



Mick Antoniw AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales

10 October 2019

Dear Mick,

The Welsh Government has this afternoon published a new document on constitutional policy, entitled "Reforming our Union: Shared Governance in the UK". The document sets out the Government's views on the reforms of culture, institutions and processes which we believe are necessary if the UK is to have a sustainable future as a union of nations.

I know that your Committee is already taking great interest in this matter, and I hope you find the document of interest. I would be glad in due course to have your views on the ideas we have brought forward.

Best wishes,

Mark.

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We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.



Llywodraeth Cymru
Welsh Government

Reforming **our** Union

Shared Governance in the UK

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1 First Minister's Foreword



Mark Drakeford AM
First Minister of Wales

In the public debate around Brexit which has engaged politicians and citizens in all parts of the UK in recent times, the main focus has been on the UK's future international and trading relations with the European Union and the wider world. This of course is vitally important, but just as much attention needs to be paid to the other side of the coin: how is the UK itself to be governed in future years as it responds to the challenges of the new century, including the potential challenges resulting from Brexit?

There is currently a vacuum in the UK Government's thinking on this issue, at least so far as manifested in public documents. Admittedly, in a speech delivered shortly before she left office, Mrs Theresa May spoke with commitment about the benefits of the Union. But her speech did not provide a way forward for those of us who believe that the United Kingdom continues to have value for each of its constituent parts, that its survival is however an open question, and who wish to see it continue as an effective and mutually-beneficial partnership between people and nations. So this document is offered by the Welsh Government as a stimulus to public debate on this vital question.

In a speech at the Institute for Government earlier this year, I referred to the well-known quotation in Giuseppe di Lampedusa's novel, *The Leopard*: "If we want things to stay as they are, things will have to change". So, for the United Kingdom to continue in being (something to which the Welsh Government is committed), so much of it – its institutions, its processes and above all its culture – will all have to change. As I told the new Prime Minister when he visited Cardiff in July, I believe that the Union has not been under greater strain in my lifetime. We cannot and must not avoid an urgent public debate about this. The prospect of an imminent General Election and the arrival of a new UK Government makes this all the more timely and necessary.

This document is the latest to be produced by the Welsh Government on these matters. I hope it will stimulate new thinking in this area, and I look forward to constructive engagement, not least from the UK Government, with the ideas the Welsh Government is putting forward.

2 Introduction

In July 2018 the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) published a Report¹ on “Devolution and Exiting the EU: reconciling differences and building strong relationships”. The Committee noted that

“Devolution is now an established and significant feature of the UK constitutional architecture and should be treated with respect to maintain the integrity of the United Kingdom. The Government needs to bring clarity to the situation by setting out, in response to this Report, its Devolution Policy for the Union...”.

In its response² published in September 2018, the UK Government noted the Committee’s recommendation and declared its intention “to publish a statement on the Union in due course”.

No such statement has however emerged. This can no doubt be explained by the all-consuming character of the Brexit crisis on which the UK Government has been almost entirely focused, but the very fact of the UK’s possible withdrawal from the European Union reinforces the need for clearer policy perspectives on the future governance of the Union. As Professor Bogdanor explains³:

“Brexit will transform the relationship between the British Government and the governments of the devolved bodies in Scotland, Wales and Northern Ireland. We will have to re-think the balance of power between Holyrood, Cardiff Bay, Stormont and Westminster... [It] raises once again the question of how the United Kingdom is to be preserved. So, Brexit involves not just a new relationship between Britain and the Continent, but perhaps also a new relationship between the various components of the United Kingdom”.

In the absence of a formal UK Government contribution to the debate, the Welsh Government considers it appropriate now to publish this paper, which is intended to stimulate further public discussion within the UK on the nature of the UK’s governance in coming years.

THIS DOCUMENT

The document comes forward from a Welsh Government whose starting point is fiercely in support of devolution, but which also believes in the UK: we stand for entrenched devolution settlements within a strong United Kingdom.

We have a particular understanding of what devolution means. The Welsh Government view is that some of the early tensions with devolution originated in the highly restrictive interpretation in Whitehall of the meaning of devolution itself. On that interpretation, devolution provides special governance arrangements in the devolved territories, so that so-called “national” policy can be flexed to meet local circumstances.

That Whitehall perspective may derive from the very language of “devolution”, which assumes the default is centralisation of political authority within the UK. But that is the wrong starting point. We should instead start from a presumption of subsidiarity and sovereignty shared within the UK. Then we can focus on how to make the Union work effectively, to join its constituent parts in a shared enterprise of governing the UK.

In other words, devolution is not only about how each of Wales, Scotland and Northern Ireland are separately governed, in different forms of association with England. Rather, devolution is concerned with how the UK as a whole should be governed, with proper account taken of the interests of all of its parts. It is a joint project between England, Wales, Scotland and Northern Ireland, based on a recognition of our mutual inter-dependence, which therefore requires a degree of shared governance.

¹ Eighth Report of Session 2017-19, HC 1485.

² Eighth Special Report of Session 2017-19, HC1574.

³ V. Bogdanor, “Beyond Brexit: towards a British Constitution” (2019), pp. x-xi.

So this document sets out for public debate a series of propositions⁴, twenty in total, reflecting that perspective. The propositions are organised under the headings of General Principles; Legislatures and Legislative Powers; Executive Powers: Governments, Agencies and Civil Service; Finance; Justice and the Courts; and Constitutional Reform. Each proposition is fleshed out as necessary by explanatory or amplifying text.

The twenty propositions are then brought together in Annex 1, and the Welsh Government's view is that, taken together, they provide a coherent vision of the way that the United Kingdom should be governed in future years for the benefit of all of its citizens in each of its parts. The propositions are presented from a Welsh perspective, and some examples drawn from the Welsh devolution settlement are referred to, but this document is intended as a contribution to public debate on the future of the UK⁵, rather than an argument about Welsh devolution as such⁶.

The proposals in this paper are designed to strengthen and improve the existing devolution settlements, and in the Welsh Government's view they represent the minimum that should be put in place. But they should not preclude consideration of a more radical approach to reform in the UK (including the need for a written or codified constitution); the case for this grows increasingly strong as devolution matures, and as compliance with traditional constitutional conventions and understandings breaks down.

This is a debate of very long standing: exactly 100 years ago, a Speaker's Conference on Devolution was appointed 'To consider and report upon a measure of Federal Devolution' for the United Kingdom. It produced proposals on a wide range of issues with which we continue to grapple today, although nothing ultimately came of those endeavours. But the need for change is urgent now; from the Welsh Government's standpoint, nothing in this paper should be taken as ruling out a yet more ambitious approach to constitutional reform.

⁴ Certain of the propositions reflect arrangements already in place. They are re-presented in this context because in the Welsh Government's view, they constitute important building blocks in our overall constitutional vision.

⁵ We do not express views here about the appropriate structures of government, including executive devolution, internal to England.

⁶ The Welsh legislature is referred to in this document as Senedd Cymru or the Senedd, in accordance with s.1 of the Senedd and Elections (Wales) Bill currently before the National Assembly for Wales.

3 General Principles

PROPOSITIONS 1-3

1. Whatever its historical origins, the United Kingdom is best seen now as a voluntary association of nations taking the form of a multi-national state, whose members share and redistribute resources and risks amongst themselves to advance their common interests. Wales is committed to this association, which must be based on the recognition of popular sovereignty in each part of the UK; Parliamentary sovereignty as traditionally understood no longer provides a sound foundation for this evolving constitution.

“The United Kingdom was constructed not through any conscious plan, but pragmatically as a result of decisions [in respect of Wales] by Henry VIII in the sixteenth century, by the Whigs who negotiated the Anglo-Scottish Union in 1707, and by Lloyd George, who negotiated a treaty with Irish nationalists in 1921.”⁷ Given this long, convoluted and at times contested history, it is the Welsh Government’s view that developments in the governance of the UK to face the challenges of the new century should be informed by our history, but not constrained by it.

The modern recognition of the UK as a multi-national state based on each nation’s choice to be a part of the United Kingdom follows from the establishment of national devolution for Scotland and Wales in 1999, and the endorsement in Northern Ireland of the Good Friday Agreement. The devolved institutions for each of Wales, Scotland and Northern Ireland within the UK were established on the basis of popular endorsement through referendums in each territory held specifically for that purpose. As the then Prime Minister Mrs Theresa May said in her speech about the Union on 4 July 2019:

“Our Union rests on and is defined by the support of its people... it will endure as long as people want it to – for as long as it enjoys the popular support of the people of Scotland and Wales, England and Northern Ireland.”

Although their existence is legally authorised by way of Acts of Parliament, the devolved institutions gained, and retain, their legitimacy by reason of democratic approval.

If, as this first proposition maintains, the UK is conceived of as a voluntary association of nations, it must be open to any of its parts democratically to choose to withdraw from the Union. If this were not so, a nation could conceivably be bound into the UK against its will, a situation both undemocratic and inconsistent with the idea of a Union based on shared values and interests.

In the case of Northern Ireland, provision is made for periodic “border polls”, and in certain circumstances the Secretary of State is statutorily obliged to arrange for the holding of one. There are no equivalent standing statutory arrangements for Scotland or Wales for the holding of referendums on continuing membership of the Union, but in the Welsh Government’s view, provided that a government in either country has secured an explicit electoral mandate for the holding of a referendum, and enjoys continuing support from its parliament to do so, it is entitled to expect the UK Parliament to take whatever action is necessary to ensure that the appropriate arrangements can be made.

That said, it would be unreasonable for such referendums to be held too frequently (and the Northern Ireland provisions require a minimum of seven years between border polls⁸). More importantly, as a government committed to the United Kingdom, we would hope that in any such referendum the relevant electorate would vote for its territory to remain in membership of the UK.

⁷ Bogdanor, “Beyond Brexit”, p.171.

⁸ Northern Ireland Act 1998, Sched. 1, para. 3.

If, further, it is accepted that sovereignty (some of which should be shared) lies with each part of the UK, the traditional doctrine of the sovereignty of Parliament no longer provides a firm foundation for the constitution of the UK. It needs to be adjusted to take account of the realities of devolution, just as it was adjusted to take account of the UK's membership of the European Union⁹.

Parliamentary sovereignty is primarily concerned with the apparently unlimited character of Westminster's legislative competence in respect of the whole of the UK. That Parliamentary legislative competence therefore overlaps with the competences of the devolved legislatures, and we say more about the implications of this in discussion of proposition 5 below. But it follows from the general approach to UK governance advocated here that the Welsh Government sees merit in at least some of the proposals of the Constitution Reform Group for a new Act of Union Bill¹⁰, explicitly predicated on an affirmation "that the peoples of [the constituent nations and parts of the UK] have chosen... to continue to pool their sovereignty for specific purposes", and which provides for mechanisms to give effect to this principle.

2. The principles underpinning devolution should be recognised as fundamental to the UK constitution. The devolved institutions must be regarded as permanent features of the UK's constitutional arrangements; any proposals for the abolition of such institutions should be subject to their consent and to the consent of the relevant electorate.

In the Introduction we drew attention to the PACAC Report recommendation, which notes that "Devolution is now an established and significant feature of the UK constitutional architecture". In the same vein, Mrs May on 4 July observed that "For those of us who believe in the Union, devolution is the accepted and permanent constitutional expression of the unique multinational character of our Union".

These welcome sentiments are reflected in statutory provisions for both Wales and Scotland, which note that the devolved institutions for each country "are a permanent part of the United Kingdom's constitutional arrangements."¹¹

Given the prevailing orthodoxy in relation to the doctrine of Parliamentary sovereignty, this may not provide the permanent protection for Senedd Cymru and the Scottish Parliament that a simple reading of the provision might imply, but it is further declared that the devolved institutions "are not to be abolished except on the basis of a decision of the people of Wales/Scotland voting in a referendum". Further, the UK Government has committed normally to seek the Senedd's legislative consent for Parliamentary legislation altering the Senedd's legislative competence. (This is a particular aspect of the Sewel Convention, discussed under Proposition 5 below). Compliance with this commitment should protect the Senedd (and the other devolved legislatures) from progressive erosion of their powers and responsibilities.

It is clear, therefore, that, although these legal provisions and extra-statutory commitments cannot, within the existing UK constitution, provide an absolute protection for devolution (because the protecting provisions could in theory be repealed by later Parliamentary legislation), any UK Government which proposed to legislate for abolition of the devolved institutions without prior popular approval in referendums, or for reduction of their powers without the relevant legislatures' legislative consent, could do so only at extreme political cost. For all practical purposes, therefore (and setting aside for present purposes the current difficult circumstances in Northern Ireland), proposition 2 sets out the existing constitutional position, and the devolved institutions are and will continue to be intrinsic to the UK's constitutional arrangements for as long as they retain popular support.

⁹ See the discussion in Bogdanor, "Beyond Brexit", pp. 65-86.

¹⁰ First Reading in House of Lords 9 October 2018.

¹¹ See for Wales, Government of Wales Act 2006, s.A1, inserted by Wales Act 2017, s.1.

3. The powers of the devolved institutions should be founded on a coherent set of responsibilities allocated in accordance with the subsidiarity principle. Those powers should be defined by the listing of the specific matters which it is agreed should be reserved to Westminster in respect of each territory, all other matters (in the case of Wales) being or becoming the responsibility of Senedd Cymru and/or the Welsh Government.

Following the changes made to the Welsh devolution settlement made by the Wales Act 2017¹², the reserved powers model, whereby a list of specific matters is excluded from the competences of the devolved legislatures and retained for Westminster and Whitehall, is now the preferred model for legislative devolution within the UK (although the particular form of the model in Northern Ireland differs from that in Wales and Scotland). The apparent corollary, that all other matters should be or become the exclusive responsibility of the devolved legislatures, however comes into conflict with the current doctrine of parliamentary sovereignty; this is further discussed in relation to proposition 5 below.

The reserved powers model may be contrasted with the conferred powers model, which was formerly in place in Wales. Under this model, the starting point was that legislative power in respect of Wales lay with Westminster, which chose, by conferring limited legislative competence, to permit the National Assembly for Wales also to legislate on certain specific matters. The UK Government, in the European Union (Withdrawal) Bill introduced in 2017, sought to create a new conferred powers model for all three devolved legislatures in relation to functions exercisable free of European Law constraints following Brexit; the functions would have been held at Westminster and then passed down, little by little, to the devolved legislatures by way of Orders in Council. This plan was wholly unacceptable to the devolved institutions, and new provisions compatible with the reserved powers model were agreed during the Bill's passage through Parliament.

Adoption of a reserved powers model, while welcome as a technically superior method of providing devolved institutions with legislative competences, cannot however answer the question as to exactly which competences should be devolved (or, more accurately, which should be reserved). The subsidiarity principle requires that legislative and governmental responsibilities should be allocated to the most local level at which they can be performed efficiently and effectively. Central authorities' functions should be subsidiary, being only those which cannot be discharged satisfactorily at local level; the starting assumption should be that responsibilities will be devolved.

Subsidiarity has not however been used as an organising principle of allocation of responsibilities under the devolution settlements within the UK. Each settlement is said to derive from the history and circumstances of the particular territory to which it relates, rather than from logic or constitutional principle. The result is an asymmetric patchwork of settlements, which in the Welsh case has led to an inappropriately lengthy set of matters reserved to Westminster, and an incoherent set of functions lying with the Welsh devolved institutions¹³. Application of the subsidiarity principle would produce a very different result.

The argument for recognition of the subsidiarity principle is not of course to seek identical settlements for each of Wales, Scotland and Northern Ireland, but it does require that differences between the settlements should be capable of rational justification (which they currently do not appear to be). The Welsh Government agrees with PACAC that "the [UK] Government should... be held accountable for representational and institutional asymmetries within the UK political system."¹⁴

¹² See in particular the new Schedule 7A to the Government of Wales Act 2006, inserted by Wales Act 2017, s.3(1). Note however that the conferred powers model continues to be used for devolution of powers in relation to taxation, this seemingly leading the UK Government to an inappropriately detailed investigation of devolved policy intentions before specific new taxation competences are conferred.

¹³ Welsh devolution appears to be the only constitutional settlement in the world which requires the specific reservation to central authority of responsibility for Hovercraft. Issues of coherence are further discussed in the context of proposition 18 below.

¹⁴ PACAC Report, n.1 above, paragraph 21.

4 Legislatures and Legislative Powers

PROPOSITIONS 4-7

4. It should be a matter for each legislature to determine its own size, electoral arrangements and internal organisation, with locally-determined Standing Order provision for the relevant legislature in respect of these matters as required.

The continuing existence of the devolved legislatures should (so far as possible under the existing understanding of Parliamentary sovereignty) be immune from questioning in accordance with proposition 2. In the same way they should be empowered to be self-governing in terms of the numbers of their members, the rules they put in place about who is eligible for membership, the arrangements they make about their elections, and the standing orders they adopt for conduct of their business.

It has long been the case that the UK Parliament can regulate itself in these matters, but provision to this effect is now also to be found in the devolution legislation for Wales and Scotland¹⁵, subject to requirements for ‘super-majorities’ of devolved legislature members voting for legislation on most of these matters (not something required of the House of Commons). The devolved legislatures in Wales and Scotland are now therefore for all practical purposes both permanent features of the UK’s constitutional arrangements and self-governing institutions, in both respects largely immune from external interference. Different prescriptive requirements apply in certain respects to the Northern Ireland Assembly’s arrangements for conduct of its business, given the particular history and circumstances of Northern Ireland.

5. The relations of the four legislatures of the United Kingdom should proceed on the basis of mutual respect. Although, as matters currently stand, the UK Parliament still formally possesses legal authority to legislate for Wales, Scotland and Northern Ireland on all matters (including those devolved), it should not normally seek to legislate for a territory, in relation to matters within the competence of the devolved legislature of that territory, without that legislature’s explicit consent. The ‘not normally’ requirement should be entrenched and codified by proper definition and criteria governing its application, giving it real rather than symbolic acknowledgement in our constitutional arrangements. Alternatively, a new constitutional settlement could simply provide that the UK Parliament will not legislate on matters within devolved competence, or seek to modify legislative competence or the functions of the devolved governments, without the consent of the relevant devolved legislature.

In contrast to the position in relation to executive powers further discussed in proposition 8, and given traditional understandings of parliamentary sovereignty, legislative devolution has not meant the transfer by the UK Parliament of legislative powers to the devolved legislatures. Currently, the UK Parliament continues to have unlimited legislative competence in respect of all parts of the UK (including, in respect of the devolved territories, competence about devolved matters¹⁶), and the devolved legislatures are additional legislatures for their territories, with competences overlapping that of the UK Parliament.¹⁷

¹⁵ For Wales, see now s.111A of the Government of Wales Act 2006, inserted by s.9 of the Wales Act 2017. Earlier legislation relating to the National Assembly for Wales was notably more prescriptive as to the Assembly’s internal organisation and management of its business, but these constraints were removed by ss.14-15 of the 2017 Act.

¹⁶ “This Part [4 of the Government of Wales Act 2006] does not affect the power of the Parliament of the United Kingdom to make laws for Wales”: s.107(5) of the 2006 Act.

¹⁷ As a result, the UK Constitution has nothing equivalent to the lists of competences common in federal constitutions of matters reserved to the federal tier, matters reserved for state responsibilities, and matters of concurrent competence. Instead we have matters explicitly reserved to the “federal” tier ie to Westminster, with all other legislative competences in effect being concurrent.

If legislative devolution is to have real meaning, this situation therefore requires the UK Parliament to adopt a self-denying ordinance in respect of legislation on matters in the devolved sphere, thereby acknowledging the primary responsibility of the devolved legislatures for legislation in their territories on devolved matters. It has done this through adoption of the “Sewel convention”, that Parliament will not normally legislate for Wales, Scotland or Northern Ireland with regard to devolved matters without the consent of the relevant devolved legislature. In the case of Wales and Scotland, the convention has been restated in statutory form.¹⁸

It is however clear from the decision of the Supreme Court in the Miller case¹⁹ that questions about compliance with the convention, even though it has been statutorily restated, are not justiciable. This means that the UK Government and Parliament have considerable discretion in deciding what circumstances are “abnormal”, enabling them to proceed with legislation on matters within devolved competence notwithstanding any refusal by a devolved legislature of its consent.

In the Welsh Government’s view, this is not a sustainable position if devolution is to be properly respected. We propose two linked reforms. First, there must be a clearer specification of the circumstances when refusals of devolved legislatures’ consent can be legitimately overridden, and secondly we advocate a more explicit stage of Parliamentary consideration of the implications of proceeding regardless of the lack of consent.

On the first point, the governments of the UK need to negotiate a new Memorandum of Understanding, setting out the circumstances and criteria under which the UK Government may in extremis proceed with its legislation, notwithstanding a lack of devolved legislative consent. Consideration should also be given to setting out these criteria in statute, in a manner which would better facilitate judicial oversight of decisions by the UK Government to proceed with legislation notwithstanding the absence of consent.

Secondly, thought should be given as to how the UK Parliament itself, when faced with a Bill for which devolved consent has been refused, should deal with the matter. In the Welsh Government’s view, Parliament should have a specific opportunity to consider the constitutional implications of allowing the Bill to proceed to Royal Assent without consent. When the Scottish Parliament refused its consent to the EU (Withdrawal) Bill in 2018, neither House of Parliament was given any real opportunity to consider the implications of proceeding without that consent.

So, in the future, these matters must be handled with greater respect for the views of the devolved legislatures. The Parliamentary legislative process should be adjusted²⁰ so that a proper opportunity is given to each House, during the final stages of a Bill’s consideration, to consider whether it wishes to proceed with a Bill when the relevant devolved legislature has refused consent. UK Ministers should be required to justify, by way of Statements in each House, why they wish to proceed with a Bill notwithstanding the absence of devolved consent, and the relevant devolved legislature should have the opportunity to provide to Parliament its reasons for not giving consent²¹. Parliamentary consideration could also be informed by reports from the relevant Parliamentary Committees on the constitutional implications of proceeding with the Bill in these circumstances.

There is however a potentially simpler, albeit more radical, approach to this issue. This would be to establish the principle, as an element in a new constitutional settlement, that the UK Parliament should not be able to legislate on devolved matters, or seek by Parliamentary legislation to modify the competences of the devolved institutions, without the consent of the relevant devolved legislature. In other words, the “not normally” qualification, with all its potential for creating uncertainty, misunderstanding and distrust

¹⁸ For Wales, see s.107(6) of the 2006 Act, inserted by s.2 of the Wales Act 2017. Note however that the UK Government’s Devolution Guidance Note 17, paragraph 69, commits the UK Government also to seeking legislative consent where a Bill provision amends the Senedd’s legislative competence: “The UK Government will normally seek [legislative consent] where Parliament is legislating on devolved matters. The UK Government will also normally seek [consent] where Parliament is altering devolved competence. This means that UK government departments will seek the consent of the [Senedd] through an LCM for a Parliamentary Bill provision which applies in relation to Wales and: a. includes devolved provision i.e. a provision which would be within the [Senedd]’s legislative competence... or b. alters devolved competence i.e. modifies the [Senedd]’s legislative competence or the Welsh Ministers’ executive competence”.

¹⁹ R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

²⁰ Note the creation, through amendment of House of Commons Standing Orders, of an additional legislative stage for England-only Bills, to give effect to “English Votes for English Laws”.

²¹ See an analogous procedure provided for by the European Union (Withdrawal) Act 2018, Sched.3 para. 43, inserting s.157ZA into the Government of Wales Act 2006 (although in that instance it is the Welsh Ministers’ reasons, rather than the devolved legislature’s reasons, that are presented to Parliament).

between the UK Parliament and the devolved institutions, would be removed, and a simpler and clearer relationship established between the institutions. The Welsh Government would certainly be open to a debate on the merits of such arrangements.

6. It should be recognised that the legislative powers of the UK state are now exercisable by four legislatures rather than one, and so the running costs of the four legislatures should in future be covered together on the same basis as those of the UK Parliament currently, ie through a specified funding line (but one covering all four legislatures), ‘top-sliced’ from the total of budget provision for the UK.

The current arrangements, whereby each devolved legislature has to finance its own running costs out of totals of resources calculated for distribution to the executive branch for public services, are inconsistent both with citizens’ expectations on the use of resources provided for such services, and with the constitutional principle of the separation of powers. In the Welsh case, the current Assembly Commission budget for 2019-20 for running the Assembly is £58m; their audited spend for the 2018-19 year was £54.4m. This money is “top-sliced” from the allocation of central funds for devolved public services, and is therefore not available for expenditure on those services. Whitehall Departments in contrast would be surprised at any suggestion that their allocations should be top-sliced to meet the running costs of the UK Parliament.

There may however be some tension between propositions 4 and 6, in that the freedom provided by proposition 4 for each devolved legislature to determine its own size and internal organisation might theoretically leave open a disproportionate claim being made by one legislature on the total of resources to be shared among the four legislatures in accordance with proposition 6. The Welsh Government would suggest that, as and when a specific funding line is established to cover the running costs of all four legislatures, this is supplemented by a memorandum of understanding between the legislatures as to how the relevant resources are to be allocated between them, and what procedures should be established to secure transparency and scrutiny in respect of the use of these resources.

7. Each of Wales, Scotland and Northern Ireland should continue to be represented in the House of Commons. A reformed Upper House of Parliament should be constituted, with a membership which takes proper account of the multi-national character of the Union, rather than (as the House of Commons is) being based very largely on population. This Upper House should have explicit responsibility for ensuring that the constitutional position of the devolved institutions is properly taken into account in UK parliamentary legislation.

As an administration committed to the UK, the Welsh Government strongly supports continued Welsh representation in the House of Commons. Further, consistently with proposition 4, it must be for that House to decide on Member numbers, and how Members are to be elected.

That said, in the past, the Welsh Government has argued²² that for any given number of Parliamentary constituencies, the allocation of seats to each part of the UK should be fixed, rather than recalculated at each Boundary Review as the law currently requires. So, for example, in a 600-Member House, the legislation should provide that there will be 30 constituencies in Wales (with equivalent numbers for Scotland and Northern Ireland), and this should remain the position unless and until the overall number of MPs is changed.

²² Written Evidence to House of Commons Political and Constitutional Reform Committee, “What next on the redrawing of parliamentary constituency boundaries?”, Eighth Report of Session 2014-15, HC 600.

If it was clear that for the foreseeable future there would be a fixed number of Welsh constituencies, that would provide the Senedd with a firm foundation to use on which to construct new electoral arrangements, if it wanted to do so. Without that foundation, it would in all likelihood have to create a quite separate and different geography for those arrangements, but there would be obvious advantages, both for voters and for political parties in local organisational terms, in having coterminous Parliamentary and Senedd constituencies. (This is already the situation in Northern Ireland, where the existing Parliamentary constituencies are used to return numbers of MLAs to the Northern Ireland Assembly, and that would continue to be the case even if the number of such constituencies is reduced; the Assembly would simply be smaller). And it could be beneficial from a wider United Kingdom standpoint to have common geographies that enabled MPs and AMs to work effectively together in serving the same electorates.

So far as the House of Lords is concerned, few would want to defend the current composition of the House, however effectively it has used its powers in recent times. If it is to be reformed, full and proper account needs to be taken of the developments in the UK's territorial constitution which is the subject of this paper.

While it would be unrealistic, given the population disparities between England and the other parts of the Union, to argue for equal representation from each territory, a reformed upper House of Parliament should be established with a membership, largely or wholly elected, which does take into account the multi-national character of the Union.

The existing House of Lords has claimed for itself a particular responsibility in respect of UK constitutional issues. This tradition could be built upon if a reformed Upper House was given explicit responsibility for ensuring that the interests of the devolved territories and their institutions are protected and properly respected in UK parliamentary legislation.²³

²³ The German Basic Law confers on the Bundesrat (Upper House) distinctive responsibilities and powers in respect of Bills impacting on the constitutional position of the Lander.

5 Executive Powers: Governments, Agencies and Civil Service

PROPOSITIONS 8-13

8. The United Kingdom is governed by four administrations, each of which (including the UK Government in respect of England²⁴) has separate responsibilities, which should be recognised by all of the other partners as part of the shared enterprise of the governance of the UK. The relations of the four governments should therefore proceed on the basis of a partnership of equals, in a spirit of mutual respect (and comment on the policies of other administrations should, within a culture of robust political debate, properly reflect that respect).

9. Save where other arrangements have been agreed (and provided for as necessary in legislation), Ministers in each administration should have exclusive authority, and be fully accountable locally, for the exercise of statutory functions in their territories in accordance with their legal powers, without challenge, review or oversight by Ministers of another administration.

These two propositions can be considered together.

Within their territories, whereas the devolved legislatures' powers would traditionally be seen as additional to those of the UK Parliament (see proposition 5), the devolved governments have exclusive responsibility for the exercise of the functions which have been transferred to them (unless the functions have been explicitly provided to be available for concurrent exercise). Although, under each of the devolution settlements, intervention powers are available to the Secretary of State on specified and limited grounds to control the exercise of devolved competences²⁵, these powers have never been used, and any attempt to do so would no doubt lead to very serious inter-governmental difficulties.

All this means that the four governments, being in practice each exclusively responsible within their territories for the exercise of relevant functions, are not, and must not be seen as, in an hierarchical relationship one to another. To the extent that they choose to coordinate and collaborate with each other, they should therefore do so on the basis of mutual respect and parity of esteem. And their accountability for the exercise of those functions will lie to the relevant legislature, rather than (in the devolved governments' case) to Westminster.

In the Welsh Government's view, it further follows that the UK Government, even if authorised by statute to do so, should not, save by prior agreement with the relevant devolved government, incur public expenditure in Wales, Scotland or Northern Ireland in respect of matters for which responsibility has been transferred to devolved governments.

²⁴ Several Whitehall Departments, following devolution, have responsibilities almost exclusively relating only to England; examples are the Department for Education, the Department of Health and the Department for Housing, Communities and Local Government. In the Welsh Government's view, it would assist public and media understanding if they were officially renamed to reflect this reality.

²⁵ In respect of the Welsh settlement, see ss. 82 and 114 (as amended) of the Government of Wales Act 2006. The intervention powers are further discussed in relation to proposition 11 below.

10. There should be well-founded arrangements and/or machinery to enable the various administrations to work effectively together on matters of mutual interest. These may be of a bilateral or multilateral nature as appropriate. Where all four administrations (or however many have the relevant powers) agree that there is a need for a common approach, common frameworks, shared delivery mechanisms and joint governance arrangements should be developed on a collaborative and consensual basis. Any such machinery must make provision for the speedy and efficient resolution of disagreements between one government and another, or between several governments, with a clear and agreed role for independent input (whether advice, mediation or arbitration).

If the UK is conceived of as a voluntary association of nations with distinct identities but a range of shared interests, its principal method of government in relation to those interests should be one of negotiation, with a view to securing consensus. This requires the establishment and maintenance of effective machinery for the conduct of inter-governmental relations.

The existing arrangements for the conduct of inter-governmental relations, based on a Memorandum of Understanding last revised in 2013, have been extensively criticised²⁶, and they have been unable to bear the weight of inter-governmental negotiation that Brexit has required. In the Welsh Government's view, we now need to secure a root and branch reform of the existing arrangements, to meet the new challenges that the post-Brexit world will bring.

In 2017 we published a paper, "Brexit and Devolution", calling for replacement of the largely consultative Joint Ministerial Committee with a decision-making UK Council of Ministers. This would oversee the existing inter-Ministerial forums such as the Finance Ministers' Quadrilateral meetings, as well as new entities such as the Inter-Ministerial Forum for Environment, Food and Rural Affairs, and the similar Forum we have proposed for International Trade. It should be supported by an independent Secretariat, with arrangements analogous to those from which the British Irish Council benefits.

Further, whether or not the argument for a Council of Ministers is accepted, the Welsh Government believes that the time has come for a reformed machinery of inter-governmental relations to be founded on statutory provision. Inter-governmental relations are now recognised as forming a fundamental component of a UK constitution based on the principle of devolution, so the foundation of the system should lie in public law, with greater transparency and accountability and better public understanding resulting from that. Statutory underpinning could then set the context for a changed culture so that the machinery operates on the basis of parity of participation by the four governments, reflecting the mutual respect and parity of esteem which should form the basis of the conduct of their inter-governmental relations.

A particular defect of the present arrangements is the failure to provide effective systems for resolution of disputes in which all administrations can have confidence. Consideration should be given to establishing these systems as part of the governance arrangements for the new Inter-Ministerial Groups referred to above, as well as at JMC (Plenary) level; dispute avoidance and resolution will frequently be more effective at this portfolio level. Introducing the possibility of independent third-party support for resolving disputes between governments, whether that takes the form in particular contexts of binding arbitration, mediation or advice, would also go some way to enabling the devolved administrations to believe that the issues they find it necessary to raise will be dealt with fairly.

There is one final point to make. If it is accepted that the four governments will need to work together more formally and across a wider range of policy areas than hitherto, this will raise questions about the most appropriate arrangements for scrutiny of this activity. It is not for the Welsh Government, or indeed any of the governments, to specify what arrangements the four legislatures should put in place to facilitate

²⁶ See for example the PACAC Report, n.1 above, ch.8: "Inter-governmental relations: the missing part of devolution?"

scrutiny, but it is right to say that if the legislatures were to establish machinery allowing for coordinated or joint scrutiny by the legislatures of inter-governmental activity, that is something that we would regard as wholly consistent with the developing structures of UK governance.

11. In relation to the UK's international relations and trade, Ministers and officials of the devolved administrations should be involved through formal inter-governmental machinery in discussion with the UK Government about the formulation of the UK's policy position on matters which may be the subject of international negotiations, particularly where these could have important implications for matters within devolved competence. The UK Government should not normally proceed with negotiating mandates on devolved matters which have not been agreed with the relevant devolved administration, and the devolved governments should be closely involved with the process of negotiation. It should be for the devolved administrations, in consultation with the UK Government (and other administrations as necessary) and subsequently with their devolved legislatures, to consider how obligations within devolved competence arising from the UK's international agreements should be implemented, including whether the devolved institutions should implement these through their own legislation or agree to be covered in UK/GB legislation.

Ministers of the UK Government conduct the UK's international relations, including negotiations in respect of trade, under powers derived from the Royal Prerogative. And the devolution settlements all provide intervention powers for the Secretary of State to take action to ensure that the devolved institutions, in exercise of their powers, do so in line with the UK's international obligations.

It is however too simple a view to conclude from this that the devolved institutions have no legitimate interests to pursue in relation to the UK Government's conduct of international relations. As was made clear by the Supreme Court in the Scottish Continuity Bill case²⁷, the provisions in the devolution legislation reserving competence on International Relations to the UK Parliament do not extend to the implementation of the UK's international obligations in the devolved sphere. Certain consequences follow from this.

The Welsh Government sees the UK's acceptance and implementation of international obligations as part of a single, albeit staged, process – agreeing within the UK what we wish to achieve in the negotiations; undertaking the negotiating; securing approval ('ratification') for what has been agreed; and giving effect to the resulting obligations (with, as noted, the possibility of use of Secretary of State intervention powers in extremis). In this process, different government actors at different times must take the lead, but in a context that all are involved in a shared or joint enterprise.

Settling the UK's negotiating mandate and doing the negotiating is clearly a UK Government lead, but the devolved administrations will wish to be involved in both of those matters because implementing the obligations, at least in the devolved sphere, resulting from negotiations is primarily their responsibility. It would be artificial in the extreme to separate the UK's negotiation of new international obligations from the process of giving effect to them, and it would serve no-one's interests if the UK Government entered into international obligations which the devolved institutions were then not prepared to implement.

27 [2018] UKSC 64.

So, inter-governmental machinery²⁸ needs to be put in place to support a single, staged, process enabling the UK to enter into and implement new international obligations, with the devolved institutions and the UK Government each having their respective parts to play in a shared collaborative effort. Further, the UK Government needs to give an undertaking that it will work with the devolved administrations to seek agreement on all negotiating positions which touch on devolved matters, and not normally pursue negotiating mandates on those matters without the agreement of the devolved administrations. Awareness that the devolved institutions are standing in partnership with the UK Government on negotiating mandates in the devolved sphere, and engaged in the negotiations themselves, should give negotiating partners confidence that any agreements they enter into will be properly implemented within the UK.²⁹

For their part, the devolved institutions will need on each occasion to give careful consideration as to whether and how new international obligations in the devolved sphere should be given effect. Assuming that the devolved administrations have been properly engaged in the negotiating process as described above, this will come down either to consenting to implementation on a UK-wide basis via Westminster legislation, or (as would be likely to be the Welsh Government's starting assumption) deciding to legislate themselves to enable international obligations to be fitted into local circumstances and legal systems. Consultations between the various governments will need to play a part in deciding on the best way forward.

12. Whenever creation, or repurposing, of a public body or agency with executive responsibilities for more than one part of the UK is in prospect, consideration must always be given in its institutional design to the views of the relevant devolved administrations, to enable appropriate account to be taken of the interests of each of the parts of the UK within the agency's remit. This should include arrangements relating both to a body's governance and funding, and to scrutiny and oversight of its activities.

The variety of circumstances in which this issue can arise means that there is no single solution appropriate to every case. The options include appointments by devolved Ministers to membership of the Board of the public body or agency; consent by devolved Ministers to appointments proposed by a Secretary of State; formal commitments to consultation about procedures for recruitment of Board members; and agreements or protocols about officials' dealings with agency officials as a routine part of the body's management of its business, including input into its corporate planning. (As a generalisation, the greater the involvement of the public body in matters within the devolved sphere, the more likely it is that devolved interests will need to be protected through direct influence on Board membership appointments).

Accountability arrangements to devolved legislatures will also need to feature in consideration of this issue. It is commonly the case that public bodies are required to send copies of their Annual Reports to devolved Ministers for laying before devolved legislatures, to facilitate scrutiny.³⁰

²⁸ The Welsh Government has argued for the establishment of an Inter-Ministerial Forum on International Trade. There is however a case for establishing such a Forum with a wider remit, to consider how the UK is projected overseas and what the priority areas for investment and engagement should be.

²⁹ Note here the UK Government's stress on the UK being able to "speak clearly, with a single voice, as a unitary actor under international law": UK Government Response to the Constitution Committee Report: Parliamentary Scrutiny of Treaties (July 2019), pp 5-6. Appropriate constitutional arrangements, including effective machinery capable of securing inter-governmental agreement on matters of mutual interest, are required to make this a reality.

³⁰ See for example Wales Act 2017, s.66: requirement for Gas and Electricity Markets Authority to send its Annual Reports and Accounts to the Welsh Ministers, who must lay these before Senedd Cymru.

13. Ministers in each administration should continue to be supported by civil servants subject to common rules and codes as to appointment and professional conduct; and arrangements should be in place to facilitate exchanges and transfers of staff from one administration to another.

The Welsh Government supports the continuation of arrangements whereby members of a single Home Civil Service are able to provide support for Ministers in each of the Welsh, Scottish and UK Governments. (For historical reasons, there is a separate Northern Ireland Civil Service). Such arrangements guarantee the maintenance of common professional standards and codes of conduct across the three administrations, which facilitates inter-governmental working on a day-to-day basis. They also enable transfers and loans of staff to take place without difficulty between administrations, enabling individual civil servants to broaden their experience and understanding of the perspectives, processes and practices of other administrations within the UK.

Over time, it is possible that individual administrations may wish to re-organise public administrative resources within their territories in order to secure greater efficiency and coherence. In Wales, this is sometimes referred to as the desirability of establishing a 'single Welsh public service'. The benefits of a single Home Civil Service will need to be recalibrated against such new developments.

6 Finance

PROPOSITIONS 14-17

14. It is for the UK Government to determine levels of public expenditure, both for programmes operating at UK/GB/England and Wales level and for England in respect of policy areas which are devolved. Spending power for the devolved administrations should be determined, having regard to proposed levels of spending for England, by reference to a set of agreed objective indicators of relative need, so that spending power is fair across the different administrations and an equivalent level and quality of public goods can be delivered in all parts of the UK. The UK Government should not be able arbitrarily to allocate additional funding to any particular part of the UK outside these arrangements.

In the current system funding is, in general, allocated to the devolved administrations through the Barnett formula, where changes in funding for the devolved administrations is a population share of changes in comparable programmes, with adjustments for revenues from devolved taxes.³¹ The system does not take into account the relative needs of each nation. There have been instances where the UK Government has acted outside the normal rules in a way which is not seen as fair by one or more of the devolved administrations.

In 2016, changes were made to the Barnett formula as it applies to Wales. This change – known as the ‘Holtham floor’³² – adds in a specific, needs-based factor, currently set at 105% but which will rise to 115% at the point that spending per person in Wales on devolved functions reaches 115% of the English level. This Wales-specific adjustment to the Barnett formula goes some way to delivering a fairer system. However, the Welsh Government believes that the Barnett formula should be replaced and a new relative needs-based system implemented, within a comprehensive and consistent fiscal framework to which all Governments in the UK agree.

Devolved administrations also have a legitimate interest in the levels and fairness in distribution of spending on UK/GB/England and Wales programmes, for example in relation to welfare benefits, justice and rail infrastructure. The levels and fairness in distribution of expenditure on such programmes is important for the devolved administrations for a variety of reasons but particularly because of the interactions between UK/GB/England and Wales programmes on the one hand and devolved programmes on the other.

³¹ Details of the operation of Barnett formula are set out in the Statement of Funding Policy (2015), www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/479717/statement_of_funding_2015_print.pdf, updated in the Scottish and Welsh Fiscal Frameworks (2016), www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/503481/fiscal_framework_agreement_25_feb_16_2.pdf, www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578836/Wales_Fiscal_Framework_Agreement_Dec_2016_2.pdf.

³² This change was first proposed by the Holtham Commission in its second report (2010), www.gov.wales/fairness-and-accountability-new-funding-settlement-wales.

15. The devolved administrations should be resourced by a combination of needs-based grant from the UK Government, resources raised through devolved and local taxation, and capital borrowing.

The balance of funding for each devolved administration as between UK Government grant and revenue raised through devolved and local taxation will reflect particular circumstances and local political preferences. There is no assumption that the balance of funding or the scope of devolved taxation powers will be identical across all devolved administrations. However, the agreements underpinning fiscal relationships between the UK Government and the devolved administrations should be based on common principles of partnership, transparency, and recognition of the interconnected nature of the UK and devolved administration fiscal landscape.

The Welsh Government recognises that different circumstances and political preferences in different parts of the UK has led to an asymmetry in fiscal devolution. However, asymmetry does not have to mean an ad hoc, unsystematic approach to fiscal devolution and there is a risk that the growing lack of coherence will lead to instability if not addressed. The Welsh Government considers that all Governments in the UK should agree a core set of principles and aims which can apply to all administrations but also allow scope for necessary diversity.

So the Welsh Government argues for a single UK fiscal framework, agreed by all Governments. At its core we would expect this agreement to be underpinned by the principles of parity of participation, collaborative working, and shared responsibility for outcomes. The framework should also provide for a rules-based approach which does not allow for political influence over funding which can create inequality and distrust. The framework should apply in all but exceptional circumstances with any deviation from the framework to be agreed by all Governments through an open and transparent system.

16. The operation of these resourcing arrangements, including determinations of devolved administrations' spending power and borrowing limits, should be the responsibility of a public agency accountable to all four administrations jointly.

The legitimacy of a UK fiscal framework can only be properly secured if it is jointly agreed and independently operated and assured. Without the existence of an independent, jointly accountable body it is highly likely that even an agreed fiscal framework will be unable to prevent all potential disputes and grievances.

The principle of third-party assistance by an independent body in the resolution of disputes is already recognised in both the fiscal frameworks of the Welsh and Scottish Governments, and is a well-used method of dispute resolution across the world. The Welsh Government believes that there is an essential role for an independent body which can ensure the necessary parity of treatment, recognising the importance of the subsidiarity principle but at its core recognising that all parts of the UK are interdependent.

17. It is for the devolved administrations to determine, within the powers and resources available to them, their own priorities for taxation and public expenditure relating to their devolved responsibilities, and to account for their decisions to their own legislatures. However, decisions taken by the devolved administrations or bodies under their jurisdiction can have financial implications for departments or agencies of the UK Government ('spill-over' effects). Alternatively, decisions of UK departments or agencies can lead to financial implications for the devolved administrations. In these cases, the Government responsible for the decisions leading to financial implications for others must take responsibility for dealing with those implications. Disagreements on the operation of this principle should be subject to independent assessment.

Existing arrangements for recognising and dealing with the potential spill over effects of decisions made by one Government on others are not fully effective and disputes often arise. The Welsh Government believes that the new UK fiscal framework requires a clear, agreed, independent mechanism for dealing with spill-over effects and a clear approach to the resolution of disputes.

7 Justice and the Courts

PROPOSITIONS 18-19

18. The devolved institutions (and the UK Government and Parliament in respect of England) should be responsible for policing and the administration of justice in their territories. Jurisdictional arrangements and court structures should reflect the devolved institutions' distinctive responsibilities for their territories in respect of these and related matters.

This proposition is a particular application of proposition 3, that the powers of the devolved institutions should be founded on a coherent set of responsibilities and allocated in accordance with the subsidiarity principle. It is of distinctive significance for Wales, where (unlike Scotland and Northern Ireland) these powers are not presently devolved.

In the other jurisdictions the lines between what is devolved and what is not are drawn in such a way as to confer coherent sets of powers on the devolved institutions. But in the Welsh case an arbitrary division has been drawn between what can be legislated for and what cannot. So, Senedd Cymru can legislate, but the enforcement of that legislation is through the courts system, for which the UK Government has responsibility in Wales.

The Welsh Government is not aware of any decentralised system of government in the common law world which is as limited. In other jurisdictions all or most “domestic” matters are devolved, which includes all public services and other matters that do not have to be regulated centrally. So there are no reasons why the police, most aspects of civil and criminal law, anti-social behaviour, or the administration of justice and related matters need be controlled centrally – and so, in Scotland and Northern Ireland as elsewhere, they are not.

As a result, it is clear what each government is responsible for, and they are able to develop coherent and comprehensive joined-up policies and laws, including in respect of policing and justice, to tackle the social problems they face. Given that responsibilities for policing and justice are currently not devolved, that is not an option at present available to the Welsh Government.

If responsibilities for policing and justice are matters appropriate for devolution to Senedd Cymru and the Welsh Government in accordance with the subsidiarity principle, this would serve to reinforce the case for the creation of a discrete system of courts for Wales, but in our view that case stands in its own right on general constitutional grounds.

In the Welsh Government's evidence to the Thomas Commission on Justice in Wales, we argue that, with one exception across the common law world, a legislature is always accompanied by a corresponding legal jurisdiction. That is because divergence in law necessitates different jurisdictional arrangements, and the existence of a distinct legislature, by definition, will mean divergence in law. Wales is however in that respect the exception. Creating a Welsh legal jurisdiction would therefore merely be dealing properly with the implications of what has already occurred, the establishment for Wales of legislative devolution. And among other things, creating a discrete jurisdiction would secure for Wales the benefits of strong local judicial leadership which is such a significant feature of the courts systems in both Scotland and Northern Ireland.

19. The Supreme Court, as the ultimate court of appeal for most matters within the United Kingdom, should have in membership individuals identified with each and every part of the UK. The opportunity should be taken, when vacancies come to be filled, to ensure that at least one suitably-qualified person identified with Wales is a member of the Supreme Court.

In a sense, this proposition is simply a particular application of the principle in proposition 12, that appropriate account must be taken in a public body's institutional design of the interests of each of the parts of the UK within its remit. But it also follows logically from the argument in proposition 18 in support of a discrete courts system for Wales.

The Supreme Court stands at the apex of the legal systems of England and Wales; Northern Ireland; and, for most matters, Scotland. Section 27(8) of the Constitutional Reform Act 2005 provides that

“In making selections for the appointment of judges of the [Supreme] Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.”

On its face, this would appear to require judicial representation from Wales on the Court, as from the other parts of the UK. The initial interpretation however was that for this purpose, a “part of the United Kingdom” was a reference to one of the existing three legal jurisdictions within the United Kingdom; on that basis, Wales, as part of the jurisdiction of England and Wales, was not entitled to separate representation on the Court.

This is not a sustainable position, and both Lord Thomas of Cwmgiedd (as Lord Chief Justice of England and Wales, but now retired) and Lord Lloyd-Jones have served the Court with distinction. But their appointments appear to have depended upon their personal qualifications and expertise, rather than a recognition of Wales as a distinct entity for legal purposes.

If the Supreme Court is truly to be perceived as serving all parts of the United Kingdom, it will be essential, from a constitutional standpoint, that when Lord Lloyd-Jones retires, he is replaced by someone who has “knowledge of, and experience of practice in, the law” of Wales, and that from henceforth Wales is represented on the Supreme Court in its own right. Creation of a discrete Welsh courts system, as argued for in proposition 18, would reinforce the case for this.

8 Constitutional Reform

PROPOSITION 20

20. Future constitutional developments in the United Kingdom should be considered on a holistic basis and on the basis of constitutional principle, rather than by way of ad hoc reforms to particular constitutional settlements. This should be undertaken by a constitutional convention. The Welsh Government and the other devolved administrations must have seats at the convention table, and have the opportunity to press their particular constitutional aspirations, informed by proposed developments elsewhere in the UK. Citizens across the UK should also have an organised ability to contribute to any convention.

The UK Constitution is uniquely malleable. It is not codified, nor is there any special procedure to give effect to proposals for constitutional reform. Furthermore, policy conversations about devolution have tended to take place in a series of bilateral exchanges between the UK Government and the relevant devolved administration, to some degree without reference to how devolution is developing in other parts of the UK. This has resulted in a piecemeal approach, not obviously based on any intellectual rationale, to devolving powers, leading to a patchwork of different arrangements across the UK.

In the Welsh Government's view, future constitutional reform needs to be considered from a UK-wide perspective. The case for a written constitution, and a debate about the nature of such a written codification should, we believe, form part of the deliberations of a constitutional convention. As we said earlier in relation to propositions 3 and 15, this does not necessarily mean that the devolution and resource settlements need to be identical, although the differences between them should be capable of rational justification; but it does mean that ad hoc adjustments to particular settlements should be avoided, or at the very least their implications for other settlements taken into account before proceeded with.

The Welsh Government has consistently argued for the creation of a constitutional convention, primarily tasked with examining the full set of relationships between the devolved administrations and the UK Government, in the context of our joint enterprise of the governance of the UK. It continues to be our belief, now more than ever, that such a debate about the future of the Union is vital; and if, in order to secure that, it is decided to turn to some other mechanism, the Welsh Government would accept that, provided that it allows for a wide-ranging debate among the interested parties, with effective public participation.

9 Annex 1: The Twenty Propositions

GENERAL PRINCIPLES

1. Whatever its historical origins, the United Kingdom is best seen now as a voluntary association of nations taking the form of a multi-national state, whose members share and redistribute resources and risks amongst themselves to advance their common interests. Wales is committed to this association, which must be based on the recognition of popular sovereignty in each part of the UK; Parliamentary sovereignty as traditionally understood no longer provides a sound foundation for this evolving constitution.
2. The principles underpinning devolution should be recognised as fundamental to the UK constitution. The devolved institutions must be regarded as permanent features of the UK's constitutional arrangements; any proposals for the abolition of such institutions should be subject to their consent and to the consent of the relevant electorate.
3. The powers of the devolved institutions should be founded on a coherent set of responsibilities allocated in accordance with the subsidiarity principle. Those powers to be defined by the listing of the specific matters which it is agreed should be reserved to Westminster in respect of each territory, all other matters (in the case of Wales) being or becoming the responsibility of Senedd Cymru and/or the Welsh Government.

LEGISLATURES AND LEGISLATIVE POWERS

4. It should be a matter for each legislature to determine its own size, electoral arrangements and internal organisation, with locally-determined Standing Order provision for the relevant legislature in respect of these matters as required.
5. The relations of the four legislatures of the United Kingdom should proceed on the basis of mutual respect. Although, as matters currently stand, the UK Parliament still formally possesses legal authority to legislate for Wales, Scotland and Northern Ireland on all matters (including those devolved), it should not normally seek to legislate for a territory, in relation to matters within the competence of the devolved legislature of that territory, without that legislature's explicit consent. The 'not normally' requirement should be entrenched and codified by proper definition and criteria governing its application, giving it real rather than symbolic acknowledgement in our constitutional arrangements.

Alternatively, a new constitutional settlement could simply provide that the UK Parliament will not legislate on matters within devolved competence, or seek to modify legislative competence or the functions of the devolved governments, without the consent of the relevant devolved legislature.
6. It should be recognised that the legislative powers of the UK state are now exercisable by four legislatures rather than one, and so the running costs of the four legislatures should in future be covered together on the same basis as those of the UK Parliament currently, ie through a specified funding line (but one covering all four legislatures), 'top-sliced' from the total of budget provision for the UK.
7. Each of Wales, Scotland and Northern Ireland should continue to be represented in the House of Commons. A reformed Upper House of Parliament should be constituted, with a membership which takes proper account of the multi-national character of the Union, rather than (as the House of Commons is) being based very largely on population. That Upper House should have explicit responsibility for ensuring that the constitutional position of the devolved institutions is properly taken into account in UK parliamentary legislation.

EXECUTIVE POWERS: GOVERNMENTS, AGENCIES AND CIVIL SERVICE

8. The United Kingdom is governed by four administrations, each of which (including the UK Government in respect of England) has separate responsibilities, which should be recognised by all of the other partners as part of the shared enterprise of the governance of the UK. The relations of the four governments should therefore proceed on the basis of a partnership of equals, in a spirit of mutual respect (and comment on the policies of other administrations should, within a culture of robust political debate, properly reflect that respect).

9. Save where other arrangements have been agreed (and provided for as necessary in legislation), Ministers in each administration should have exclusive authority, and be fully accountable locally, for the exercise of statutory functions in their territories in accordance with their legal powers, without challenge, review or oversight by Ministers of another administration.

10. There should be well-founded arrangements and/or machinery to enable the various administrations to work effectively together on matters of mutual interest. These may be of a bilateral or multilateral nature as appropriate. Where all four administrations (or however many have the relevant powers) agree that there is a need for a common approach, common frameworks, shared delivery mechanisms and joint governance arrangements should be developed on a collaborative and consensual basis. Any such machinery must make provision for the speedy and efficient resolution of disagreements between one government and another, or between several governments, with a clear and agreed role for independent input (whether advice, mediation or arbitration).

11. In relation to the UK's international relations and trade, Ministers and officials of the devolved administrations should be involved through formal inter-governmental machinery in discussion with the UK Government about the formulation of the UK's policy position on matters which may be the subject of international negotiations, particularly where these could have important implications for matters within devolved competence. The UK Government should not normally proceed with negotiating mandates on devolved matters which have not been agreed with the relevant devolved institutions, and the devolved governments should be closely involved with the process of negotiation. It should be for the devolved administrations, in consultation with the UK Government (and other administrations as necessary) and subsequently with their devolved legislatures, to consider how obligations within devolved competence arising from the UK's international agreements should be implemented, including whether the devolved institutions should implement these through their own legislation or agree to be covered in UK/GB legislation.

12. Whenever creation, or repurposing, of a public body or agency with executive responsibilities for more than one part of the UK is in prospect, consideration must always be given in its institutional design to the views of the relevant devolved administrations, to enable appropriate account to be taken of the interests of each of the parts of the UK within the agency's remit. This should include arrangements relating both to a body's governance and funding, and to scrutiny and oversight of its activities.

13. Ministers in each administration should continue to be supported by civil servants, whether or not organised on a territorial basis, subject to rules and codes as to appointment and professional conduct; and arrangements should be in place to facilitate exchanges and transfers of staff from one administration to another.

FINANCE

14. It is for the UK Government to determine levels of public expenditure, both for programmes operating at UK/GB/England and Wales level and for England in respect of policy areas which are devolved. Spending power for the devolved administrations should be determined, having regard to proposed levels of spending for England, by reference to a set of agreed objective indicators of relative need, so that spending power is fair across the different administrations and an equivalent level and quality of public goods can be delivered in all parts of the UK. The UK Government should not be able arbitrarily to allocate additional funding to any particular part of the UK outside these arrangements.

15. The devolved administrations should be resourced by a combination of needs-based grant from the UK Government, resources raised through devolved and local taxation, and capital borrowing.

The balance of funding for each devolved administration as between UK Government grant and revenue raised through devolved and local taxation will reflect particular circumstances and local political preferences. There is no assumption that the balance of funding or the scope of devolved taxation powers will be identical across all devolved administrations. However, the agreements underpinning fiscal relationships between the UK Government and the devolved administrations should be based on common principles of partnership, transparency, and recognition of the interconnected nature of the UK and devolved administration fiscal landscape.

16. The operation of these resourcing arrangements, including determinations of devolved administrations' spending power and borrowing limits, should be the responsibility of a public agency accountable to all four administrations jointly.

17. It is for the devolved administrations to determine, within the powers and resources available to them, their own priorities for taxation and public expenditure relating to their devolved responsibilities, and to account for their decisions to their own legislatures. However, decisions taken by the devolved administrations or bodies under their jurisdiction can have financial implications for departments or agencies of the UK Government ('spill-over' effects). Alternatively, decisions of UK departments or agencies can lead to financial implications for the devolved administrations. In these cases, the Government responsible for the decisions leading to financial implications for others must take responsibility for dealing with those implications. Disagreements on the operation of this principle should be subject to independent assessment.

JUSTICE AND THE COURTS

18. The devolved institutions (and the UK Government and Parliament in respect of England) should be responsible for policing and the administration of justice in their territories. Jurisdictional arrangements and court structures should reflect the devolved institutions' distinctive responsibilities for their territories in respect of these and related matters.

19. The Supreme Court, as the ultimate court of appeal for most matters within the United Kingdom, should have in membership individuals identified with each and every part of the UK. The opportunity should be taken, when vacancies come to be filled, to ensure that at least one suitably-qualified person identified with Wales is a member of the Supreme Court.

CONSTITUTIONAL REFORM

20. Future constitutional developments in the United Kingdom should be considered on a holistic basis and on the basis of constitutional principle, rather than by way of ad hoc reforms to particular constitutional settlements. This should be undertaken by a constitutional convention. The Welsh Government and the other devolved administrations must have seats at the convention table, and have the opportunity to press their particular constitutional aspirations, informed by proposed developments elsewhere in the UK. Citizens across the UK should be able to participate in any convention. The case for a written constitution should form part of the convention's deliberations.

