

Constitutional Reform in the UK: A Conference on the Brown Commission Report (Part Two)

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Background

At the end of 2022, the Brown Commission published its final report, '[A New Britain: Renewing our Democracy and Rebuilding our Economy: Report of the Commission on the UK's Future](#)'.

[Part One of the Conference](#) took place at the Bonavero Institute of Human Rights, University of Oxford on 5 May 2023. Three panels considered (i) The Process of Constitutional Change; (ii) Second Chamber and Electoral System Reform; and (iii) Ethics, Integrity and Fourth Branch (Guarantor) Institutions. A recording of Part 1 is available [here](#).

In this, Part Two of the Conference, panellists considered (i) Devolution, the Constitution and the Union; (ii) Decentralisation and Localism in the UK; and (iii) Institutional Modes of Protection and Fulfilment of Social Rights.

Part Two of the Conference was hosted by the Bingham Centre for the Rule of Law in partnership with the Bonavero Institute of Human Rights, University of Oxford, LSE Law School, UCL Faculty of Laws, and the British & Irish Chapter of the International Society of Public Law.

The conference was convened by Prof Jeff King, Lucy Moxham, Prof Kate O'Regan, Prof Tarun Khaitan, and Prof Jo Murkens.

INTRODUCTION AND REFLECTION ON PART ONE OF THE CONFERENCE

Prof Jim Gallagher CB FRSE, Visiting Professor, University of Glasgow School of Law

Prof Gallagher began by explaining that the Report seeks to address two pervasive problems facing the UK.

First, Prof Gallagher noted that the UK central state is one of the [least trusted in the OECD](#). Expanding further, [he pointed out that this affliction is unique to the central executive and legislature](#). Other state institutions in the UK, such as the police, are trusted as much as equivalent institutions in other states. The second problem is that the [north-south divide](#) on the island of Great Britain means that the UK is the [most imbalanced economy in the OECD](#). Prof Gallagher argued that both of these issues have existed for so long that the situation has become accepted. Both of these issues he said were linked to the UK, being the most centralised state, where virtually all tax and spending decisions are taken in London away from the people they affect. He suggested that this means that local decisions are being taken in an inappropriate context in London, distracting decision-makers from taking strategic UK-level decisions which in his view is the purpose of the central state.

Prof Gallagher then reminded attendees of the topics discussed in Part One of the Conference in Oxford, before introducing the main themes for discussion in Part Two, namely the geographic distribution of power and articulation of the purpose of the central state. He noted that the Brown Report is clear that the devolution agenda will distribute power but also determine what power remains at the centre to guide the interactions and relationships of power holders at the different levels. Prof Gallagher explained that the Brown Report provides recommendations on devolution, principally about England where it builds pragmatically on mayoral and combined authority models, which are working and [trusted by the population](#). He noted that the recommendations in the Brown Report are incremental to what has already begun but would build on these in order to improve the economic capacity of the regions. Ultimately, the aim would be to devolve power currently wielded in the English context by the central government to regional and city level including the ability for locally promoted legislation at Westminster. The Brown Report, Prof Gallagher explained, is explicit about the political, economic and social purposes of the UK as well as the social and economic guarantees the UK state offers to all citizens. The model for this is the devolution settlements that embed human rights in the competencies of the devolved institutions. He suggested that the Report seeks to make a similar statement that devolution occurs in the context of a guarantee to all UK citizens. The recommendations relating to social rights are therefore to guarantee an underlying framework that produces social solidarity across the Union.

PANEL ONE: DEVOLUTION, THE CONSTITUTION AND THE UNION

Chair: Prof Jo Murkens, Professor of Law, LSE Law School

Akash Paun, Programme Director, Institute for Government

Akash engaged with four key issues from the Brown Report about the future of devolution.

First, the balance of power between the different tiers of government: Akash highlighted that, as regards Scotland and Wales, the Report does not set out a significant list of further powers that should be devolved, in comparison to its proposals for further devolution within England. He suggested that this is in line with an ongoing change in how unionists answer nationalist challenges.

Previously, he noted, the instinct was to offer greater powers to devolved regions as a way to enhance the legitimacy of the Union, but the focus has shifted in recent years to how to strengthen by demonstrating the value of interventions led from Westminster. Though Akash agreed with the Brown Report that, comparatively speaking, Scotland is a very powerful sub-national entity, he thought the Report could have potentially been bolder in areas such as fiscal and borrowing powers, employment law, and immigration policy. On Wales, Akash noted that the Report understandably deferred to the separate [Independent Commission on the Constitutional Future of Wales](#), which recommended an extensive package of new powers, in particular the entirety of justice and policing. He speculated that this might be where the energy ends up being in terms of national rebalancing, though he noted that the Labour leadership has not shown obvious enthusiasm for these measures. Second, entrenchment of devolution: Akash explained that the Report focused on the important question of how entrenchment of devolution can be achieved in a regime of parliamentary sovereignty. Since Brexit, he commented, it has been shown to be relatively easy for Westminster to legislate for the devolved nations in the absence of consent, contrary to the Sewel Convention. Akash noted that the solution proposed, to give a reformed upper chamber an absolute veto power over bills to which the Sewel Convention would apply, is an innovative one that builds on the precedent of the Parliament Acts, though he questioned how it would play out. The Report assumes that the upper chamber would exercise a veto power if it were to be given one; however, Akash suggested that this may depend on the electoral process applicable and the composition of the chamber, issues which the Brown Report does not engage with fully. He noted that the House of Lords currently has powers which it rarely if ever uses, such as blocking statutory instruments and forcing the House of Commons to use the Parliament Acts. Akash commented that the role of institutional culture is perhaps greater than that of formal powers so it is hard to know how the proposed measures would operate in practice.

Third, improving cooperation between the UK and devolved governments: Akash emphasised that creating a culture and institutions of shared government has always been an afterthought of devolution and so, in his view, the recommendations are to be welcomed. However, he questioned how an incoming UK Government could be persuaded that such measures are in its interest.

Fourth, the purpose of the Union: While noting that putting the concepts of solidarity, subsidiarity, and social rights into the constitution are interesting proposals, Akash questioned what the impact of these would be on devolution, as they may be seen as imposing new constraints on the legislative and executive competencies of the devolved nations and so passing such measures with consent could be a challenge.

Prof Katy Hayward, Professor of Political Sociology in the School of Social Sciences, Education and Social Work, Queen's University Belfast

Prof Hayward focused on two dimensions of the Brown Report that relate to Northern Ireland. First, the ambition to see restored and strengthened devolution in Northern Ireland; and

second, Northern Ireland's relationship with the rest of the UK. Her comments came in the context of the recent [Safeguarding the Union Command Paper](#) which, she suggested, represents a partial step forward from the current Government.

Prof Hayward commented that restoration of devolution is not sufficient and that there is a difference between the UK Government's approach of reassuring Northern Ireland of its place in the Union and strengthening devolution itself. She referred to recent polling data showing that only a third of people expect the Executive to fulfil its mandate, which she commented, suggests that more thinking is required on what devolution should deliver for the people of Northern Ireland. Referring to the [Northern Ireland Life and Times survey](#), Prof Hayward noted that a clear and growing majority of people across the political spectrum think that the Good Friday/Belfast Agreement ('GFA') needs updating. Prof Hayward observed that the Report only mentions the principle of consent as the basis for continuing devolved institutions in Northern Ireland. She suggested that the principle of consent has been stretched too far over recent years. Strictly speaking, she noted, the principle refers to the requirement that a majority of people in Northern Ireland consent to its place in the Union. She argued that the principle should not be stretched into areas where the constitutional status is not in question because this leads to minority veto, noting that the [Northern Ireland Affairs Committee](#) has suggested reducing the scope for minority veto too. Prof Hayward then reminded the audience of some of the other principles contained in the GFA such as parity of esteem between unionism and nationalism, provisions for protection of human rights as applied recently in the [Dillon judgment](#) by the Northern Irish High Court, and the principle of democracy. Currently, the Council of Europe consistently states that Northern Ireland is failing in terms of the principle of democracy, and Prof Hayward commented that the proposal in the Report for an anti-corruption Commissioner is crucially important for Northern Ireland in this respect.

As regards Northern Ireland's place in the Union, Prof Hayward explained that the Report proposes the creation of several new bodies including a Council of the UK and Council of the Nations and Regions, new principles for the Union such as the solidarity clause, and the involvement of devolved leaders in trade policy. What this reflects, she suggested, is concern for relationships and the relative standing of the devolved governments. The Command Paper also puts forward proposals for new bodies and new principles. Prof Hayward questioned how embedded such principles can be and how the proposed bodies relate to existing bodies, commenting that it is remarkable how initiatives ignore what already exists. This is particularly seen, she suggested, in relation to the involvement of the Republic of Ireland and institutions set up under strands 2 and 3 of the GFA such as the British-Irish Council.

Philip Rycroft, Philip Rycroft Consulting Ltd, Honorary Professor at Edinburgh University and Senior Distinguished Visiting Fellow at the Bennett Institute for Public Policy, University of Cambridge

Philip began by setting out some of the challenges for a government hoping to implement proposals in the Report. For example, he noted that when the immediate pressure goes away (as has happened, he suggested, to some extent with the revival of the Northern Ireland Executive and the Scottish National Party losing ground in Scotland) it may be tempting for politicians in Westminster to think the problem itself has gone away. There is also the English political context which, Philip suggested, has particularly affected the Conservative approach to devolution, which he noted is cautious about aggravating English opinion in order to achieve improvements for the devolved nations. In addition, he emphasised, there will always be other pressing issues that demand attention not least now, the fiscal situation. A government in power, he commented, needs to be persuaded that it is necessary to dedicate government and legislative time, and political bandwidth to these issues in order to make necessary adjustments. Philip argued that we must use relatively calmer times to put the devolution settlement on a firmer footing, though he thought that this would not be a panacea against future support for independence or for Irish unification for example. To him, preserving the Union is always a work in progress and the biggest threat to it is indifference or hostility from the metropolitan centre. Philip stressed that the significant challenge posed to an incoming

Labour Government is to see this in the medium- to long- term, and to persevere with this agenda whilst facing many other challenges.

Philip went on to analyse the Brown Report through the lens of the work done by the [Independent Commission on the Constitutional Future of Wales](#) (of which he was a member).

Philip selected three themes where he suggested there is substantial consistency between the Commission and the Brown Report. (1) He noted that both agree that there is a significant challenge for the Welsh Government to reinvigorate attachment to the democratic process, particularly through greater local participation in decision-making. He highlighted, for example, that the Brown Report emphasises the importance of deliberative participatory democratic processes. (2) Philip explained that both were concerned about the degradation of the devolution settlement, the neglect of inter-governmental relations ('IGR') and the sidelining of the Sewel Convention. He suggested that warm words are no longer enough after the UK Government has failed to provide trust and respect for several years. He noted that both the Commission and the Brown Report advocate putting IGR on a statutory footing and entrenching Sewel. (3) In terms of specific powers, Philip noted that the Welsh Commission recommended devolution of justice and policing in line with the [Thomas Commission](#), as well as devolution of powers over rail, though it noted that collaboration will always be key in these and other policy areas where there are cross-border impacts. Where that cooperation is not forthcoming, Philip explained, then it reinforces the case for further devolution which places boundaries around potential damage to Welsh interests caused by neglect from the centre. He commented that the response of a future Labour Government, in the context of the relationship between the UK and Welsh Labour, will be critical.

Finally, Philip explained that the Commission had a different scope to the Brown Report in that it considered the relative benefits of different constitutional outcomes including federalism and independence in order to set out the nature of the future choice for the people of Wales. In conclusion, Philip reflected that the Welsh Commission represented rational, long-term, inclusive consideration of possible constitutional futures, which generally in his view the UK has been deficient at undertaking as shown by the Brexit process.

Prof Alisa Henderson, University of Edinburgh

Prof Henderson focused on the opportunities and challenges observed from public opinion data in the [Future of England Survey](#) and [State of the Union Survey](#). By reference to the data, Prof Henderson suggested that the Brown Report has correctly identified that, from the Union, the public wants greater levels of collaboration, more territorial representation in the upper chamber, greater compliance with the Sewel Convention, and a referenda lock on the abolition of devolved institutions.

Prof Henderson noted that the division of opinion between parliamentary and shared sovereignty would make it a challenge to find a new model that is acceptable to all parts of the UK. She explained that markedly higher support for shared sovereignty in Scotland, was matched by a clear preference for parliamentary sovereignty in England, and mixed views in Northern Ireland. Prof Henderson also explained that the data show a clear preference for policy uniformity. She noted that, after 25 years of devolution, which inherently has the capacity for policy variation, the UK public has not adjusted to this. Prof Henderson suggested that this presents a challenge for the Brown Report - where it recommends further devolution to address the over-centralisation of the UK, that will also increase the potential for policy variation.

Prof Henderson suggested that the Brown Report does not address the low level of knowledge and understanding of the Union, which may impact on levels of support for its conclusions. She noted that the data suggests that people of all regions of the UK believe they are getting less than their fair share of resources - devolved regions believe England gets more, those in England think Scotland gets more, a view shared both by those in England who identify as English and those in Scotland who identify as British. Prof Henderson also argued that the Brown Report overlooks the desires, shown in the data, for an English political space and for England to be treated as a single political unit rather than several separate regions. She suggested that

a possible solution might be the reintroduction of EVEL (English Votes for English Laws); and that an alternative would simply be for the Government to clarify when it is acting for England alone when they are legislating for it.

Finally, Prof Henderson noted the clashing visions of the UK state, with Conservative supporters in the devolved regions being much more likely than English Conservatives to believe that there is only a British nation and no sub-state nations in the UK. She commented that there are also remnants of a similar difference between Welsh Labour and Scottish Labour. Prof Henderson suggested that the Brown report reflects an Anglo-Scottish understanding of the Union, which assumes the risk to the Union is primarily from those who wish for radical change and does not address the risk presented by two different forms of union, muscular unionism, but also a considerable level of ambivalent unionism as evidence in the public opinion data. She concluded by emphasising a majority in each part of the state either wants independence for their part (or unification with Ireland) or are ambivalent to the union, in every part of the UK.

PANEL TWO: “DECENTRALISATION AND LOCALISM IN THE UK”

Chair: Bren Albiston, Society of Labour Lawyers and Associate at Stephenson Harwood

Nyasha Weinberg, 39 Essex Chambers and King’s College London

Nyasha explained that she and other experts, Anna Stansbury (MIT Sloan), Dan Turner (Harvard Kennedy School), Ed Balls (Harvard Kennedy School and King’s College London) and Esme Elden (University College London) have been researching Britain’s growing regional divides focusing on the economic as well as the constitutional and institutional aspects of regional policy. Further details about the group’s research can be found on their website – [Britain’s growing regional divides – Reviewing the regional economics, politics and policy-making of the UK since 1979](#).

Nyasha noted that the group’s most recent paper – ‘A Growth Policy to Close Britain’s Regional Divides – What Needs to be Done’ makes suggestions for what an incoming Government should do to make the UK more prosperous, to resolve the problem of underperforming cities, and to ensure that differences in regional outcomes can be equalised. The February 2024 working paper is available [here](#) via the Mossavar-Rahmani Center for Business and Government.

The paper looks at several broad areas, which Nyasha summarised as follows.

Firstly, the paper emphasises that there is a need to develop a national growth and productivity strategy that is applied over a sustained period. This strategy needs to be formulated with the benefit of insight from the local level but also with commitment from the centre of government. The strategy should focus on the drivers of productivity growth but alongside that must ensure there is comprehensive investment in social infrastructure in all places because local authorities simply cannot provide the services they are legally obliged to provide.

Secondly, the paper explores the institutional models existing at the mid-tier (between the national and local levels). Nyasha commented that some mid-tier structures exist but noted that there is not comprehensive coverage of the UK (specifically England) and so there are areas and regions which are excluded. The paper argues that all parts of England should be invited to join a structure at mid-tier level but is not prescriptive provided they adhere to the paper’s listed principles. For example, the paper recommends such structures must have sufficient scale to take decisions on sprawling issues, they must have a single point of contact such as a mayor who represents the area, they must be able to collaborate with other mid-tier authorities to deliver on issues of national importance, there must be accountability

mechanisms, and finally they must be simple so as not to further complicate a system (for example, where possible, the boundaries of these institutions might be aligned with boundaries that exist already such as those of NHS trusts). Nyasha commented that while Westminster should not dictate to the regions, if they are not able to agree to join a mid-tier institution, Whitehall should intervene to ensure comprehensive coverage. Nyasha also emphasised that insight from the mid-tier institutions should be actively fed into the national growth and productivity strategy. In particular, she recommended that regional leaders, including devolved government heads and mayors, should have seats in the upper chamber.

Thirdly, in terms of funding, the research paper argues that regional leaders need more freedom to distribute funding and that a single pot financial settlement over a multi-year period (ideally five years) should be offered. Nyasha commented that this would bring England into line with the devolved areas of the UK.

Finally, the paper recommends that there is a re-allocation of capital spending in order to compensate regions that have been historically underfunded.

Dr John Stanton, Senior Lecturer, City University of London

Dr Stanton reminded attendees that local government has been a headache for central government for 60 years with the same efforts, the same proposals and sometimes even the same reforms deployed again and again. He suggested the ultimate problem is the heavily top-down approach to sub-national democracy favoured in the UK. The varied nature of English local government was emphasised by reference to the City of Cambridge which has four levels of local government and Rochester where there is only one. Dr Stanton suggested that greater clarity about the models and choices available to local areas is therefore required, even before we can turn to the issue of how powers and resources are distributed across levels. Dr Stanton highlighted the limited options that central government provides to localities (see e.g., the [Local Government Act 2000](#)) and argued that the constitutional environment in which local government operates needs to change.

Turning to the Brown Report, Dr Stanton commented that some of the proposals were innovative suggestions, such as using the second chamber as a constitutional check on how the centre is treating the regions (though he did not think it was likely to materialise) and the ability for local initiatives and legislation to be communicated to the centre. His main concern was that the rhetoric in the report largely follows the pattern of the last 60 years. Dr Stanton drew parallels between several initiatives by several governments of different colours, the most recent being the levelling-up agenda, in that they say the right thing but suffer in terms of achievable implementation.

Dr Stanton argued that an effective agenda needs to go beyond the specifics of local government and focus on the broader picture in order to limit central government's powers in relation to local government, which is an aspect the Brown Report does not engage with sufficiently. An effective agenda also needs to focus on creating the constitutional space in which local government can function effectively, without that being enforced from the centre. In concluding, Dr Stanton stressed that the ultimate challenge is creating the political consensus across the local and medium levels alongside commitment from the centre.

Prof Patrick Diamond, Queen Mary, University of London

Prof Diamond firstly provided some intellectual and political background to the Brown Report's recommendations, particularly how they relate to previous actions of the Coalition Government. He suggested that the New Labour reforms, though not creating the English question, failed to deal with it by leaving England's place in the newly constituted UK opaque and to some extent undefined. He acknowledged that there was a regional agenda which Labour had been working on in the 1980s and 1990s due to demands from John Prescott who wanted to pursue a coherent regional agenda. This produced the nine regional development agencies in England in 1997/8. These were, however, a centralised reform since members were chosen by and accountable to ministers. Prof Diamond explained that there was also an

attempt in 2004 to introduce an elected element into the regional framework by holding a referendum on a North East regional assembly. Ultimately, this was defeated by the no campaign, led by Dominic Cummings, making anti-politics arguments which were effective and prevented Labour seeing through their regional agenda and which effected a shift to city-led devolution. Prof Diamond followed the effect of this through to the coalition years where there were a series of efforts made between 2010 and 2014 to implement a framework of combined authorities ('Cas') and elected mayors that would devolve powers to cities. He noted that there are now 11 CAs across England, commanding a reasonable degree of consensus and offering political incentives to both major parties.

Secondly, Prof Diamond reflected that the Brown Report is in line with the emerging consensus that city-based devolution is an important tool in England for plugging gaps in the national framework. However, he suggested that the Brown Report diverges from that consensus in two important respects. This is because it has a focus on ("double") devolution, to levels below a city such as neighbourhoods which would oversee the delivery of local public services as well as engineering deliberative involvement in the democratic process. Prof Diamond suggested that the exact meaning of that proposal is left to a degree vague, but it is certainly a move away from the agenda of the current government. Prof Diamond noted there is also a return to regionalism in the Brown Report with the regional partnership proposal. These are groups of several combined authorities collaborating to deliver major projects such as infrastructure items.

Finally, Prof Diamond outlined four reasons why he is sceptical of the ability of a Labour government to implement the agenda. (1) A successful devolution programme in England would require far greater fiscal devolution which for various reasons a Labour government is unlikely to accept. (2) The historical ideology and outlook of Labour politicians is highly centrist, believing that the best way to deliver economic and social reforms is through top-down imposition. (3) The proposals are quite complex and as such they are likely to encounter resistance on the basis that they would create more politics and more bureaucratic waste. (4) Devolution is always hard to achieve because it confronts vested political and institutional interests as well as the sensitive politics of territory. On the latter point, Prof Diamond questioned how desirable it would be for Keir Starmer as Prime Minister to have many more directly elected mayors, some of whom would be Labour members, actively opposing policies the party is pushing in Westminster.

PANEL THREE: "INSTITUTIONAL MODES OF PROTECTION AND FULFILMENT OF SOCIAL RIGHTS"

Chair: Prof Tarun Khaitan, Professor (Chair) of Public Law, LSE Law School

Prof Kate O'Regan, Professor of Human Rights Law and Director of the Bonavero Institute of Human Rights, University of Oxford

Unfortunately, Prof O'Regan was unable to join the conference.

Prof Jeff King, Professor of Law, UCL and research Director, Bingham Centre

Prof King began by explaining how the rights appearing in Chapter Six of the Brown Report are part of the Report's approach to defining a renewed purpose for the Union and its central apparatus (central government). The aim is to create shared social citizenship and to provide economic opportunity and security across the whole country. Social rights are seen as filling out a picture of what the Union is meant to secure to ensure a common social framework that is protected by the UK Parliament. The Brown Report proposes four new social rights relating to health, education, housing and poverty. The Brown Report prefers for these to be protected in a concrete form as guarantees, rather than an aspirational form as policy objectives. Prof King then engaged with the proposals through the lens of four key issues that need to be addressed.

Firstly, Prof King considered what is meant by entrenchment and how it might work in the Brown Report framework. He explained that the type of entrenchment suggested in the Report is that the second chamber would have an absolute veto over legislation that relates to a defined set of constitutional statutes. Prof King emphasised that the distinction between constitutional and ordinary statutes will be key, as the Report envisages a less significant role for the upper chamber generally apart from in relation to constitutional issues. However, the Report is ambiguous about whether social rights will be on the list of protected statutes. Prof King predicted that the second chamber's blocking function is unlikely to materialise in practice as the Report itself emphasises that the chamber should not have responsibility for tax and spending decisions. Prof King suggested that the implication is that either the courts must play a significant role, though the Report is not enthusiastic about this, or there must be a more active political process in conjunction with mild judicial review.

Secondly, Prof King considered how the rights would interact with devolution. He pointed out that the subject matter of such rights is mostly devolved, so creating guarantees will require legislative consent or legislating contrary to the Sewel Convention. He predicted that the political conditions for the obtaining of consent will likely involve some important concessions, including revisiting the Barnett formula and a resource package to implement the provision of social rights.

Thirdly, Prof King considered how the rights would function in the Courts. He emphasised that both resource rationing and the prominence of judicial restraint should be viewed as compatible with the constitutional protection of social rights.¹ Prof King noted that the Brown Report is alive to these points as it refers to giving constitutional effect to arrangements to which the UK is already committed. The proposal is therefore politically credible and enables incremental change via judicial enforcement rather than judicial mandating of unfunded changes to the delivery of social services. Prof King suggested that it would be necessary to consult (likely via a citizen's assembly) on the standards suggested in the proposal. In considering the model of enforcement, Prof King suggested it would not be subjectively enforceable rights brought as free-standing claims as in Section 6 of the Human Rights Act. He suggested instead that the rights would be used to interpret the dense coverage of statutory and regulatory rules that apply in the areas covered. Prof King suggested this could work via the introduction of an interpretive obligation on courts similar to Sections 2 and 3 of the Human Rights Act or the public sector equality duty in Section 149 of the Equality Act, to have regard to social rights and a requirement to give the interpretation that affords greater protection to the Claimant in cases of ambiguity. Prof King explained that, though not a revolutionary legal change, he thought it was likely to introduce a higher standard of judicial review along the 'anxious scrutiny' lines which was valuable.

Finally, Prof King commented on the Brown Report's suggestion for a body akin to the Equality and Human Rights Commission ('EHRC') to monitor the observance of these social rights principles and report to Parliament. He suggested that this is a promising avenue which would ensure a degree of political prominence and discussion, although similar previous initiatives such as the Climate Change Committee had produced mixed results.

Stephen Hockman KC, Society of Labour Lawyers and Six Pump Court

Stephen covered three topics: the definition of social rights, the mechanism for entrenchment, and the role of the courts.

Firstly, Stephen commended the ambitious approach taken in the Brown Report to defining social rights. However, he also drew attention to the principle of ['equality of access' as formulated by Peter Kellner](#). Stephen then considered the common objection to the proposals: that these rights impose on the state not just negative obligations but also positive obligations. However, he challenged the distinction by pointing out that some classic civil liberties, such as

¹ See J King, 'Judging Social Rights' (Cambridge University Press 2012).

the prohibition on torture, also create some element of positive right on the state because, for example, they must ensure that citizens are protected from torture by non-state actors.

Secondly, concerning entrenchment, Stephen drew attention to the work being continued by the Society of Labour Lawyers to further develop this concept. He argued that we should not rule out that these rights can be entrenched, even under our current constitutional system. The Brown Report suggests a second chamber veto, but he noted that this may conflict with proposals for the second chamber or fail to take hold culturally. Stephen suggested a requirement for a supermajority in the House of Commons as an alternative mechanism, though he conceded that it is not certain if the courts would enforce this. Stephen argued strongly that there was a need for a genuine form of entrenchment rather than an enhanced form of enforcement such as an interpretive obligation.

Thirdly, on the role of the courts, Stephen considered international comparators such as India, where the courts are excluded from dealing with these types of provisions. He considered that the courts should have a role in upholding these rights. Considering whether it was legitimate for the courts to take on a quasi-legislative role, Stephen pointed out that judges are not intimidated from playing this role simply because they discover the line that divides marginal cases is difficult to draw. The distinction between the mechanical application of rules and judicial discretion is a matter of degree and not the sharp distinction it is made out to be. Stephen concluded we should be prepared to trust the judges with these types of issues.

Colin Caughey, Director of Public Policy, Northern Ireland Human Rights Commission

Colin began by explaining the role of the Northern Ireland Human Rights Commission ('NIHRC'), which includes advising on a bill of rights for Northern Ireland. He also considered the need for improvements in the policy-making process to support socioeconomic rights in the UK and offered observations on the devolution settlement and its implications for rights protections.

Colin explained that the UK is unique in having three national human rights institutions ('NHRIs') which are independent national bodies accredited by the UN. The NIHRC is the NHRI for Northern Ireland with a remit that extends to both devolved and non-devolved matters in Northern Ireland. Colin noted that the Brown Report refers to the EHRC, suggesting that it take on a role relating to social rights throughout the UK, but does not consider the two other human rights institutions, the NIHRC and the Scottish Human Rights Commission. Colin suggested that this needs to be reconsidered.

Colin noted that the Good Friday Agreement proposed that [the NIHRC have a role in advising on a bill of rights for Northern Ireland](#), though it was made clear that advice should relate to rights that are supplementary to the European Convention on Human Rights ('ECHR') and reflect the circumstances in Northern Ireland. This work was the focus of the NIHRC for the first ten years. There was a lack of political consensus on the content of a bill of rights – As Colin explained, generally, unionists were opposed to a broad bill of rights containing social rights and nationalists were in favour. Colin noted that the NIHRC's advice proposed protections for the four social rights referred to in the Brown Report and that judicial review be available. The Secretary of State responded that over half of the rights proposed in the advice were as relevant to citizens of the rest of the UK as they were to the people of Northern Ireland, meaning that introduction in Northern Ireland would give rise to unjustified inequalities across the Union. The Northern Ireland Office further argued that economic and social rights were outside the democratic mandate of the judiciary since they would affect state spending. Since this initial response, the UK Government has continued to express support for the concept of a bill of rights for Northern Ireland, however, it has highlighted that it cannot progress in the absence of consensus. There is a persistent suggestion from this process that any advancement of social rights must be on a UK-wide basis.

As regards devolution, Colin suggested a UK-wide provision for social rights, the subject matter of which is devolved, would likely not be welcomed by the devolved administrations as it

would in effect constrain them in the provision of services. He suggested that devolved governments may be happy to receive more funding to provide services but would not be happy for Westminster to dictate resource distribution. Colin suggested that one way to mitigate the risk of further human rights protections being seen as a power grab would be to draw from the international and regional human rights instruments that the UK has ratified. This would be an exercise in incorporating into domestic law the UK's international obligations, which Colin recommended as state bodies, civil society actors and NHRIs are used to performing their functions in relation to these standards.

Finally, Colin noted that the right to education is already protected under the Human Rights Act so further explanation is required to show what further protection as envisaged in the Brown Report would contribute. He also highlighted that in the Brown Report the right relating to poverty is premised on a "legitimate presence" in the UK which is contrary to the universal nature of human rights.

REFLECTIONS ON THE CONFERENCE

Prof Jim Gallagher CB FRSE, visiting Professor, University of Glasgow School of Law

Devolution and the Union: Prof Gallagher made two points on the devolution settlement between the devolved nations and Westminster. Firstly, he noted that there is broad consensus on the type of actions that need to be taken to make inter-governmental relations effective, with which the Brown Report is in line. Where the Report is more radical, is in acknowledging that while the UK is a multinational state and needs inter-governmental relations ('IGR') that reflect that, it is also a series of bilateral relationships that reflect the individuality of each part. Prof Gallagher commented that there is an opportunity to blur the boundaries between IGR and international relations in the British Irish Council where both sovereign and devolved governments meet. Secondly, Prof Gallagher emphasised that none of this is a panacea, and that even extremely well-functioning IGR will not make questions of nationalism go away. However, he emphasised the importance of putting the Sewel Convention on a firmer footing, commenting that if it cannot be done by the means suggested in the Report, another way must be found.

English devolution: Prof Gallagher commented that, even if it is not clear that greater English devolution would have a positive economic effect, the current arrangements are not doing so either, so trying something new is a good idea. He cited economic literature suggesting that the effective level at which to manage economic development is at the level of some millions of people, implying that we should start from the assumption that greater devolution is a necessary but not sufficient condition for economic development. Prof Gallagher reflected that the Brown Report was in line with a positive consensus on mayoralities and combined authorities, though there was a danger of decentralising power in a way whereby central power is also retained, and he commented that areas and regions being forced into devolution is not empowerment. Prof Gallagher also raised the important point that English devolution would inject greater political pluralism into what is a "winner-takes-all" system. Once there is decentralised power in England, it will be possible for different parties to be 'in power' in different places and levels at the same time, which Prof Gallagher commented is healthy for democracy.

Protection and fulfilment of social rights: Reflecting on the rich discussion of social rights at the conference, Prof Gallagher noted that the principal purpose of the rights suggested in the Brown Report is to guide the government and that the Report had proceeded on the assumption that there would be a mechanism to implement these rights. He commented that the discussion during the conference showed that there would be a choice of mechanisms. Prof Gallagher reflected on a question underlying some of the discussion, about the kind of entrenchment we should try to achieve and what purpose it serves. Prof Gallagher's answer was made by reference to A.V. Dicey, whose work shows there is a spectrum of possible

constitutional arrangements ranging from the more rigid to the more flexible. For Prof Gallagher, the USA exhibits an arrangement where it is too hard to change the Constitution and the UK governed by Boris Johnson exhibited an arrangement where it was too easy. Prof Gallagher favoured the mechanism suggested by the Brown Report where the second chamber had a veto over certain legislative changes (perhaps subject to a requirement for super majorities in the Commons) and acknowledged that the entrenchment mechanism itself needs to be entrenched ('double entrenchment').

Future developments: Giving a prediction of what would happen next, Prof Gallagher thought a future government faced with the current national difficulties might find it challenging to fully implement the recommendations in the Brown Report as an early package, though they may be able to cherry-pick elements. He argued that action on public standards and English devolution were non-negotiable and that a process of reform of the House of Lords should begin.

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