



Law Society
of Scotland

Law Society Scotland Response

House of Lords Constitutional Committee Inquiry into
the Governance of the United Kingdom

May 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law Sub-committee welcomes the opportunity to consider and respond to the House of Lords Constitution Committee Inquiry into the Governance of the United Kingdom. The sub-committee has the following comments to put forward for consideration.

General Comments

Our comments

When approaching this inquiry, it would be tempting to try to answer each of the questions which the Constitution Committee has set out. However, the Society does not believe that the questions are capable of individual answers without straying widely into political, economic and sociological matters (which are outwith the Society's scope) as well as constitutional and legal ones which are within our remit.

We consider that it would be better to set out an understanding of what governance means and then explore briefly what principles should apply to the governance of the United Kingdom.

What does governance mean?

What does governance mean? AM Kjaer in *Governance* (Cambridge Polity, 2004) provides various descriptions of governance, in public administration, international relations, the EU, comparative politics and good governance as defined by the World Bank (*The New Oxford Companion to Law* pp 506/7).

For our purposes we will focus on governance in public administration based on constitutional and administrative law. Classical constitutional theory relies on the balance of powers as stated in Montesquieu's *De L'esprit des lois* which postulates that liberty is threatened if the three functions of government, legislative, executive and judicial are not institutionally distinct and discharged by separate persons. A precisely defined separation of powers (which might for example be found in France, Germany, or the United States under their written constitutions) does not really apply within the UK. In the UK, at UK level and within the devolved arrangements, the executive and legislative branches of government are fused. It is only since 2005 that the judicial power has been more strictly separated from the legislative and executive branches by the creation of the United Kingdom Supreme Court by the Constitutional Reform Act

2005. The focus at UK level continues to lie on parliamentary sovereignty, a powerful executive and ministerial accountability to Parliament.

In addition to this fundamental analysis governance, in a more modern sense, describes the relationship between the public, private and voluntary sectors and the networks within which they operate. The changing nature of the state is key to understanding how governance as a concept is an evolving one.

This is particularly the case in the United Kingdom where since 1997 significant changes have been made in connection with governance arrangements. The foremost change is of course the creation of devolved Legislatures and Administrations in Scotland, Wales and Northern Ireland. Extensions to devolved powers in all three jurisdictions since 1997 have been made at regular intervals. Accompanying these changes was the enactment of the Human Rights Act 1998 as a fundamental statement of human rights entitlement and local jurisdiction. Changes to the administration of justice through the creation of the United Kingdom Supreme Court under the Constitutional Reform Act 2005 and legislative obligations on UK and Scottish ministers to uphold the independence of the judiciary emphasise the separation of the judiciary from both the legislative and executive branches of government. Other changes such as the Freedom of Information Act 2000 and the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration 2014 (and legislation on lobbying activity in Scotland: the Lobbying (Scotland) Act 2016) have developed ideas of transparency and open government at least up to a point.

Recently, the most significant change to governance in the UK has been the withdrawal from the European Union. The deconstruction of the supranational legal order and its domestication into UK and devolved law has altered significant aspects of governance such as the nature of many areas of the law which apply in the UK, how that law is made and the structure of its adjudication. The changes which Brexit has brought to the U.K.'s governance arrangements are still in the process of being worked out. The implementation of the Trade and Cooperation Agreement and the withdrawal agreement (particularly in relation to Northern Ireland) will continue to affect the governance arrangements for many years to come. Additionally, increasing numbers of international agreements will be agreed between the UK and other third countries which may affect the scope of policy freedom of UK and devolved Governments. This additional layer of governance is of increasing importance and yet the mechanisms for Parliament and the devolved legislatures to scrutinise such treaties before they are agreed is inadequate.

What principles should apply to the governance of the United Kingdom?

We consider that there are four principles which set the context for change to the governance of the United Kingdom. They are respect for the rule of law (including adherence to the rules of good law making), respect for human rights, pre-legislative consultation and Parliamentary scrutiny and respect for devolution.

Respect for the Rule of Law

The United Nations describes the rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”.

The UN notes that the rule of law requires adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers (between the Legislature, the Executive and the Judiciary), participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

We know from the UN’s work how the rule of law is important to peace and political stability; helps achieve economic and social progress and development; and protects people’s rights and fundamental freedoms. It is foundational to access to public services, curbing corruption, restraining the abuse of power, and to establishing the social contract between people and the state. Fundamental rules of Public International Law mean States are obliged to keep to their agreements, including agreements with other countries and institutions.

The rule of law was examined closely by Lord Bingham, one of the UK’s most distinguished lawyers. In his book, *The Rule of Law*, he explains the core objective of the rule of law:

“that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts”.

Lord Bingham set out key principles which he saw as being the necessary components to support that objective. That law must be accessible, intelligible, clear, and predictable. That law should apply equally to all. That Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred. Importantly, the rule of law requires compliance by the state with its obligations in international as well as national laws.

Put simply, the rule of law is a foundation upon which our society exists and operates. Any change to the governance of the UK would require following these principles.

Respect for Human Rights

In tandem with respect for the rule of law we take the view that any system of governance should also respect human rights. In particular, any change to the system of governance should comply with the European Convention on Human Rights, Convention Rights under the Human Rights Act 1998 and with other rights instruments which apply across the UK.

Pre-legislative Consultation and Parliamentary Scrutiny

Any change to the governance of the UK must be subject to wide-ranging pre-legislative consultation and adequate parliamentary scrutiny.

When contemplating change to the governance of the UK there must be effective engagement with not only the devolved legislatures and administrations and those bodies and individuals who are normally consulted but also those who are not accustomed to respond to consultations.

It is relatively easy for professional organisations, campaigning bodies, experts in the relevant fields, and those accustomed to civil service and political structures to respond to consultations.

It is less easy for those whose interaction with government or legislative authorities is sporadic. The language used in consultations must be open and accessible, assumptions made of prior knowledge and understanding of the constitutional and legislative backdrop must be replaced with clear explanatory notes so that the broadest range of participation can be achieved.

The Coronavirus experience has taught us how technology can be used to engage with large groups of people and further potential technological developments should not be underestimated. Outreach through the internet, blogs, and social media about the existence of pre-legislative consultation, how to participate, where to participate and within what timescale would improve the democratic legitimacy of any legislative out-turn. When permissible the deployment of citizen assemblies and other forms of deliberative democracy will enhance public understanding of the governance system and how any proposed changes would make a difference. It is no coincidence that the creation of devolution in Scotland in 1998 was founded, in part at least, on the deliberations and decisions of the Scottish Constitutional Convention and preceded by a referendum.

Parliamentary scrutiny of such legislation must not be constrained by political considerations. Important changes to UK governance must be afforded adequate time for debate in the House of Commons and in the House of Lords and, where devolved matters are engaged, also in the devolved legislatures. Public Bill Committee hearings and Select Committee Inquiries should be able to hear from the largest possible pool of witnesses. The Parliamentary process should engage in a programme of outreach which gathers the widest spectrum of views.

Respect for Devolution

The legislative consent (or Sewel) convention, declared in the Scotland Act 1998 Section 28(8), asserts that the UK Parliament will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament without the consent of the Parliament. Reforms of the governance of the UK may impact on matters which relate to the legislative competence of the Scottish Parliament and the executive competence of Scottish Ministers and have a similar impact in Wales and Northern Ireland. Accordingly, when considering the governance of the UK and potential changes it is important to respect the devolved institutions and the legislative and legal systems which operate across the UK. This would include consultation and engagement between the UK Government and the devolved administrations.

In practice, this should mean that only in the most exceptional circumstances should the UK Parliament legislate on matters within the legislative competence of the Scottish Parliament without its consent and this should be especially so when it comes to making changes in the governance of the UK which impact

upon the devolution settlement. Despite the passing of some Brexit legislation without such consent, there should be no inference drawn that the Sewel Convention has in any way been diluted.

Constitution Committee questions.

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

In considering this matter, great care should be exercised so as not to weaken the role of the Judiciary in holding the Executive branch accountable to the public it serves. Particularly in modern times, where government may intervene in so many contexts, the public has a legitimate expectation that the Courts should be able to hold the Executive fully to account, thereby ensuring that the rule of law is observed, and that the highest quality of governance is maintained. There is a further matter to be taken into account, namely that the supervisory jurisdiction of the Court of Session, within which judicial review falls, is a matter of constitutional significance. This can be seen from Article XIX of the Acts of Union of 1706 and 1707, whose opening provision states:

“That the Court of Session or Colledge of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same Authority and Priviledges as before the Union subject nevertheless to such Regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain.”

This preserves the Court and its jurisdiction, whilst permitting reforms for its better operation. Indeed, a modern example of new provision for the better administration of justice in the Court of Session’s supervisory jurisdiction can be seen in the Courts Reform (Scotland) Act 2014 - an Act of the Scottish Parliament, under devolution amending the UK Parliament’s Court of Session Act 1988. But care always has to be taken so as not to render the Court’s jurisdiction ineffective. If matters went that far it could be argued that this would be in breach of the Acts of Union and that the matter was justiciable. The fundamental law issues raised by this matter can be seen from the speech of Lord Hope of Craighead in a case that went before the Committee for Privileges of the House of Lords, namely *Lord Gray’s Motion 2000* SLT 1337 at page 1345.

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

Other than the points made above we have no further comments to make.

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

We have no comments to make.

4. How well understood in its constituent parts is the UK’s common purpose and the collective

provision it makes? And what impact does this have on democratic accountability?

We have no empirical evidence to offer.

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

Our comments

Although 1998 was a watershed year for devolution it is trite to acknowledge that the devolution architecture and pillars for each of Scotland, Northern Ireland, and Wales were differentiated by legal, political, social, historical, and economic considerations. It is difficult to conceive of a means to have a more schematic approach to devolution given the different political considerations which apply between the three devolved parts of the UK. Therefore, it would appear that a bespoke approach to the devolved constitutional arrangements is inescapable. However, that should not mean that there could not be further formalisation between the constituent parts of the UK with constitutional issues firmly on the table.

Some may advocate governance ideas which involve federalism. Such a change would raise many important issues such as entrenchment, symmetrical governance, the impact on devolution to Scotland, Wales and Northern Ireland, what institutions are needed for England and how to include the English regions.

The need for a new Governance Agreement

We agreed with the analysis in the SPICe Paper *Common UK Frameworks after Brexit* ((2 February 2018 SB 18-09) which noted on page 14 that “The 1999 devolution settlements were designed on the principle of a binary division of power between what was reserved and what was devolved. This model had advantages in terms of clear accountability, but it meant the UK did not have to develop a culture of or institutions for ‘shared rule’ between central and devolved levels. The UK’s membership of the EU further contributed to the weakness of intergovernmental working, since many policy issues with a cross-border component (including environmental protection, fisheries management, and market- distorting state aid) were addressed on an EU-wide basis”.

The SPICe Paper also noted that “when more decisions are taken through intergovernmental forums, as in some federal systems, accountability and parliamentary scrutiny can suffer. The creation of common frameworks signals a move away from a binary division of power towards more extensive joint working between UK and devolved governments. This therefore increases the importance of ensuring that intergovernmental bodies are transparent and accountable”.

In our view the current arrangements lack sufficient transparency and accountability. The Communiqués from the JMC meetings are frequently commented upon for their lack of detail. It is essential that all legislatures in the UK have adequate information of the discussions within the JMC structure in order to hold Ministers, in all the administrations, to account.

A helpful step towards providing further information is the recent publication of the reports on The

European Union (Withdrawal) Act and Common Frameworks, the tenth edition of which is referred to below.

The Inter-Governmental Relations written agreement between the Scottish Parliament and Scottish Government dated 10 March 2016 was considered to be a strong development in parliamentary scrutiny of inter-governmental relationships. http://www.parliament.scot/20160309_IGR_Agreement3.pdf

It would however enhance parliamentary scrutiny if Ministers in all legislatures could provide an oral report (which goes beyond the relatively uninformative published communiqués) soon after any JMC or specialised JMC meeting.

Reforming the intergovernmental system

On 24 March 2021, just before the pre-election period began Lord Dunlop's *Review of UK Government Union Capability* was published by the UK Government. This report (which was submitted in November 2019), proposed a Cabinet role of Secretary of State for Intergovernmental & Constitutional Affairs, supported by a Cabinet sub-committee. The sub-committee would be "tasked with preparing cross-government strategic priorities to enhance the Union and ensure their effective delivery" with resourcing from a new fund for UK-wide projects.

Such proposals are matters of political controversy on which the Law Society has no view although we note that there is currently a designated Minister of State for Constitution and Devolution, Chloe Smith MP and advancement to Cabinet level is a matter which is in the gift of the Prime Minister which could be exercised or withdrawn at any time.

We have suggested in the past that new inter-governmental structures could include "new JMC-type committees in areas where common frameworks are created" with accompanying sub-committee structures. We have also suggested that the JMC (and consequently any replacement) is put on a statutory footing, that it is given a defined structure and that its Sub-Committees are reformed in such a way as to be clearer and better understood by those who have contact with them and that the dispute resolution arrangements are more structured.

Lord Dunlop proposed replacement of the Joint Ministerial Committee (JMC) with a new UK Intergovernmental Council (UKIC).

No matter what formal structures are put in place or what they are called, their effectiveness depends on matters of substance such as mutual trust, transparency and respect being in place too. Those aspects are beyond legislation. If the JMC is replaced, we agree with the creation of relevant sub-committees. The development of a new body will require revision of the Memorandum of Understanding between the UK Government and the devolved administrations which in turn will require revision of the Devolution Guidance Notes. We have already stated that such a revision is necessary in the light of withdrawal from the EU.

Lord Dunlop has suggested that the UKIC should look to take on a decision making role via co-decision by consensus. We agree that if a new body is established this would be an innovative approach to decision making which could build on the precedent of Common Frameworks.

Common frameworks show in concrete terms how inter-governmental relations can function.

Common Frameworks

The tenth European Union (Withdrawal) Act and Common Frameworks statutory report detailing the progress on the development of common frameworks (published 18 March 2021):

<https://www.gov.uk/government/publications/the-european-union-withdrawal-act-and-common-frameworks-26-september-to-25-december-2020> describes the extent to which officials can work together and how the administrations can produce mechanisms to allow for regulatory diversity.

We have expressed the view in relation to Common Frameworks that “There appears to be general acceptance that the programme is a satisfactory means of managing diversity within the regulatory arrangements across the UK”.

The Common Frameworks Scrutiny Committee published its first report:

<https://committees.parliament.uk/committee/474/common-frameworks-scrutiny-committee/news/153616> . It found that common frameworks are mechanisms for developing UK-wide policy by collaboration and consensus between the four administrations, while recognising the autonomy of each administration in its areas of competence. The Committee recommended that “common frameworks should be used as a model to reset UK intergovernmental relations and build a cooperative Union”.

Common frameworks represent an example of best practice for positive cooperation across the UK and have an important role to play in an evolving devolution.

The House of Lords Common Frameworks Scrutiny Committee recommended that the Government exempt common frameworks from the UK Internal Market Act 2020 expressing the view that the Act has strained relations with the devolved administrations, particularly in Scotland and Wales, and could severely compromise common frameworks.

As a result of amendments made to the bill whilst it was in the House of Lords the UK Government may use delegated powers under Sections 10 and 18 of the Act to exclude divergence agreed through the Common Frameworks process from the operation of the market access principles. This would be in addition to existing exclusions in the Schedules to the Act.

Also, under Section 33, the Office for the Internal Market will report every five years on the intersect between the market access principles and agreements made under Common Frameworks, including the effect that those agreements have had upon the operation of the internal market.

Intergovernmental dialogue could benefit from another of Lord Dunlop’s recommendations that: DIT and other UK Government departments should build on wider examples of technical engagement and explore establishing inter-ministerial groups.

Not only does this suggestion build on the example of Common Frameworks but there are other examples of inter-ministerial working from the period before the UK left the European Union which could usefully be deployed in such circumstances and which are reflected in the Memorandum of Understanding.

It is clear that one significant improvement to governance in the UK is a need for more systematic intergovernmental dialogue and also for increased inter-parliamentary contact. Parliamentary scrutiny (in all the legislatures in the UK) of the activities of the JMC (or whatever body takes its place) and any Frameworks which are created in whatever form they take will be essential if the actions of all the Governments throughout the UK are to be fully accountable.

Inter-parliamentary cooperation could be increased between the UK Parliament and the other legislatures in the UK, the Scottish Parliament, the Senedd and the Northern Ireland Assembly. Such cooperation, modelled on the Inter-Parliamentary forum on Brexit convened by Lord McFall, then Deputy Lord Speaker, could become a fruitful source of new ideas which could give all the legislatures and administrations models for future development.

We urge the UK Government to take note of the Public Administration and Constitutional Affairs Committee report: <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/148511.htm> . “25.The absence of formal and effective inter-governmental relations mechanisms has been the missing part of the devolution settlement ever since devolution was established in 1998. The process of the UK leaving the EU has provided the opportunity for the Government to re-think and redesign inter-governmental relations in order to put them on a better footing. Once the UK has left the EU, and UK Common Frameworks are established, the present lack of intergovernmental institutions for the underpinning of trusting relationships and consent will no longer be sustainable. We recommend that the Government take the opportunity provided by Brexit to seek to develop, in conjunction with the devolved Administrations, a new system of inter-governmental machinery and ensure it is given a statutory footing. Doing this will make clear that inter-governmental relations are as important a part of the devolution settlement as the powers held by the devolved institutions. (Paragraph132)”.

We welcome the UK Government’s publication of updates on [Intergovernmental Relations](#), the [quarterly reports on intergovernmental relations](#) and a [progress update on the review of intergovernmental relations](#) . However more needs to be done to ensure that cooperative working between the administrations is revisited with a view to concluding a better approach to inter-governmental working when the UK Government, the Governments in Wales and Scotland, and the Northern Ireland Executive are able to turn attention to this task.

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

We have no comments to make.



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