Constitutional Reform: Three Crucial Tests Are Proposed For Any New Legislation

A public statement by the British Academy

The Scottish referendum raised fundamental questions about constitutional and democratic processes in the UK. While the referendum did not result in a vote for independence that would have necessitated immediate constitutional change, it has opened up a debate concerning constitutional reform for the United Kingdom as a whole, including for England.

Constitutional change should not be entered into unadvisedly or lightly. Nor should it be carried out with an eye to partisan advantage. The complexity of these issues means that decisions should not be rushed, and that expert evidence, research and analysis – along with open public debate – must be allowed to inform the development of what will be very important legislation.

We set out below a series of important considerations regarding the pace of potential changes in legislation, followed by an outline of three crucial tests that the Academy suggests any new legislation should satisfy.

The pace of constitutional reform

- The recent Scottish referendum has led to wider constitutional reform now being actively considered, even before the 2015 General Election. Constitutional reform raises deep and complex issues with lasting ramifications. Drafting legislation without proper analysis or sufficient time for scrutiny and debate would be unlikely to result in a successful and lasting outcome.

- The Government’s timetable for considering the implications for the rest of the UK of further devolution to Scotland is problematic. The issues are complex and the ramifications serious and long-ranging. Time is needed for thorough debate and deliberation and for the consideration and use of expert research and analysis, including comparison with the experience of other countries.
Some have argued that Britain should follow almost every other democracy and encode its constitution. Some have also proposed a constitutional convention, with popular participation. These proposals raise very large issues. The British Academy would be willing to contribute independent expertise and analysis to activities that examine all of the issues relating to the development of a written constitution.

The British Academy believes that the major UK-wide parties should implement the promises they jointly made before the Scottish referendum without undue delay, but that devolution for the rest of the UK raises very complex issues and must not be rushed. The work of the McKay Commission has shown that a plan for English Votes for English Laws (EVEL) may be very difficult to draft. While there is growing interest in English regionalism it is far less prominent on the current political agenda than Scottish devolution and none of the versions of regionalism that have been mooted included legislative devolution or exclusive competences. And city-regions in England (which appear to be resurrecting the metropolitan counties) are quite different from federalism or devolution in the sense of the Scottish debate – they are an answer to a question about England, rather than a way of rebalancing the UK. These issues require a great deal more reflection – and the British Academy would be very willing to assist in this process of reflection.

Three crucial tests for any new legislation

While it is therefore clear that there are are subtle and complex issues in any plans for constitutional change, and these require detailed analysis, there are also crucial tests that should apply to any such legislation. The British Academy presents the following tests as critical to the success and effectiveness of proposed reforms.

1. Constitutional reform should be the product of a clear parliamentary consensus. This does not mean that a political party should be able to veto particular proposals, but that every effort should be made to secure all-party agreement. If that is not possible, reform must not be partisan in the sense of benefiting one party at the expense of others.

2. Whereas ordinary legislation is generally accepted as legitimate if it has commanded the support of a majority in the Commons, we believe that a higher bar is needed for constitutional legislation – as indeed occurs in virtually all other democratic legislatures. There is a case for considering whether a separate category of ‘constitutional’ legislation can be identified; and, if so, whether some special procedure should be introduced for such legislation. In some cases a
referendum may be appropriate; where it would not be appropriate, there should be wide public consultation before significant constitutional reforms are introduced.

3. Constitutional reform should occur very rarely. Therefore it should, so far as possible, provide an enduring settlement of contentious questions, and not require constant revision. This strengthens the case for a more stringent legislative process for constitutional legislation.

The British Academy, the UK’s national academy for the social sciences and humanities, is happy to offer the expertise of its Fellows in guiding the decision-making and scrutiny processes relating to devolution and constitutional reform. The Academy has already carried out considerable work on these issues including a publication *Enlightening the Constitutional Debate*, produced in conjunction with the Royal Society of Edinburgh following a series of joint events exploring the practical aspects of future constitutional change held in Edinburgh and London between January 2013 and March 2014. See: [http://www.britac.ac.uk/policy/Enlightening_Constitutional_Debate_Book.cfm](http://www.britac.ac.uk/policy/Enlightening_Constitutional_Debate_Book.cfm).

A further British Academy report *Wales, the United Kingdom and Europe*, was also produced in 2013 in conjunction with the Learned Society of Wales, analysing options for Welsh devolution and the changing constitutional relationship Wales is likely to have with England in the wake of the Scottish Referendum. See: [http://www.britac.ac.uk/templates/asset-relay.cfm?frmAssetFileID=12934](http://www.britac.ac.uk/templates/asset-relay.cfm?frmAssetFileID=12934)

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