the federal level based on the principle of subsidiarity;
3. To abolish the House of Lords as presently constituted and to create a new Senate of the Nations and Regions, so to give voice and physical expression to the new federal settlement in the UK Parliament;
4. To create new intergovernmental and interparliamentary machinery to govern internal relationships between the nations and regions of the UK and the federal central government, including the creation of a Council of the Union and Interparliamentary Committee; and
5. To reform and give formal legal recognition to many parts of the British constitution, which have previously existed as convention or in the common law and the royal prerogative.

The Constitutional Monarchy, the Royal Prerogative and the Aristocracy

The UK is of course a constitutional monarchy, and any new constitutional arrangements would require taking this into account and it is suggested that the constitutional monarchy should be accommodated in any new settlement. Although as a constitutional monarchy it is often suggested that the role of the Monarch is only ceremonial and carries no real political or legal import, this is not correct as the Monarch does retain a number of royal prerogative powers which are personal to the Monarch and are not exercised by government ministers.

The constitutional role of the Monarch must be clarified and given legal certainty, and to give the Monarch formal legal status as the head of state. Currently, the role of the Monarch is largely ceremonial, yet still retains a number of formal legal powers under the royal prerogative including the power to appoint a Prime Minister, the power to dismiss a government and the important power of

granting royal assent to legislation. It is suggested that it is inappropriate for such powers to be exercisable by an unaccountable and unelected officeholder.

One suggestion may be rather than stripping these powers from the Monarch completely, the exercise of these powers should be made subject to strict legal rules laid down in the constitution and subject to judicial review, thereby eliminating any discretion that may exist on the part of the Monarch.

All of the powers of the royal prerogative, most of which have been delegated to government ministers, should also be given formal legal recognition and clarification. For example, the rules on the exercise of powers, such as the power to make international treaties, to conduct international diplomacy, to deploy and manage the operations of the British armed forces, to organise the British civil service, to issue and revoke British passports, and to grant executive pardons, should all be codified in the constitution, with clear rules on who exercises these powers, under what circumstances and who should be brought into the consultation process as part of the taking of those decisions, including for example Parliament or the governments of the devolved nations and regions.

It may be that a new codified constitution should seek to amend where these powers sit within the constitution, for example giving the power to grant executive pardons to an independent Pardons Commission, or similarly making the power to enter the UK into international treaties subject to a ratification process in Parliament and in agreement with all the nations and regions of the UK.

Furthermore, although the Monarch would remain as head of state, all of the trappings and add-ons of the monarchy should be abolished with immediate effect, including the Privy Council and the requirement to swear an oath to the Monarch to hold certain public offices. In addition, all royal involvement in public affairs should be subject to a constitutional prohibition, with criminal sanction if contravened.¹

In addition, the new constitution should take the opportunity to abolish the British nobility in its entirety across the UK. This includes the immediate abolition of all aristocratic titles and designations including Dukes, Marquesses, Earls, Viscounts and Barons, and constitutional prohibition on any future creation of noble titles. Knighthoods and all other Royal Honours should also be abolished and replaced with a new Civic Award that can be conferred by the UK Parliament to individuals who have contributed in a significant way to the UK.

Moreover, some of the principal parts of English constitutional law should be abolished, including the establishment of the Church of England and in particular there will be no religious representatives in the new Second Chamber of the UK Parliament replacing the House of Lords, the Senate of the Nations of Regions. The Senate is discussed in further detail below and in Chapter 9.

The Great Offices of State, the Cabinet and the Official Opposition

Moreover, some of the main offices of the state currently have no formal legal recognition, and instead exist only as a matter of constitutional convention, most notably the office of the Prime Minister. It is suggested that the constitution should give formal legal recognition and status to the office of the Prime Minister as the head of government, and there should be a formal delineation of the powers and role of the Prime Minister particularly vis-à-vis Parliament, the Cabinet and the institutions of the nations and regions of the UK.

¹ Meeting Note with David Jamieson, 31 May 2019

The constitution should spell out how the office of the Prime Minister should relate to these other parts of the constitution and also how the office holder is appointed and dismissed from office. Currently, the Monarch appoints the person who is best able to command a majority in the House of Commons, but this is only required by convention and theoretically at least the Monarch could appoint any other person he or she wishes.

In the UK, traditionally the Cabinet was the principal organ of government responsible for executive decision-making. However, in recent years, especially with the premierships of Margaret Thatcher and Tony Blair, there has been a drift away from the collective decision-making of Cabinet to a more prime ministerial form of executive government.² Adopting a new constitution would offer the opportunity to strengthen the role of the Cabinet and also to enshrine constitutional principles such as collective responsibility.

It is perhaps inadvisable to give constitutional status to each office of the Cabinet ministers, such as the Department for Work and Pensions or the Department for Culture, Media and Sport, given that these departments tend to be changed from time to time by different administrations. However, consideration should be given to making the Great Offices of State permanent features of the constitution, such as the Chancellor of the Exchequer, the Home Secretary and the Foreign Secretary, as well as the Territorial Offices of the Scotland Office, Wales Office and Northern Ireland Office. In addition, the Attorney General for England and Wales, the Attorney General for Northern Ireland, and the Lord Advocate in Scotland should all be given permanent constitutional status.

Another critical part of the current constitution that exists merely by convention is the Official Opposition, which is by convention the second largest party in the House of Commons, and has a constitutional function of holding the party of government to account, as well as forming a Shadow Cabinet led by the Leader of the Opposition. The constitution should give formal legal recognition to the Official Opposition, its role and functions.

Parliamentary Democracy and the Nations and Regions

The centrepiece of UK democracy will continue to be the UK Parliament, albeit in a different form. The role of the House of Commons should be given formal legal recognition and status, the role of the executive as part of the House of Commons, its role in scrutinising legislation, in passing bills, in holding the government of the day to account and the rights and responsibilities of individual MPs. Consideration should also be given to putting the relationship between individual MPs and their constituencies on a constitutional footing, with potentially a right of recall for constituents in each Commons constituency against sitting MPs. The constitution should set out the role of House of Commons committees, alongside the precise nature of the relationship between the House of Commons and the Second Chamber.

The adoption of the new constitution should take the opportunity to abolish the House of Lords as currently constituted, including all hereditary peers, life peerages and bishops, and replace the current Second Chamber with a new fully elected Second Chamber to be known as the *Senate of the Nations and Regions*. The nature of this body will be discussed further in Chapter 9, but it is important to ensure that the constitution sets out the nature of the body, its composition, how it is to be elected, its role and purpose, and importantly its relationship with other parts of the constitution, mostly

² Turpin, Colin and Tomkins, Adam, *British Government and the Constitution*, Sixth Edition, pp. 393

notably the House of Commons and the executive as well as the institutions in the nations and regions of the UK.

The new constitution should also codify the rules and procedures for the passing and enacting of legislation in the UK Parliament, and Parliament's general procedures and rules in relation to powers, privileges and immunities; public access and participation in the parliamentary process; petitions; the role of Parliamentary committees; and powers to make calls for evidence.

The official offices of the UK Parliament should also be given constitutional status including the Speaker of the House of Commons, and the Lord Speaker of the House of Lords should be replaced with a Presiding Officer of the Senate of the Nations and Regions.

At the centre of Westminster there should be a strong influence of the nations and regions of the UK, and it is suggested that this can be done in two principal ways. The first way in which this can be done is through the Senate of Nations and Regions, which will be explored in further detail below. However, another way in which this could be done is by the creation of a new body at the heart of the British state, to be known as the Council of the Union, as a UK council of ministers.³

The Council would be a body made up of the Prime Minister, the First Minister of Scotland, the First Minister of Wales, the First Minister of Northern Ireland, Deputy First Minister of Northern Ireland,⁴ as well as the Minister for England. This will ensure that all of the nations and regions of the UK have an intergovernmental forum at the heart of Westminster.

The functions of the Council of the Union will be to provide a forum for the executives of each of the nations and regions of the UK, and a channel between those executives and the central UK Government led by the Prime Minister. The Council would be a decision-making body in respect of federal-devolved relations, and would be the supreme executive body in the constitution on federal-devolved relations, albeit still subject to the purview of the courts and subject to judicial review. In this regard, the Council would be able to overrule decisions of the British Cabinet on federal-devolved relations, and the Council would be responsible and accountable to the Senate of the Nations and Regions for its decisions.

A recent example of what would be considered a federal-devolved issue in this regard would be the repatriation of powers from the EU institutions to the UK. Decisions in relation to where those powers should sit within the state should be decided by the Council of the Union, and not dictated by the UK Government.

The Council of the Union would replace the current Joint Ministerial Committee, and would be required by the constitution to meet at regular intervals throughout the year, perhaps once every three months. The meetings should be chaired by each of the six members of the Council on a rotating basis, with each member having equal status in the meetings.

For federal-devolved issues for which the Council has decision-making power, the Council would operate on the basis of a mixture of unanimity voting, qualified majority voting and simple majority voting depending on the issue being voted on at Council meetings. For example, issues relating to the repatriation of powers from the EU post-Brexit may require unanimity voting while issues such as

³ Meeting Note with Mark Drakeford MS, 31 July 2019; Meeting Note with Professor Tom Mullen, 29 August 2019

⁴ Both First Minister and Deputy First Minister of Northern Ireland would be required to reflect their parity under the Good Friday Agreement, see Meeting Note with Ruaidhri O'Donnell, 22 May 2019

issues in relation to the operation of the UK single market could be decided by qualified majority voting.

Similar to the requirement to consult the JMC discussed in Chapter 4, there should be a legal requirement for the Council to be consulted when decisions of the UK Government have an impact on devolved areas of competence. All UK Government departments should be required to carry out impact assessments to establish how the devolved settlements in Scotland, Wales and Northern Ireland and how London and the English regions may be affected by a policy, and based on this assessment, the Council should be consulted.

The Council of the Union should facilitate intergovernmental relations between all of the different parts of the constitution on a non-plenary basis to enable, for example, the Scottish Government to work closely with the Combined Regional Authority for the North-West of England on a matter of common concern, or to enable the Combined Regional Authority for the West Midlands to work closely with the Welsh Government on a matter of common concern.

In addition to this executive body, there should be an Interparliamentary Committee established at Westminster made up of MPs, Senators, MSPs, MSs and MLAs to facilitate joint working between all of the legislatures in the UK. The Interparliamentary Committee should have the ability to conduct inquiries and hold the Council of the Union and the devolved administrations to account. It will also be responsible for trying to coordinate the legislative agenda between all of the legislatures of the UK including the UK Parliament, the Scottish Parliament, the Welsh Senedd, and the Northern Ireland Assembly.

Parliamentary Procedure

A new system of rules will require to be developed governing the procedures in the UK Parliament, and be incorporated in the constitution, not least because of the abolition of the House of Lords and its replacement with a Senate of the Nations and Regions. The new rules on parliamentary procedure will also have to take cognisance of the place of England as a nation within the UK and develop special rules to accommodate this in the House of Commons and Senate.

The particular nature of these rules is outwith the scope of this work. However, there is some discussion regarding the new parliamentary procedure which will govern the relationship between the House of Commons and the new Senate of the Nations and Regions in Chapter 9. There is also a discussion of some of the ways in which the place of England can be strengthened within the UK Parliament to allow it to function as a Parliament of England as well as the UK Parliament in Chapter 5.

In addition, new codes of conduct should be developed for both the House of Commons and the Senate of the Nations and Regions, based on the current Code of Conduct for the House of Commons and the Code of Conduct for the House of Lords. These codes of conduct should be incorporated by reference into the constitution and failure to adhere to the codes of conduct should result in disciplinary action by IPSA and potentially investigation by the CPU.⁵

⁵ Please see the section below on Civic Leadership and Integrity for further discussion on these bodies.

The Structure of the Federal State

The new constitution would be required to make clear what would be the units of the constitution and the new federal state. It is clear that Scotland, Wales and Northern Ireland would be obvious units of the constitution. However, given England's size, importance and wealth compared with the other nations of the UK, it would be required to be broken up into English regions together with Greater London. Those regions would be governed by Combined Regional Authorities (CRAs). The regions would not be imposed or dictated by Westminster but rather would grow organically as discussed in further detail in Chapter 5.

The Scottish Parliament, the Welsh Senedd and Northern Ireland Assembly would be given permanent constitutional status and become independent sources of sovereign power distinct and independent of Westminster in their areas of competence. The Greater London Authority will also be given permanent constitutional status in the same way as the Scottish Parliament and Welsh and Northern Irish Assemblies.

In relation to the regions of England, the existing local government structures could be used to create Combined Regional Authorities ("CRA") that will be amalgamations of the existing local authorities in England. It is already possible to create a form of Combined Authority under the Local Democracy, Economic Development and Construction Act 2009, and the Cities and Local Government Devolution Act 2016. However, as part of the constitutional reform programme, all current Combined Authorities should be abolished in their current form to prevent conflict. All other forms of English local government should be maintained.⁶ The CRAs in the English regions should also be given permanent constitutional status in a similar way to the GLA and the Scottish Parliament, Welsh Senedd and Northern Ireland Assembly.

Local government in England outside of London is a complicated patchwork, but it is suggested that there should not be a complete overhaul of the structure of English local government. Currently, there are two broad patterns of local government in England. In some parts of the country there are single tier authorities where the authorities in those areas are responsible for all local government functions. These include 55 unitary authorities and 36 metropolitan boroughs. In other parts of England, there is a two-tier structure with 26 non-metropolitan counties and 6 metropolitan counties in the upper tier, and 192 non-metropolitan districts in the lower tier, and a clear division of functions between the upper tier and lower tier. There is a different division of functions in metropolitan and non-metropolitan areas.⁷

Under a new model of regional administration for England, every local authority in England would be given the option to become part of a CRA, and each local authority will be able to determine which CRA it wishes to join. The CRAs will be given sweeping new powers of administration to give maximum regional autonomy to the English regions.

The constitution would legally guarantee the status of the national, devolved legislatures and the English CRAs, and they would be legally protected from interference by Westminster in their areas of competence. Any legislation which sought to apply outside their own competence would be struck down as incompetent by the Supreme Court. Meanwhile, any legislation from Westminster which encroached upon the competence of the national and regional bodies would also be similarly held to be unconstitutional and struck down as invalid.

⁶ Meeting Note with Dr. Andrew Blick, 17 September 2019

⁷ Meeting Note with Dr. Mike Cole, 2 August 2019

The constitution would be required to recast the UK Parliament as a federal parliament, with the House of Commons remaining the lower house but with the House of Lords being recreated into a federal Senate of the Regions and Nations. Much like the Council of the Union, which will be the federal executive forum, the Senate will become the federal legislature bringing all parts of the federal state together. This will be discussed in further detail in Chapter 9.

The new constitution would be required to codify the rules and procedures for the passing and enacting of legislation in the devolved institutions of the nations and regions, and also general procedures and rules in relation to powers, privileges and immunities; public access and participation in the parliamentary process; petitions; the role of Parliamentary committees; and powers to make calls for evidence. The process of constitutional reform could allow these institutions themselves to determine their own rules rather than them being imposed by Westminster, but the rules determined would be required to be included in the new constitution.

Local government will also be required to be given constitutional status as independent sources of sovereign power distinct both from the federal government at Westminster, but also from the national and regional administrations across the UK. The role of local government and CRAs in England would be legally guaranteed, and, within their areas of competence, decisions of local councils upheld and guarded from interference by regional or Westminster governments.

The underlying principle governing the relations between these different parts of the constitution should be one of parity of esteem, meaning that the UK Parliament, the Scottish Parliament, the Welsh Senedd, the Northern Ireland Assembly, the Great London Assembly, the English CRAs and local government must all treat each other with mutual respect and appreciation for the roles of these institutions within the federal state. There should be no attempts to block, frustrate, denigrate or diminish the purpose, role and functions of the institutions by other institutions, and all of the institutions should respect and adhere to the letter and spirit of the codified constitution in this regard.

Northern Ireland and the Good Friday Agreement

The place and status of Northern Ireland in the UK is a special case given the tumultuous history of the island of Ireland and its relationship with Great Britain. Prior to 1921, the entire island of Ireland was part of the UK in what was known as the United Kingdom of Great Britain and Ireland. Following the Irish War of Independence between 1919 and 1921, the Anglo-Irish Treaty brought the conflict to an end, and established the Irish Free State, which was an independent dominion of the British Crown with full internal self-government, comprising the southern 26 counties of the island of Ireland. As part of the Treaty, the island was partitioned and six counties of the historic province of Ulster remained part of the UK as Northern Ireland, with its own devolved parliament at Stormont.

The Dáil in Dublin ratified the Treaty and a civil war broke out between those who supported the Treaty and those who opposed it. In 1937, the Dáil ratified a new Constitution of Ireland that abolished the Irish Free State and proclaimed Éire as a sovereign, independent and democratic state, but this was not recognised by the UK Government. Éire officially left the British Commonwealth in 1949 and became the Republic of Ireland.

The Ireland Act 1949 of the UK Parliament which recognised this new fact also reaffirmed Northern Ireland's place in the UK, and in terms of s.1(2) stated that in no event will Northern Ireland cease to be part of the UK without the consent of the Parliament of Northern Ireland.

The Parliament of Northern Ireland was prorogued and then abolished in 1972 and this was followed by a border poll which asked voters two questions, namely whether Northern Ireland should remain part of the UK or whether it should join the Republic of Ireland outside of the UK. A huge majority voted in favour of Northern Ireland remaining part of the UK, but the poll was boycotted by almost the entire Nationalist community in Northern Ireland. It was reported that less than 1% of Northern Ireland's Roman Catholic population voted.⁸

Given the result of the poll, the UK Government took no further actions and fresh elections were held to a new Northern Ireland Assembly on 28 June 1974.

By this point, of course, Northern Ireland was in the grip of an ethno-nationalist and sectarian civil conflict between the majority Protestant community and the minority Roman Catholic community, in what has since become known as the Troubles. The vast majority of those in the former community supported Northern Ireland remaining part of the UK, while the majority in the latter supported the idea of Northern Ireland seceding from the UK and joining the Republic of Ireland.

Following on from the civil rights movement in the early 1960s, the Troubles erupted between Irish Nationalist paramilitary groups, most notably the Provisional IRA, and Ulster Loyalist paramilitaries and the British state security forces, and to a lesser extent the state security forces of the Republic of Ireland. It is estimated that there were approximately 3,500 deaths, and a total of over 50,000 injuries as a result of the violence including, almost 2,000 civilians.⁹

The Provisional IRA called a ceasefire in 1994, and in 1998 a peace agreement known as the Belfast Agreement, or the Good Friday Agreement ("GFA"), was negotiated between the UK Government, the Irish Government, and the main political parties in Northern Ireland from both the Protestant and Catholic communities.

The GFA is a binding bilateral international agreement governed by international law, which radically and fundamentally altered both the UK constitution and the Constitution of Ireland. Indeed, the Nineteenth Amendment to the Constitution of Ireland is the amendment that permits the Republic of Ireland to be bound by the terms of the GFA, and enables the establishment of shared political institutions between the Republic and Northern Ireland.

Any new constitutional arrangements for the UK would similarly have to ensure that the GFA in its entirety is entrenched in the constitution.¹⁰

Firstly, the GFA recognised that that the majority of the people of Northern Ireland wished to remain a part of the United Kingdom, and that a substantial section of the people of Northern Ireland, and the majority of the people of the island of Ireland, wished to bring about a united Ireland. Both of these views were held to be legitimate by the GFA.¹¹

Secondly, the GFA set up a range of new institutions under three strands. In Strand 1, the GFA set up the Northern Ireland Assembly, which is the devolved legislature, and the Northern Ireland Executive, which is the power sharing executive in Northern Ireland.

In Strand 2, the GFA set up the North/South Ministerial Council, which co-ordinates activity and exercises certain governmental powers across the whole island of Ireland. The Council takes the form

⁸ Secession from Nation States, House of Common Library Briefing, 14 August 2019, pp. 5

⁹ http://www.bbc.co.uk/history/topics/troubles_violence

¹⁰ Meeting Note with Lord Bew, 29 July 2019

¹¹ The Belfast Agreement, Constitutional Issues, paragraph 1, 10 April 1998

of meetings between ministers from both the Republic of Ireland and Northern Ireland, and is responsible for twelve policy areas. Six of these areas are the responsibility of corresponding North/South Implementation Bodies.

Also as part of Strand 2, the GFA set up an inter-parliamentary forum created between the national parliament of the Republic of Ireland (the Oireachtas) and the Northern Ireland Assembly. The association has 48 members, drawn equally from members of the Northern Ireland Assembly, and the Oireachtas, and will meet twice annually on a rotational basis.

The GFA also set up North/South Consultative Forum, which is a planned civic forum on the island of Ireland envisioned as part of the Good Friday Agreement. The Forum is envisioned as an independent consultative forum appointed by the Government of Ireland and the Northern Ireland Executive, "comprising the social partners and other members with expertise in social, cultural, economic and other issues" and being representative of civil society.

In Strand 3, the GFA set up a number of intergovernmental institutions including the British-Irish Intergovernmental Conference is an intergovernmental organization established by the Governments of Ireland and the United Kingdom.

The GFA also set up the British-Irish Council which is an intergovernmental organisation which aims to improve collaboration between its members in a number of areas including transport, the environment, and energy and currently has a membership comprising the governments in the Republic of Ireland, the United Kingdom, the devolved governments of Northern Ireland, Scotland and Wales, and the governments of the Crown dependencies of the UK including Guernsey, Jersey and the Isle of Man.

Lastly, the GFA set up the British-Irish Parliamentary Assembly, which is a deliberative body consisting of members elected to the parliaments of the United Kingdom, Ireland, Scotland, Wales, Northern Ireland and the British crown dependencies. Its purpose is to foster common understanding between elected representatives from these jurisdictions.

The assembly consists of 25 members each from the Parliament of the United Kingdom and the Oireachtas (the Irish parliament), as well as five representatives each from the Scottish Parliament, the Welsh Senedd, and the Northern Ireland Assembly, and one each from the States of Jersey, the States of Guernsey and the Tynwald of the Isle of Man.

In addition to setting up this panoply of institutions, the GFA also sought to foster peace through the decommissioning of weapons held by all paramilitary groups in Northern Ireland, and the subsequent normalisation of security arrangements in Northern Ireland and a return to normal policing.

Critically, the GFA also committed the UK Government to the incorporation of civil and political rights under the European Convention on Human Rights into the law of Northern Ireland, and to the establishment of the first National Human Rights Institution in the UK, the Northern Ireland Human Rights Commission.

The Northern Ireland Act 1998 implemented much of the GFA domestically in providing for the Northern Ireland Assembly, with special arrangements for the passing of certain types of resolution requiring cross-community support and also providing for a petition of concern procedure which acts as a veto for each community. It also creates the Northern Ireland Executive which has special power-sharing requirements to ensure that both communities are represented, most notably by requiring each community to either hold the office of First Minister of Northern Ireland or Deputy First Minister and ensuring both of these offices are equal in power and status.

The GFA has a number of implications for developing a new constitutional model for the UK as whole. Firstly, it is suggested that the whole of the GFA should be incorporated into the codified constitution by reference so that the special arrangements to preserve peace in the Northern Ireland are protected within the constitution.¹²

Secondly, the institutions that were set up as part of the GFA including the Northern Ireland Assembly and Northern Ireland Executive should not be altered in any way by the constitutional arrangements for the UK as a whole, as they are part of a binding international agreement between the UK and the Republic of Ireland.¹³

Thirdly, the incorporation of international human rights standards, which will be discussed more fully below, should not in any way diminish the current protection of human rights in Northern Ireland through the incorporation of the civil and political rights under the European Convention on Human Rights. The incorporation of international standards should only improve and build on these protections and not undermine them in any way.

Fourthly, although suggestions on the representation of Northern Ireland at a federal level will be addressed here, it is suggested that a North/South Consultative Forum should be convened in Northern Ireland to consider how best Northern Ireland and its institutions should fit into the new constitutional arrangements for the UK as a whole.¹⁴

Local Democracy and Municipal Socialism

A key part of democratic renewal and a constitution based on progressive federal principles is the reinvigoration of local government and local democracy across the UK. As discussed more fully in Chapters 1, 2 and 3, local government in the UK has been systematically undermined over the course of the last few decades and lacks the powers, funding and status to make an impact on local communities.

The constitution must recognise the need to give local government back its status and power, and a protection against both central government and devolved government encroachment. The reinvigoration of local government and local democracy is key to ensuring that decision-making is done according to the principle of subsidiarity, people feel connected to the levers of powers, and people feel a sense of agency and control over their lives.

Local government takes various forms across the UK and is different in England, Scotland, Wales and Northern Ireland. Local government in England was discussed more fully in Chapter 5 in relation to achieving greater regional autonomy for the English regions. However, there are common measures that could be taken in relation to local government across the UK in order to strengthen democratic participation at a local level and reinvigorate local authorities.

Firstly, in relation to the status of local government, local councils should be given protection under the constitution to ensure that they are not left to the whim of central or devolved governments on their form, powers and finance. Clearly, flexibility must be built into the system to enable changes to local government to be made, but the constitution should make clear that future local government reorganisations should be subject to consultation with and the consent of the local authorities

¹² Meeting Note with Lord Bew, 29 July 2019

¹³ Meeting Note with Ruaridh O'Donnell, 22 May 2019

¹⁴ Ibid.

affected. The constitution may make specific rules on how reorganisations should take place, for example, by local referendum or a supermajority in local councils.

Secondly, in relation to the financing of local government, there has been a gradual drift from a system where there was no central funding of local government, to a finance system that now funds over 60% of local monies from central coffers. With this increase in central funding over the years has come a corresponding increase in central control.¹⁵ As a consequence, local government has become less responsible and accountable to local people for the way in which they are run and the decisions that they make.

Funding of local government across the UK requires an overhaul to give greater responsibility to local authorities to raise their own funding, while concurrently increasing the accountability of local councillors for local spending decisions. This will require transferring new fiscal powers to local authorities to enable them to increase taxes in their local areas to meet local needs including full control over Council Tax to local authorities. Local authorities should have the power to set policy on Council Tax including abolishing it and replacing it with other forms of local taxation, such as Land Value Taxation.

Thirdly, local authorities should be empowered to hold a variety of public services directly accountable in respect of the services delivered in their local communities, and a statutory duty should be imposed on local authorities to hold such bodies charged with the delivery of public services to account. For example, local authorities should hold to account all public and private bodies involved in the delivery of services such as water, gas, electricity, local transport, environmental protection, health and social care, housing, and economic development.¹⁶

This would include local authorities having responsibility for holding to account bodies such as Scottish Water or Thames Water, regardless of whether such bodies are publicly or privately owned, even if the services are not being delivered directly by the local authority. The first line of democratic accountability for all such bodies and the services they deliver in local areas should be local authorities.

In addition to strengthening the role of formal local government, it is important that in accordance with the principles of progressive federalism, in particular that of subsidiarity and agency, the constitution should make provision for creating ways for citizens to take collective action in their local communities outside of formal central, devolved or local government.

Collective groups of citizens should be able to collectivise and access public funding in order to pursue local projects such as taking communal ownership and control of land or local landmarks, or to launch local campaigns.¹⁷ There should be a national Local Democracy Fund to support this and collective groups of citizens should be able to apply for funding and would also be required to be held accountable for public money spent as part of their collective project to the Local Democracy Fund.

¹⁵ Travers, Tony and Esposito, Lorena, *The Decline and Fall of Local Democracy, A History of Local Government Finance*, Policy Exchange, 2003, pp. 56

¹⁶ This has already been called for by Scottish Labour in the form of the 'Green Bus Fund', which would be part of a broader Municipal Ownership Revolution, decarbonising buses and introducing council-owned, cheaper services for the people of Scotland.

¹⁷ Meeting Note of Sounding Board, 24 May 2019

The Supreme Court and Human Rights

As mentioned above, the UK Supreme Court would be given responsibility as the UK's final constitutional court, and as such would be given an additional role to guard the new constitutional settlement. Significantly, it will be given the role of ensuring that legislation from Westminster as well as all the devolved legislatures are compliant with the constitution, as well as decisions of the executives and Council of the Union.

The law of judicial review would require to be reformed so that the grounds of review include a ground, which allows legal challenge to primary and secondary legislation emanating from the UK Parliament, Scottish Parliament, Welsh Senedd, Northern Ireland Assembly and the English CRAs and executive decisions made by the devolved institutions that contravenes the constitution.

This will mean that if the legislation or executive act in question goes beyond the competence of the institution in question, or encroaches upon another institution under the constitution, or infringes upon a human right protected by the constitution, then the Supreme Court will be required to rule this unconstitutional and invalidate it.

The adoption of a new codified and entrenched constitution will also offer up the opportunity to incorporate international human rights standards into UK domestic law. As has been discussed above, the UK has already incorporated some human rights standards into UK domestic law principally via the Human Rights Act 1998, which incorporates most of the human rights under the European Convention on Human Rights into UK domestic law.

However, it is suggested that the new constitution should incorporate human rights standards not only in relation to civil and political rights but also in relation to economic, social and cultural rights too. A major piece of work has been done in this area for the Scottish Human Rights Commission in relation to Scotland¹⁸ that offers a model on how this might be achieved across the UK. All UK public authorities and all legal entities performing public or quasi-public functions should be under a constitutional legal obligation to have due regard to international human rights standards in decision-making, with failure to have such due regard resulting in decisions of public authorities being challenged by way of judicial review proceedings.

Specific economic and social rights which ought to be constitutionally protected include the right to strike by all workers across the UK, including a right to solidarity strike action, a legal obligation on all business organisations to recognise trade unions and collective bargaining, and first preference for all workers across the UK to buy-out their employers when a business organisation is put up for sale or falls into administration, with financial assistance from the state to encourage the establishment of worker cooperatives. It should be made a constitutional right for all workers to elect representatives which will have a constitutional right to sit on the boards of all business organisations registered in the UK.

Other economic and social rights which should be protected include the right of every citizen to access universal healthcare free at the point of need, a right to housing and a right to an adequate standard of living, which include secondary rights to a living wage, to social security and/or a universal basic income.

Moreover, the constitution should also include third generation human rights as well as economic and social rights. For example, a right to a clean and healthy environment could be a right enshrined in the

¹⁸ Boyle, Dr. Katie, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights*, November 2018

new UK constitution for each and every citizen, giving citizens a legal right of action against public authorities and corporations for polluting the atmosphere, water supply or food chain. The third-generation rights could also include rights to self-determination for different national groups within the UK, and also rights to be able to access and enjoy natural resources such as clean water.

All public authorities in the UK as well as private bodies performing public functions should be subject to a legal obligation to comply with all of these human rights standards.

The role of the UK's National Human Rights Institutions (NHRI) including the Equality and Human Rights Commission, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission, should be strengthened in this regard to give them sweeping new constitutional powers to enforce the upholding of civil, political, economic and social rights as well as third generation rights. Secondly, there should be constitutional duties for the NHRIs to do so and if these legal duties are contravened then they should be subject to sanction by way of judicial review, budget cuts and potential abolition.

Judicial Appointments

In giving increased power to the judiciary through the adoption of a legally codified and entrenched constitution, it will be necessary to reform the judicial appointments procedure to ensure that the judiciary is representative and reflective of society at large, and not only of one privileged part of society.¹⁹ Currently, the judiciary is inherently unreflective of society as a whole and that must change to ensure a wider spectrum of political, social and economic views are represented in the courts.

While only 7% of school pupils in the UK attend private school, the Sutton Trust found that three quarters of judges at the top level of the UK judiciary attended private school, and the same proportion attended two of the most elite universities in the UK, Oxford and Cambridge.²⁰ Not only are the judiciary drawn from a principally middle or upper middle social class, but the House of Lords Constitution Committee found that only one in twenty judges is non-white and fewer than one in four is female. The same report also found that the higher up the chain, the less representative it is of wider society. The report concluded that the unrepresentative nature of the judiciary was undermining trust in the courts.²¹

It is critical that the judiciary are representative of society as a whole, as the independence and impartiality of the judiciary are cornerstones of all democratic constitutions, including the current British constitution. If the ambition is to adopt a codified and legally entrenched constitution for the UK based on progressive federalism, it becomes even more important to ensure that the judiciary is representative and impartial.

In order to challenge the extreme disparities between the current judiciary and society as a whole, it is suggested that radical action is required in relation to judicial appointments. Political screening of appointees to courts that have the power to strike down primary legislation will be required.²²

It is of critical importance that political screening of judges is introduced for judges empowered to strike down primary legislation. The adoption of a codified constitution, as well as giving the higher courts the ability to strike down primary legislation that is unconstitutional, fundamentally alters the

¹⁹ Meeting Note with Max Harris, 1 August 2019

²⁰ <https://www.suttontrust.com/newsarchive/75-of-leading-judges-went-to-private-school/>

²¹ *Judicial Appointments*, Select Committee on the Constitution, House of Lords, 25th Report of Session 2010-12

²² Meeting Note with Lord Hope, 16 October 2019

British constitution, replacing the doctrine of the Sovereignty of Parliament with a supreme law. Such a reform would fundamentally recalibrate the relationship between Parliament, the executive and the courts, and would inevitably lead simultaneously to a politicisation of the judiciary, and the consequent juridification of politics.

Given this, it is crucial that judges empowered to strike down primary legislation should be required to firstly go through a rigorously independent appointment process, but secondly an element of political screening to ensure the bench of the appellate courts are fairly balanced. This political screening role would be reserved for the Senate of the Nations and Regions, and is discussed in Chapter 9.

UK Citizenship and Civic Education

The new constitution should codify and set out the rules on eligibility in respect of UK citizenship, the entitlements and obligations attaching to UK citizenship, rules on retention and acquisition of citizenship, rules in relation to dual and multiple citizenship, revocation of citizenship and provision for the UK Parliament to make special rules in relation to UK citizenship.

The constitution should make clear, for example, that every person born in the UK is a UK citizen, every citizen is entitled to hold a British passport, how citizenship can be gained through marriage, that citizenship cannot be lost through dissolution of marriage, the status of children and grandchildren of UK citizens either living in the UK or outside the UK, and rights of recourse in relation to revocation of citizenship.

It is suggested that the UK should adopt liberal rules on eligibility for UK citizenship, and should adopt a liberal method of naturalisation for becoming a UK citizen, for example providing for an entitlement to naturalisation after a period of 6 years' residence and for those with a genuine link to the UK. Moreover, it should be clarified that UK citizenship should not be for sale or capable of being purchased or traded.²³

It is suggested that UK citizenship should confer certain entitlements, including the right to vote for all UK citizens over the age of 16 years without qualification. This would include a right to vote for prisoners who are UK citizens. Voting in elections is discussed in further detail below.²⁴

One of the obligations of being and/or becoming a UK citizen should be the duty to undertake and complete a compulsory UK civic education course, as part of which all citizens will learn about the workings of the state, the government, elections, civil society, trade unions, and participation in the democratic process. This course should be delivered primarily by secondary schools before citizens reach the age of 16 and for all those who naturalise as UK citizens.²⁵

Central Bank and National Investment Bank

As the UK's central bank, the Bank of England would also be required to be given constitutional status within the new constitution and an outline of its role and responsibilities should be enshrined in

²³ For information on current citizenship naturalisation rules of EU Member States see:

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI\(2018\)625116_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf)

²⁴ Meeting Note with Professor Aileen McHarg, 6 July 2019

²⁵ Meeting Note with Lesley Laird MP, 24 July 2019; Meeting Note with Christina Rees MP, 30 July 2019; Meeting Note with Professor Laura McAllister 31 July 2019

constitutional law, along with its relationship with the central government, particularly the Treasury and the office of the Chancellor of the Exchequer.

The bank should have regional offices around the country that should be responsible for gathering and reporting information on regional economic development and performance to the central bank. Also, appointments to the Courts of Directors of the Bank of England and the Monetary Policy Committee should be done on a regional basis, with each of the regions of the UK represented.

The size of the Monetary Policy Committee should be increased to include an additional four external members. The Chancellor of the Exchequer appoints the current four external members, but the additional four members should be appointed by the Council of the Union to ensure committee represents the nations and regions of the UK.

It is suggested that the complete operational independence of the Bank of England requires reform, and the central bank should be made politically accountable to the Chancellor of the Exchequer. The independence and the expert impartial professional judgement of the Bank of England in relation to the setting of interest rates should be maintained, but the central bank itself must be made accountable to the Chancellor for its decisions. Ultimately, the Chancellor should be able to overrule the decisions of the Bank of England in its setting of monetary policy.

Moreover, the Treasury should be able to borrow directly from the Bank of England to deliver fiscal stimulus and to enable a government to run a deficit. The UK Government should not be required to issue bonds in order to borrow; it should be able borrow directly from the central bank in order to run a budget deficit and invest in the UK economy.

The Labour Party's plan to set up a National Investment Bank should also be made a permanent feature of the UK constitution. The National Investment Bank would be legally obligated to ensure that investment in the UK economy is directed across the country according to need. The objective of the National Investment Bank from a constitutional perspective would be to ensure investment is spread across the nations and regions, and in some ways to effect a distortion in the market, so to channel investment to certain parts of the country according to need and not merely based on rates of return on capital and market demand. Rather than being a one-off Labour Party policy, the National Investment Bank would become a permanent feature of the federal state.²⁶

In addition to the National Investment Bank, the constitution should set up local boards of trade and industry across the UK. In Scotland, one suggestion would be for a local board to be set up in respect of each region of Scotland for the Scottish Parliament elections.²⁷ The local boards of industry and trade should be connected to the National Investment Bank, which will be charged with directing capital investment across the country, but the local boards should make decisions in relation to the spending of that capital.

These boards could be responsible and accountable to local government and should have strong trade union and civil society representation. The boards could also be given sweeping powers in relation to land to facilitate radical land redistribution across the UK according to local needs, in order to stimulate local economies.²⁸

²⁶ Meeting Note with Rory MacQueen, 24 April 2019

²⁸ Meeting Note with David Jamieson, 31 May 2019

Financial and Fiscal Responsibility and Accountability

The federal constitution must ensure that the nations and regions of the UK are given real responsibility over their finances. Each of the nations and regions of the UK should be given full borrowing powers under the new constitution, and an uncapped and unrestricted ability to issue bonds on the international money markets.

Without the ability to issue its own bonds uncapped by Westminster, the nations and regions will not be able to take responsibility for its finances, and therefore the Scottish Parliament, the Welsh Senedd, the Northern Ireland Assemblies, Greater London Assembly and the Combined Regional Authorities in England should be given unrestricted powers to borrow. In addition, as discussed more fully in Chapter 5, the Combined Regional Authorities in England should be given the ability to take on certain tax powers.

There would be significant moral hazard within the constitution that a nation or region can act in any way it chooses and always be bailed out by Westminster if financial disaster happens. To this end, the constitution should allow the UK Government to bail out failing nations and regions if so minded to do so, but there should be no constitutional requirement to do so.

In order to balance the principles of subsidiarity and solidarity, it should be possible for one part of the UK to default on its own debt. However, in order to prevent long-term and lasting damage to the economy of one part of the UK, it is suggested that a fiscal backstop should be built into the constitution that would operate as a fiscal reset applied every 15 years. This would mean that all debts held by all parts of the UK should be rearranged and subsumed into the national debt at the end of the 15-year period. This would ensure that there is no long-term or permanent damage to one part of the UK, while ensuring accountability of local politicians for fiscal policy and spending decisions.²⁹

As discussed more fully in Chapter 4, the current funding arrangements through the block grants and the Barnett formula are not fit for purpose in relation to the devolved settlements. Therefore, a new needs-based formula should be developed for the whole of the UK, including Greater London and the English regions, to calculate funding from the UK Government.

The funding arrangements should be based on regional need across the UK, and the constitution should clearly outline the federal tax regime and fiscal arrangements, revenue sharing and fiscal transfers, and the mechanisms for the redistribution of wealth across the UK. The constitution should also make provision regarding fiscal policy coordination, and debt management between the nations of the UK. Consideration should also be given to the setting up of a constitutionally protected UK Sovereign Wealth Fund.³⁰

Constitutional Commitment to Socialism

The constitution should also protect key parts of the UK economy from being taken over and controlled by the private sector. The constitution should hardwire public ownership into the idea of UK democracy, and include a constitutional commitment to socialism through the public ownership of the means of production, distribution and exchange for the UK's key assets and key industries including the NHS; utilities including water, natural gas and electricity generation and supply; natural resources including oil and gas; essential transport infrastructure including the railways; the National

²⁹ Meeting Note with Professor Gerry Holtham, 11 September 2019

³⁰ Ibid.

Investment Bank as the UK's state investment bank and the Bank of England as the central bank; and the state education system.³¹

A legal form of words should be developed as part of the new constitution that commits the UK to public ownership of these assets and industries to be run in the national interest, and never for private profit. Any attempts to sell these industries and assets into private hands should be subject to challenge by way of judicial review and held to be unconstitutional by the Supreme Court.

It may be that the legal form of words developed ultimately does not require direct state ownership and control of certain parts of the economy. It may be that a variety of forms of ownership are permitted by the constitution, but that there is a legal requirement for the parts of the economy in question to be run in the national interest and not for profit, a ban on all shareholders and a removal of the fiduciary duty to maximise returns for shareholders. Certain parts of the economy could be owned on a cooperative basis or as a company limited by guarantee as a mutual. It may not necessarily require direct state ownership.³²

Economic and Industrial Democracy

A very important aspect of the programme of democratic renewal and constitutional reform should be an aim to extend democracy beyond the political and civil sphere of our lives and into the economic sphere. There is no reason why our vision of democracy should be limited to the ideas of democratic elections, parliamentary accountability of government, and the rule of law. Democratic control and democratic principles should be introduced into all aspects of our life, including the economy and the workplace.

A fundamental part of this is extension of democracy into the economy is ensuring that workers are given full protection of their economic and social rights under the constitution.³³ As discussed in relation to human rights above, it is important that economic and social rights are incorporated into the constitution, and specifically in relation to the rights of workers. The rights for workers which should be included as part of the constitution should be based on the rights enumerated in the Charter of Workers' Rights, produced by the Institute of Employment Rights.³⁴

1. *Single Employment Status*

Everyone shall be protected by labour law, unless genuinely running a business on their own account. The distinction between employees and workers shall be abolished rather than clarified, and in the meantime employers shall not use false classifications of employment status. Everyone who works for a living shall be entitled to the protection of the State's labour laws, which set only minimum standards below which no one should fall. This includes not only the minimum wage and paid holidays, but also protection from unfair dismissal and redundancy, and all other employment rights.

³¹ Meeting Note with Max Harris, 1 August 2019

³² Meeting Note with Professor Gerry Holtham, 11 September 2019

³³ Meeting Note with Jackson Cullinane, 10 May 2019

³⁴ Meeting Note with Professor Keith Ewing, 11 September 2019

2. Working Time and Zero Hours

Every worker shall have the right to transparent and predictable working hours. Anyone who is requested or required to work more than the hours prescribed in the contract shall be given proper notice, paid overtime rates for doing so, and paid for cancelled shifts. This will address the problem of zero-hours contracts, and in doing so will build upon but go beyond EU proposals in the Draft EU Directive on the Employment Relationship designed to overhaul the current law on what information employers are required to provide employees at the start of the employment relationship.

3. Living Wage

The Scottish Living Wage shall be set at the same rate as the national living wage, which the UK Labour Party proposes should be £10 per hour (Spring 2019). The living wage shall be the benchmark for both future legislation and collective agreements, with the aim being to establish a minimum weekly Living Wage, with overtime rates. The latter should be set by a process involving the UK Government and representatives of trade unions and Employers. The latter process shall require overtime rates to be set for those working in excess of their contractually prescribed hours.

4. Pay Equality – Race and Gender

The UK Government and employers in the UK shall take steps in conjunction with trade unions representing Scottish workers to identify and eliminate the gender and racial pay gap. In the private as well as the public sector, hiring practices, promotion procedures and compensation schemes shall be designed and assessed with this aim in mind. The UK Government, employers and unions shall act to ensure that workers are paid equal wages for equal work, regardless of sex, race, disability or any other protected characteristic. Never again should it be necessary for a trade union to have to devote its time and resources, taking industrial action and/or legal action, in order to force an employer – in the public or the private sector – to respect the right of workers to equal pay.

5. Family and Carer Responsibilities

The rights of workers with family and carer responsibilities cannot be met by any single, simple solution. The matter cuts deep into stereotyping of roles that needs to be confronted, the responsibility of the State properly to fund child and social care, and the role of employers to facilitate flexible working.

Employment law thus has a role in this respect, as acknowledged by ILO Convention 156 (Workers with Family Responsibilities), which requires all steps possible to be taken to facilitate employment by workers with family and carer responsibilities. Building on existing legislation, this means enhancing the right of workers with family and carer responsibilities to flexible working practices; and strengthening the protection for women who are pregnant or have recently given birth from discrimination or dismissal.

6. *Health and Safety at Work*

No worker should be required to face the risk of predictable injury or death, and no employer should be relieved of the obligation to provide effective health and safety standards. It has been some time since British law was the subject of detailed official scrutiny to determine whether it is still fit for purpose, while in the meantime the nature of the economy has changed and funding for enforcement has been cut.

Pending the outcome of a long overdue strengthening of occupational health and safety law, health and safety standards at both industry and company level shall be determined as a matter of collective bargaining, setting real world standards appropriate for the sector and enterprise involved; employers shall recognise the right of access for 'roving' union safety representatives in the most remote and dangerous industries – particularly construction and agriculture; and workers' representatives should have the right of serving provisional improvement notices on employers and, where there is a serious and imminent risk, to stop the job, a power which should apply wherever the union has a member.

7. *Protection of Wages*

There shall be greater pay transparency and an end to the use of intermediary pay-roll companies. Following the proposals in the backbench Workers (Definition and Rights) Bill 2017-2019, there will be full supply chain responsibility for unpaid wages, holiday pay and other benefits. Contractors must take greater care in the choice of sub-contractors, and following the precedent of the Posted Workers Regulations contractors must undertake to meet the liabilities of sub-contractors who flee without paying wages or other debts to their workers, subject to a defence of due diligence on the third party being sued.

Collective rights and collective bargaining have a central and crucial role in this Charter. It is now no longer in doubt that an efficient and productive economy is critically associated with strong workers' rights and high levels of collective bargaining coverage. Over and above the contribution that it can make to economic goals, collective organisation is a necessary condition both of workers' freedom and of a free society more generally. Strong trade unions and collective bargaining improve democracy, help to achieve social justice, and help to ensure respect for the rule of law and the international standards that the UK is bound by.

8. *Freedom of Association*

Employers shall fully respect the right of their workers to form and join trade unions, and will not: participate in any formal or informal blacklisting of trade union activists, victimise trade union representatives at the workplace; nor engage in anti-union activities of any other kind, in accordance with ILO Convention 87.

In addition, trade unions shall have the right to appoint representatives at the workplace, and all employers shall fully respect the rights of workers' representatives as set out in ILO Convention 135 and ILO Recommendation 143. Special procedures shall be introduced to protect workers' representatives from dismissal.

9. Trade Union Access

Trade union representatives shall have the right of access to a workplace on giving reasonable notice to the employer for the purposes of organising, Trade union representatives shall have the right of access to a workplace on giving reasonable notice to the employer for the purposes of organising, meeting and representing workers on any matter relating to their employment, in accordance with ILO Convention 135 and ILO Recommendation 143. The employer shall be under a duty to provide an opportunity for meetings to be held on the premises, in conditions which are reasonable and appropriate, and which respect (i) the autonomy of the trade union, (ii) the freedom of any worker to meet a trade union representative, and (iii) the confidentiality of the employer's business.

10. Trade Union Facilities

Workers' representatives need protection from discrimination and dismissal, as well as access. But they also need facilities at the workplace, which have been cut back by the Westminster Government and subject to new statutory constraints in the Trade Union Act 2016. Building on ILO Convention 135 and ILO Recommendation 143, trade unions shall have the right to negotiate check off facilities with employers on whatever terms the parties deem appropriate, while trade union representatives at the workplace shall have the right to: such time off with pay as is necessary for them to perform their duties; a dedicated private space to meet members individually and collectively; access not only to the establishment, but to all parts of an establishment to the extent necessary for the performance of functions; and access to a secure email system protected from employer surveillance.

11. Trade Union Recognition

Trade unions shall have the right to recognition by an employer in accordance with ILO Convention 98. To this end, a union will be entitled to recognition by demonstrating majority support either by membership or by petition or other evidence without the need for a ballot, once recognised a union will be entitled to bargain collectively on all matters relating to the employment relationship and, these rights shall be available only to independent trade unions. and not also to 'employee associations', as suggested by the Fair Work Agenda.

It shall be open to trade unions and employers to negotiate supply chain agreements to impose obligations throughout the supply chain. The law should be changed to require such agreements and to remove impediments thereto.

12. Sectoral Collective Bargaining

Terms and conditions of employment shall be set by a process of sector wide collective bargaining, in order to raise wages and improve working conditions across the economy as a whole. The provisions of sectoral agreements shall be binding on all employers in the sector, including private sector contractors in the case of out-sourced public services. All employers shall comply with all relevant collective agreements. It shall remain possible for employers and trade unions to improve upon sectoral terms and conditions by means of enterprise agreements between an employer and a recognised trade union. Sectoral bargaining is dealt with more fully in paras 41-44 below.

13. Right to Strike/Solidarity Action

Workers and trade unions shall have the right to strike as an essential element in collective bargaining. That right shall be recognised in accordance with minimum standards set by international law to which the United Kingdom is a party, notably ILO Convention 87 and the European Social Charter of 1961. This means in part that the total ban on all forms of solidarity action should be lifted so that workers are free again to register their support for workers in brutal regimes overseas.³⁵

In addition to these core employment rights for workers, another key part of extending democracy into the economic sphere is the protection of alternative models of ownership in the economy. The economic system in the UK has a number of fundamental structural flaws that undermine economic strength and societal well-being. The predominance of private property ownership has led to a lack of long-term investment and declining rates of productivity, undermined democracy, left regions of the country economically forgotten, and contributed to increasing levels inequality and financial insecurity. Alternative forms of ownership can fundamentally address these problems.³⁶

Private ownership of the means of production, distribution and exchange is the default mode of ownership in the UK economy, and therefore the constitution should ensure it encourages and protects alternative models of ownership to rebalance the economy towards democratic principles rather than private profit.

National ownership of certain industries promotes long-term planning of the economy, helps to provide modernising infrastructure, quality health and social care, and to combat climate change. Examples around the world point to the positive contribution of national ownership³⁷ and that is why it is important to have a constitutional commitment to socialism in the constitution for certain national assets, including the National Health Service and the railways, for example, as discussed more fully above.

However, the constitution may also protect and encourage alternative models of ownership other than state ownership, such as cooperative ownership and municipal ownership. Cooperative ownership has the ability to increase employment stability and increase productivity levels, as well as making firms more democratic. Meanwhile, municipal and locally led ownership can improve service provision and guarantee that economic prosperity is not concentrated in certain regions of the country.³⁸

For example, the constitution should give the right to workers to buy-out their employers if their employer is selling off the business, or if the business is facing insolvency. This is known as the Macora

³⁵ Draft for Consultation: Charter of Workers' Rights, Institute of Employment Rights. This document was designed for use in Scotland, but the workers' rights enumerated in it are suitable for incorporation into a UK-wide constitution.

³⁶ Alternative Models of Ownership, Report to the Shadow Chancellor of the Exchequer and the Shadow Secretary of State for Business, Energy and Industrial Strategy, the Labour Party, pp. 5

³⁷ Ibid.

³⁸ Alternative Models of Ownership, Report to the Shadow Chancellor of the Exchequer and the Shadow Secretary of State for Business, Energy and Industrial Strategy, the Labour Party, pp. 5

Law³⁹ and should be incorporated into the constitution. Moreover, there should be constitutional protection of certain types of municipal ownership as discussed more fully in the section on Local Democracy and Municipal Socialism. The constitution could set up a Workers' Ownership Fund to assist workers to buy out their employers in a situation where the business is being sold off or is facing insolvency.

Common Frameworks, the UK Single Market and Brexit

The Treaty of Union of 1706 and resulting Acts of Union passed by both the Parliament of England and the Parliament of Scotland created for the first time a UK single market that came into force in 1707.⁴⁰ Following on from the creation of the single market in the UK, the economies of England, Scotland and Wales became enmeshed into one single economic unit. Ireland also became part of this economic unit when it joined the UK through the Acts of Union 1800.

Following the creation of the Irish Free State in 1921, the 26 southern counties of Ireland left the single economic unit of the UK and the UK single market and resulted in a trade war between the UK and the Irish Free State known as the Anglo-Irish trade war between 1932 and 1938. Northern Ireland, meanwhile, continued to be part of the UK and the UK single market. The Republic of Ireland, the successor to the Irish Free State, and the UK both joined the European Economic Community on 1 January 1973, and therefore both joined the European single market effectively bringing the UK single market and the separate Irish market together into one single market.

Following the UK's imminent departure from the EU, the UK single market will come back online for the first time since 1973, when the UK leaves the EU single market and customs union and recreates its own internal single market between England, Scotland, Wales and Northern Ireland. However, two critical constitutional changes have taken place in the UK and the Republic of Ireland since 1973 that makes the resuscitation of the UK single market potentially problematic.

The first constitutional change is the signing of the Good Friday Agreement ("GFA") in 1998 and the removal of all security installations and physical infrastructure at the border between Northern Ireland and the Republic of Ireland. In terms of security, under the GFA the UK Government is bound to normalise security arrangements in Northern Ireland, which includes the removal of security installations, in other words demilitarisation.⁴¹ This was a key plank of the peace process and especially a key part of winning the support of nationalist communities in the North over to the GFA. This has been to a large extent achieved, and there is now currently no physical infrastructure on the Northern Ireland/Republic of Ireland border.

However, assuming UK the leaves the EU, as discussed above, this will involve the UK (including Northern Ireland) leaving the EU single market and customs union. The logical result of this is that some form of a physical border would require to be installed between Northern Ireland and the Republic of Ireland for the purposes of managing the interface between the UK single market and customs arrangements on the Northern Ireland side, and the EU single market and customs union on the Republic of Ireland side.

³⁹ Italian Minister of Trade and Industry, Giovanni Marcora passed a law that aimed to support worker buyouts. The law, which came to be known as the Marcora Law, has helped to create 257 new employee owned firms, saving or creating 9,300 jobs according to the International Cooperative Alliance, <https://www.ica.coop/en/media/news/marcora-law-supporting-worker-buyouts-thirty-years>

⁴⁰ Treaty of Union, Articles 5-15, 17 and 18

⁴¹ Good Friday Agreement, Security, Articles 1 and 2

Although the GFA does not preclude all forms of border or physical infrastructure at the Northern Ireland/Republic of Ireland border, the reinstatement of any form of physical infrastructure at the border between the North and South is widely recognised as inevitably becoming a target for attacks, mainly by dissident Republican groups, and therefore a threat to peace and security in Northern Ireland.⁴²

Any form of physical infrastructure such as customs checks at the border would therefore require security such as a police presence. However, it has been argued that creating a police presence at the border will itself make the checks more of a target, therefore requiring a military presence to ensure security. This will result in the UK Government being in breach of its commitments under the GFA to demilitarise Northern Ireland and remove security installations and could result in a return to political violence in Northern Ireland.

Given the potential for the rekindling of violence in Northern Ireland and the undermining of the GFA by the recreation of a hard border, special arrangements will require to be made in the event of the UK leaving the EU in respect of Northern Ireland, to ensure it has full access to the UK single market while at the same time avoiding the need for physical infrastructure of any kind at the border.

The second major constitutional change since 1973 when the UK joined the EU is the creation of the current devolution settlements in Scotland, Wales and Northern Ireland that did not exist when the UK joined the EU. The creation of the Scottish Parliament, the Welsh Senedd and Northern Ireland Assembly, with their own executives which have responsibility in certain devolved areas of competence, creates an additional layer of complexity to the UK single market, as the regulation of the UK single market will fall under both reserved and devolved areas of competence, and some areas may straddle both.

The additional layer of complexity not only affects the operation of the UK single market. The devolved institutions are legally bound to comply with EU law. As a result, in many nominally devolved policy areas – such as environmental regulation, agriculture, public procurement and aspects of justice, transport and energy – the autonomy of the devolved institutions is significantly constrained in practice.

When the UK leaves the EU, if no changes were made other than to remove the statutory requirement on the devolved institutions to comply with EU law, these policy areas would fall completely under devolved control. This could lead to policy differentiation within the UK in areas where EU law has previously provided a common legal framework.

To prevent or limit divergence, the UK Government has said that common frameworks may therefore be created to set out a common UK, or GB, approach and how it will be operated and governed. Depending upon the policy area, this may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition.

As discussed in Chapter 1, according to the UK Government, there are 160 distinct policy areas where EU law intersects with devolved powers in at least one of the three devolved nations. These include environmental regulation, agriculture, state aid for industry, public procurement and aspects of justice, transport, and energy, most of which have significant importance to the UK single market.

New frameworks will not necessarily be required in all these areas. In 63 of these policy areas, the UK Government has stated that no further action to create a common framework is required and so full

⁴² <https://www.theguardian.com/uk-news/2019/aug/22/northern-ireland-police-chief-simon-byrne-warns-brexit-hard-border-could-revive-paramilitary-groups>

control will transfer to the devolved institutions. However, in many other areas that are critical to the UK single market, common frameworks may be required.

As discussed in Chapter 1, there are different models of setting up common frameworks. First, the UK might agree to continue to comply with EU law as part of a new deep and special partnership. For instance, the UK might maintain EU-compliant state aid rules or remain within some arrangements for justice cooperation. Additional policy autonomy would not be devolved, but the UK and devolved governments would need to cooperate on implementation.

Second, in areas where the UK is definitively taking back control, but where regulatory consistency is deemed crucial, new frameworks could be set up by legislation at Westminster for the entire UK. This might apply to management of fisheries or subsidies for agriculture. Since these policy areas are already devolved in principle, the Sewel Convention would apply, meaning that the consent of the devolved bodies should be sought.

Third, there may be areas where coordination is required, but a binding legal framework is seen as unnecessary. In this case, powers might be devolved in full but with agreement about how the different governments will work together, perhaps to share best practice and data, or to agree upon minimum standards, for instance in areas such as air or water pollution.

Fourth, the UK and devolved governments could create new intergovernmental structures to take binding decisions for the whole UK. The Welsh Government has proposed a new UK Council of Ministers to oversee issues such as agriculture-related aspects of trade negotiations. The Welsh propose that the UK Government should not be able to override the opposition of all three devolved governments in the event of disagreement.⁴³

In relation to the third and fourth models, the UK currently does not have the constitutional machinery to deal with the issues arising in respect of such joint working, which is hardly surprising given that the current devolution settlements did not exist in 1973 when the UK joined the EU. Since 1973, regulation of these policy areas has been done at EU-level. However, after Brexit there must be constitutional machinery put in place in order to deal with the regulation of these policy areas, particularly those which touch on the UK single market, taking into account the devolution settlements and the place of England, Scotland, Wales and Northern Ireland within the UK.⁴⁴

The integrity of the UK single market will be required to be guaranteed under the constitution. Regulation of the UK single market and related common frameworks as well as the other areas of policy identified which have an intersection with a devolution settlement will require a significant role for the Council of the Union and the Senate of the Nations and Regions.⁴⁵

It is suggested that where coordination is required between the UK Government and the devolved administrations in Scotland, Wales and Northern Ireland, the Council of the Union could provide the forum for joint working between the heads of government. Where it is necessary for binding decisions to be taken in relation to the policy areas and the UK single market to be binding on the UK Government and devolved administrations, the Council of the Union could take those decisions based on unanimous voting, qualified majority voting or simple majority voting depending on the issue in question.

⁴³ <https://www.instituteforgovernment.org.uk/explainers/brexit-devolution-and-common-frameworks>

⁴⁴ Meeting Note with Professor Michael Keating, 26 August 2019

⁴⁵ Meeting Note with Gordon Brown, 19 April 2019

If the Council of the Union then agreed a binding common framework, this would require to be passed through the UK Parliament to become law and the Senate of the Nations and Regions would then be given a role of scrutinising the common framework and holding the Council of the Union to account as is discussed further in Chapter 9.

Land Ownership, Land Value Tax and Economic Rent

As discussed more fully in Chapter 3, the UK and Scotland in particular has one of the most inequitable distributions of land ownership of any country in the developed world, and one the most concentrated pattern of land ownership in Europe. In Chapter 3, the focus was on Scotland in particular, but the problem of land ownership distribution is equally severe in other parts of the UK. For example, it is estimated that half of the land in England is owned by less than 1% of the population. It is estimated that 30% of all land in England is owned by the aristocracy, 18% by corporations, and 17% by oligarchs.⁴⁶

As discussed in Chapter 3, such patterns of land distribution are problematic for a variety of different reasons, including raising questions of social justice, creating barriers to economic development particularly in rural areas, and entrenching a deeply divided and unequal society.

It is suggested that the constitution should place a legal obligation upon all levels of government, federal, devolved and local, to institute policies to rebalance land ownership distribution in favour of giving greater ownership rights to individuals and collective groups of citizens, and breaking up the monopoly control of the British nobility, the corporations and oligarchs.

One substantive policy proposal that may help in achieving a more equitable distribution of land ownership could be the introduction of a Land Value Tax across the whole of the UK, to replace the current Council Tax regime. The Labour Party already signed up to initiating a review into reforming council tax and businesses rates and consider new options such as a land value tax, to ensure local government has sustainable funding for the long term.⁴⁷

The Land Value Tax would operate in a way so as to apply an annual tax on land based on its market value. If, for example, a levy was imposed as a flat rate then the owners of properties with the highest values would be required to pay the most under the tax system. This may encourage landowners who own the largest and most value estates to sell off their land or to make good use of it for local economic development.

The Environment and Climate Change

Humanity may be approaching an extinction event unique in the history of our planet, in that it will be self-inflicted by our own species rather than caused by the external natural environment. Part of the Holocene Extinction event may in fact be the extinction of humanity itself as a result of man-made damage to the natural environment and climate change.⁴⁸ As a consequence, there is no greater threat

⁴⁶ Shrubsole, Guy, *Who Owns England? How We Lost Our Green and Pleasant Land and How To Take it Back*, 2019

⁴⁷ The Labour Party Manifesto, *For the Many Not the Few*, 2017, pp. 86

⁴⁸ Spratt, David and Dunlop, Ian, *Existential climate-related security risk: A scenario approach*, National Centre for Climate Restoration, Melbourne, May 2019

to the survival, well-being and flourishing of humanity than the threat posed by us to the natural environment and the global climate.

Concern over this threat to life on Earth has been brought to UK streets in recent times with, for example, the Extinction Rebellion demonstrations in April 2019 and the Leader of the Opposition, Jeremy Corbyn MP, declaring a climate emergency in the House of Commons on 1 May 2019.⁴⁹ Radical action is required now to avert climate and environmental catastrophe, and introduction of measures that ensure environmental protection, and a minimisation of the contribution to climate change must be hardwired into the national constitution in the UK.

As was discussed above, this may be partly achieved by the incorporation of third generation human rights into UK domestic law, including the right to access clean water, clean air and to enjoy the natural resources of the nation. However, incorporation of rights in this respect is necessary, but not sufficient, to protect the environment and minimise climate change.

Legally enforceable environmental obligations must be incorporated into the constitution and these obligations must apply to the state, corporations as well as private individuals. In some recent constitutional texts adopted by nations in modern times, such as in the case of the Constitution of Kenya that was adopted in 2010, there are extensive provisions that deal with the environment.

For example, in the Kenyan constitution, the Kenyan state is placed under an obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.⁵⁰ Moreover, the state is required to adhere to specific obligations such as to achieve and maintain a tree cover of at least 10% of the land area of Kenya.⁵¹

In respect of the new constitution for the UK, it is suggested that the state should also be under an obligation to eliminate processes and activities that are likely to endanger the environment, protect genetic resources and biological diversity, and to establish systems of environmental impact assessment, environmental audit, and monitoring of the environment. More specific legal obligations could be made as part of the constitution imposed on the state, for example, the state should not exceed a certain level of greenhouse gas emissions per year and all government contracts must be awarded to environmentally friendly contractors.⁵²

All emanations of the state and all UK public bodies should be made subject to these obligations, including all central and devolved government departments and agencies, the parliaments and CRAs, the courts and local authorities.

In addition to the imposition of legal obligations on the state in respect of the environment and climate change, the constitution should also impose obligations on corporations. Some of the more general obligations that are imposed on the state could also apply to corporations they could be given a maximum carbon footprint based on number of employees or annual turnover.

The environment agencies across the UK should be guaranteed constitutional status, and their roles, powers and functions should be codified in the constitution. The Environment Protection Agency in England, Natural Resources Wales, the Scottish Environment Protection Agency, and the Northern Ireland Environment Agency should also be given constitutional status, and in addition to their current

⁴⁹ <https://labour.org.uk/press/jeremy-corbyn-declares-environment-climate-emergency/>

⁵⁰ Constitution of Kenya, 2010, Part 2, Article 69(a)

⁵¹ Ibid., Article 69(b)

⁵² Meeting of Sounding Board, 23 August 2019

powers should be given further powers to hold the state, corporations and individual citizens to account for their environmental and climate change obligations including enforcement powers and powers to take legal action through the courts.

International Treaties and International Relations

The new constitution would be required to incorporate rules on the negotiation and ratification of international treaties and to specify the level of government that would be responsible for such negotiation and ratification within the UK. Under the current constitution, the power to negotiate international treaties lies with the UK Government under the royal prerogative. The authority of the UK Parliament is not required for the making of treaties under the prerogative, although an Act of Parliament will be needed if the treaty requires changes to UK domestic law.⁵³ There is a constitutional practice, which is that a treaty that is subject to ratification should be laid before each House of Parliament for a period of twenty-one days before it is ratified to allow for sufficient scrutiny and debate.⁵⁴ This rule is normally observed but on rare occasions governments have dispensed with the requirement.⁵⁵

It is suggested that the constitution should include specific rules for the signing and ratification of international treaties. It is suggested that in reserved areas of competence, the UK Government should have the exclusive power to enter into international treaties. However, ratification of such treaties should be subject to approval in both the House of Commons and the Senate of the Nations and Regions, as discussed more fully in Chapter 9. The UK Government should also be required to consult the Council of the Union on all international treaties being entered into by the UK Government and should be required to have due regard to the views expressed in the Council.

Although England, Scotland, Wales and Northern Ireland are not sovereign states in their own right, it is suggested that in devolved areas of competence, all of the devolved administrations should be given the power to enter into international treaties and agreements. This would be competent under international law as currently done by the Länder in Germany, provided that the UK constitution made allowance for different parts of the UK to enter into international agreements.⁵⁶

The constitution should allow the devolved administrations to enter into international treaties and agreements that fall into devolved areas of competence. For example, the constitution should make clear that the Scottish Government would be able to enter into international agreements in relation to environmental protection standards, but only in order to improve the standards in place at UK level. The devolved administrations should only be able to reduce standards by entering into international agreements.

It is suggested that broader international relations between the UK and other sovereign states should be the exclusive competence of the UK Government, including international diplomacy, as the UK should be dealing with other sovereign states as a sovereign state. It should not be the responsibility of sub-national units of the UK to be conducting international diplomacy. The nations and regions will have a voice in such international relations through the Senate and the Council of the Union.

⁵³ Turpin, Colin and Tomkins, Adam, *British Government and the Constitution*, Sixth Edition, 2008, pp. 164

⁵⁴ First stated by Arthur Ponsonby, Under-Secretary of State for Foreign Affairs, 1 April 1924, HC Deb vol 171, cols 2001-04, known as the Ponsonby Rule

⁵⁵ Turpin, Colin and Tomkins, Adam, *British Government and the Constitution*, Sixth Edition, 2008, pp. 164

⁵⁶ Meeting Note with Aidan O'Neill QC, 20 September 2019

British Commonwealth, Overseas Territories and Crown Dependencies

The constitution must accommodate the British Overseas Territories and the Crown Dependencies in the constitution, and also must give special recognition of the British Commonwealth and the legacy of the British Empire.

The British Overseas Territories (OTs) are a set of largely self-governing territories spanning nine time zones, from the Atlantic to the Pacific, the Antarctic to the Caribbean. These territories are not part of the UK and each has its own constitution, but all share cultural and social bonds with the UK and have British identities,⁵⁷ and the UK is under an obligation under Article 73 of the United Nations Charter to provide for the wellbeing of its inhabitants.⁵⁸

Within the UK Government, current responsibility for the OTs sits with the Foreign and Commonwealth Office (FCO), although concerns have been raised that it may not be appropriate for the FCO that manages foreign affairs to be responsible for the OTs given the special relationship between the OTs and the UK. Suggestions have been made that responsibility for the OTs should be given to the Cabinet Office, or that there should be a special government department set up specifically with responsibility for the OTs.⁵⁹

The OTs also do not have direct representation in the UK Parliament, while it is a commonly held view by the people who live in the OTs that they should. This fact is somewhat of an anomaly in that other European countries with overseas territories allow for such representation, such as in Denmark where both Greenland and the Faroe Islands send representatives to the Danish Parliament, the Folketing, and in France where the French overseas territories send representatives to both the National Assembly and the Senate of the French Parliament.⁶⁰

This has become an issue in recent times with the passage of the Sanctions and Anti-Money Laundering Act 2018 (the “2018 Act”) by the UK Parliament. The 2018 Act makes provision for an independent post-Brexit sanctions and anti-money laundering regime. It requires the Foreign Secretary to assist the OTs to establish publicly accessible beneficial ownership registers and allows for the Foreign Secretary to impose them by Order in Council if the OTs do not do so by 31 December 2020.

The UK Government claims that there is a link between OT-registered companies and certain autocratic regimes around the world, and therefore it is important to have such registers. For some of the OTs, the 2018 Act is not problematic, but for some governments of other OTs there is strong resistance to the introduction of the registers, most notably from the governments of Bermuda, the British Virgin Islands and the Cayman Islands. The economies of these OTs are heavily reliant on financial services in terms of both jobs and tax revenue, and the view taken by those governments is that the registers could be damaging to their local economies.⁶¹

It is suggested that current arrangements are unsuitable, and the OTs must be given representation in the UK Parliament if the UK Parliament is asserting jurisdiction over the OTs and claiming an ability

⁵⁷ Global Britain and the British Overseas Territories: Resetting the Relationship, House of Commons, Foreign Affairs Committee, Fifteenth Report of Session 2017-19, pp. 3

⁵⁸ United Nations Charter, Chapter XI, Article 73.

⁵⁹ Global Britain and the British Overseas Territories: Resetting the Relationship, House of Commons, Foreign Affairs Committee, Fifteenth Report of Session 2017-19, pp. 8

⁶⁰ *Ibid.*, pp. 17

⁶¹ *Ibid.* pp. 14

to pass laws for the OTs. One potential way in which this could be done is by allowing the OTs to return MPs to the House of Commons and/or to elect Senators to the Senate of the Nations and Regions. This will be covered in further detail in Chapter 9.

It is further suggested that a new Joint Ministerial Council,⁶² which would be the intergovernmental body bringing together political leaders from the OTs and UK Ministers, should be made a permanent feature of the constitution. It should meet at least once per year and be charged with reviewing and implementing the shared strategy for promoting the security and good governance of the OTs and their sustainable economic and social development.

In respect of the Crown Dependencies, they are comprised of three islands, Guernsey and Jersey that are situated in the English Channel, and the Isle of Man in the Irish Sea. Within Guernsey there are three distinct jurisdictions including Guernsey, Alderney and Sark.

The Crown Dependencies are not part of the UK but are self-governing dependencies of the Crown. This means they have their own directly elected legislative assemblies, administrative, fiscal and legal systems and their own courts of law. The Crown Dependencies are not represented in the UK Parliament. The Crown Dependencies have never been colonies of the UK. Nor are they Overseas Territories, like Gibraltar, which have a different relationship with the UK.

The constitutional relationship of the Islands with the UK is maintained through the Crown and is not enshrined in a formal constitutional document. HM Government is responsible for the defence and international relations of the Islands. The Crown, acting through the Privy Council, is ultimately responsible for ensuring their good government.

The Queen is the Head of State of each Island, and the Lieutenant-Governor for each Crown Dependency is Her Majesty's personal representative. The Lord Chancellor and Secretary of State for Justice is the Privy Counsellor with special responsibility for Island affairs, and is supported by a Ministry of Justice Minister who is responsible for the conduct of Island's business within Whitehall. The Ministry of Justice is responsible for managing the constitutional relationship with the Crown Dependencies, which involves a variety of different responsibilities, including involvement in key Crown Appointments, processing their legislation for Royal Assent and issuing Letters of Entrustment authorising Crown Dependency Governments to negotiate and conclude international agreements.⁶³

The British Nationality Act 1981 confers British Citizenship on all those with close connections with the UK, the Channel Islands and Isle of Man. The Islands have adopted the common format passport and the Lieutenant Governor remains the passport-issuing authority in the Islands. Jersey, Guernsey, the Isle of Man and the Republic of Ireland, together with the UK, comprise the Common Travel Area. There is no immigration control between the UK and the Islands or between the Islands themselves. Rather, the Islands form part of the border for the British Isles as a whole.

It is suggested that the place of the Crown Dependencies should be accommodated formally within the constitution. On issues of citizenship, the provisions of the British Nationality Act 1981 should be codified in the constitution as it relates to the Crown Dependencies. The Common Travel Area and their place in it should also be included in the constitution.

⁶² This is not to be confused with the JMC between the Scottish Ministers and UK Ministers discussed in Chapter 4.

⁶³ Fact Sheet on the UK's relationship with the Crown Dependencies, Ministry of Justice, pp. 2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/734590/crown-dependencies-factsheet.pdf

As the Privy Council is to be abolished as discussed more fully above, a new Joint Ministerial Council for the Crown Dependencies should be established, made up of either the Secretary of State for Justice or the Minister for the Cabinet Office and representatives of each of the governments of the Crown Dependencies, and this body should take over from the Privy Council with responsibility for the good governance of the Crown Dependencies.

Colonial Apology and Reparations Fund

The history of the British Empire is one of subjugation of peoples, colonisation, land grabs, slavery, religious bigotry and racism. The Empire stretched from North America to Africa, India to Ireland, Australia to New Zealand, and meted out untold misery to and violated the human rights of millions of peoples across the world. As discussed above, the British state was an imperial state and to this day the UK is stuck with that imperial state in a post-imperial world. The constitution must make a fundamental break with this imperial past in order to ensure that the UK can move forward into the future as a modern progressive state designed for the 21st century.

In recognition of the past wrongdoings of the British state, the new constitution should make an unreserved apology to all of the countries of the world that the Empire invaded and negatively impacted. In addition, the British state should set up a reparations fund as part of the constitution, which offers financial assistance to communities across the world that can show loss and detriment as a result of the actions of the British state.⁶⁴

It would be necessary to design such a provision in the constitution to avoid legal indeterminacy and limitless liability. Therefore, the principles of delictual liability should be included in the constitution to determine liability. In particular, it should be necessary to first determine whether the British state owed the claimants in question a duty of care; whether the British state breached that duty of care; whether there was a factual and legal causal link between the breach of the duty of care and the loss suffered by the claimants; whether the loss was too remote to be recoverable; and whether there was any intervening events which broke the chain of causation between the breach of the duty of care and the loss suffered.⁶⁵

Civil Service and Security Services

The Civil Service would also be required to be given constitutional status within the constitution and the Civil Service Code given force of law via the constitution. The impartiality and independence of the Civil Service would be guaranteed and legally protected under the constitution. Moreover, although the civil service as a whole should remain in place regardless of the government of the day, it is suggested that the Permanent Secretaries of each government department in addition to some other high-ranking civil service posts should become political appointments by the Cabinet and should be eligible for change after each general election, albeit they should enjoy security of tenure during parliamentary terms.

The constitution should establish a new UK Civil Service Federal Secretariat that should not answer to the Office of the Prime Minister or the Cabinet Office, or any other UK Government department. Instead, the Federal Secretariat should report only to the Council of the Union and should be charged with serving the Council of the Union and enforcing its decisions in Westminster and across the nations

⁶⁴ Meeting of Sounding Board, 23 August 2019

⁶⁵ Thompson, Joe, *Delictual Liability*, Fifth Edition, 2015

and regions of the UK.⁶⁶ The Federal Secretariat should have the power to issue directives in this regard to all UK Government departments, including the Office of the Prime Minister, as well as to all of the devolved institutions, including the CRAs in the English regions, Scottish Government, the Welsh Government and the Northern Ireland Executive.

The civilian oversight of the security services, including the Security Service (MI5), the Secret Intelligence Service (MI6), the Government Communications Headquarters (GCHQ), the Defence Intelligence Staff, the Joint Intelligence Committee, Special Branch (SO12), Anti-Terrorist Branch (SO13) and Counter Terrorism Command (SO15) should also be strengthened beyond the government. In addition, the Ministry of Defence (MOD) and the UK armed forces should also be subject to strengthened civilian oversight beyond the government.

Currently, the Intelligence and Security Committee and the Defence Select Committee currently oversee the security services and UK armed forces and the MOD. The powers of these committees should be strengthened, being able to conduct inquiries, make calls for evidence, and full reporting requirements should be imposed on these bodies to report to the committees. Information sharing should be done between the committees and all of these bodies should also be subject to investigation by the Civic Police Unit as discussed more fully below. The Committees should also be given the power to establish public inquiries in relation to the activities of the security services and armed forces.⁶⁷

The Investigatory Powers Tribunal and Special Immigration Appeal Commission should be reformed to end the practice of secret justice, and full appeals on the merits should be allowed to the Supreme Court from these special tribunals.

Freedom of Information and Data Security

The UK currently has a freedom of information regime under the Freedom of Information Act 2000 (the “2000 Act”) and the Freedom of Information (Scotland) Act 2002 (the “2002 Act”), which were both major advances in increasing transparency of public affairs and the actions of public authorities by giving members of the public rights to access information held by public authorities.

In terms of s. 1 of the 2000 Act, any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds in the information in question and, if it does, to have that information communicated to that person. There are of course certain exemptions to the information that is required to be released by public authorities. For example, if the information is required in relation to safeguard national security, or if release of such information could prejudice the UK’s defence capabilities, or if release of such information would be likely to prejudice relations between the UK and another state.⁶⁸

The issue with the current freedom of information regime in the UK is of course they are merely Acts of Parliament that could easily be repealed by any future government. Indeed, there have been reports that in recent times the UK Government is not content with the current freedom of information regime and commissioned a review of the legislation.⁶⁹ In addition, former Prime Minister

⁶⁶ Meeting Note with Professor Tom Mullen, 29 August 2019

⁶⁷ Meeting Note with David Jamieson, 31 May 2019

⁶⁸ Freedom of Information Act 2000, Part II

⁶⁹ Independent Commission on Freedom of Information, Report, March 2016

Tony Blair who introduced the current freedom of information regime has suggested publicly that he regrets introducing the legislation.⁷⁰

It is suggested that transparency in public affairs and public administration are key parts of having a healthy and robust democracy, and it should not be a choice open to the government of the day to adhere to these standards or to attempt to repeal the legislation. The freedom of information regime should therefore be made part of the constitution and should provide all members of the public rights of access to information held by public authorities. The Office of the Information Commissioner and the Scottish Information Commissioner should also be put on a constitutional footing.

In addition, the freedom of information regime should also be extended significantly as although the current regime was a step forward, it does not go far enough in opening up access to information held by public authorities.

Firstly, the ministerial veto, which is contained currently in section 53 of the 2000 Act, should be removed. Currently, a Minister of the Crown who is in the Cabinet, or a UK Law Officer, can use the ministerial veto that overrides a relevant decision of the Information Commissioner requiring disclosure. Section 53(2) of the 2000 Act requires the accountable person to present a certificate to the Commissioner and to lay a copy before the UK Parliament.

The accountable person has 20 working days in which to serve the certificate. The power can be used only when the Commissioner and/or Tribunal has decided in favour of disclosure on public interest grounds; it is not available where a Commissioner has decided that the information is not covered by an exemption.

Secondly, in terms of section 34 of the 2000 Act, there is currently a veto available to both the Speaker of the House of Commons and the Clerks of the House of Lords to issue a certificate to the effect that the release of certain information could compromise parliamentary privilege with no need to apply a public interest test or justify its reasoning. It is suggested that this veto should also be removed but rather only allowing the Speaker and Clerks to express an opinion.

Thirdly, currently the freedom of information regime contains an exemption in s. 37 of the 2000 Act to the effect that communications with the Monarch, the heir to the throne, the Royal Family and the Royal Household are exempt from freedom of information requests. It suggested that this exemption should be removed in its entirety to ensure that all royal documents and correspondence are covered by the freedom of information regime.

Lastly, it is suggested that the freedom of information regime should be extended to ensure that all private sector contractors that are performing public functions should be subject to freedom of information provisions.

There is a rich case law in relation to what constitutes a public authority for the purposes of s. 6 of the Human Rights Act 1998 in discussing whether so-called hybrid public authorities which are functional public authorities although they are in fact private contractors can be considered public authorities for the purposes of the Human Rights Act 1998.

Historically, the courts have been reluctant to hold that such hybrid authorities can be considered public authorities for the purposes of the Human Rights Act 1998.⁷¹ However, in more recent times,

⁷⁰ https://www.bbc.co.uk/blogs/opensecrets/2010/09/why_tony_blair_thinks_he_was_a.html

⁷¹ *Callin, Heather and Ward v Leonard Cheshire* [2002] EWCA Civ 366

the courts have been more willing to accept that private sector contractors which are performing public functions can be considered public authorities for the purposes of the Human Rights Act 1998.⁷²

It is suggested that the constitution should make clear that all private contractors which perform public functions should be subject to the freedom of information regime in a similar way to private contracts in terms of s. 6 of the Human Rights Act 1998. In addition, all private contractors should be subject to the freedom of information that has undertaken public contracts to the extent that the information requested relates to such contracts.

Equally important as the right of members of the public to access information held by public authorities is the right to data security and protection. Many of the key protections on data are currently contained in the Data Protection Act 2018 and this should remain as the principal source of the law on data protection in the UK.

However, it is suggested that the constitution should contain some provisions on data security, particularly in relation to personal data and the rights of subjects of data collection. For example, it is suggested that every person in the UK should be entitled to the right to erasure or right to be forgotten⁷³ and potentially other rights contained under the General Data Protection Regulation such as the right to access information held on the subject by the subject.⁷⁴

Civic Leadership and Integrity

The seven Principles of Public Life, or the Nolan principles,⁷⁵ should be incorporated into the constitution and should be binding on all public office holders in the UK including in elected office; the civil service; local government; the police; the courts and probation services; non-departmental public bodies; health, education, social and care services. These principles are:

- 1. Selflessness – Holders of public office should act solely in terms of the public interest.**
- 2. Integrity – Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.**
- 3. Objectivity – Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.**
- 4. Accountability – Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.**

⁷² For example, *Ali v. Secro, Compass SNI, and the Home Secretary* [2019] CSOH 34

⁷³ General Data Protection Regulation, Article 17

⁷⁴ *Ibid.*, Article 15

⁷⁵ Standards in Public Life, First Report of the Committee on Standards in Public Life, May 1995, <https://www.ocsc.go.th/sites/default/files/attachment/article/1stinquiryreport.pdf>

5. ***Openness – Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.***
6. ***Honesty – Holders of public office should be truthful.***
7. ***Leadership – Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.***

All public office holders should be under a legal requirement to adhere to the seven principles and failure to do so may lead to removal from office or charges of the crime of misconduct in public office.

An addition to the constitution may be the creation of a new Civic Police Unit (“CPU”) that could be created as a new police force in the UK. The role of the CPU would be to guarantee standards in UK public life, initiate investigations in relation to corruption and bribery, lead on all investigations of misconduct in public office and impeachment proceedings against ministers, and to prevent criminality generally in UK public life. The CPU would be given powers to initiate investigations in contrast to current ombudsman services and would also be given full police powers.

The CPU should be accountable to a newly created Anti-Corruption Commission whose Commissioners should be directly elected as part of a general election to the UK Parliament representing each nation and region of the UK and the CPU should be the primary investigatory body for allegations of the crime of misconduct in public office.

In addition to the current crime of misconduct in public office, the constitution should create a new impeachment procedure that should be reserved for the most serious instances of misconduct in public office by public office holder including ministers and the Prime Minister. Impeachment should complement the crime of misconduct in public office and one person may be investigated for both simultaneously. However, the Senate of the Nations and Regions should conduct investigation of impeachment allegations, and the trial should be a political trial conducted by Senators. The sole remedy for impeachment should be removal from office. The constitution should make clear that a person subject to impeachment proceedings can still be subject to criminal prosecution and sanction during and the following the impeachment process.

The Independent Parliamentary Standards Authority (“IPSA”) should also be made part of the constitution, and there should be a requirement for IPSA to submit an annual report to the Anti-Corruption Commission and to cooperate fully with the CPU.

No one holding public office should be required to swear an oath to the Monarch, but rather all holders of public office in the UK must swear an oath to the new constitution and to uphold it to the best of their abilities. In addition, no person who is an MP, MSP, MLA or AM should be able to have a second job while in office.

Electoral Systems, Electoral Commission and Boundaries Commission

The way in which all Prospective Parliamentary Candidates (“PPC”) are selected for the House of Commons should be reformed so that there are open primary elections in every constituency in the UK that are managed by the Electoral Commission rather by political parties. Of course, PPCs are likely

to be members of political parties, but the parties themselves should not control which candidates are selected to represent them in each constituency. It should be the responsibility of the people who live in the constituencies to select each party's candidates for a general election.

Each political party wishing to field a PPC in a constituency for a UK general election should be required to hold an open primary election managed by the Electoral Commission, with all candidates who are members of that party up for election by voters in that constituency. For example, if the Labour Party wishes to field a PPC in the constituency of Edinburgh North and Leith, the party members wishing to become the Labour Party PPC in that constituency must participate in an open primary election before being selected as the Labour Party PPC for the constituency. This process would be required to be repeated for all of the parties wishing to field PPCs in each constituency across the UK.

All voters registered in that constituency would be eligible to vote in any of the primaries of the political parties and would not be restricted to voting only in the primary of the party of which they are a member. However, it is suggested that a voter should only be given the opportunity to vote in one of the primaries of one of the political parties. The candidates who receive the highest number of votes in each primary for each political party in a particular constituency will then become that party's PPC for that constituency. Each PPC will then proceed to the general election in which each PPC will contest the seat on behalf of their political party.

The current electoral systems in use for the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly should be maintained, as well as the voting arrangements for local government across the UK and Greater London Authority.

However, it is suggested that electoral reform is required in respect of the House of Commons and clearly a new voting system will be required in relation to the newly established Senate of the Nations and Regions. The latter will be discussed in further detail in Chapter 9 but in relation to the House of Commons, it is suggested the First-Past-The-Post system is not an appropriate means of electing representatives to the UK based on the principles of progressive federalism.

The electoral system that should be used for elections to the House of Commons should be a form of proportional representation, which ensures that voter choice is reflected in the composition of MPs in the House. The traditional argument in favour of First-Past-The-Post that it tends to produce relatively stable majority governments is no longer holding up in reality, as for almost a decade the UK Government has been made up of either a coalition or minority government with confidence and supply arrangements.

However, although it is suggested that the adoption of proportional representation is correct in principle, given that the referendum on the adoption of the AV+ electoral system was heavily defeated in 2011, it is suggested that there may be little or no appetite to reform the voting system in the House of Commons, and could prove very difficult if not impossible to achieve in practice. It is therefore suggested it should not be a policy priority.

Political Parties, lobbying and the Media

The new constitution should also regulate the funding of political parties in the UK that at the moment is regulated by the Political Parties, Elections and Referendums Act 2000. It is suggested that the constitution should introduce strict rules on who can fund political parties as part of the constitution and potentially even outlawing the private financing of political parties altogether with the state charged with funding them as an extension of the civil service.

One of the main criticisms of the current funding arrangements is that it allows the two main parties, the Labour Party and the Conservative Party, to be dominated by trade unions in respect of the former and wealthy individual donors in respect of the latter. Since the Labour Party's membership has expanded exponentially in recent years, the financial reliance on trade unions has lessened but the Conservative Party is still beholden to wealthy individual donors.

Labour members, who number about 550,000, generated £16.1m in subs for their party in 2017. A further £18.2m came via donations, partly from online campaigns. Fees from trade union affiliates amounted to a relatively modest £6.2m, although the union Unite, remains the Labour Party's biggest single donor and unions continue to contribute millions in donations.⁷⁶

Meanwhile, £72 million – over *half* of the party's declared cash donation income – has been donated to the Conservative party from just 50 such donor groups over the course of a decade. Perhaps more strikingly, £45.5 million has been sourced from the top 15 donor groups – amounting to just under one-third of all Conservative Party donation income from January 2001 to June 2010.⁷⁷

In 2011, the Committee on Standards in Public Life published a report on the future of political party finance⁷⁸ that made a series of recommendations in relation to funding. Recommendation 1 was that a cap of £10,000 should be applied to all donations to political parties from any individual or organisation in any year.

Recommendation 2 was that private companies donating to political parties should declare their ultimate ownership and be able to demonstrate that their owners would be permissible donors if they had given the same money directly. A controlling shareholder's share of any corporate donations, when added to any personal donations, should not be allowed to exceed the £10,000 cap.

Recommendation 3 was that affiliation fees paid to the Labour Party by trade unions and other affiliated bodies should be subject to the £10,000 cap. But special rules should be introduced to allow the affiliated union or other body to change their procedures so the fees could be regarded as an aggregation of individual payments, to which the cap applies individually and not collectively.

It is suggested if private donations are to be allowed to political parties at all, then these should be capped in a way similar to the recommendations in the 2011 report. However, it may be that there is no place for the private financing of political parties and that this should be done exclusively by the state. Whatever is decided, there should be clear rules on funding contained in the constitution.

In respect of lobbying Members of Parliament and Senators, specific rules should be included in the Codes of Practice discussed above on access to elected representatives and attempts to influence them. Crucially, there should be strict prohibitions on elected MPs and Senators accepted any form consideration, gift or benefit in kind in respect of their duties in Parliament. Moreover, all MPs and Senators should be excluded from having second jobs in addition to their duties in Parliament and there should be a strict prohibition on all MPs and Senators acting as advocates for others on a formal or informal basis as part of their duties in Parliament.

The constitution should also seek to make provision for the regulation of aspects of the media given the importance of impartial reporting and independent journalism to the overall health of democracy

⁷⁶ <https://www.theguardian.com/politics/2018/aug/22/labour-coffers-make-party-richest-in-britain>

⁷⁷ <https://blogs.lse.ac.uk/politicsandpolicy/just-50-%E2%80%99donor-groups%E2%80%99-have-supplied-over-half-of-the-conservative-party%E2%80%99s-declared-donation-income-in-the-last-decade-a-fact-disguised-by-legal-%E2%80%99fame-avoidance/>

⁷⁸ *Political Party Finance, Ending the Big Donor Culture*, Committee on Standards in Public Life, November 2011

in the UK and particularly the importance of the right to freedom of expression. In addition, given the importance of local media to local accountability and the financial pressure independent local media outlets are under across the UK, a Local Media Fund should be established as part of the constitution that would provide funding to independent media across the UK.⁷⁹

Declaration of War and State of Emergency

Under the current British constitution, the royal prerogative includes the power to declare war or to engage the armed forces in military expeditions or armed conflict and this power is exercisable by ministers of the UK Government. As a matter of law, the current constitution allows the UK Government to exercise its power to engage the armed forces in military conflict without seek approval from the UK Parliament and can do so without any other caveat other than the lawful exercise of the royal prerogative.⁸⁰

However, as discussed in Chapter 1, before embarking on military intervention in Iraq in 2003 the UK Government sought parliamentary approval for decisions on the use of the armed forces. The House of Commons was asked to vote on the Prime Minister's motion requesting approval for the use of necessary means including military force to ensure the disarmament of Iraq's weapons of mass destruction.

Arguably, this course of action by the UK Government has established a new constitutional convention that the UK Government will consult Parliament and seeks its approval for military action. The Foreign Secretary at the time, Jack Straw MP, appeared to support the idea of the creation of such a new convention by stating at the conclusions of the House of Commons debate on the subject of the Iraq War that it was constitutionally proper in a modern democracy that the UK Government should seek the express approval of the House of Commons for military action.⁸¹

Since then, there have been conflicting signs on whether such a constitutional convention in fact exists. For example, in 2011 the UK Government claimed that the conflict in Libya required an immediate response and a vote in the House of Commons was only held after military intervention.⁸² In contrast, in 2013, the UK Government held a vote on whether to stage a military intervention in Syria but the vote was defeated in the House of Commons and no military action was taken.⁸³

It is suggested that the rules on declarations of war and all forms of military action should be governed by clear rules in the constitution. An appropriate balance must be struck between the importance of allowing ministers to take quick decisions to respond to often fast-moving, fluid and unpredictable exigencies based on expert military advice while also allowing the UK Parliament to have a say on engaging the armed forces in conflict.

As a consequence, it is suggested that the constitution should make clear that all forms of military action should require approval by simple majority in both the House of Commons and the Senate of the Nations and Regions. However, the UK Government should have a power to deploy the armed forces and to engage in conflict in certain cases without first having to seek parliamentary approval, for example, if there is a terrorist attack on the UK territory or assets, an immediate threat to the

⁷⁹ Meeting of the Sounding Board, 21 June 2019

⁸⁰ Turpin, Colin and Tomkins, Adam, *British Government and the Constitution*, Sixth Edition, 2008, pp. 163

⁸¹ HC Deb Vol 401, col 900, 18 March 2003

⁸² <https://fullfact.org/law/parliament-vote-military-intervention/>

⁸³ Ibid.

territorial integrity of the UK or any situation which may arise which requires immediate response failing which there would be a risk to national security.

In cases where immediate action is required, there should be a requirement for a retrospective vote in the UK Parliament at the earliest opportunity where the UK Government would be required to explain the reasons why military action was necessary. If the parliamentary vote is against military action, the military action should cease immediately.

The UK Government will be required to adhere to the letter and spirit of the constitution at all times and must uphold it to the best of its ability. This is no different from the position under the current constitution in accordance with the principle of the rule of law.

However, the UK Government must be allowed some latitude to derogate from the constitution in certain circumstances clearly defined by the constitution. It will be a decision for the Prime Minister to declare a state of emergency in a time of war or other public emergency threatening the life of the nation. A derogation clause may be inserted into the constitution to the effect that in time of war or other public emergency threatening the life of the nation, the government may derogate from certain defined parts of the constitution providing that such derogation is not inconsistent with the obligations of international law.

Such a clause would require to be carefully drafted to only allow derogation of the parts of the constitution which are likely to hamper the UK Government responding to certain events such as a severe natural disaster, a nuclear strike on or an invasion of UK territory, war or terrorist attack. The main parts of the constitution that could perhaps be circumvented in such an event include the legislative process in the UK Parliament, the duty to consult the Council of the Union and the requirement to obtain the consent of the devolved parliaments to legislate in devolved areas of competence.

This may mean that the UK Government is given emergency powers as currently contained under the Civil Contingencies Act 2004 to make special executive orders which would normally require primary legislation to secure the essentials of life and the maintenance of security. Other parts of the constitution, which may not be circumvented, would include human rights standards, the role of the courts in upholding the rule of law and parliamentary scrutiny of the UK Government's actions.

The roles of the Scottish Government, the Welsh Government and the Northern Ireland Executive should be incorporated into the constitution and should be given the power to make special executive orders in areas of devolved competence. However, the UK Government should retain the right to make special executive orders in devolved areas of competence and these should be superior to orders made by the devolved administrations.

Once a state of emergency has been declared by the Prime Minister, it should be time limited and only allowed to continue for a period of six weeks after which time the Prime Minister must make a full report to the UK Parliament. In order to extend the state of emergency for a period longer than six weeks, the UK Government must win a vote by simple majorities in both the House of Commons and Senate of the Nations and Regions.

Supremacy of Laws

The constitution should make clear that federal law passed by the UK Parliament is supreme above all other forms of law passed by the Scottish Parliament, the Welsh Senedd or the Northern Ireland

Assembly. Any incompatibility between federal UK law and laws passed by the devolved nations should be resolved in favour of federal UK law.

Third Source Powers

In the UK, the UK Government representing the Crown is said to have a third source of constitutional power in addition to the powers it has been conferred by statute and recognised by the common law such as the powers of the royal prerogative.⁸⁴ This third source of power is generally thought to contain general administrative powers that are necessary for routine operation of modern government.

In reality, the government engages daily in actions lacking a formal source of authority such as the power to form government departments and public bodies, enter into contracts, convey and purchase property, give gifts and create policies.⁸⁵ There are two principal theories about this third source of power should be understood.⁸⁶

The first is that there is a residual freedom which the Crown enjoys as it has the power to do anything which is not prohibited. Indeed, an internal memorandum circulated around the UK Government in 1945 stated that:

“A Minister of the Crown is not in the same position as a statutory corporation. A statutory corporation is entirely a creature of statute and has no powers except those conferred upon it or under statute, but a Minister of the Crown is not a creature of statute and may, as an agent of the Crown, exercise any powers which the Crown has powers to exercise, except so far as he is precluded from doing so.”⁸⁷

An alternative view is that the Crown’s general administrative powers derive from the common law and this has been the view generally taken by the courts in the UK. The view has been taken by the courts that the Crown has common law powers to do anything which could be done by a natural person.⁸⁸

Whichever account is the correct account, it is suggested that the general administrative powers of the Crown should be clarified by the constitution and should be set out in the constitution itself. Ministers of the Crown should be given a general administrative power under the constitution in terms similar to the general power to advance well-being given Scottish local authorities under section 20 of the Local Government in Scotland Act 2003.

The general administrative power should give the Crown the power to do anything which is reasonably connected to and required for the operation of good government in the UK including the power to incur expenditure; give financial assistance to any person; enter into arrangements or agreements with any person; co-operate with, or facilitate or co-ordinate the activities of, any person; exercise on behalf of any person any functions of that person; and provide staff, goods, materials, facilities, services or property to any person.

⁸⁴ Meeting Note with Max Harris, 1 August 2019

⁸⁵ <https://ukconstitutionallaw.org/2014/10/25/adam-perry-the-source-of-the-crowns-general-administrative-powers/>

⁸⁶ Simpson, Jeff, *The Third Source of Authority for Government, Action Misconceived*, Auckland University Law Review, Vol 18 (2012)

⁸⁷ Memorandum by Sir Granville Ram 1945; this gave rise to the name the “Ram doctrine”.

⁸⁸ For example, see *R. v. Secretary of State for Health, ex parte ‘C’* [2000] EWCA Civ 49

The exercise of the power should, of course, be subject to judicial review and the courts should be given discretion what on powers are reasonably connected to and required for the purposes of good government in the UK.

Secession from the Federal State

The right to self-determination of the three historic nations of the UK federal state including England, Scotland and Wales, should be safeguarded by the new constitution. The position of Northern Ireland should be treated separately in accordance with the terms of the Good Friday Agreement as discussed more fully above.

In relation to England, Scotland and Wales, each nation should have the right to secede from the UK if they so wish. The Scottish Parliament, the Welsh Senedd and the UK Parliament working under special rules to represent England only should be able to hold an advisory and consultative referendum on secession from the UK. This constitutional right should only be exercisable once every 12 years.

In relation to Northern Ireland, the current arrangements under the Good Friday Agreement should continue in effect. Pursuant to the Northern Ireland Act 1998, if at any time it appears likely to Secretary of State that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall make an Order in Council enabling a border poll.⁸⁹ As discussed above, the terms of the Good Friday Agreement should be incorporated into the constitution.

Mode of Amendment

The new constitution requires a mode of amendment which ensures that all of the diverse views and opinions across the nations and regions of the UK are represented but while at the same time ensuring that the constitution is entrenched in the UK legal order. Any amendment to the constitution should require supermajorities of two-thirds of all Members of Parliament in the House of Commons and two-thirds of all Senators in the Senate of the Nations and Regions in order to secure an amendment to the constitution and all amendments.

Key Findings and Recommendations

- 1. A new federal codified and legally entrenched constitution should be adopted by the UK based on the principles of subsidiarity, solidarity, agency and a geographic redistribution of the institutions of the British state.**
- 2. The Monarch should be recognised as the Head of State of the UK under the constitution but the royal prerogative should be abolished and the powers currently personal to the Monarch as well as all other prerogative powers should be subject to strict codified rules in the constitution subject to judicial review.**

⁸⁹ Northern Ireland Act 1998, section 1 and Schedule 1, paragraph 2

3. **The aristocracy and British nobility should be abolished in their entirety, and all royal honours including Knighthoods should be abolished. A new Civic Award should be created for citizens who have significantly contributed to the UK and should be awarded by the Senate of the Nations and Regions.**
4. **The Home Office, the Foreign and Commonwealth Office, the Treasury, the Office of the Prime Minister and the Territorial Offices should be given formal constitutional recognition with codified rules on powers, roles and functions.**
5. **The Cabinet and the Official Opposition should be given formal constitutional recognition with codified rules on powers, roles and functions.**
6. **The House of Commons should be given formal constitutional recognition with codified rules on powers, roles and functions. The constitution should set out the role of House of Commons committees and the precise nature of the relationship between the House of Commons and the Second Chamber.**
7. **The House of Lords as currently constituted including all hereditary peers, life peerages and bishops should be abolished in its entirety and replaced with a new fully elected Second Chamber to be known as the Senate of the Nations and Regions.**
8. **The Scottish Parliament, the Welsh Senedd and Northern Ireland Assembly should be given permanent constitutional status and become independent sources of sovereign power distinct and independent of Westminster in their areas of competence.**
9. **Combined Regional Authorities would be required to be established with their own executives and together with the Greater London Authority will also be given permanent constitutional status.**
10. **A new Council of the Union should be established as the supreme executive body on federal-devolved relations bringing together the heads of government of each of the governments around the UK including of the UK Government, the Scottish Government, the Welsh Government and the Northern Ireland Executive as well as a representative of the English devolved administrations accountable to the Senate of the Nations and Regions.**
11. **A new Interparliamentary Committee should be established as part of the UK Parliament comprised of English MPs, MSPs, MSs, MLAs, to manage relations between the legislatures of different parts of the UK. MPs in Westminster from the devolved nations will be required to participate as the purpose of the Committee is to manage relations between the legislatures in devolved areas of competence.**
12. **The law of judicial review should be reformed so that the grounds of review include a ground which allows legal challenge to primary and secondary legislation from the UK Parliament, Scottish Parliament, Welsh Senedd, Northern Ireland Assembly and the exercise of executive functions of the English Combined Regional Authorities which contravene the constitution.**

13. Good Friday Agreement in relation to Northern Ireland should be incorporated in full by reference into the new codified constitution.
14. Local government should be reinvigorated and will also be required to be given constitutional status as independent sources of sovereign power distinct both from the federal government at Westminster but also from the devolved administrations across the UK as well as distinct from the English Combined Regional Authorities.
15. The constitution should ensure that it is possible for collective groups of citizens to combine outside of the formal federal, regional and local government structures to make changes in their local area with local funding.
16. International human rights standards should be directly incorporated into UK domestic law including civil and political as well as economic and social, and third generation human rights and the law of judicial review should allow challenges to primary and secondary legislation as well as acts of public authorities for contraventions of human rights standards.
17. Judicial appointments should be made by an independent nominations process followed by confirmation in the Senate of the Nations and Regions to allow an element of political screening for judges who will be empowered to strike down primary legislation.
18. The constitution should set out the rules on UK citizenship and the right to vote. The constitution should also include a requirement for all UK citizens to complete a civic education course on the subject of the constitution.
19. The National Investment Bank as well as local boards of trade and industry across the country should be given constitutional status and charged with directing capital investment across the UK. The Bank of England should be given constitutional status but drastically reformed including in its appointment to the Monetary Policy Committee.
20. The constitution should set out rules on debt management across the UK between the federal government and the devolved governments which have power to borrow from financial markets.
21. The constitution should include a constitutional commitment to socialism through the public ownership of the means of production, distribution and exchange for the UK's key assets and key industries including the NHS.
22. The constitution should give protection to employment rights based on the Charter of Workers' Rights produced by the Institute of Employment Rights and the constitution should also encourage alternative models of employee ownership including enshrining the Macora Law.
23. The constitution should make provision for the development of common frameworks between different parts of the UK particularly in relation to the regulation of the UK internal market.

- 24. The constitution should include legally enforceable environmental obligations which should apply to the state, corporations as well as private individuals.**
- 25. The constitution should make clear that international treaties entered into by the UK Government on behalf of the whole of the UK should be subject to ratification in the Senate of the Nations and Regions.**
- 26. The British Overseas Territories and the Crown Dependencies should be formally recognised in the constitution and the rules on the relationship with the UK should be set out.**
- 27. The new constitution should set out an apology for the actions of the British Empire and provide for a Colonial Apology and Reparations Fund to redress the historic wrongs and injustices imposed by the Empire on communities around the world.**
- 28. Permanent Secretaries of the Civil Service should be political appointments and should change after a change of government.**
- 29. The constitution should make provision for freedom of information and data protection for all UK citizens.**
- 30. The constitution should make provision on the electoral systems to be used for the UK Parliament and devolved legislatures including replacing First Past the Post for the House of Commons with a system of proportional representation.**
- 31. The constitution should reform party political funding and consideration should be given to a form of state funding for political parties.**
- 32. The constitution should make clear that all military action requires approval by simple majority in both the House of Commons and the Senate of the Nations and Regions.**
- 33. The constitution should make clear that UK federal law passed by the UK Parliament enjoys supremacy above all other forms of law in the UK.**
- 34. England, Scotland and Wales should also be given a right to self-determination under the constitution in accordance with strict rules. The position of Northern Ireland should be treated differently under the terms of the Good Friday Agreement.**

Chapter 9

Senate of the Nations and Regions

Introduction

The new Senate of the Nations and Regions would replace the current House of Lords as the UK Parliament's Second Chamber. House of Lords reform is long-overdue as the current Second Chamber is completely unelected but rather contains an assortment of appointed life peers, hereditary peers and Church of England bishops. The current composition and role of the House of Lords is untenable and must be changed; there is no place in a modern democracy for such an unaccountable and elitist institution to be at the heart of the British state.

However, rather than simply abolish the House of Lords and turn the UK Parliament into a unicameral legislature, it is suggested that it should be reformed to take on a new role with a new composition and a new name to give expression and physical form to the new federal state. In addition, it is suggested that it is important for the UK Parliament to retain a Second Chamber as a revising chamber and counter-weight to the House of Commons.

In order to devise ways in which the Second Chamber can be reformed from the present House of Lords to a more representative institution, it is important to consider international comparisons of secondary chambers in other states which have adopted a federal system of government to take into account regional differences.

International comparisons

German Bundesrat

It is important to understand from the outset that the Basic Law of Germany does not provide for a classic two-chamber parliament. No mention is made in the Basic Law of a 'parliament' that incorporates the Bundestag and the Bundesrat as two chambers or houses. Rather, the Basic Law establishes two legislative bodies of which the Bundestag is the main legislator while the Bundesrat's involvement in legislation is reduced. Formally, thus, the Bundesrat is not a classic second chamber.¹

This was confirmed by the Federal Constitutional Court which argued in its decision of June 25, 1974 that 'pursuant to the Basic Law, the Bundesrat is not a second chamber of a uniform legislative organ that participates in the legislative process on an equal footing with the first chamber.'² However, it is important to note that the Court did not rule out categorically the possibility of classifying the Bundesrat as a second chamber.³

¹ Articles 55 para. 1, 59 para. 2, 122 para 1 BL

² BVerfGE 37, 363/380

³ Niedobitek, Matthias, *The German Bundesrat and Executive Federalism* in Perspectives on Federalism, Volume 10, Issue 2, 2018, pp. E-208

The Bundesrat primarily serves to represent the interests of the Länder in the federal part of the German constitution and the Bundesrat is generally regarded as a key element in the German constitution's vertical separation of powers between the Länder and the Bund. However, it has been suggested that the Bundesrat also plays an important part in the German constitution's horizontal separation of powers between it and the Bundestag, the equivalent of the lower house of the German federal parliament.⁴

The Bundesrat operates primarily as a legislative body and participates in the making of federal legislation in Germany. Article 77 of the Basic Law of Germany provides for two different types of bill in respect of the Bundesrat's function as a legislative body. Firstly, there are bills which require the consent of the Bundesrat in order to become law, and secondly, there are all other bills against which the Bundesrat can raise objections which is in effect a suspensive veto which can be outvoted by the Bundestag. The rule is that the Bundesrat should only have the right to a suspensive veto and if the Bundesrat is to have a full veto this must be made clear in the Basic Law. The Bundesrat also has a power to initiate legislative initiative under Article 76 B of the Basic Law which means that the Bundesrat can initiate bills and importantly this power is not restricted to representing the Länder interests.

In addition to its legislative function, the Bundesrat also performs a whole host of other functions including administration in the of the federal state and also it has a specific responsibility in relation to Germany's relationship with the European Union in terms of Article 23 of the Basic Law.

The composition of the Bundesrat marks it out as different to most second chambers in that it has no legislative period like the Bundestag but rather it is an eternal institution and consists of members of the Land governments which appoint and recall the members pursuant to Article 51 of the Basic Law. Furthermore, according to Article 51, each Land should have three votes in the Bundesrat, Länder with more than two million inhabitants have four votes, Länder with more than six million have five votes, and Länder with more than seven million inhabitants have six votes in the Bundesrat. This is clearly an asymmetric distribution of votes per Länder based on the degressive proportionality⁵ principle in order to strike a balance between federal and democratic representation in the Bundesrat.⁶

The committee system in the Bundesrat is unique in that it provides a way for the executives of the Land to be directly represented. Article 52 of the Basic Law allows each Länder to send not only other members but also 'representatives' (*Beauftragte*) of the Land governments into the committees of the Bundesrat. In practice, this means that the work in the committees of the Bundesrat is dominated by the Land bureaucracy and their executive expertise. The primary role of the Land bureaucracy in the decision-making process of the Bundesrat is evidenced by the huge number of meetings of the committees and subcommittees of the Bundesrat compared to its plenary sessions and unlike in the plenum of the Bundesrat, in its committees each Land has one vote.⁷

Voting in the Bundesrat by members is done along territorial lines and members of each Land must cast the Land votes as a unit.⁸ It suffices that one Bundesrat member of a Land is present in the meeting and this member is entitled, and obliged, to cast all votes of the Land. This feature of

⁴ Ibid., pp. E-204

⁵ This is a name borrowed from the operation of the European Union pursuant to Article 14, paragraph 2 of the Treaty on the European Union.

⁶ Niedobitek, Matthias, *The German Bundesrat and Executive Federalism* in Perspectives on Federalism, Volume 10, Issue 2, 2018, pp. E-206

⁷ Ibid.

⁸ Article 51 para. 3 sentence 2 of the Basic Law

Bundesrat voting proves to be problematic in coalition governments which may have split opinions on an issue which is on the Bundesrat's agenda. In fact, all Land governments tend to be in coalition governments except but usually, coalition agreements provide for the possibility of diverging opinions within the government in that the Bundesrat members have to abstain from voting if no prior agreement has been reached.⁹

There have been occasions in the past where the requirement for voting as a Land unit has been infringed. For example, in 2002 when the Bundesrat was voting in relation to the Immigration Act (*Zuwanderungsgesetz*) the members for the Land Brandenburg did not vote uniformly but openly differently. The Land was reprimanded by the then President of the Bundesrat Klaus Wowereit and then he asked the Minister President of Brandenburg, Manfred Stolpe, to clarify the Land's position, which he did and stated the Land voted 'yes'.

The Federal Constitutional Court subsequently declared the Immigration Act void¹⁰ and the court stated that the President of the Bundesrat was not permitted to count the casting of the votes for the Land Brandenburg by the Minister President as an agreement of the Land to the Immigration Act. The Minister President, the Court said, cannot be regarded as the holder of the block votes if a Bundesrat member of the Land in question contradicts.

Between the Bundestag and the Bundesrat there is a Conciliation Committee which is neither part of the Bundestag or the Bundesrat but acts as a sui generis joint institution of both. It consists of 16 members of the Bundestag and 16 members of the Bundesrat and the Committee's task is to jointly consider a bill.¹¹ This is particularly important when the Bundesrat's consent is required. In that case the Bundesrat, the Bundestag and the Federal Government are entitled to convene the Committee. When the Bundesrat can only raise objections to a bill, solely the Bundesrat can convene the Committee and to object to a bill requires the prior convention the Committee.¹²

Senate of Canada

The Parliament of Canada consists of three elements: The Queen, the House of Commons and the Senate. The Senate is the upper house of Parliament and is constituted by appointed Senators. The constitutional role of the Senate is to be a complementary legislative body to the elected House of Commons in providing sober second thought. In that role, the Senate acts essentially as a reviewing chamber on proposed bills before they are passed.

The Senate has a fundamental role to play as a chamber for the representation of regional interests. The Senate has become an important institution for the representation of minority interests and groups who may be underrepresented in the elected chamber (such as Indigenous peoples, minority language and ethnic groups, and women). In addition, the Senate's committees play an investigative role in undertaking studies on important social and political issues facing the country, such as poverty, aging, unemployment, land use, and national defence.¹³

⁹ Niedobitek, Matthias, *The German Bundesrat and Executive Federalism* in Perspectives on Federalism, Volume 10, Issue 2, 2018, pp. E-207

¹⁰ BVerfGE 106, 310)

¹¹ Article 77 para. 2 sentence 1 of the Basic Law

¹² Niedobitek, Matthias, *The German Bundesrat and Executive Federalism* in Perspectives on Federalism, Volume 10, Issue 2, 2018, pp. E-208

¹³ Government of Canada website, <https://www.canada.ca/en/campaign/independent-advisory-board-for-senate-appointments/about-the-senate.html>

In relation to the composition of the Senate, the Canadian Constitution provides that the Senate has 105 appointed members divided among the provinces and territories as follows:

- Alberta, British Columbia, Manitoba, and Saskatchewan: 6 seats each
- Ontario: 24 seats
- Quebec: 24 seats (Quebec's seats are allocated by electoral division)
- New Brunswick and Nova Scotia: 10 seats each
- Prince Edward Island: 4 seats
- Newfoundland and Labrador: 6 seats
- Yukon, Northwest Territories, and Nunavut: 1 seat each.¹⁴

Pursuant to sections 24 and 32 of the Constitution Act 1867, the power to appoint individuals to the Senate is vested in the Governor General of Canada. By constitutional convention, the Governor General summons individuals to the Senate on the advice of the Prime Minister. To be appointed to the Senate, individuals must meet the constitutional qualifications in the Constitution Act 1867 (e.g. in terms of age, citizenship, property, and residency).

Australian Senate

The Australian Senate is one of the two houses of the Federal Parliament of Australia. It consists of 76 senators, twelve from each of the six states and two from each of the mainland territories. It shares the power to make laws with the House of Representatives.

The powers of the two houses of the Commonwealth Parliament, the Senate and the House of Representatives, are defined by the Australian Constitution. All proposed laws (bills) must be passed by both houses. The Senate's law-making powers are equal to those of the House of Representatives except that it cannot introduce or amend proposed laws that authorise expenditure for the ordinary annual services of the government, or that impose taxation. The Senate can, however, request that the House of Representatives make amendments to financial legislation and it can refuse to pass any bill.

The Senate is a house of review and a powerful check on the government of the day. The proportional representation system of voting used to elect senators makes it easier for independents and the candidates of the smaller parties to be elected. In recent decades this has meant that the government party usually does not have a majority of votes in the Senate and the non-government senators are able to use their combined voting power to reject or amend government legislation. The Senate's large and active committee system also enables senators to inquire into policy issues in depth and to scrutinise the way laws and policies are administered by ministers and public servants.¹⁵

Under its Constitution, each state of the Australian federation, regardless of its population, has an equal number of senators. The Senate currently consists of 76 senators. Twelve senators represent each of the six states, elected for a period of six years. A system of rotation, however, ensures that half the Senate retires every three years. The four senators who represent the Australian Capital

¹⁴ Ibid.

¹⁵ Ibid.

Territory and the Northern Territory are elected concurrently with members of the House of Representatives, and the duration of their terms of office coincide with those for that House (a maximum of three years).

The Senate is elected by a system of proportional representation which ensures that the composition of the Senate more accurately reflects the votes of the electors than the method used to elect members of the House of Representatives.¹⁶

US Senate

The United States Senate is one of the two houses of Congress of the United States, established in 1789 under the US Constitution. The role of the Senate was conceived by the Founding Fathers as a check on the popularly-elected House of Representatives. Thus, each state, regardless of size or population, is equally represented.

The Senate's key powers under the Constitution is the power to try impeachments (a two-thirds majority being necessary for conviction), the approval of treaties (also by a two-thirds majority) and the power of "advice and consent" on important public appointments such as those of Cabinet members, Ambassadors and Justices of the Supreme Court (by a simple majority). The Senate also shares with the House of Representatives responsibility for all lawmaking within the United States. For an act of Congress to be valid, both houses must approve an identical document.

As in the House of Representatives, political parties and the committee system dominate procedure and organization. Each party elects a leader, generally a senator of considerable influence in his or her own right, to coordinate Senate activities. The leader of the largest party is known as the majority leader, while the opposition leader is known as the minority leader. The Senate leaders also play an important role in appointing members of their party to the Senate committees, which consider and process legislation and exercise general control over government agencies and departments. The Vice President of the United States serves as the president of the Senate but can vote only in instances where there is a tie. In the vice president's absence, the president *pro tempore* – generally the longest-serving member from the majority party – is the presiding officer of the Senate.¹⁷

Until the Seventeenth Amendment to the Constitution (ratified in 1913), election to the Senate was indirect, by each state legislature. As a result of the amendment, they were elected directly by voters in each state. Each state elects two senators for six-year terms, meaning a total of 100 senators. The terms of about one-third of the Senate membership expires every two years.¹⁸

Irish Senate

Legislative power in Ireland is vested in the bicameral Oireachtas (National Parliament), comprising the Seanad Éireann (Senate) and the Dáil Éireann (House of Representatives). The Seanad's functions and powers derive from the Constitution of Ireland enacted on 1 July 1937, and mainly concern the revision of legislation sent to it by Dáil Éireann.

¹⁶ Government of Canada website, <https://www.canada.ca/en/campaign/independent-advisory-board-for-senate-appointments/about-the-senate.html>

¹⁷ https://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm

¹⁸ Ibid.

In matters of legislation the Constitution provides that Seanad Éireann cannot delay indefinitely the passage of legislation. Bills to amend the Constitution and Money Bills i.e. financial legislation, can only be initiated in Dáil Éireann. Seanad Éireann *can* make recommendations (but not amendments) to Money Bills, and these must be made within 21 days as against 90 days for non-Money Bills.

However, Seanad Éireann does have prior or exclusive powers in two areas:

- abbreviating the time within which the President may sign a Bill into law (called an “earlier signature motion”).
- petitioning the President to decline to sign a Bill until the people have decided the matter by referendum (such a petition requires the support of a majority of the Seanad and not less than one third of the Dáil).

The two Houses of the Oireachtas have complementary powers in certain areas, e.g. the removal from office of the President, a judge of the Supreme Court or the High Court and the Comptroller and Auditor General, the declaration and termination of a state of emergency, and the making of law and annulment of Statutory Instruments (i.e. delegated legislative power to Ministers).

The Constitution of Ireland states that elections to Ireland’s upper house, the Seanad Éireann, must take place not later than 90 days after the dissolution of the Dáil. The Seanad has 60 members, known as Senators, including 11 nominated by the Taoiseach (Prime Minister) and 49 indirectly elected for five years:

- 43 are elected by five panels representing vocational interests namely, Culture and Education, Agriculture, Labour, Industry and Commerce and Public Administration;
- 6 are elected by the graduates of two universities: three each by the National University of Ireland and the University of Dublin (Trinity College).

In theory, Seanad Éireann does not recognise party affiliations. However, as the electorate for the panels is made up of the Members of the incoming Dáil, the outgoing Seanad, county councils and county borough councils, the composition of Seanad Éireann, including the Taoiseach’s nominees, will tend to reflect party strengths in Dáil Éireann. In practice, Senators will divide into groups supporting and opposing Government business when voting on issues.

The Constitution provides that not more than two Senators may be members of the Government and this provision has been exercised twice in the last 60 years.¹⁹

Senate of the Nations and Regions

The composition of the Senate

In designing the Senate of the Nations and Regions, as the principal federal organ of the new federal UK state, it is critical that its role and composition should be based on the principles of progressive federalism discussed in detail in Chapter 7. In particular, the Senate should seek to uphold solidarity between all peoples across the UK and as part of that to effect a redistribution of wealth and power within the UK. The Senate should also be designed to recognise the importance of the principle of

¹⁹ Oireachtas website, <https://www.oireachtas.ie/en/visit-and-learn/how-parliament-works/>

subsidiarity, allowing decisions to be taken at the lowest possible level of government closest to the people whom the decisions affect most directly.

The Senate should also strive to uphold parity of esteem between Westminster and the different nations and regions of the UK and among those nations and regions themselves as well as the related principle of the protection of minority groups. The Senate should recognise that the UK is a multi-national state which is comprised of different national identities, ethnicities, cultures and institutions. All of the peoples and institutions of the UK must treat each other based on a principle of mutual appreciation and respect, and the institutions themselves must give each other due deference befitting the roles, functions and various democratic mandates of those institutions.

The Senate of the Nations and Regions should be representative of the nations and regions of the UK and its composition should be designed in such a way to achieve this. There are two main ways this could be achieved based on the principles of progressive federalism one of which involves Senators being directly elected by the people of each nation and region of the UK. Under this model, each region or nation of the UK would be ascribed a number of seats in the new Senate to represent their regions or nations and this number could be calculated using the degressive proportionality principle as in the German Bundesrat.

As opposed to using the degressive proportionality principle, an alternative would be that the number of Senators could be set at a fixed number for each nation and region, for example 30 members, and so each region or nation would elect 30 Senators regardless of population size as in the Australian Senate. Therefore, in this instance Scotland would be represented by 30 Senators while Greater London would also be represented by 30 Senators despite the latter having double the population size to the former. This recognises the special constitutional status of each nation and region of the UK and gives them an equal voice at federal level.

An alternative model of composition completely would involve the institutions of the nations and regions electing Senators rather than the Senators being directly elected by the people. Under this indirect election model, each institution representing the nations and regions of the UK such as the Scottish Parliament and the Welsh Senedd would each elect Senators to represent those institutions in the Senate similar to the US Senate before the ratification of the Seventeenth Amendment in 1913 as discussed above.

In the German Bundesrat, members are delegates sent on behalf of the Land to represent the Land institutions directly at a federal level. However, it is suggested that in respect of the Senate, the Senators should be indirectly elected by the devolved institutions and English local government but along party political lines.

The number of Senators to be indirectly elected in respect of each nation and region could again be calculated using the degressive proportionality principle as discussed above in reference to direct elections, or alternatively, a set number of members could be allocated to each nation and region. Then, political parties in the devolved legislatures and in the English Combined Regional Authorities would gain a certain number of nominations based on their seats in the devolved institutions and English local government. The candidates would then stand for election by these institutions and the successful candidates would take on the role of Senator which would be a full-time and salaried post.²⁰

There may be significant merit in giving preference to indirect elections to the Senate rather than direct elections to the Senate given the nature of the British constitution. As discussed in Chapter 1,

²⁰ Meeting Note with Lord Hope, 16 October 2019

the House of Commons currently enjoys primacy vis-à-vis the House of Lords and allowing direct elections to the new Senate could raise the problem of a dual mandate between the House of Commons and the newly constituted second chamber. Given that both the House of Commons and the Senate would be directly elected, each house would arguably have an equal democratic mandate, and this could give rise to disputes over the legitimacy of the House of Commons to retain its primacy.

Although having indirect elections to the Senate would still have implications for the primacy of the House of Commons,²¹ the fundamental principle that the House of Commons would retain its supremacy could remain intact. Therefore, it is suggested that if the primacy of House of Commons is to be retained, there should be indirect elections to the Senate rather than direct elections.

It is suggested that a system of proportional representation should be used to elect the Senators under either composition model, most likely the Single Transferable Vote in order to maximise voter choice. Under the indirect elections model, the Single Transferable Vote could be used by MSPs from the Scottish Parliament, MSs from the Welsh Senedd, and councillors from the English regions to elect Senators. In relation to England specifically, Senators could be elected by the Combined Regional Authorities.

As discussed in Chapter 5, each CRA in England could return Senators to represent that English region in the Senate of the Nations and Regions. Each political party represented in the CRA could nominate candidates for election as Senator and the number of nominations allowed for each party would be determined by the number of councillors that party had in the local authorities making up the CRA. Each local authority making up the CRA would then vote using a proportional system of election such as the Single Transferable Vote to elect Senators for that CRA.²² The political parties in the Greater London Authority would similarly nominate candidates for election to the Senate and the Greater London Assembly would elect the Senators using the Single Transferable Vote.

Northern Ireland has a special set of circumstances given the history of the Troubles and the Good Friday Agreement signed in 1998. The Agreement is an international agreement which has status in international law between the UK and the Irish State and therefore its terms must be accommodated within the federal state, particularly in relation to power sharing and accommodation of the two communities in Northern Ireland.

One potential way in which Northern Ireland could send Senators to the Senate of the Nations and Regions would be for a Civic Forum to be established under the Article 34 of the Good Friday Agreement which will comprise representatives of the business, trade union and voluntary sectors, and such other sectors as agreed by the First Minister and the Deputy First Minister. The Civic Forum could then nominate candidates for election to the Senate of the Nations and Regions.

The original intention of the Civic Forum was that it would act as a consultative mechanism on social, economic and cultural issues. However, it is suggested it could be given a new role as forming a pool of individuals who could then be elected by the Northern Ireland Assembly to represent Northern Ireland in the Senate.

As stated at the outset, one of the principal objectives of creating the Senate will be to give the second chamber democratic legitimacy. Therefore, clearly all hereditary peers, life peers and Church of England bishops members will be abolished. However, a question remains as to whether the Senate

²¹ This is discussed in further detail below.

²² Meeting Note with English Council Leaders, 31 October 2019

should retain members who are currently known as Crossbenchers in the House of Lords who independent members of the Lords with no political affiliation.

There is a good argument for retaining Crossbenchers in the new Senate of the Nations and Regions. Crossbenchers in the current House of Lords allow expertise to be brought into the Second Chamber from all different walks of life including doctors, judges, social workers, diplomats, civil servants and people from certain communities including the BAME and LGTB groups. Currently Crossbenchers make up around 20% of the of House of Lords.

This capacity of expertise in the second chamber could be preserved in the elected Senate. Crossbenchers should be nominated and appointed through the three devolved governments and, for England, nominations and appointments should be done via the Combined Authorities and Greater London Assembly. These Crossbenchers should perhaps only have membership of the Senate in an advisory function and should not have full voting rights and it would have to be decided what the length of term should be for the Crossbenchers. For example, it could be 15 years.²³

It may the case that once the Senate has been established and has operated for an initial period of time, there may be pressure to move towards direct elections to the Senate rather than indirect elections from the devolved institutions and English local government. However, as mentioned above, direct elections to the Senate will inevitably put pressure on the principle of the primacy of the House of Commons as the Senate will have equal democratic legitimacy as the Commons having been directly elected by the people.

Moreover, directly electing Senators runs the risk of simply replicating the House of Commons in the Second Chamber prompting a question over the purpose of the Senate and whether it is needed at all. As discussed above, the primary purpose of the Senate is to represent the nations and regions at a federal level, not necessarily to directly represent the people in constituencies across the UK – that is the role of the House of Commons.

It will be necessary to allow the Crown Dependencies and Overseas Territories representation in the Senate of the Nations and Regions and Senator seats must be allocated to each of the Crown Dependencies and Overseas Territories according to the same calculation used in respect of Scotland, Wales, Northern Ireland and the English regions.

The role of the House of Lords

Currently, bills (draft laws) have to go through various stages in both the House of Commons and House of Lords before they receive Royal Assent to become law. The House of Lords spends most of its time in the chamber (60%) on legislation.²⁴ It examines and revises bills from the Commons, carefully checking government proposals and making changes through debate on amendments. Unlike the Commons, there is no selection of amendments, all can be considered, and debate on amendments is not time limited.

Given the extended time period allowed for scrutiny of bills, the House of Lords is able to deliberate and consider potential problems, helping to make better, more effective laws. The House of Lords also

²³ Meeting Note with Lord Hope, 16 October 2019

²⁴ House of Lords, Briefing, Role and Work, 2011, pp. 3, <https://www.parliament.uk/documents/lords-information-office/lords-briefing-papers/15595HoLBriefing-work-role-function.pdf>

initiates bills (usually non-controversial ones). Increasingly, a larger share of government bills start in the Lords to spread the legislative load more evenly between the two Houses.

Another important function of the House of Lords is to act as a check on government by questioning its activities and challenging its decisions. The House does this by questioning the government in the chamber or by submitting written questions, responding to government statements and debating topical policy issues.

Questions enable Members of the Lords to seek information and raise issues of concern about government policy and activities. Question time takes place in the chamber at the start of business (Monday to Thursday) and lasts for 30 minutes. It allows Members to question the government as a whole when the House is at its fullest. A maximum of four questions are asked. Ministers can be asked further questions about their answer. The House also submits about 6,000 written questions to the government annually.

Debates are an opportunity to discuss important public policy issues and draw the government's attention to concerns. More than 100 debates take place over the parliamentary year on a huge range of subjects. Members have a correspondingly wide range of experience and knowledge to underpin the arguments they deploy in debate.

There are three main types of debate in the House of Lords. Firstly, general debates (on Thursday), normally for a maximum of five hours. Sometimes there is one long debate, or there may be two shorter ones. Usually the subjects are chosen by the parties or the Crossbenchers, but once a month two 2 and a half-hour debates are chosen by ballot from topics suggested by backbench or Crossbench Members. Secondly, there are short debates, lasting 60 or 90 minutes, usually at dinner time or sometimes at the end of business. Lastly, there are debates on committee reports, which are not normally time limited.

Government ministers also make statements in the Lords chamber, announcing important policy initiatives, reports on national and international issues and government actions. There is a limited time for immediate questioning of the minister, allowing Members another opportunity to raise concerns and seek further information on government decisions.

The House of Lords also has an elaborate committee system which focuses on specialist subjects for the purposes of scrutiny and debate. Committees are an important resource for the House of Lords and conduct wide-ranging inquiries into policy issues and government decisions. During inquiries, members hear evidence from ministers, experts and relevant organisations.

The European Union Committee scrutinises and reports on proposed European legislation. It has seven sub-committees and focuses on a range of policy areas, conducting inquiries into European Commission policies and regulations. For example, the EU committee investigated the role the EU can play in helping the UK and other member states to detect and prevent cyber-attacks and called for better cooperation between the EU and NATO. The committee's membership includes former ministers, EU commissioners, members of the European Parliament and ambassadors.

The Science and Technology Committee operates normally through two sub-committees enabling it to carry out two inquiries at a time. Many of its members are distinguished scientists with experience of high office in science policymaking, university and industrial research, clinical medicine and so on. It has published reports on the scientific aspects of aging, avian flu and water management. It recently examined the role of nanotechnologies in food production and packaging.

The Constitution Committee examines public bills that raise significant constitutional issues. It constantly reviews the operation of the UK constitution and keeps a check on any broader government policy that might affect the constitution. The committee members include senior lawyers, former ministers and academic experts on the constitution. They have examined issues such as the workings of devolution, the government's war-making powers and the Identity Cards Bill.

The Economic Affairs Committee considers economic affairs and reviews aspects of the Finance Bill and the work of the Bank of England Monetary Policy Committee. Its members are experts on economic issues and have included former Chancellors of the Exchequer, senior Treasury officials and high-profile business leaders.

The Communications Committee looks at a broad range of broadcasting and communications issues, including those affecting new media and creative industries. It has conducted inquiries into public service broadcasting and the ownership of the news and media, called for enhanced tax breaks for low-budget films made in the UK, and for new tax incentives to encourage video games producers to stay in the UK.

One-off committees are set up from time to time to examine issues or bills outside the remits of the main investigative committees – such as intergovernmental organisations and animals in scientific procedures.

The role of the Senate of the Nations and Regions

The role of the Senate of the Nations and Regions will be central to the operation of the new federal state as it will give a voice to all of the different parts of the UK at the centre of the British state. The Senators will be representative of the nations and regions not by population size like the constituencies for seats in the House of Commons but rather it will be representative of the nations and regions as units of the constitutional order.

The role and responsibilities of the new Senate will take on the legacy functions of the present House of Lords as a secondary revising chamber in the UK Parliament. This will include the making of legislation by examining each bill and other legislation line-by-line before it becomes law. It will also include in-depth consideration of important public policy matters in various select committees and also holding the government to the day to account by scrutinising the work of the government during question time and debates in the chamber and requiring government ministers to respond. These functions are more fully described above. Although government ministers would not be members of the Senate, they could be invited to answer questions in Senate committees or in plenary session.

However, the Senate will take on new functions which are not currently exercised by the House of Lords. In addition to functioning as a counterweight to the House of Commons and the federal UK Government, the Senate will also act as a link between the central federation and the nations and regions of the UK.

The Senate will be the federative constitutional organ in the UK through which the nations and regions can play a direct part in federal affairs in particular policy areas. The Senate will ensure the nations and regions can participate, within the framework laid out in the constitution, in formulating the political objectives of the UK as a whole.

In all states with a federal system of government, a natural tension exists between the state as a whole and the constituent units. The federation and the constituent units strive to assert their own position

and to strengthen it as much as possible and are always keen to make full use of their rights and perhaps also to acquire broader rights.

The Senate's key role will be to defend the interests of the nations and regions at the central government level, but at the same time it must seek to ensure these are in keeping with the needs of the UK as a whole. In order to empower the Senate to carry out this role and given its democratic legitimacy, the Senate's power must be strengthened compared with the current role of the House of Lords while maintaining the primacy of the House of Commons.

This will require a new relationship to be carved out between the House of Commons and the new Senate different from the current relationship principally based on the Parliament Acts 1911 and 1949, the principle of the primacy of the House of Commons and the Salisbury-Addison Convention along with some other conventions.²⁵

The Parliament Acts 1911 as amended by the 1949 Act restricts the power of the House of Lords in relation to, inter alia, finance bills to the effect that if a financial bill has been passed by the House of Commons and sent to the Lords at least one month before the end of the parliamentary session but is not passed by the Lords without amendment within one month of it having been sent to the Lords, the bill will be sent for royal assent and become an Act of Parliament notwithstanding the lack of consent by the Lords to the passage of the bill, unless the Commons directs otherwise.²⁶

In relation to any public bill, if such a bill is passed by the House of Commons in two successive sessions and having been sent to the Lords at least one month before the end of the session is rejected by the Lords in each of those sessions, the bill will be sent for royal assent and become an Act of Parliament upon its rejection by the Lords for the second time, unless the Commons decides otherwise.²⁷

The provisions of the Parliament Acts 1911 and 1949 do not encompass secondary legislation but only apply to financial bills and public bills and therefore delegated legislation rejected by the Lords cannot have effect even if the Commons have approved it. Neither House of Parliament has the power to amend delegated legislation.²⁸

The Salisbury Convention is generally understood to mean that the House of Lords should not reject, at second or third reading, Government Bills brought from the House of Commons for which the UK Government has a mandate from the nation, usually when the measure was a manifesto commitment of a sitting government. The Commons has also claimed a general privilege in relation to the raising and spending of taxpayers' money since the 17th century. Bills to raise taxes or authorise expenditure always start in the Commons and cannot be amended by the Lords.²⁹

Taken together, these statutory provisions and constitutional conventions make up the principle of the primacy of the House of Commons. However, it is suggested that this arrangement will not be suitable for the new Senate as the voice of the nations and regions at federal level. The new constitution should make clear that the House of Commons retains its primacy, but this primacy should be curtailed further and the influence of the new Senate should be strengthened.

²⁵ Maer, Lucinda, *Conventions on the relationship between the Commons and the Lords*, House of Commons Library Briefing Paper, 7 January 2016

²⁶ S.1, Parliament Act 1911

²⁷ S.2, Parliament Act 1911

²⁸ Maer, Lucinda, *Conventions on the relationship between the Commons and the Lords*, House of Commons Library Briefing Paper, 7 January 2016, pp.17

²⁹ House of Lords, Briefing, Role and Work, 2011, pp. 4, <https://www.parliament.uk/documents/lords-information-office/lords-briefing-papers/15595HoLBriefing-work-role-function.pdf>

For example, as is the case in relation to the German Bundesrat, two different categories of bills for the UK Parliament could be created which in relation to the first the Senate would only be able to delay, revise and express discontentment. However, in relation to the second category of bills, the Senate would be given a veto power over the bill which would mean the bill could not continue in its passage through Parliament if not passed by the Senate.

Consideration would be required to be given to which areas of policy the Senate veto would extend but could include, for example, issues such as the regulation of the UK internal market, powers to be repatriated from Brussels after the UK's departure from the European Union, and other issues which affect federal-devolved relations. In particular, the Senate could be given a veto over legislation which falls in devolved areas of competence, but which have a cross-territorial impact across the UK such as common frameworks on fisheries, agriculture, and environmental standards which will be required following the UK departure from the EU.

As discussed in Chapter 1, According to analysis conducted by the UK Government, there are a total of 160 distinct policy areas where EU law intersects with devolved powers in at least one of the three devolved nations. In Scotland, there are 111 such policy areas. New frameworks will not necessarily be required in all these areas. In some cases, full control is expected to be transferred to the devolved institutions, allowing policy divergence between the devolved nations and the rest of the UK.

The areas over which the Senate of the Nations and Regions could be given a veto could include the areas where there are to be common frameworks:

1. Common frameworks to ensure that the effective functioning of the UK single market is maintained. For instance, it may be necessary to limit regulatory differences emerging in areas ranging from public procurement, rail franchising which has a significant cross-border element and animal welfare to the management of radioactive waste.
2. Common frameworks which would enable the UK to conclude trade deals with other countries. The Government is concerned that regulatory divergence might make it harder for the UK to strike comprehensive trade deals, for instance if the devolved nations created more generous schemes for subsidising farmers or supporting local industry.
3. Common frameworks to ensure that the UK meets international obligations, including in areas relating to devolved policy competences. This might apply, for instance, in relation to international agreements on carbon emissions, management of fisheries in the North Sea or in allowing each other's citizens access to healthcare when abroad.
4. Common frameworks to ensure the management of common resources that naturally cross boundaries between the UK nations, including the water and air quality as well as fisheries.
5. Common frameworks to administer and provide access to justice in cases with a cross-border element.
6. Common frameworks to continue cooperation where it is needed to safeguard the security of the UK.

As discussed in Chapter 8, the Council of the Union could be given a role to negotiate then agree a binding common framework. Following this, the binding common framework would require to be passed through the UK Parliament to become law and the Senate of the Nations and Regions would then be given a role of scrutinising the common framework and holding the Council of the Union to account.

In Germany, the Bundesrat is given a veto over certain bills to reflect its key role in defending the interests of the Land. This includes bills affecting the division of political tasks between the German Federation and the federal states i.e. provisions pertaining to legislative, administrative and jurisdictional competence nationally and vis-à-vis the European Union; the apportionment of tax revenue between the Federation and the federal states; stipulation of the administrative procedure to be applied by state authorities in enforcing federal laws.³⁰

It is suggested that the Senate of the Nations and Regions in the UK should be given a similar power of veto over such bills to allow it to discharge its function of defending the interests of the nations and regions. The bills over which the Senate ought to have an absolute veto, therefore, fall into three broad categories:

1. Bills which alter the relationship between the UK Government and UK Parliament and the nations and regions would be subject to a veto by the Senate including the apportionment of tax revenue raising powers between the UK Government and the devolved institutions of the nations and regions;
2. Bills which fall into areas of devolved legislative competence with a cross-territorial element including in policy areas of the repatriated powers returning from the European Union such as binding commons standards on and regulation of the UK internal market, environmental protections, fisheries, and agriculture; and
3. Bills which stipulate how the nations and regions implement and enforce UK federal law would also be subject to a veto in the Senate.

The consequence of giving the Senate a veto over certain bills will mean that parliamentary procedure will require to be amended to allow this veto power to be accommodated. However, one immediate consequence will be that when considering English-only bills or English-only issues, a version of the English Votes for English Laws procedure used in the House of Commons may have to be adopted by the Senate.³¹ It is suggested the amended procedure discussed in detail in Chapter 5 should also be adopted in relation to the Senate of the Nations and Regions.

Legislative Procedure and the Mediation Committee

There will also require to be a mechanism for resolving disputes between the House of Commons and the Senate where the Senate vetoes a bill which has been passed by the House of Commons.

In the German model, there is a Mediation Committee which can be convened. All bills adopted by the Bundestag must be forwarded to the Bundesrat by the President of the Bundestag. In the second "reading" initiated by the forwarding of the bill, Bundesrat committee meetings are held to determine whether or not the results of the first "review" have been taken into account and whether or not the Bundestag has introduced other amendments.

If the Bundesrat decision is based on a Bundesrat draft bill, there is only this "second reading". However, if the Bundesrat is not in agreement with the version of a bill passed by the Bundestag, it can approach the Mediation Committee within a period of three weeks. In its submission to the

³⁰ Bundesrat website, <https://www.bundesrat.de/EN/funktionen-en/aufgaben-en/aufgaben-en-node.html>

³¹ Meeting Note with Professor Nick Pearce, 8 October 2019

Committee, which must be adopted in the plenary with an absolute majority, the Bundesrat normally includes specific proposals for amendment, along with comprehensive justification.

Consent bills, which have a special bearing on Länder interests over which the Bundesrat have an effective veto, cannot become law unless the Bundesrat gives its express approval. If the Bundesrat votes definitively against a consent bill it cannot become law. The Bundestag cannot override the Bundesrat's rejection. The Bundestag and the Federal Government may merely apply to the Mediation Committee in an attempt to reach a compromise. This means that for consent bills the Bundestag and the Bundesrat must be in agreement before legislation can be enacted. Specific clauses in the Basic Law stipulate which bills require Bundesrat consent.³²

It is suggested that a similar dispute resolution mechanism should be adopted between the House of Commons and the Senate of the Nations and Regions based on the German Mediation Committee. This may facilitate agreement between the Commons and the Senate on bills over which they disagree. However, it should be noted that the Senate should retain a veto over certain bills as discussed above.

This gives rise to two potential legislative processes for bills going through the UK Parliament, one in relation to bills over which the Senate has a suspensive veto and the other in relation to bills over which the Senate has an absolute veto. These processes can be illustrated as follows:

³²Bundesrat website, <https://www.bundesrat.de/EN/funktionen-en/aufgaben-en/aufgaben-en-node.html#doc5981294bodyText2>

Suspensive Veto Procedure

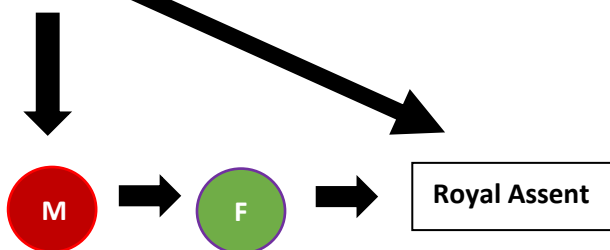
Key:

- 1 = First Reading
- 2 = Second Reading
- C = Committee Stage
- R = Report Stage
- 3 = Third Reading
- M = Mediation Committee
- F = Final Reading

House of Commons



Senate of the Nations and Regions



If there is a disagreement between the Commons and the Senate over the bill, the Senate would have the right to apply to the Mediation Committee in order to reach agreement with the Commons. It is suggested that the Senate would be required to make a detailed submission to the Mediation Committee which would make specific proposals for amendments to the bill with justifications. The submission must be endorsed by a simple majority in the Senate before being sent to the Committee.

The Senate would then nominate one Senator from each nation and region to be mediation managers to attend the Mediation Committee and to represent the Senate's views and present its submission. The Commons would also send MPs as mediation managers in equal number to the number of Senators. The Committee would be chaired by the Speaker of the House of Commons or the Presiding Officer of the Senate on a rotating basis.

The purpose of the Mediation Committee would be to debate and then vote on the Senate’s proposals for amendment to the bill. The Committee should then vote by simple majority for one of four possible outcomes:

1. The Committee may recommend that a bill passed by the Commons be revised, i.e. that provisions not acceptable to the Senate be reformulated, that additions be made, or that parts be deleted;
2. A bill passed by the Commons may be confirmed. In this case draft amendments submitted by the Senate are rejected;
3. The proposal may be made that the Commons repeal the bill in question. This happens when the Senate rejects a bill in its entirety and is successful in having this accepted by the Mediation Committee; or
4. Mediation Committee proceedings may be concluded without the submission of a compromise proposal. This happens, for instance, when no majority decision can be reached in the committee.

Under the suspensive veto procedure, if the Mediation Committee decides on Outcome 2, that the bill passed by the Commons should be confirmed and the proposals of the Senate are rejected, the bill will go back to the Commons for a Final Reading and then will pass for royal assent.

If Outcome 1, 3 or 4 are decided by the Mediation Committee, then the bill will return to the Commons for a Final Reading and the Commons may decide whether to agree with the Mediation Committee or to reject its Compromise Proposal. The bill will then pass for royal assent.

It is important to have the Mediation Committee stage even under the suspensive veto procedure as it provides an opportunity for the Senate to attempt to influence the Commons through the mediation process. Ultimately, under this procedure the Commons will have the final say and the primacy of the House of Commons will remain.

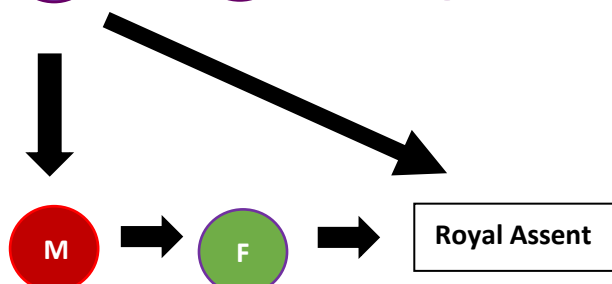
It should be noted that if there is complete agreement between the Commons and the Senate, the bill can bypass the Mediation Committee and go straight for royal assent.

Absolute Veto Procedure

House of Commons



Senate of the Nations and Regions



Under the absolute veto procedure, the process would be identical as under the suspensive veto procedure up until the bill goes to the Mediation Committee where the process will diverge from the suspensive veto procedure. Under the absolute veto procedure, if the Mediation Committee returns a decision of Outcome 2 rejecting the Senate's submission in its entirety and no Compromise Proposal can be reached, the bill will return to the Senate for a Final Reading to confirm whether it wishes to veto the Commons bill. If the Senate vetoes the bill, the bill will fall completely.

If the Committee returns a decision of Outcome 1, that the bill should be amended as per the Senate's submission, the bill should go back to the Commons for potential amendment and reconsideration based on the Compromise Proposal of the Committee. If the Commons accepts the Compromise Proposal, the bill will then go to the Senate for a Final Reading for confirmation and then will pass to royal assent. If the Commons rejects the Compromise Proposal, the bill will go back to the Senate for a Final Reading to confirm whether it wishes to veto the bill. If the Senate vetoes the bill, the bill will fall completely.

If the Committee decides on Outcome 3, that the bill should be rejected in its entirety, the bill will go back to the Senate for a Final Reading to confirm whether it wishes to veto the bill. If the Senate vetoes the bill, the bill will fall completely. Similarly, if Outcome 4 is the result of the Committee meaning that no Compromise Proposal could be reached, the bill will return to the Senate for a Final Reading to confirm whether it wishes to veto the bill. If the Senate vetoes the bill, the bill will fall completely.

It should be noted that if there is complete agreement between the Commons and the Senate, the bill can bypass the Mediation Committee and go straight for royal assent.

Additional functions of the Senate

The Senate would also be given an additional role of holding to account the Council of the Union and executive decisions taken by this body on matters of federal-devolved relations. This could involve the power to require the Prime Minister as well as the leaders of the devolved nations and regions to appear at hearings of Senate Committees on federal-devolved relations, to ask questions and conduct inquiries. It is of critical importance that the Council of the Union is politically accountable to the UK Parliament and it suggested that the Senate is best placed to hold the Council accountable given its representation of all of the nations and regions of the UK.

The Senate could also be given the power to ratify international treaties which have been signed by the UK Government as is the case in the US Senate. It could be included as part of the constitution that the UK will not be able to enter international treaties with other sovereign states unless the treaty is ratified by the Senate, thereby giving a voice to the devolved nations and regions on UK foreign relations. This would mean, for example, that a trade deal negotiated between the UK Government and the US Government would be subject to approval in the Senate. If the Senate rejects the treaty, the trade deal would fall. This would ensure that all of the nations and regions of the UK would have a direct say on the shape of future of trade deals as well as broader international relations.

As the UK's Supreme Court will become the constitutional court of the UK guarding the new entrenched constitution, it is suggested that the Senate should be given an influence in appointments to the Supreme Court. The constitution could stipulate that the nominations for appointments to the Supreme Court could be made by an independent body and then all nominations should be ratified by

the Senate before appointment is made. This would allow an element of important political screening for judges who will be empowered to strike down primary legislation as discussed in Chapter 8. Justices of the Supreme Court should, however, continue to enjoy security of tenure for life after appointments are made.

It is of critical importance that political screening of judges is introduced for judges empowered to strike down primary legislation. As discussed more fully in Chapters 7 and 8, the adoption of a codified constitution and giving the higher courts the ability to strike down primary legislation which is unconstitutional fundamentally alters the British constitution replacing the doctrine of the Sovereignty of Parliament with a supreme law. Such a reform would fundamentally recalibrate the relationship between Parliament, the executive and the courts, and would inevitably lead simultaneously to a politicisation of the judiciary and the juridification of politics.

Given this, it is crucial that judges empowered to strike down primary legislation should be required to firstly go through a rigorously independent appointment process but secondly an element of political screening to ensure the bench of the appellate courts are fairly balanced. This political screening role would be reserved for the Senate of the Nations and Regions.

The Senate of the Nations and Regions could also be given important constitutional powers similar to the US Senate including the ability to hold the trial of impeachment proceedings against a sitting Prime Minister as discussed more fully in Chapter 8 and the power of advice and consent on important public appointments such as Ambassadors.

The relationship between the Senate and the Nations and Regions

It is proposed that the relationship between the Senate the nations and regions could be strengthened by ensuring that Senators are non-partisan and sit in territorial groups as opposed to party political groups within the Senate similar to the German Bundesrat. However, Senators could still be members of political parties, but it may be advisable that the party whips are removed for Senators to ensure they are free to represent the nations and regions as opposed to rigorously following their respective party lines.

In addition to sitting in territorial groups, it is suggested that Senators could also vote in territorial groups rather than following the party whip. A position on issues could be negotiated amongst members of these territorial groups of Senators and voting could be done on this basis which would require negotiation between the parties in each territorial area on each issue. If the balance of parties in the territorial blocks approximated to that in the respective assemblies, this could also help ensure that there was some consistency of view coming from the territorial areas.

Consideration should be given as to whether sitting and voting in territorial groupings in the Senate should only be required for certain types of bill, such as bills over which the Senate has a veto, and in other circumstances, Senators would be free to sit and vote in political party groupings. When considering this important issue, it is suggested that it is critical to strike a balance between the need to provide some form of geographic and territorial representation in the UK Parliament while at the same time ensuring that the Senate is reflective of the political landscape of the UK as a whole.³³ It is therefore not recommended to follow the German Bundestrat in this regard which is based solely on territorial representation or the model of the Irish Senate where there are no political affiliations.

³³ Meeting Note with Professor Keith Ewing, 11 September 2019

Another way in which the relationship between the Senate and the nations and regions could be strengthened could involve Senators being held accountable by the institutions in the nations and regions. Senators representing a territory could be required – whether or not they are also members of the territorial assembly – to come and answer regular questions in the national and regional assemblies and account for their work in its committees. Members might also be given automatic speaking rights in the assembly if there were issues before the upper house which they wanted to raise for debate.

If Senators are given speaking rights in the national and regional assemblies, a reciprocal arrangement could be developed whereby ministers of the executives in each of the nations and regions also have speaking rights in the Senate. In designing such a system speaking rules might also be introduced to require territorial representatives to restrict their speeches to purely territorial issues in the Senate or to only be able to appear before special territorial committees of the Senate.

This leads to another measure which would involve the establishment of special committees of the Senate given primary responsibility for any special debates or scrutiny on territorial issues. It is envisaged that these special territorial committees would be the main way in which the Council of the Union would be held to account and would also provide an opportunity for members of the executive of each devolved nation and region to make representations to the Senate.

Another key feature of the new Senate would be to ensure a strict separation between the Senate and the federal UK Government. What this means is that no Senators may be appointed to a ministerial portfolio in the UK Government. If Senators were to be engaged in addressing territorial assemblies and their committees, dealing with territorial legislation, and scrutinising national legislation from a territorial perspective, it is suggested that this will be more than enough to occupy their time without also taking up ministerial appointments. It will also ensure the loyalty of the Senators is to their territories and not the government of the day. However, the Senate should be given the power to order government ministers to attend the Senate to answer questions.

Key Findings and Recommendations

- 1. There are broadly two ways in which the composition of the Senate of the Nations and Regions can be organised. Firstly, the number of Senators could be assigned to each nation and regions of the UK based on a degressive proportionality principle similar to the German Bundesrat model or the number of Senators could be fixed as the same for each nation and regions similar to the Australian Senate.**
- 2. Elections to the Senate could be either direct elections from each nation and region or indirect elections where Senators represent the devolved institutions and English local authorities. It may be advisable to use indirect elections to the Senate at least initially to avoid the problem of a dual mandate between the House of Commons and the Senate. The Single Transferable Vote could be the electoral system used to elect Senators from the devolved institutions and English local government.**
- 3. A Civic Forum should be convened under the terms of the Good Friday Agreement to return Senators from Northern Ireland to the Senate given Northern Ireland's special status and history.**

4. The Senate should retain the legacy functions of the House of Lords including as a revising chamber, holding the government to account through committees and debates, and requiring government ministers to answer questions from Senators.
5. The Senate should take on new functions including a power of veto over certain bills, for example bills which relate to devolved areas of competence but have a cross-territorial element. The Senate could also be charged with the ratification of international treaties, confirming certain judicial appointments, holding the Council of the Union to account, and conducting impeachment trials of sitting Prime Ministers.
6. Senators should sit and vote in territorial groupings rather than political groupings but should be allowed to be members of political parties. Consideration should be given to requiring sitting and voting in territorial grouping only in certain circumstances, for example, when voting on bills over which the Senate has a veto and allowing sitting and voting in political groupings otherwise.
7. There should be a prohibition on Senators being government ministers and there be a strict separation between the executive and the Senate. However, the Senate should be given the power to order government ministers to attend the Senate to answer questions.

Chapter 10

The Process of Constitutional Transformation

The Breaking of Legal Continuity

One of the most significant problems with the UK adopting a new constitutional settlement with a new codified constitution is that it would require a replacement of the foundational principle of the British constitution, namely the Sovereignty of Parliament, with a supreme constitutional law. As discussed in Chapter 1, the Sovereignty of Parliament means that the UK Parliament can make or unmake any law whatever and, moreover, there is no higher authority than the UK Parliament that can set aside or invalidate an Act of Parliament.

The adoption of a codified constitution would mean that the Sovereignty of Parliament would be supplanted with a new supreme law which would mean the UK Parliament would only be able to legislate in accordance with that supreme law and that the courts would be empowered to strike down legislation which it viewed as unconstitutional. This would clearly involve the creation of a new constitutional settlement and legal order in the UK.

One of the largest stumbling blocks to establishing this new constitutional settlement is the lack of a constitutional moment or break in legal continuity that could act as the catalyst for the creation of a new constitution. As discussed in Chapter 7, the UK as a whole has never experienced a constitutional moment in the sense of a civil war, independence or revolution after which the institutions of the state and the constitution were formed. Instead, the British constitution has developed organically over a prolonged period of time.

The replacement of the current legal order with a new constitutional settlement would require a break in legal continuity equivalent to a constitutional moment. It is suggested that simply one political party taking office, having a manifesto commitment to change the constitution, and delivering the reforms through an Act of Parliament or multiple Acts of Parliament cannot achieve this.

There must be a process developed which has political legitimacy and is able to ensure a break in legal continuity. The lack of such a process has been one of the most significant reasons why the UK has continued without a codified constitution despite attempts to adopt one.¹ Below are suggestions on some of the elements that could make up a process of constitutional transformation.

It should be noted that the current political landscape in the UK means that pursuing such a radical constitutional reform agenda will be very difficult to achieve. The Labour Party is not currently in power at Westminster or Holyrood and therefore the party's thinking and vision for the constitution must be long-term and transformative in order to counter the competing nationalisms both of the SNP in Scotland and of Johnsonian Toryism in Westminster.

¹ Prime Minister Gordon Brown had a plan to adopt a codified constitution. See Meeting Note with Professor Jim Gallagher, 10 April 2019

UK Constitutional Convention and Citizens' Assemblies

The Labour Party should develop its own clear vision on the constitution, and it is hoped that this work will go some way to inform that vision. However, it is critical that the UK as a whole is brought into the discussion around the constitutional future of the nation in a UK-wide Constitutional Convention including civil society, universities, the public sector, trade unions, other political parties, religious groups, other civic groups and business groups, similar to the Scottish Constitutional Convention which was held in 1989.²

University College London has carried out a significant amount of work in relation to what a UK-wide Constitutional Convention might look like, and a rehash of that work will not be attempted here.³ UCL's work in this regard relies heavily upon the idea of having citizens' assemblies throughout the UK and argues that a citizens' constitutional convention should ideally consist of ordinary members of the public only, who should be chosen through stratified random sampling from the population as a whole. The only reason to include politicians or representatives of organised civil society would be to encourage them to take the convention process seriously.⁴

It is suggested that citizens' assemblies should have a role as part of the Constitutional Convention,⁵ but it should not be completely restricted to citizens. Civil society, universities, the public sector, trade unions, other political parties, religious groups, other civic groups and business groups should also be included in the Convention. It is suggested that concrete proposals should be put to the citizens' assemblies rather than opening it up for a free-for-all and the function of the assemblies should be advisory and informative-only, not decision-making. In this way, discussion in the assemblies will be more focused.

The citizens' assemblies could feed into the work of the Convention along with civil society and other interest groups. The Convention may be able to elect a Committee with a Chairman responsible for formulating recommendations and the drafting of final report that would inform the shape of the new constitutional settlement. It is suggested that the key findings and recommendations from the Committee report should not be subject to approval by any form of citizens' assembly, although clearly citizens' assemblies will be able to feed into the process.

Referendum on the New Constitution

Following the conclusion of a UK-wide Constitutional Convention informed by citizens' assemblies and the drawing up of a final report by the Committee on the shape of the new constitutional settlement, the constitution will require to be drafted by an expert panel of lawyers, perhaps drawn from the Office of the Parliamentary Counsel. There have been attempts at drafting a constitution for the UK before. For example, the Institute for Public Policy Research drafted The Constitution of the United Kingdom, albeit this is out of date as it was published in 1991.⁶

² Meeting Note with Dr. Alan Renwick, 11 September 2019; Meeting Note with Daniel Greenberg, 29 July 2019; Meeting Note with Michael Clancy, 4 April 2019; Meeting Note with Dr. Pete Ramand, 5 August 2019.

³ Renwick, Dr. Alan and Hazell, Robert, *Blueprint for a UK Constitutional Convention*, The Constitution Unit, UCL, June 2017

⁴ *Ibid.*, pp. 76

⁵ Meeting Note with Graham Allen, 20 May 2019

⁶ <https://www.ippr.org/files/images/media/files/publication/2014/01/the-constitution-of-the-united-kingdom-1991-2014-1420.pdf>

The new constitutional text should be based on the results of the UK-wide Constitutional Convention. The new constitutional text will then be subject to a UK-wide referendum and, if approved, would form the new supreme constitutional law of the UK.

It is suggested that going through a rigorous process of a UK-wide Constitutional Convention informed by citizens' assemblies followed by a referendum on a legal text would offer sufficient political legitimacy to supplant the concept of the Sovereignty of Parliament with a supreme constitutional law. The constitution would be founded on the popular sovereignty of the people as embodied in the codified constitutional text and upheld by the courts.

Key Findings and Recommendations

- 1. In order to provide a break in legal continuity between the current constitutional settlement, a new constitutional settlement, there should be a UK-wide Constitutional Convention with the participation of all UK political parties, civil society, universities, the public sector, trade unions, religious groups, other civic groups and business groups, similar to the Scottish Constitutional Convention which was held in 1989.**
- 2. The Labour Party should participate in the convention and it is hoped that this work will go some way to inform the Party's position on constitutional reform.**
- 3. Citizens' assemblies should be established to foster the participation of citizens from across the UK which will advise and inform the Constitutional Convention but should not have decision-making power.**
- 4. The Constitutional Convention should establish a Committee that will have responsibility for drafting a final report with recommendations on the future of the UK's constitution.**
- 5. Based on the report, a codified constitution should be drafted by the Office of the Parliamentary Counsel and this constitutional text should be put to a UK-wide referendum for approval.**
- 6. If approved, the codified constitution would replace the current constitutional settlement for the UK.**

