

A Written Entrenched Constitution for the United Kingdom – all of it and parts of it.

Delivered on Friday 7th November 2014 at the National Library of Wales by Lord Bourne of Aberystwyth

Section A – Aberystwyth

It is a great pleasure to be here this evening Mr President.

My first trip to Aberystwyth was actually to take up my University place in the Law Department. I had not been before. I made the train journey from my home in Essex via London, and after changing trains at Shrewsbury, it seemed that each town I visited was smaller than the one I had just left. By the time I got to Borth I was seriously worried that I was going to be placed in a large village rather than a cosmopolitan town. I needn't have worried; Aberystwyth's spell was woven over me within minutes of my arrival. Actually I was staying in nearby Bow Street – almost by accident. My parents, in organising my accommodation, had not unreasonably believed that somewhere with a name Bow Street, Aberystwyth, with its echoes of Sir Robert Peel's runners and an urban property in the game of Monopoly would be in the centre of the town. It was not to be. I finally reached Bow Street by bus and was then taken on to Mrs Mort's digs by a kind resident. The kindness was an auspicious start.

I remember during the journey to Aberystwyth that I was reading two books – I have had a lifelong love affair with books. One was Robert Markham, or Kingsley Amis as he was better known writing the latest Bond book 'Colonel Sun'. It was based on a sun drenched Greece. The other was Thomas Hardy's 'Far From the Madding Crowd' which was based on a windswept Wessex. Aberystwyth was to prove, despite the later exotic novels of Malcolm Pryce, more like Hardy's Wessex than Markham's Greece. It didn't matter. Three wonderful years and some lifelong friendships, and the benefit of the teaching from an excellent Law Department magnificently led by Professor John Andrews. It was all I could have hoped for.

Years later I came back as an Assembly Member of the National Assembly for Wales and was happily based here living in the town for over a decade. Later still I had no hesitation in persuading the Garter King of Arms to add the appendage of Aberystwyth to my title on taking up my place in the House of Lords.

I would like to thank the National Library for asking me to deliver this lecture and for the assistance they have provided me in terms of access to literature and for their guidance. I have had a long association too with the National Library having used it frequently as a student and more recently as a resident, and I am proud to be Friend of the National Library – both emotionally and institutionally.

The pitch of my speech tonight is to look at the case for a written constitution contained in a single entrenched document covering a whole range of constitutional activity 800 years after the signing of Magna Carta. Then to look specifically at the constitutional chapter of the project and particularly the shape of devolution within the constituent parts of the United Kingdom. I should say in opening the substantive part of my speech that this is very much a personal view of the constitutional vista.

Section B – A Written Constitution

1. The case for a Written Constitution

The term ‘Written Constitution’ is often, indeed, usually used somewhat misleadingly. Most of the constitutional rules of the United Kingdom are already written down in statutory form. It is not as if there is some court of elders gathering around a camp fire making constitutional rulings based on folklore handed down from generation to generation, conducting affairs as if in some red Indian pow ow.

The British constitution is only unwritten in the sense that its rules are not contained in a single constitutional document, as is the case in most other countries, indeed the vast majority of other countries. Such constitutions are generally entrenched, that is to say it is more difficult to alter the terms of the constitution or at least some of its terms than would be the case in a normal statute. This might involve typically the need for a two-thirds majority of legislators to vote in favour of change. There might also be time constraints on how a change may be made. Alternatively changes of certain provisions in the constitution may require the backing of a plebiscite. As will be seen, without any deliberate move to an entrenched constitution, the United Kingdom has already moved some way down this path.

Over the years Acts of Parliament have contributed towards the constitutional framework of the United Kingdom. Thus the Union of England and Scotland Act 1603, which provided for the investigation of the possible union of England and Scotland beyond the Union of the Crowns is such an Act. This was not effective, however, and the two kingdoms were eventually united over a century later by the Acts of Union 1707.

Other Acts have contributed to the constitution. The Bill of Rights of 1689 was an Act of Parliament providing that the succession of the Crown should pass to William and Mary as joint sovereigns of England and Wales.

The Habeas Corpus Act of 1679, defined and strengthened the prerogative writ of Habeas Corpus, a device to oblige the courts to examine the legality of a prisoner's detention.

Perhaps most famously we have the Magna Carta 1215 or Great Charter of the Liberties of England. It also has chapters dealing with Wales and Scotland. This was the first statement of rights imposed upon a King of England by a group of his subjects, the Barons.

It was an attempt to limit the King's powers by law. This Charter is, of course, well known throughout the English speaking world and beyond, and next year will be the 800th Anniversary of its signature.

More recently we have had the Parliament Acts of 1911 and 1949, two Acts which limit the powers of the House of Lords to block legislation that has been passed by the Commons.

All of these documents are statutory provisions that contribute towards the constitution of the United Kingdom. What the United Kingdom lacks is a single consolidating document, a written constitution, entrenched and recognisable as the constitution of the land.

Additionally, a feature of countries with unwritten constitutions so called, is the importance of constitutional conventions which are not codified. Thus conventions that surround the use of the Royal Prerogative,

Ministerial responsibility, the rule of law and the sovereignty of parliament are all important parts of the United Kingdom's constitution.

Most constitutions in the world were written constitutions.

Few countries have unwritten constitutions. Israel, New Zealand and the United Kingdom are amongst the few that do not have written constitutions.

Of course, the presence of a written constitution is certainly no guarantor of fundamental liberties and human rights. Some of the worst despotisms in the world have written constitutions.

My argument is not that a written constitution will always guarantee fundamental rights and constitutional rules, but that in a developed country it provides certainty.

What I am keen to investigate this evening is whether a written constitution would, in the case of the United Kingdom, help the efficient running of the constitution, and in the context of a country with democratic rights and liberties traditionally protected by the courts, put some of those fundamental rights on a different level.

It is somewhat ironic in the case of the United Kingdom that with few exceptions, up to and including the Basic Law in the case of Hong Kong in 1997, the United Kingdom has handed over freedom to its former colonies with the backing of a written constitution. It may be asked why, if this is so helpful to our former colonies, do we not follow this good practice ourselves.

Too often it seems that we take the view that everybody is out of line, except Little Willie, to adopt the language of the proud mum watching her son keep pace in time when all the others are marching out of time.

This somewhat jingoistic approach is very well summed up in Charles Dickens's 'Our Mutual Friend' when Mr Podsnap is in conversation with a person described by Dickens as a foreign gentleman.

“We Englishmen are very proud of our constitution, Sir. It was bestowed upon us by providence. No other country is so favoured as this country” said Mr Podsnap.

“And other countries,” said the foreign gentleman. “They do how?”

“They do, Sir,” returned Mr. Podsnap, gravely shaking his head; “they do—I am sorry to be obliged to say it—as they do.”

Consolidating, codifying and entrenching key parts of our constitution provide certainty and security with fundamental provisions adamant or, at the very least, difficult to alter.

2. Lessons from other Countries

As has been noted, most countries have written constitutions. Indeed the vast majority of members of the United Nations have a written constitution contained in a single constitutional document which is entrenched, from Afghanistan, Albania and Algeria to Kazakhstan, Kyrgyzstan, both Koreas, Kuwait, Luxemburg, Libya, Malaysia through to the Socialist Republic of Vietnam, Yemen and Zimbabwe.

Of those countries that have written constitutional documents India has the longest and the United States the shortest.

As noted, of course, the possession of a written constitution does not signify effective protection of human rights or fundamental freedoms. Nor does it necessarily mean that the constitution is not subject to frequent changes. It is alleged in India that on one occasion when a citizen asked in a bookshop for copy of the constitution, he was told sorry we do not sell periodicals!

3. Entrenching the Constitution

A common feature of countries having a written constitution is that they have a specialised procedure for altering some or all of the provisions of the constitution. This would typically include making it more difficult to alter the constitution while requiring more than a simple majority of votes in the legislature to make the alteration.

It is said that in addition to the question of whether it is wise to have a written constitution is the very real legal question of how, in a country

with a doctrine of sovereignty residing in the Queen in parliament such as our own, can a constitution be entrenched. How can any law be placed on a different plane from other laws. Can it not simply be amended or repealed in the traditional way?

It is already the case in the United Kingdom that some legislation is more difficult to alter because of such provisions. This raises some basic questions about the sovereignty of parliament. From Jeremy Bentham and John Austin onwards within the United Kingdom, jurists have recognised that sovereignty lies with the Monarch in parliament. Traditionally legislation could not bind future parliaments. An act of parliament could always be repealed or amended by a later act of parliament. Thus in strict legal theory, for example, the India Act, giving India independence, could be repealed by the Westminster parliament following the same procedure with which it was enacted.

This doctrine, a classic Austinian view is also reflected in Hans Kelsen's exposition of the Grundnorm, the Basic Principle or law of the constitution and the Basic Principle within the United Kingdom would traditionally reside within this principle of the sovereignty of parliament.

Sovereignty in the Monarch in parliament was, according to this principle, absolute. However, in the United Kingdom some legislation at least purports to make it more difficult to alter the legislation than is the norm, or seeks to assert that it has some superior status to other legislation.

Thus the European Communities Act 1972 in Section 2 could be said to drive a coach and horses through the traditional view of the sovereignty of parliament.

Section 2(1) of the Act provides in simple terms that provisions of EU law that are directly applicable, or that have direct effect such as EU regulations and certain provisions of the EU treaties, are automatically, without further enactment, part of the United Kingdom law. Furthermore, Section 2(4) provides that any enactment passed or to be passed shall be construed and have effect subject to the foregoing provisions of the sections, i.e. in the light of the European Communities Act.

Section 3(1) provides for the purpose of all legal proceedings, any question as to the meaning or effect of any of the Treaties or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and if not referred to the European court, be for determination as such in accordance with the principles laid down by, and any relevant decision of the European Court).

The effect of these two sections is to give effect to the doctrine of the supremacy of EU law as interpreted by the European Court of Justice over national law. Only by some considerable sophistry or legal fiction can this be fitted within the traditional view of parliamentary sovereignty.

This supremacy of European Law is all borne out by the Factortame case (1991).

The case concerned a United Kingdom company that was owned and controlled by a number of Spanish nationals. The company engaged in fishing activities in the United Kingdom's territorial waters. The principle reason for establishing the business in the United Kingdom was to bypass fishing quota exemptions available to United Kingdom nationals and companies.

The Merchant Shipping Act 1984 prescribed that no foreigner was permitted to register a fishing vessel. However, nothing precluded a United Kingdom company from registering a fishing vessel.

It was argued on behalf of the company that it was authorised to fish within any area regulated by the laws applicable to the then EEC. It was argued that the restrictions were contrary to community law. The company was controlled by Spanish shareholders.

The House of Lords sought clarification from the European Court of Justice whether the national courts had the power to grant injunctive relief to enable nationals to be afforded protection against breaches of community laws. The European Court of Justice determined that if the only preclusion to granting injunctive relief to give effect to community law was the national laws of a member's state, then that national law ought to be set aside.

The House of Lords, following the European Court of Justice's determination, interdicted the Secretary of State from withdrawing the registrations under the Merchant Shipping Act of 1988 which required that UK vessels should be 75% UK owned.

The case makes clear the supremacy of community law over United Kingdom law. It shows that the Grundnorm has shifted.

There are, in addition, further seeming limits on the sovereignty of parliament. Thus Section 1 of the Northern Ireland Act 1998 provides for a 'binding' referendum requirement in relation to the status of Northern Ireland. In political reality, it is hard to see this being reversed by statute.

Furthermore, the Human Rights Act 1998, Section 3, empowers courts to 'read' legislation in such a way as to give effect to the European Convention on Human Rights.

The Fixed Term Parliaments Act 2011, Section 2, has a provision requiring a qualified majority of at least two thirds of the members of the House of Commons to bring forward the date of a general election.

The truth is that for some time now sovereignty in the United Kingdom has not been absolute within the Queen in parliament. The rules on determining where sovereignty lies have been changing over many years. Legislation altering the succession of the Crown, such as the Act of Succession of 1689, has certainly altered the reality of sovereignty. So too have the Parliament Acts of 1911 and 1949 restricting the powers of the House of Lords to delay legislation.

In a similar way, and more dramatically, more recent legislation providing for a referendum on qualified voting, as well as requiring that future legislation be interpreted in the light of a particular act of parliament such as the European Communities Act of 1972, and the Human Rights Act of 1998 have similarly refined sovereignty.

The use of referendums in the Celtic nations of the United Kingdom and in the whole of the United Kingdom on electoral systems and presaged for EU membership is, in reality, incompatible with parliamentary sovereignty. The country is moving to a position where the people are acknowledged as sovereign, not the Queen in Parliament, although it is through Parliament that this principle is expressed.

The reality then is that for some time now sovereignty has not been absolute in the Monarch at parliament in Westminster. Parliamentary sovereignty has been qualified in the light of political realities. Kelsen's

Grundnorm has shifted. This aperçu surely renders it possible for us to invoke a written constitution to help deliver a clear statement of our constitutional rights and freedoms placed on a higher shelf in the legislative shop than other legislation.

A written constitution would be a clear parliamentary recognition of this shift and would provide security in the context of devolution to the various parts of the United Kingdom of a settled will in terms of the powers of the constituent parts of the Kingdom. The devolution settlement for Scotland, Wales and Northern Ireland is surely irreversible and a written constitution would put that totally beyond doubt.

The truth then is that legal rules give way to political realities. It is unthinkable in any meaningful way that the India Act could ever be repealed. Similarly it is surely inconceivable in terms of political reality that the devolution settlements that affect Scotland, Wales, and Northern Ireland, would ever be revoked, certainly not without a plebiscite, though, of course, they may be amended. A written constitution could put this beyond doubt if it contained entrenched provisions. It should also be noted that at large, international law is a check on absolute sovereignty. Thus membership of the United Nations and other international organisations imposes international obligations, and membership of NATO is a demonstration of the pooling of sovereignty by the United Kingdom as well. Parliament is, of course, already looking at this question. The House of Commons Political and Constitutional Reform Committee has examined the case for a written constitution and, without supporting a position for or against, has put the question out to public consultation until the end of 2014.

Proponents of a written constitution have been diverse – Lord Hailsham from the right and Tony Benn from the left for example. It is not a question that is inherently loaded with ideology, although this may, of course, affect the content of the constitution. To me there is something attractive in the people of our islands having an ‘Owners’ Manual’ setting out our rights and freedoms and responsibilities. A written constitution offers the prospect of a coherent rule book to guide our constitutional development. It will, for example, set out what powers are to be properly exercised by Westminster. It is the role of Westminster that urgently needs to be clarified, both as a result of EU membership and as a result of devolution.

The result of all of this would be a fundamental change in our constitutional arrangements in the United Kingdom with a separate

distinct body of statutory constitutional law backed by a Constitutional Court.

4. The Debate on Devolution

This part of my analysis gives way to the next part. I have so far concentrated on looking at what it would mean to the United Kingdom to have a written constitution and whether that written constitution could be entrenched, to which I believe the resounding answer is ‘yes it could’.

I do not intend to look at what should be contained within this constitution in any great detail but to consider it in the most general terms.

The constitution should cover such matters as the functions of the Monarch as Head of State, the Privy Council, citizenship and the relationship between the citizen and the state, the working of parliament - both the House of Commons and the House of Lords, an exposition of fundamental rights and freedoms, the conduct of elections, and the relationship with Europe.

There is, of course, currently a debate about whether the United Kingdom should have its own statement of rights and freedoms. This new constitution could be a vehicle for such a move. This is something that Lord Neuberger, President of the Supreme Court, has recently suggested for example.

I do think that a written constitution should certainly contain rules regarding the relationship between the different parts of the United Kingdom and the question has become more pressing now post the Scottish referendum decision this September, and the vow given by the Prime Minister, the Deputy Prime Minister, and the Leader of the Opposition.

I believe that a debate is needed as a matter of some urgency to look at the details of how power should be dispersed within the component parts of the United Kingdom, and that debate needs to look at not just legislative powers but also financial settlements in terms of what subvention is received from the centre, and what tax raising powers are given to component parts of the United Kingdom.

Wales, Scotland and Northern Ireland have already travelled some distance, though differing distances, along the devolutionary route. There is no pre-conceived destination except that certain power, in my belief, should be retained at Westminster.

Devolution is important and appropriate and established and so too is the union in my view and the recognition of what Abraham Lincoln once called “The mystic chords of memory that bind us together”.

The second part of the Silk Report provides, in my view, a model of how future devolution may be shaped in Wales. The unanimous report was a result of the work of our Chairman, Paul Silk – a Chairman of great patience and good humour, marshalling the thoughts and ideas of the political representatives and independent members of the Commission – a somewhat unlikely but essentially happy crew. This report provided for a reserved powers model and further devolution of powers including policing and other Home Office powers, as well as some economic and energy powers, for example. This followed the taxation and fiscal provisions contained in the Wales Bill 2014 currently passing through Parliament.

The dog that hasn't barked, or the sleeping giant as it is sometimes termed, is England. How is England to deal with matters that are specifically English? Should there be an English parliament for example? These are questions which rightly should be determined by people within England just as the Welsh, Scottish and Northern Ireland devolution settlements have been primarily matters for the residents of those countries. The devolutionary questions for England should rightly be matters for those within England though, of course, devolution in any one part of the United Kingdom impinges upon the rest. There is a need for a nuanced approach here. Some issues affect devolved countries more than is immediately apparent; perhaps most obviously budgetary allocations in England would currently influence spending levels in Wales, Scotland and Northern Ireland.

In addition, the new constitutional settlement will need to take account of the so called West Lothian question, i.e. that it is inappropriate that legislators from one part of the United Kingdom should be able to vote on legislation that applies **exclusively** within other parts of the United Kingdom, thus a Scottish MP should not be able to vote on legislation that only affects England and Wales for example.

Nor should we be afraid that the result of any debate which, I believe, needs to be made up not just of legislators and the great and the good but of people from all parts of the United Kingdom. It may well come up with an asymmetric construct of how the constitution of the United Kingdom should operate. It is far more important that it should work for all parts of the United Kingdom than that it should look like some idealised model of how a constitution works. For a long time now the United Kingdom constitution has, in diagrammatic terms, looked somewhat like a Heath Robinson construct, but for most of that time it has worked perfectly well.

5. Conclusions

Let me draw some tentative conclusions.

1. The importance of the task in hand of maintaining and enhancing our political union and of setting out a constitutional document for our time means we should look seriously at the case for a written constitution.
2. Such a written constitution should constitute a very substantial piece of work encompassing individual rights and freedoms, expositions of the workings of key parts of our constitution, constitutional machinery and, not least, a statement of rights and obligations of the component parts of our United Kingdom.
3. Such a constitution should be entrenched and certainly that principle should apply to key parts of the devolution settlement.
4. This project is considerable and in practice a constitution would comprise many separate Acts of Parliament to make up the constitutional whole.
5. The Devolution of Powers Bill, if I may so term it, would need to take a panoramic view of the settlement for each part of the country. Separate ad hoc consideration of each part of the Union may provide a 'fix' for a particular problem, but an overall constitutional vista is needed otherwise it is as if, as an architect, we have superbly designed

separate rooms for a house without looking to see how they will complement each other and dovetail into the completed building.

6. The devolution chapters of the constitution will need to strike a balance between powers devolved and powers retained. Silk II for Wales is, in all modesty, a bold and realistic All-Party and independent attempt to grapple with this difficult question in the context of Wales.
7. The devolution settlement needs to provide for appropriate fiscal support for the nations of the United Kingdom. The Barnett formula has been discredited by both the Holtham Commission and by the House of Lords Committee that looked at the issue.
8. In my belief there needs to be taxation powers.
9. My own personal view of the overall constitutional settlement for the United Kingdom is that the search for symmetry across the United Kingdom is misguided. To take one obvious example, Northern Ireland needs a form of government that takes proper account of both communities within Northern Ireland. Other factors may influence the ultimate form of devolution. The Welsh language is more prevalent in Wales than Gaelic is in Scotland. The Anglo-Welsh border is more porous than the Anglo-Scottish border and so on.
10. The English dimension needs addressing with some degree of urgency and certainly with equity and sensitivity.

Through a mixture of disquieting complacency and well-meaning respect for traditional methods of working, we came within an ace of losing the United Kingdom, probably the most effective political union the world has ever seen.

A refreshing willingness of the Secretary of State for Wales to work across party lines, a willingness I may say that seems to be shared by the First Minister and other party leaders in Cardiff Bay, and the preferred approach of a Prime Minister who is keen to ensure that government is close to the people means that we have an opportunity to move things forward in Wales and more broadly.

I believe that 800 years after Magna Carta we are now faced with a position where the challenge and dominating issue of the next parliament

is likely to be the constitutional settlement of how the component parts of the United Kingdom operate into the foreseeable future.

That is the challenge we face. We must rise to that challenge.

Lord Bourne of Aberystwyth