Chapter Seventeen: The Future of the UK

When in 2019, with Lady Hale sporting her famous spider-shaped brooch, the Supreme Court disallowed the government's advice to the Queen on the prorogation of Parliament, it declared (in paragraph 40 of its ruling) that though the UK did not have a single document setting out the constitution of the UK, it had one 'established over the course of our history by common law, statutes, conventions and practice'.[1] This chapter considers the chances of something more focused emerging in the next few years than a set of conventions and practices garnered through time.

The first point to make is that it is unlikely that significant constitutional reform will happen under the present Conservative government. During the 2019 British general election, Boris Johnson's Conservative government promised to instigate major constitutional reforms. However, this has not happened.[2]

It is undoubtedly the Labour Party which takes the idea of constitutional reform most seriously. It has a clear practical reason for being interested in saving the Union – or at least Great Britain. Its strength – perhaps its survival – in electoral terms is closely associated with the survival of Britain. Before the rise of the Scottish National Party, Labour had the overwhelming majority of seats in Scotland, as it still has in Wales. Its position might be compared to that of the Liberal Party a century ago, which was then heavily dependent on the votes of Irish MPs. In 1910 the Liberal government remained in power because it had the support of 80 Irish MPs, even though the Conservatives had just as many seats as the Liberals. By 1922, when the Irish Free state had been formed whose

1 UK Supreme Court 41 (2019), Judgment (on the Application of Miller) (Appellant) v The Prime Minister (Respondent).

2 See Schleiter, P., Fleming, T.G. *Radical departure or opportunity not taken? The Johnson Government's Constitution, Democracy and Rights Commission*. British Politics (2022).

MPs attended the Irish Parliament or *Dail* rather than Westminster, that support had gone. Indeed, the Irish MPs who remained in the Westminster Parliament were Unionists from Northern Ireland who supported the Conservatives.[3] Unless one wants to call the Coalition government of 2010–15 a 'Liberal' government, one can say that the Liberals never formed a government again (though for other reasons besides the loss of Irish support).

There is evidence that the Labour Party might embrace some of the reforms made by the Welsh *Senedd*, whose leader is, after all, also the leader of the Labour Party in Wales. Three years before the *Senedd* proposals, in November 2016, former Labour Prime Minister Gordon Brown made a speech to the Fabian society calling for a 'people's convention' on the constitution and outlining suggestions for constitutional reform. There was also a long report (234 pages) overseen by Labour peer Pauline Bryan, made for Jeremy Corbyn, the leader of the Labour Party in 2016, called *Remaking the British State*.[4] It anticipated the *Senedd* proposals in calling for the Lords to be replaced with a federal senate of the nations and English regions – effectively a UK version of the German *Bundestag* – and proposed various new financial and policy powers for the devolved nations. It is noteworthy that theScottish Labour leader Anas Sarwar has also backed replacing the Lords with an elected 'senate of the nations and regions.' Of all the reform proposals in the *Senedd*report, this is perhaps the one most likely to succeed.

In December 2020, the new Labour leader, Keir Starmer, announced that Labour intended to launch a UK-wide constitutional commission and the former Prime Minister Gordon Brown was appointed to lead it. At the Scottish Labour annual conference of 2022 Starmer assured delegates that it would 'create a new blueprint for a new Britain'. After an earlier suggestion that more details would be available in time for the Labour conference in 2022, it turned out that they would be forthcoming 'in the coming months.' Then at the end of 2022 Labour announced proposed constitutional reforms, although once again further details are yet to be released. However, there was a clear call for the Lords to be replaced by a body representing the nations and regions.[5] This has con-

3 See 'The General Election of January 1910 and the bearing of the results on some problems of representation' by S. Rosenbaum in the *Journal of the Royal Statistical Society*, Vol 73, No 5 (May 1910), pp. 473–528.

4 See https://www.scottishlabourleft.co.uk/uploads/6/4/8/1/6481256/remaking_the_british_state_for_the_many_not_the_few_final_report_v2.pdf

5 The document has now been published https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf. There is a short but useful summary of the

sistently been the core of Labour reform proposals. At the same time there are a lot of questions that remain unanswered in Labour's programme, not least whether it recognises that power needs to be shared rather than simply given away under its newly adopted 'take back control' slogan.

The Liberal Democrats have long pressed for constitutional reform because of their concern about the voting system and they have a long history of supporting an elected second chamber and devolution. They would probably back some of the reforms Labour proposes. No one can predict with any confidence what is likely to happen in the next election and beyond, but one can have a glimmer of hope that serious constitutional reform might finally be embraced by a Westminster government. At least there is a possible roadmap for it to happen, most likely through the election of a Labour government or some kind of left-wing coalition which is both determined to maintain the Union and has some conception of what needs to be done to ensure its survival.

Bearing in mind the points made discussing the *Senedd* proposals, we can suggest the basic ingredients of what, whether or not it becomes enshrined in a UK written constitution, we consider necessary in order to strengthen the United Kingdom as a multinational state and its ties to the Republic of Ireland.

The *first* ingredient must be an acceptance that the House of Commons will not have the sort of supremacy in a future UK Union that is claimed for it now under the principle of the sovereignty of Parliament (or of the House of Commons). Since 1975, when the first referendum on Europe took place (and people voted by two to one to remain in the EEC), the principle of parliamentary sovereignty has effectively been undermined, even if the referenda have strictly speaking been consultative. It could be said that by his attempted prorogation in 2019 Johnson was simply reminding Parliament that it had to carry out the will of the people, whatever its own views – and many people interpreted Johnson's actions in this way at the time.[6] Doubtless he also recognised that this was a position that could carry him to power with a healthy majority as the 'people's champion' (which it did at the end of that year). But it also meant that the basis of whatever constitution the UK had began to look more like the

proposals and problems associated with them by the *Institute for Government*. See https://www.instituteforgovernment.org.uk/explainer/labours-constitutional-proposals

6 Two former Conservative Prime Ministers accused him of stifling democratic debate. But he could always claim that he was only stifling the ability of MPs to override the decision of the people – and proceeded to call a General Election in December 2019 which he won. See Stephens, *Britain Alone*, p. 408.

sovereignty of the people than the sovereignty of Parliament. Though there was a great deal in the popular press that represented the issue as one of parliament versus the courts, it should more appropriately have been seen as one of parliament, supported by the courts, versus the people and their 'leader.' It was the sovereignty of elected representatives in Parliament on the one hand, and the sovereignty of the people expressed through a referendum on the other. When in 2019 the Supreme Court declared that the government's advice to the Queen on the prorogation of Parliament should be disallowed, it made clear that it viewed the outcome of the Brexit vote, though not 'legally binding', as 'politically and democratically' binding.[7]

Brexit undermined the sovereignty of Parliament because it was a political decision based on a referendum in which the people voted against the wishes of most MPs, including the leaders of all the major parties. For four years and through changes of government the MPs struggled to accept a verdict that most of them believed to be against the interests of their country. However, in the end they had to go along with it. They decided that you can't first ask the people and then ignore their answer. It is therefore arguable that the absolute sovereignty of Parliament is not even something that Parliament itself feels committed to. By its actions if not its words, the Westminster Parliament has shown that it would be better to begin, like the American constitution, with 'We the people' as the basis of any constitutional arrangements for the UK.

If one begins with 'the people' one is free to move away from parliamentary sovereignty and towards a system which is more like both that of the United States and the European Union, containing checks and balances. The sovereignty of Parliament as traditionally understood would give way to a separation of powers.

How would such a separation of powers appear if it was to be adopted by a UK Constitution? One obvious element, and probably the one which receives the most support, would be the creation of an effective second chamber. The *second* ingredient of a UK constitution is reform of the House of Lords. People generally feel that it needs reform (though some prefer abolition), but there is concern that a reformed House of Lords might be a threat to the supremacy of the Commons. Hence a separation of powers proves an unavoidable element of constitutional reform. While the House of Lords remains a Ruritanian body, its very insignificance means that it does not raise too many difficult questions.

7 See paragraph 7 of the judgment cited in note 1.

But give the Upper House a clear role which is distinct from that of the Commons, and you are bound to raise the question of how the relation between the two houses is going to be mediated in the event of disagreement.

While such views are understandable, it is noteworthy that despite a century of reform proposals, none of them has included what might be called a territorial element. This is surely an oversight. The future role of the Upper House lies in what Gordon Brown in his Fabian lecture called 'replacing the Lords with a federal senate of the nations and English regions', in other words something akin to the German *Bundesrat,* similar to the report Pauline Bryan made for Jeremy Corbyn and which seems to have been endorsed in proposals made by Labour at the end of 2022, backed by its leader Keir Starmer. One could also point to the way the U.S. Senate is made up of two senators per state, whatever the population of the state (which varies considerably), and the way Canadian senators, though appointed by the Prime Minister, come from specific provinces. About one quarter of the members of the Spanish senate are chosen by regional legislatures. In all these cases some attempt is made to ensure that a second chamber reflects the importance of regional differences. It is noticeable, moreover, that Brown suggested in his lecture 'significant devolution of policymaking and financial powers to English regions and councils, including borrowing,' and this seems to be maintained in the Labour Party's proposals at the end of 2022. The English regions, rather than the English nation as a whole, are therefore treated as part of a devolution settlement alongside the devolved nations.

Gordon Brown was right to point to the need for additional powers at the local/regional level in England. There can be all sorts of arguments about how 'the regions' should be defined. Would one of these regions be the capital, with its ten million inhabitants as large as all the devolved nations outside England combined? Would there be some sort of division between 'inner London' and 'outer London'? There would certainly be some difficulties in what might be called dividing up England, but two things make the inclusion of regions a good idea. One is the obvious need for more devolution of power to councils in England, which have had their powers steadily eroded since the 1970s, when their budgets were increasingly determined from the centre and their powers limited by reorganisation, for instance through the abolition of the metropolitan county councils in the 1980s by the Conservative government under Margaret Thatcher. The other is the advantage of a grouping of members one of which (England) does not comprise five-sixths of the UK in terms of population. Even

a single authority for Greater London would not be anything remotely as dominant.

Hence an Upper Chamber which is made up of what Gordon Brown called a senate of devolved nations and English regions makes sense. Like the *Bundesrat* it could be given the power to veto some legislation. He also suggested that it could have the power to ratify international treaties, including the sort of trade deals which Boris Johnson referred to as facilitated by Brexit but without showing that he wanted the devolved nations to be required to give their consent. It should be noted that Gordon Brown, partly because of his years representing a Scottish constituency, has consistently emphasised the way in which Brexit throws the future of the Union into doubt and even described it, as a BBC News report quoted him saying, as 'sleepwalking into oblivion and nationalism' in a speech given in August 2019.[8]

If there are to be two effective chambers, there has to be an independent arbiter to determine what legislation may come before the Upper House and whether it is a subject on which it should exercise its veto power. Hence the second ingredient of a UK Constitution demands the *third* ingredient, an effective Supreme Court. In Germany the Federal Constitutional Court (*Bundesverfassungsgericht*) is responsible for making sure that all government institutions comply with the constitution. The judges are elected equally by both Houses of Parliament (*Bundestag* and *Bundesrat*). The court has the power to disapply legislation that does not comply with the constitution, and it also decides whether a bill adopted by the *Bundestag* requires the consent of the *Bundesrat* in order to become law (all legislation is passed to the 'upper house', but it may only veto legislation which has particular significance for the regions, a principle which is obviously subject to interpretation). As the website of the German Parliament itself makes clear:

> Disagreements on this issue are not uncommon between the Federal Government and the Bundestag on the one hand and the Bundesrat on the other. The Federal Constitutional Court has had to decide more than once whether a bill requires, or should have required, the consent of the Bundesrat. If the Bundesrat fails to give its consent to a bill of this kind, then the bill becomes null and void.[9]

8 https://www.bbc.com/news/uk-politics-49309113

9 https://www.bundestag.de/en/parliament/function/legislation/14legrat-245876

Apart from being required to determine what should properly come before the two houses of parliament, the Supreme Court will have a further role, which is connected to the *fourth* ingredient of a UK constitution, subsidiarity. The principle of subsidiarity, which the UK insisted must be a part of the institutional set-up of the European Union when it was a member, emphasised that measures should be taken at the lowest level of government consistent with efficiency. This is a good principle and is another area where the Supreme Court should be able to make a final ruling. For instance, The Welsh government suggested in 2021 that the devolved institutions should be responsible for policing and the administration of justice in their territories. It pointed out that during the COVID pandemic the Welsh Government created wide-ranging criminal offences that were part of its own response to COVID, differing in several respects from those in England. It was perfectly entitled to do this – the four nations had different policies on handling COVID. However, political responsibility for policing and enforcing these offences remained nominally with the Home Secretary, with no accountability to the democratic institutions of Wales.[10] This made no sense, and it would be justifiable to ask for further devolution in this regard. But it should be for a legal body like the Supreme Court to decide the matter.

The chapter on Wales in this book used the example of funding for the HS2 project to suggest that railway infrastructure should be managed by Wales rather than by England and Wales together. In Scotland, to give another example, Monica Lennon, a member of the Scottish Parliament, has proposed devolving extra powers like drugs policy and social security.[11] Again, in his lecture to the Fabian Society, Gordon Brown suggested that employment law might be devolved in order to preserve the employment protections contained in the social chapter, which the Conservatives had opted out of at the time of the Maastricht treaty and then the Labour government of 1997 opted back into.

10 See the Welsh government's programme for reform of the justice system in Wales. https://www.gov.wales/delivering-justice-for-wales-summary-and-work-programme-html

11 As *The Scotsman* reported, she was in favour of 'devo max' rather than independence. Her desire to devolve drugs policy was associated with a desire to decriminalise certain drugs, but the point here is to stress that she wanted more things devolved. See https://www.scotsman.com/news/politics/monica-lennon-insists-scottish-labour-should-not-stand-in-the-way-of-a-second-scottish-independence-referendum-3105531

The same argument could be used over the powers enjoyed by – or withheld from – the English regions. One can give examples where the English regions could make a case for more control of their affairs, just as one could give examples from the devolved nations. Indeed, that was a point frequently made by the so-called 'metro mayors' during the recent pandemic, when it was argued that local areas should have more autonomy when deciding on measures like lockdown.[12] Subsidiarity when the UK was inside the EU was all about 'not having everything decided by Brussels'. Now it will be about 'not having everything decided by Westminster' – and once again, it is the courts that must arbitrate.

The *fifth* ingredient concerns the method by which the different members of a multinational and multi-regional state work together. It therefore requires an effective Council of Ministers. It has been repeatedly emphasised that what is fundamental to a future UK Union is not only how much is handed downwards (or conceivably taken back up), but how the different members of that Union should be able to decide certain policies together. As Keating puts it, 'while the UK settlement provides for extensive self-rule, shared rule is almost completely absent.'[13]

If it is a question of how power can be *shared* as well as how it can be divided, there need to be intergovernmental mechanisms so that ministers of the different governments inside the UK become used to sitting round a table together. 'Joint Ministerial Committees' of the UK were, indeed, established as part of the devolution settlement, but the only one to meet regularly was the one on Europe, where a common position to be taken at the European Council was discussed. At the invitation of the UK, devolved ministers were allowed to participate in the UK delegation to the Council of the EU. They had to represent the UK as a whole rather than their own interests, but the fact this happened at all shows they were trusted to be able to speak for the UK. Ironically, it was precisely in a European context that joint working between the nations became a reality – a joint working that Brexit has put paid to. Worse still, when Brexit made it clear that there would be a repatriation of powers to the UK, the last thing the UK government was willing to do was share those repatriated competences with the devolved nations to develop a policy of joint working on

12 *The Guardian* reported on COVID-19 measures being too 'nationally driven'. See https://www.theguardian.com/world/2020/may/18/covid-19-strategy-too-nationally-driven-warn-uks-regional-mayors

13 Keating, *State and Nation*, p. 75.

matters such as agriculture and fisheries which had previously been EU competences. It insisted that the powers would be brought back to Westminster, though later modifying its position to one of doing so if necessary. In either event, its allergy to teamwork remained firmly in place. In 2018 the Advocate General, Lord Keen declared in the House of Lords in March 2018 that 'if we are to have a single market for the United Kingdom, we require a body to have jurisdiction over that single market…that ultimately has to be the Parliament of the United Kingdom.'[14] In the previous year the Welsh Government had proposed UK-wide frameworks negotiated on the basis of equality among the four nations, but such proposals for teamwork (beyond offers of 'consultation' with the devolved nations) were ignored.

It is therefore vital to determine how the 'four nations' (or if regions are thrown in the dozen or so nations and regions inside the UK) should address issues that *can only be tackled jointly*. This is increasingly an issue in the early 2020s as the Conservative government emphasises post-Brexit trade opportunities and the devolved nations object to the way they are being railroaded into them.[15]

It has already been mentioned that where the EU trade deal with Canada was concerned, Belgium could not ratify it without securing ratification from the regions – and Wallonia took some time to give its consent. There is a good case for saying that the UK cannot devolve to the regions all the powers that used to be held by Brussels when the UK was a member of the European Union and was part of the common commercial policy. It has to be able to reach a trade deal of its own as the United Kingdom. But it may well be that this should involve the nations working together in order to reach a joint position on a trade deal. How would that work? Would each nation be given a veto? Might the UK reaching a trade deal have to wait upon, for instance, Welsh consent in the way that a trade deal between the EU and Canada waited upon Wallonian consent? What is needed, as Mark Drakeford recognised in the *Senedd*'s proposals, is a viable way in which the nations can jointly reach a decision in areas that are of

14 It should be added that Lord Keen later resigned as Advocate General over Prime Minister Boris Johnson's plans to breach parts of the Brexit divorce treaty.

15 See the update on the latest deals given in September 2022 by the BBC in one of its useful 'reality checks'. https://www.bbc.com/news/uk-47213842 Note that deals with New Zealand and Australia have provoked concerns among UK farmers about being undercut by cheap imports. This is precisely the argument used by EU farmers to defend the Common External Tariff imposed by the EU under the Common Agricultural Policy.

concern to all of them. The devolved governments certainly have considerable scope in policy matters but are not part of any effective bodies that enable them to participate in the joint management of UK policies. And in the modern era trade deals involve questions of labour standards and environmental rules that take them beyond purely economic considerations. A joint approach therefore becomes even more necessary.

The allocation of resources between the different parts of the United Kingdom is another area in which joint decision-making is woefully lacking and so a consistent system remains unavailable. Everyone accepts the limitations of the so-called Barnett Formula, which has lasted decades (as did its predecessor the Goschen Formula, based on relative levels of probate duties in the different parts of the UK), largely because it is relatively easy to apply.[16] It is not, however, a needs-based system, which would be more appropriate both for the devolved nations and for disadvantaged regions of England. The particular needs of disadvantaged areas are therefore dealt with through bargaining between the centre and a troublesome part of the periphery in order to produce a one-off bespoke deal to lessen tension with that particular part of the UK. If, however, there was really joint management of the allocation of resources, a needs-based system could be developed and applied with a clear explanation of why particular areas received more. A welfare state whose remit runs to all parts of the UK should be managed jointly by those different parts.

Pan-UK welfare measures are now a century old, dating back to the Liberal government of 1906 which brought in unemployment insurance and old age pensions. These were extended by the Labour government of 1945–51.[17] They are not, however, universally applied, even if disagreement is basically 'tinkering at the edges' rather than about fundamental principles. England has toyed with introducing market mechanisms into the health service and has introduced university fees. Scotland has rejected such moves and (like Wales) has abolished prescription charges. Whether one is in favour of such measures or not, the usual approach is to say that these must be devolved matters and if the Scots decide to use their money in this way it's their decision. But even though this must be appropriate for many areas of expenditure, it would be useful to consider for a moment what it would look like if Scotland and Wales sat round a table with English representatives to discuss the workings of the

16 See Keating, *State and Nation*, Chapter 9, pp. 153–169 which discusses Goschen and Barnett.

17 See Keating, *State and Nation*, pp. 153–156, 'The Welfare State'.

supposedly 'national' health service, devised by the Welsh politician Aneurin Bevan to be the same everywhere in the UK, and reached a common position on (say) prescription charges, which possibly might entail a veto exercised by Scottish, Welsh, Northern Irish and a number of English regional representatives who could manage a blocking minority in the manner of the system used in the European Union. It is this way of working that has never been properly tried. Everything is based on a hand-out to the Scots who can go and 'make their own mess' if they want. The one thing they can't do is sit at the top table and join in the decision-making process at the highest level – even for what is clearly applicable throughout the UK, like the NHS or the interestingly named 'universal credit,' a fledgling and controversial system of benefit payments which might also be jointly determined by the different parts of the Kingdom to which that universality supposedly belongs. Keating is right to observe that…

> Neither Labour nor Conservative governments have been open to the idea that the devolved bodies should be able to restrain Westminster or bind it to higher standards of universal services.[18]

This is where a Council of Ministers is crucial. It could take decisions on the basis of unanimity or through a form of majority voting, depending on the issue (as happens inside the European Union). When the Council of Ministers from different parts of the UK met a majority vote would be binding upon dissenting members. Given that nine of the dozen members of this Council would be from England, it might be necessary to say that if unanimity wasn't required any two or perhaps three dissenting members would be enough to derail a proposal. Alternatively, there could be a form of weighted voting. There is a European precedent in terms of 'qualified majority voting' (QMV), which means that larger member states can't simply steamroller over the wishes of smaller ones. A form of QMV for the UK could ensure that a proposal needed support from outside England as well as within it.

In the EU some matters are community competences to be determined at the EU level. Other matters are 'national competences' to be determined at the member state level. Similarly, one could say that certain matters within the UK are to be determined at UK level, and certain matters at the national or regional level, for instance by the Welsh *Senedd* or Greater Manchester. In some cases, unanimity would be required for action to be taken and in other cases a qualified majority.

18 Keating, *State and Nation*, p. 169.

It is not only the European Union which provides a useful point of comparison for a Council of Ministers. The all-Ireland Council which was part of the Belfast Agreement provides another. The power-sharing which was so essential to the Belfast Agreement could be extended to all the devolved nations in addressing such issues as reaching trade agreements post-Brexit. The imagination shown in helping to bring the 'Troubles' (hopefully) to an end needs to be repeated in seeking to maintain the United Kingdom intact, or even in creating a Union of the Isles, so long as this would in no way affect the status of the Republic of Ireland as an independent nation-state just like other members of the EU such as France or Italy.

The *sixth* ingredient is the involvement of a Citizens' Assembly. The UK's use of Citizens' Assemblies so far has been open to question. Climate Assembly UK produced a report in September 2020 called the *Path to Net Zero*.[19] The assembly was treated rather like a focus group used by advertisers to see what products are acceptable to the public. It was commissioned by cross-party select committees of the House of Commons with an emphasis on the need for a cross-party consensus – i.e., explicitly looking for something that could be supported by as many people as possible. 'Forging consensus is what we do on our cross-party select committees, on the basis of the evidence and what in our judgement is acceptable to the public,' explained the Conservative Committee Chairs, Mel Stride MP and Darren Jones MP.[20] Moreover, even if they accepted the recommendations of the Citizens' Assembly, as select committees they could only advise government, not determine its policy.

When the Conservative government published its 'net zero strategy' in response to the report, it was accompanied by a blueprint from a so-called 'behavioural insights team' which studied how to change public behaviour. Though the blueprint was withdrawn a few hours later, the notion of a so-called 'nudge unit' reminds us once again of the techniques of persuasion developed by advertisers. The report stressed that governments had been prepared to use legislation to change behaviour in the past – such as rules on where people could smoke (and the price of nicotine), rules to make driving as safe as possible (wearing seat belts, not drinking or using mobile phones when driving) or insisting on vaccinations (for instance MMR jabs for children). There would be little difference in 'nudging' people by means of similar methods to eat less

19 https://www.climateassembly.uk/report/read/

20 See the Foreword from Committee Chairs, part of the Preface to 'The Path to Net Zero'. https://www.climateassembly.uk/report/read/plain.html

meat or make fewer flights, even though one could expect similar protests about restricting human freedom. But this is not the cascading upwards explored in an earlier chapter. It is trying to make the flow coming down acceptable to those who are about to be drenched.

In other words, the UK's Citizens' Assembly was a testing-ground to determine what policy initiatives from above would be broadly acceptable. It could certainly be argued that this is a case of listening to the people, but it is not a model which invites any new initiatives *from* the people. The people have been turned into passive consumers rather than active policymakers. It is a top-down approach (since the proposals come from the top) masquerading as a bottom-up approach. It is a way of testing public responses to government measures rather than inviting the citizens to take the initiative in producing measures of their own. An effective Citizens' Assembly has to avoid being hijacked in this way. In relation to a reformed EU, it needs to be a permanent part of the constitutional structure, a forum for citizens not simply to react but to initiate legislation. The same must apply to the role of a citizens' assembly within a British Union. It could not pass legislation but it could certainly initiate it.

There is a *seventh* ingredient, namely a declaration of human rights. The Human Rights Act of 2000 was at least willing to introduce into UK law rights contained in the Convention, whereas the present Conservative government plans to adopt a more pick-and-choose approach. Since there is no European Law binding upon member states in the case of the European Court of Human Rights, the UK will remain a member of the Council of Europe while effectively choosing how to interpret the rulings of the European Court.[21] This will not do. The most important requirement is that any Human Rights Act passed by a future government in the UK gives the courts the right to disapply an act of Parliament that conflicts with the Act, a right which they had when the UK was part of the European Union if there was an infringement of the Charter of Fundamental Rights.

It is difficult to avoid the impression that the present system in the UK allows the British government to roam unhindered through the judicial undergrowth treading on whatever it doesn't like, claiming all the while that is merely reflecting a commitment to the sovereignty of Parliament. This only reinforces the point that the sovereignty of Parliament is no basis for guaranteeing human rights. There is no doubt that a supreme court, like a parliament, can act

21 See Bogdanor, *Beyond Brexit*, chapter 5, 'Europe and the Rights of the Citizen', pp. 135–167.

in such a way as to challenge human rights rather than to protect them, as the recent debate over abortion rights in the USA shows. But the whole point of a Charter of Fundamental Rights (such as applies inside the European Union) or the weaker European Convention on Human Rights (which applies to all members of the Council of Europe, including the UK) is to provide some kind of template enabling people to see whether their liberties have been undermined – not least by acts of government. That template is undermined if the UK government decides that Parliament is the sole determinant of whether a decision of the European Convention on Human Rights is applicable within the UK. If it does so decide, then 'elective dictatorship' moves a stage nearer. To avoid such a dictatorship, there needs to be a clear statement of human rights to which all governments must be bound – and that only makes sense if the decisions of a Supreme Court, the ultimate arbiter of whether rights have been infringed, are binding upon governments of all political persuasions. As Bogdanor (quoting Lord Bingham) has pointed out,[22] those who react with shock when courts challenge the decisions of parliaments should note that there are plenty of countries in the world where the courts can be relied upon always to echo the views of those in power. Russia is a good example. But would one want to live under such a regime?

Conclusion

The suggestions made in this chapter do not presume that the constitution of a multinational state could simply be a replica of the European Union, but there are lessons to be learned from that union. According to what is proposed, a Council of Ministers drawn from the different nations and regions within the UK will be established to manage tasks which can neither be devolved nor clearly identified as a responsibility of central government alone. These tasks will be shared between central government and the devolved nations and regions. The House of Commons would not have the supremacy in a future UK Union that it currently enjoys. The House of Lords would become a senate of the nations and English regions, akin to the German *Bundesrat*. To oversee the manner in which legislation passes between the two houses of Parliament, an independent arbiter is needed, and the Supreme Court should fulfil this role.

22 See the interview with Professor Bogdanor organised by the Constitution Society and hosted by Dr Andrew Blick, https://www.youtube.com/watch?v=8WixxocvUso

It will also determine how tasks are divided between the devolved nations and regions on the one hand and central government on the other. The Supreme Court, acting on the basis of a clearly defined statement of human rights, perhaps enshrined in a written constitution, will determine whether governments of whatever persuasion are protecting human liberties in what they enact. If an act is passed which the Supreme Court judges to be unconstitutional, it will be able to strike the act down. Finally, any citizens' assembly should be made a permanent part of the constitution with the right to initiate legislation.

Such an arrangement may appear to be a far cry from the present form of governance adopted by the UK. Yet that present form looks like a system of devolution which has been bolted on to another system of parliamentary sovereignty with which it is incompatible. There is a chance that a new government may be more imaginative in its attempt to preserve the Union, not least one in which the Labour Party plays a leading role, simply because Labour needs the Union more than the Conservative Party does in order to have a chance of power. Its proposals put forward at the end of 2022 show that it is at least thinking seriously about constitutional reform. Moreover, in relation to Northern Ireland, both major parties have been prepared to show imagination and flexibility with regard to constitutional arrangements. Whether they will feel the same compulsion to be innovative in the case of the UK as a whole is another question, but the possibility of doing so is there.

It might even be possible to think of extending a constitution for the UK to a constitution for the Isles, so long as it is recognised that this would in no way compromise the Republic's status as a separate nation-state. It is interesting that since 1922 Ireland has combined a firm assertion of its complete independence as a nation-state – for instance by refusing to be part of the (British) Commonwealth – with a willingness to accept a close partnership with the UK on many practical issues, most notably the common travel area. If a future constitution of the Isles maintained the autonomy of the two nation-states involved, just as the European Union itself maintains the independence of 27 member-states, then it might be willing to be included in a Council of the Isles, which could in turn help to heal wounds that extend over centuries and remain raw in parts of the western isle.