

## DEVOLUTION. FEDERATION. CONSTITUTION. FROM HERE TO WHERE?

2015 Sir David Williams Lecture

Cheryl Saunders, Melbourne Law School

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### 1. Introduction

I am honoured to have been invited to deliver this year's Sir David Williams lecture. While I was a long-time admirer, I did not get to know Sir David well before my term in Cambridge as the Goodhart Professor in 2006. Spending time with David and Sally Williams was a particular pleasure during that most enjoyable year. David was unfailingly supportive, generous with his time, fun to be with and intellectually curious about every aspect of public law, including the odd variants that are found in Australia. I very much regret that he is not still here to give us the benefit of his views on some of the more recent developments in public law in both our countries, not least in the field in which he initially made his name, the endless battle between liberty and democratic accountability on the one hand and national security on the other.<sup>1</sup>

I owe the general theme for tonight's lecture to Lady Williams. We last met in Cambridge in September, two days before the referendum in Scotland. Devolution was the hottest of hot topics, readily confirmed as the subject for the lecture when Sally reminded me of David's interest in – or should I say passion for- Wales. I did not need much reminding. Sir David Williams was a proud Welshman, who remained engaged in Welsh affairs throughout his life, including as the first Chancellor of Swansea University in 2007. During my time in Cambridge we talked a lot about both devolution and Wales and he arranged for me to give some lectures in Swansea, which I very much enjoyed. Sir David wrote a lot about devolution himself, generally from a Welsh perspective, informed by deep knowledge of Welsh history. He was caustic about the initial devolution scheme for Wales in the *Government of Wales Act 1998*, describing it as 'neither fish nor fowl'<sup>2</sup>, and rightly anticipated further change. He remained critical of the absence of straightforward legislative devolution in the *Government of Wales Act 2006* as it first took effect as a 'recipe for continuing

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<sup>1</sup> Sir David's interest in this subject is evident from his book on *Not in the Public Interest: The Problem of Security in Democracy* (1965).

<sup>2</sup> Professor Sir David Williams QC DL, 'Wales, the Law and the Constitution', Inaugural Annual Lecture of the Centre for Welsh Legal Affairs, 2000.

irritation and frustration’.<sup>3</sup> I am sure that he would be fascinated by the strides since made in the rollout of devolution in Wales and by the implications for Wales of developments in devolution in the wake of the Scottish referendum.

Devolution in the UK is frequently described as a ‘process not an event’. The description does not seem to me to be entirely accurate or particularly comforting but it is apt enough for present purposes. My objective tonight is to explore two distinct, although related, directions in which the process might be heading. One is to establish the United Kingdom as a federation. The other is to adopt for the United Kingdom a written, entrenched constitution in which devolution is enshrined. I do not seek to be prescriptive about either. Rather, I will try to place devolution in the United Kingdom in comparative perspective, both to identify some of the issues that would arise in either case and thus flesh out the implications of these options and to draw on the positive experiences of the United Kingdom for other federal-type systems. The comparative perspective will include, although not be confined to Australia. As it happens, however, federalism reform currently is under consideration in Australia, raising at least some of the issues that are relevant here, including intergovernmental relations and tax devolution.

I do not need for this purpose to come down one way or another on the question whether the United Kingdom already is a federation of sorts. I am content to assume that it is not, for all the reasons commonly given: the asymmetry of the devolution schemes for Scotland, Wales and Northern Ireland; the absence of any form of devolution for England; the lack of an entrenched constitution and its concomitant assumption of parliamentary sovereignty. I note, however, that the increasing diversity of acknowledged federations makes it difficult to determine which, if any, of these features necessarily precludes describing the United Kingdom as a federation, albeit an unusual one, particularly if convention effectively restrains parliamentary sovereignty where devolution is concerned. I also am unable to resist quoting David Williams observation that legislative devolution is ‘federalism without the courage of its convictions’.<sup>4</sup> Nevertheless, the definitional question can be avoided because, on any view, the UK has enough federal features to be characterised as a federal political system, making comparison both defensible and worthwhile.

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<sup>3</sup> Professor Sir David Williams, ‘Devolution in Wales: the Challenges Ahead’, an address to the 2007 Legal Wales Symposium, quoted in Winston Roddick, ‘The development of devolution and legal Wales’, Ninth Annual Lecture of the Centre for Welsh Legal Affairs, 2008,

<https://www.aber.ac.uk/en/media/departamental/lawcriminology/cwla/pdf/Winston-Roddick-lecture.pdf>

<sup>4</sup> ‘Wales, the Law and the Constitution’, 2000.

In what follows, I deal separately with the possibilities of federation and constitution. There is an obvious overlap between the two, but I conceive them as presenting distinct issues. For federation, these include the design of central institutions, the division of power for federal purposes and the structure and operation of intergovernmental relations. Under the rubric of Constitution I will consider options for content, including the treatment of constitutional arrangements for the devolved jurisdictions, which from now on I will refer to as nations, in the interests of brevity. I will also deal briefly with judicial review on constitutional grounds. Much of the lecture is concerned with institutions. First, however, I turn to the question of culture; an important if elusive ingredient of any federal political system.

## 2. Culture

Where it exists, what might be characterised as a federal culture may affect the policies and practices of each jurisdiction, their relations with each other, the expectations of their people and judicial doctrine. It is a complex notion that follows from the nature of federalism itself. Federalism involves shared and therefore limited power. Jurisdictions may act alone, exercising and taking democratic accountability for the exercise of their own, allocated authority. In this case, uniformity may be sacrificed to the values of subsidiarity, including effectiveness, responsiveness and enhanced potential for innovation. Jurisdictions often collaborate, where this is mutually beneficial, but the decision making process may be messy and slow, at least by the standards of a unitary state. A truly federal culture requires the downsides of governing in a federal political system to be accepted with equanimity and the advantages to be valued and maximised. Equally importantly, it requires trust, fair dealing and mutual respect between the institutions of the jurisdictions that collectively constitute the state. Logically an imperative of any federal-type arrangement, this requirement is reinforced in a democracy by the respect due to institutions that are chosen by and accountable to their people.

In some respects, the United Kingdom is well-placed to develop and maintain such a culture. National diversity is acknowledged, along territorial lines, providing a compelling rationale for devolution, the need for which was further reinforced by the independence referendum in Scotland. The union has long since accommodated distinct institutions and differences in laws and legal systems between at least some of its constituent parts. The United Kingdom has a refreshingly tolerant theory of the state to the extent, perhaps, to which it has a theory at all, which places no restrictions on diversity and allowed for a referendum on secession with relative ease in comparison, for example, to the position in Spain. This may help to explain the extent to which judicial doctrine

has responded with some sensitivity to novel questions raised by legislative devolution in the UK, at least by accepting the exercise of devolved legislative power as primary legislation, with all that follows from that conclusion.<sup>5</sup> There is more to be said on this important issue, however, to which I will return.

But powerful factors also militate against a federal culture in the UK. Cultural adaptation is difficult in any transition from an essentially unitary to a federalised state, requiring the surrender of power by established central institutions. In the case of the United Kingdom, the difficulty is exacerbated by two of the most distinctive features of the current devolution arrangements. One is the reality that the central institutions are dominated by the unfederated segment of the state namely, England, reflecting its population size. These institutions also, by default, exercise for England powers that are devolved to regional authorities elsewhere. The other is that the Parliament at Westminster enjoys absolute legal sovereignty, at least in theory, from which Whitehall derives benefits and responsibilities as well. The consequences that follow range from the superior status of Westminster legislation under, for example, the *Human Rights Act* 1998 to the continued potential of ‘formal intervention’ by the UK government in devolved matters, which can never entirely be disavowed.<sup>6</sup>

Australian experience suggests that Westminster-style responsible government offers a testing terrain for the development of a federal culture. The catch-cry at the time of federation that ‘either responsible government will kill federation or federation... will kill responsible government’<sup>7</sup> was driven by consideration of the composition and powers of the Senate but contains more than a germ of truth in other contexts. The cultural attitudes associated with responsible government in many respects are the antithesis of federalism. Responsible government places a premium on the speed and efficiency of public decision making; accepts that the winner-takes-all; encourages competition and conflict between two, powerful sides of politics; assumes an umbilical link between taxing and spending; and relegates relations between governments, whether inter or intra-state, to the realms of executive power, where transparency is weak. None of this precludes the development of a workable federal culture, but it suggests that the issue needs deliberate attention.

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<sup>5</sup> See, for example, *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*, [2015] UKSC 3. But compare the ‘weight’ accorded to the judgment of the Welsh Assembly by Lord Mance, for the majority, with that of Lord Thomas, in dissent, with whom Lady Hale agreed: [67], [118]-[122].

<sup>6</sup> *Memorandum of Understanding and Supplementary Agreements*, October 2013, [27]. The force of the description of these powers as ‘very much...a matter of last resort’ is somewhat weakened by the embellishment: ‘the UK Government will whenever practicable inform the devolved administration of its intentions in sufficient time to enable that administration to make any representations it wishes, or to take remedial action’.

<sup>7</sup> John Hackett, *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 1891, 214-5

Instant cultural change is no easy feat. The efforts of the United Kingdom to lay down new principles and practices from the outset of devolution are interesting for this reason. In evaluating them, two observations might be made. One is to draw attention to the use of constitutional convention to underpin, for example, the undertaking of the UK Government that the UK Parliament ‘will not normally legislate with regard to devolved matters except with the agreement of the devolved legislature’.<sup>8</sup> The mechanism of constitutional convention is available elsewhere for this purpose, but may be uniquely effective in the UK, where an uncodified constitution gives it prestige and rationale. The second is that the changes are not as far-reaching as may first appear. The Sewel and related conventions were necessary to give devolution any kind of teeth in conditions of parliamentary sovereignty. The volume of Westminster legislation that continues to be enacted in devolved areas, in reliance on Sewel-type procedures, might reflect successful intergovernmental collaboration but might equally suggest that the reality of legislative devolution is only just beginning to hit home. The remaining new practices set out in the MOU and other documents relate to the nuts and bolts of collaboration: communication, consultation, the exchange of information, the collection of statistics, the confidentiality of shared material. They are useful, as long as they work on a reciprocal basis, but do not clearly represent the shift in the character of the state. In a perceptive article written shortly after the MOU first came into effect, Richard Rawlings bemoaned the failure to clearly articulate a ‘fundamental constitutional principle’ of comity or mutual respect of the kind that operates in the Germanic federations,<sup>9</sup> which he detected as ‘locked in the Memorandum of Understanding, and waiting to escape’.<sup>10</sup> Judging by the call by Lord Smith for ‘greater respect’ between governments in the wake of the referendum in Scotland, the principle has not escaped yet.<sup>11</sup>

### 3. Federation

I now move to examine three key issues suggested by comparative experience for the United Kingdom as a federation: the design of central institutions for the purposes of ‘shared rule’; the federal division of power; and intergovernmental relations.

#### 3.1 Institutions

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<sup>8</sup> *Memorandum of Understanding and Supplementary Agreements*, October 2013 [14]. In relation to Scotland, this is known as the Sewel Convention.

<sup>9</sup> Anna Gamper, ‘On Loyalty and the (Federal) Constitution’ 4 *Vienna Online J. on IN’tl Const.L.* 157 (2010)

<sup>10</sup> Richard Rawlings, ‘Concordats of the Constitution’ (2000) 116 *Law Quarterly Review* 257, 267.

<sup>11</sup> Lord Smith of Kelvin, ‘Foreword’ in *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, 27 November 2014,

The participation of the federated regions, as regions, in central institutions is an element in the design of all federations. It helps to provide the glue for the federated state, balancing the dynamics of self-rule. In symbolic terms, it acknowledges the shared ownership of the state. For practical purposes, it enables the needs and perspectives of the constituent parts of the state to be fed into decisions made at the centre. The practical imperative for such a mechanism is heightened in integrated federations, where central legislation is administered by the regions.

The principal mechanism associated with shared rule is a second chamber of the federal legislature, representing the constituent regions and contributing at least to decisions that affect them. The German Bundesrat illustrates the possibilities well. Not all federations have a federal second chamber, however, as the very different example of Canada shows. And not all federal second chambers play an effective federal role in practice. The Australian Senate is a case in point. Senators vote along party lines with little, if any, attention to federal considerations. On the other hand, the equal representation of States in the Senate has symbolic importance in the Australian context; gives smaller States a larger voice than they might otherwise have had; and has proved to have some doctrinal significance.<sup>12</sup>

Federal chambers are the most prominent, but by no means the only mechanism through which federation affects the constitution of central institutions and to that extent contributes to shared rule. In some federations the constituent regions have a guaranteed minimum of seats in the popular legislative chamber.<sup>13</sup> Regional representation is often a factor in the compositions of courts and in particular in appointments to apex courts with final responsibility for adjudicating federal disputes.<sup>14</sup> Ministries often are composed with an eye to regional balance.<sup>15</sup> The federal form of the state may affect the organisation of the civil service and the armed forces as well. Where independent governmental institutions such as, for example, Electoral Commissions, perform functions for both spheres of government this is likely to be reflected in both their composition and procedures.

Against this background of theory and practice, other federations were somewhat bemused when the examination of House of Lords reform and the first tranches of devolution took place in the United Kingdom largely in isolation from each other. Once again, however, the distinctive features of

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<sup>12</sup> In particular, one of the contextual factors used to determine limitations on executive spending schemes in *Williams v Commonwealth of Australia* [2012] HCA 23 was the lack of opportunity for Senate deliberation and approval.

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the compound state of the United Kingdom assist with the explanation. Famously, the number and population size of the devolved regions in the UK vis-à-vis England make it implausible to reconstitute the House of Lords entirely as a federal chamber even if, as in Germany, the majority principle is given some weight. It may be, as the Labour Party recently has proposed, that the House of Lords could be reconceived more generally as a territorially representative chamber in a way that included Scotland, Wales and Northern Ireland but subdivided England along the lines of regions and, perhaps, cities.<sup>16</sup> Even in this case, however, questions remain about whether the powers of the new chamber should be federalised as well or whether they should remain as they are.

Of course, in the United Kingdom as elsewhere, the functions of shared rule need not depend on a second chamber alone. Albeit in a highly asymmetrical form, various institutional devices that provide a measure of shared rule are already in place or under discussion here. These include the guaranteed minimum seats for Wales in the House of Commons;<sup>17</sup> the somewhat coy provision in section 27(8) the *Constitutional Reform Act 2005* that presently is understood to require the Supreme Court to include judges from Scotland and Northern Ireland;<sup>18</sup> a shared civil service that must nevertheless be accountable to devolved administrations when acting in that capacity; the consideration currently being given to ways of encouraging civil servants at the centre to have had experience in other jurisdictions; and the adaptation of the procedures of bodies such as the Law Commission to the emergence of a distinct legal system in Wales. The device of a territorial secretary of state with a seat in cabinet for each of the constituent nations is another interesting innovation from the perspective of federal design, which nevertheless tends to be an instrument for central control rather than shared rule, at least as I understand it.

In fact, mechanisms to give the three constituent nations greater participation in the institutions of the central state have not been a major focus of the devolution debate. Rather, perhaps ironically, concern has centred on excluding representatives of these jurisdictions when central institutions perform their other role of governing for England. These are waters that as an outsider I would prefer not to enter but let me do so gingerly. Clearly there is potential for the so-called English problem to raise concerns about the fairness of democratic representation that can be exploited politically. From a comparative perspective, however, it may be overstated. The West Lothian

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<sup>16</sup> 'Miliband calls for second chamber to represent all UK's cities and regions', *The Guardian*, 1 November 2014

<sup>17</sup> *Parliamentary Constituencies Act 1986* Schedule 2

<sup>18</sup> Section 27(8) requires the selection commission to ensure that 'between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom'. As the legal system in Wales diversifies, this requirement could be understood to apply to Wales as well. The composition of the selection commission reflects principles of shared rule as well: Schedule 8, section 1.

phenomenon must occur in any partially or unevenly federalised state including, for example, Spain, Italy and Iraq. The population size of England and its dominance of the membership of both Parliament and government serve to diminish its practical effect. If England wanted devolved institutions, moreover, presumably it could have them. Unless and until that occurs, there is no perfect solution to an issue that has the potential to derail devolution more generally. In the circumstances, it is tempting to sympathise with Lord Irvine's view, for which I am indebted to Mark Elliott in his always perceptive analysis of these matters, that the best solution to the West Lothian question is, or at least was, to stop asking it.<sup>19</sup> Now that the genie is out of the bottle, however, it may not be possible to go further than the McKay Commission<sup>20</sup> and to rely on the familiar constitutional tools of parliamentary processes and convention to ensure that the views of representatives of English constituencies are known, heard and generally given effect when powers that are devolved elsewhere are exercised in relation to England.<sup>21</sup>

### 3.2 Power

Federation involves a division of legislative, executive and, sometimes, judicial power in a way that gives each jurisdiction responsibilities for which it is accountable to its own people. Comparative experience suggests standard lines along which this occurs. Power may be divided vertically, so that each jurisdiction administers its own legislation or horizontally, separating legislative from executive power. As a generalisation, the former is more common in common law federations and the latter in Germanic federations but there is enough contrary practice in each of these two broad groupings to demonstrate that generalisation is fraught. Legislative power that is divided vertically may be assigned to either or both of the two spheres of government exclusively or on a concurrent basis. Concurrence, at least, requires further provision about which law is to prevail in the case of conflict. Whichever mechanism is chosen, a range of other choices must be made about the delineation of incidental power; the assignment of residual powers; the treatment of authority to tax and spend; and whether and if so how and when central intervention can occur in the affairs of the federated units.

Asymmetry, coupled with successive phases of change, makes the United Kingdom a veritable cornucopia of experience with the federal allocation of power. Arguably, there is a default

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<sup>19</sup> Mark Elliott, 'Devolution, the West Lothian Question, and the nature of constitutional reform in the United Kingdom', *UK Const.L.Blog* (26 March 2013).

<sup>20</sup> McKay Commission, *Report on the Consequences of Devolution for the House of Commons*, 2013

<sup>21</sup> Including Grand Committees and national legislative consent motions. On the Grand Committees of the House of Commons for Scotland, Wales and Northern Ireland see: Colin Turpin and Adam Tomkins, *British Government and the Constitution* CUP, 7<sup>th</sup> edition, 2011, 246



assumption that each jurisdiction administers its own legislation, although the extent of the devolution of executive authority to administer Acts of the Westminster Parliament gives the UK some characteristics of an integrated federation. Thanks to the operation of Sewel-type conventions, devolved powers effectively are assigned exclusively, albeit with parliamentary sovereignty lurking in the background. Surprisingly, the treatment of residual power differs between jurisdictions. In relation to Scotland and Northern Ireland it rests with the national legislatures, through the general conferral of power territorially bounded, subject to powers retained by Westminster, which also effectively are exclusive.<sup>22</sup> In Wales, since 2006, the heads of devolved legislative competence are specified and the residue by implication lies with Westminster.<sup>23</sup> All three devolution statutes use a broadly familiar formulation to delineate the bounds of incidental power, by reference to what is 'incidental', 'consequential', or 'appropriate' for enforcement. All are restricted in their revenue raising authority and heavily dependent on revenue redistribution from the state. Both the use of a block grant for this purpose and the still tentative forays into the devolution of tax powers, however, are pro-federal features. They make the UK an interesting case study for Australia, presently struggling inconclusively with both questions.

Even apart from the elephant of parliamentary sovereignty, however, there are other features of the scheme that depart from familiar federal practice. One is its complexity, including the detail in which powers are devolved, withheld in some form, or both. This characteristic continues even in the draft clauses of the Scotland Bill published in the wake of the independence referendum. A second is the degree of surveillance of the exercise of devolved power by institutions representing the central state, through requirements for prior approval and deliberate provision for retrospective intervention. These run counter to the democratic logic of federation and suggest that the transition from a unitary to a federal mindset has some way to run. To the extent that they also require the maintenance of central state capacities in devolved areas they also are a luxury in difficult economic times.

Finally, I cannot resist making some remarks about the treatment of executive power, which recently has emerged as an intriguing jurisprudential problem in the Australian federation. The Australian Constitution itemises the (largely) concurrent legislative powers of the Commonwealth but refers to executive power in general terms, simply as the 'executive power of the Commonwealth'. In context, this section presents two challenges. One is the scope of Commonwealth executive vis-à-vis legislative power; the other is the extent of the executive power held by the Commonwealth vis-à-

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<sup>22</sup> Scotland Act section 29

<sup>23</sup> Wales Act 2006 section 94

vis the States. A persistent question over time has been whether the executive power thus conferred on the Commonwealth government is more extensive than the substantive legislative power conferred on the Parliament, particularly in relation to what was assumed to be inherent executive power to contract and spend. The most recent decisions of the High Court of Australia, however, suggest not only that the executive power is federally limited but that at least some contract and spending programs must be supported by legislation, which necessitates a head of federal legislative power. Against that background, I looked at the comparable provisions in the devolution legislation with considerable interest. Through Australian eyes, at least, the general transfer of executive power in, for example, section 53(2) of the Scotland Act 1998 leaves open the scope of executive vis-à-vis legislative power with its reference to ‘the prerogative and other executive functions’. On the other hand, section 54(2) of the Scotland Act firmly ties the scope of transferred executive power to devolved legislative power. The corollary is that if there are inherent executive powers in relation to Scotland that could not be supported by legislation, they are retained by the United Kingdom government, if only by default.

### *3.3 Intergovernmental Relations*

One final issue for consideration under the rubric of federation is intergovernmental relations. These are a dimension of the operation of all federations, whether known by this term or not. The significance of intergovernmental relations is often attributed to the complexity of the conditions for contemporary government. The reality, however, is that governments operating within a single state in relation to the same people have always had to interact in various ways, even if the mode and degree of doing so have changed. Intergovernmental relations are used for a variety of purposes: information sharing; harmonisation of the exercise of power; dispute avoidance or resolution; the transfer of funds on conditions acceptable to both donor and donee. They rely for these purposes on some standard devices: intergovernmental meetings; agreements and undertakings; joint institutions; pooled legislative power. The precise form of intergovernmental arrangements in each federation depends on the rest of the system of government in which they are embedded, historical context and prevailing political dynamics.

Intergovernmental relations in the Westminster-style parliamentary systems with which most common law federations co-exist tend to exacerbate the power of the executive branch in both spheres of government. The explanations for the phenomenon of ‘executive federalism’ have been well-rehearsed: intergovernmental meetings and agreements fall entirely within the conception of executive power in common law legal systems; governments typically exercise considerable control

over Parliaments in any event, making them compliant when legislative approval is needed; the culture of secrecy that attends cabinet deliberations extends easily to meetings of ministers across jurisdictional lines. Executive federalism presents problems for democratic accountability to both Parliaments and people and for legal accountability through tribunals and courts, with implications for the rule of law. Behind the closed doors of intergovernmental meetings, executive federalism may also lend itself to central dominance and to bureaucratic, rather than political control.

The potential solutions have been well-rehearsed too. They include the formalisation of intergovernmental procedures, whether in statutory or other form; the greater involvement of legislatures in making and scrutinising intergovernmental arrangements, the management of intergovernmental fora by independent secretariats, responsible to all participating jurisdictions; mandated transparency for intergovernmental decisions, activities and instruments; the legal enforceability of at least some intergovernmental agreements. A recent comparative study of intergovernmental arrangements in selected federations suggests that principles of this kind are beginning to be given effect, albeit gradually and on a piecemeal basis. Powerful forces are ranged against them as well, however. As always, there is a trade-off between the flexibility that accompanies informality and the accountability and predictability to which more structured procedures should lead. Political players do not necessarily perceive that their interests lie in greater transparency and accountability, although in the context of intergovernmental relations they may be wrong. There is also aversion to what one member of the House of Lords Constitution Committee described recently as ‘letting those damn judges in the door.’

Again, the United Kingdom fits into this picture well enough for comparative experience to be relevant here and vice versa. There is a plethora of bilateral and multilateral intergovernmental meetings of ministers and civil servants from the Joint Ministerial Committee down. Memoranda of Understanding, concordats and agreements of other kinds set out understandings between jurisdictions, on procedural and substantive questions. Parliamentary sovereignty obviates the need for complex legislative schemes to adjust the devolution of power or to harmonise the exercise of devolved legislative power. On the other hand, the Sewel and related conventions that govern the enactment of Westminster legislation for these purposes themselves involve intergovernmental relations of a kind.<sup>24</sup>

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<sup>24</sup> See the arrangements set out in Government of the United Kingdom, *Guidance on Devolution* and the Devolution Guidance Notes in respect of each jurisdiction: <https://www.gov.uk/guidance-on-devolution>.

Judged by the standards of some other federal-type systems, intergovernmental relations in the United Kingdom have some moderately progressive features. The Memorandum of Understanding and principal concordats are publically available although they seem to be systematically collated and published only in Scotland and Wales and these lists may not be complete.<sup>25</sup> The Joint Ministerial Committee issues both meeting communiques and an annual report although all are too brief to be useful. Significantly, the three national legislatures take an active interest in intergovernmental relations, not least through the legislative consent motions required by the Sewel convention. The doctrine of legitimate expectations offers potential for the 'soft law' of concordats to play a role in judicial review,<sup>26</sup> whether or not the prospect has yet materialised.

There is plenty of evidence, however, that there is more to be done to improve the effectiveness of intergovernmental relations and their fit with democracy and the rule of law. One of the key recommendations of the Smith Commission concerned reform to the 'intergovernmental machinery...as a matter of urgency'; in his foreword to the Report Lord Smith referred to the need for a more 'productive, robust, visible and transparent relationship' based on 'greater respect'. Some of the particulars of the problems have recently been explored in evidence to the House of Lords Select Committee on the Constitution in the course of its inquiry into intergovernmental relations. These include the paucity of parliamentary involvement, particularly at Westminster; central state dominance of the intergovernmental decision-making machinery; and the generally unhelpful nature of the information publically available about what is going on. These are familiar concerns. The Government's response so far, however, has been noticeably lacklustre.<sup>27</sup> The experience of other federations suggests that those interested in such matters should seize the momentum presented by the Smith Commission and press for changes to intergovernmental procedures and practices to deal with the problems now.

#### 4. Constitution

For some time now, consideration has been given in the United Kingdom as to whether to adopt a written and in that sense codified Constitution. That debate is not necessarily linked to federation or, for that matter, to devolution. While it is customary for federations to have a codified Constitution, constitutions need not provide for federalism. Indeed, discussion of a written

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<sup>25</sup> For example, the Scottish Government, *Concordats between Scottish Ministers, United Kingdom Government and the Cabinet of the National Assembly of Wales*, <http://www.gov.scot/About/Government/concordats>; Welsh Government, *Concordats*, <http://wales.gov.uk/about/organisationexplained/intergovernmental/concordats/?lang=en>;

<sup>26</sup> Rawlings, *op.cit.*, 283-4

<sup>27</sup> *Scotland in the United Kingdom: An Enduring Settlement*, chapter 9.

constitution here is often driven by other aspects of the constitutional arrangements of the United Kingdom including the scope and exercise of executive power and the protection of rights. Nevertheless, given developments since 1998, if the United Kingdom were now to adopt a written Constitution, it is unthinkable that devolution would not be included in it.

For present purposes I am prepared to assume that such a Constitution would be entrenched, in accordance with typical world practice. I acknowledge but do not engage with the legal puzzle of how this might occur; in this, at least, if there is literally a will, there will be a way. I note, however, that it would be possible to codify constitutional arrangements without entrenchment, thereby preserving parliamentary sovereignty subject to the limited protection that constitutional statutes now enjoy. At least some of the observations that I will make on this subject also would apply whether the Constitution were entrenched or not. It should go without saying, moreover, that a decision for entrenchment says nothing about the degree of difficulty of constitutional change.

In what follows, I deal with three aspects of a written Constitution: content; the treatment of the constitutions for the constituent nations of a federal United Kingdom; and the methodology of constitutional review.

#### *4.1 What would be included in a Constitution for the United Kingdom?*

Federation is more than an add-on to a unitary constitution. Federal features are likely to infuse the institutional arrangements for the central state and its component parts. Federation may require consideration in designing mechanisms for constitutional rights protection, as the example of Canada shows. Generally, the federal form of the state is reflected in any preamble and affects the design of procedures for constitutional change.

Federation itself is a complex arrangement with multiple dimensions for which a codified constitution normally would provide. I have mentioned three already: institutional arrangements for shared rule; the federal distribution of legislative, executive and judicial power; a framework for intergovernmental relations. Others suggested by comparative federal experience include matters for which common standards are sought across the federation and aspects of unity that are deemed to need protection in a compound state. Human rights are a typical example of the former, with Australia a conspicuous exception. Under a codified Constitution it is highly unlikely that rights protection would continue to have a lower legal status in England than elsewhere in the United Kingdom. Unity may be emphasised in relation to, for example, freedom of movement and equality

of treatment of citizens each of which may be threatened by the dynamics of competing jurisdictions with responsibilities to discrete groups of voters.

Path dependency is inevitable and appropriate in a new Constitution. In crafting a codified Constitution for the United Kingdom, however, some matters necessarily would change. Let me identify five, drawing on my earlier observations about what federation involves.

First, moving to a written, entrenched Constitution would force decisions on the thorny issues of the constitution and powers of the House of Lords and on the West Lothian question. The latter might be assisted by constitutional provision of a mechanism to allow further federalisation by or in relation to parts of England if the will to do so emerged.

Secondly, drafting a written Constitution would be likely to lead to a reduction of the asymmetry in the design of institutions and the allocation of powers in relation to Scotland, Wales and Northern Ireland. In particular, it offers an opportunity to provide a similar model for the allocation of powers in relation to all three jurisdictions, with advantages for the consistency of practice. It would not necessarily eliminate asymmetry entirely but it would require any departure from similarity of treatment to be justified.

Third, on a related point, reflection on the implications of abandoning parliamentary sovereignty might in any event prompt change in the method of devolution of legislative and executive power in relation to Scotland and Northern Ireland. Questions that would arise include whether there should be a list of identified powers for the constituent nations as well as the central state; whether residual power should continue to rest with the former; and whether some or all powers should be stipulated as concurrent, in the sense that they might be exercised by either sphere of government; and which law should prevail in the case of conflict.

Fourth, the description of the powers themselves would be likely to change in the course of developing a codified Constitution, not least to abandon much of the detail in which they are presently prescribed. And equally, fifth, both the detail and the principle of central powers of intervention in the affairs of devolved jurisdictions may need to be revisited. It is relatively unusual for federations in developed states to make constitutional provision for intervention by the centre. Where it occurs as, for example, in the Federal Republic of Germany, safeguards are provided in the form of procedures for approval by the institutions of shared rule, coupled with judicial review.

#### *4.2 National constitutions*

A particular aspect of the question of the content of a federal Constitution is what, if anything, should be said about the constitutions of the constituent jurisdictions.

Federal constitutional practice varies in this regard. In many federations, the constituent jurisdictions have their own constitutions, prescribing their own institutional arrangements, subject to overriding constraints in the federal Constitution, as in the United States, Germany and Australia. In others, the constitutional arrangements for the constituent regions are prescribed in the federal Constitution, although sometimes in a form that gives each jurisdiction some say in their alteration over time, as in Canada. In a South African variation, the state Constitution prescribes the constitutional arrangements for the provinces but authorises the latter to draft their own constitutions if they so choose, within tightly prescribed limits. Any provincial constitution must be certified by the Constitutional Court as complying with these overriding constraints, which have proved to present a very high hurdle.

As matters presently stand, the constitutional arrangements for Scotland, Wales and Northern Ireland are prescribed in devolution statutes, in an exercise of reserved power, on the basis of consultation and approval. While satisfying the proprieties of devolution in conditions of parliamentary sovereignty, it is improbable that this particular aspect of the status quo would be maintained under a federal Constitution; change of some kind therefore would be inevitable. As a generalisation, discrete Constitutions for constituent jurisdictions are less usual in federations formed by devolution rather than by aggregation, if only for the pragmatic reason that they did not exist before. This is not entirely the case in the United Kingdom, however, if the devolution statutes are treated as proto-constitutions. This consideration may suggest that, if the United Kingdom were to constitutionalise a federal form of government, each jurisdiction should be authorised to draw up its own Constitution, subject to central constitutional constraints, the extent of which would need to be determined.

#### *4.3 Constitutional review*

In a codified Constitution, the provisions constituting the federation, as well as all or most others, would be subject to review by the courts on constitutional grounds. On the assumptions that I have made, constitutional review would apply to legislative, as well as executive action, even by the Westminster Parliament. Common law constitutionalism normally accepts that review may be initiated by anyone with a sufficient interest, in the context of a concrete dispute. Common law

practice varies in accepting abstract review in the form of an advisory opinion at the instance of governmental actors, as presently occurs under the devolution legislation.

In recent years, there has been growing comparative interest in the reasoning of courts with constitutional review jurisdiction. The work done so far suggests that the differences are considerable and that the reasons for difference lie deep. In relation to federal constitutional review, there are at least two sets of variables. One concerns the mechanisms and principles used by courts to determine the validity of challenged action. A prime example is the techniques to determine whether a law is supported by a constitutional power: a search for ‘pith and substance’ in Canadian terms and ‘sufficient connection’ in Australia. The other concerns any underlying assumptions that affect judicial understanding of the task to be performed. These may relate to the nature of federation itself, including its purpose and core features. The Australian High Court, for example, decided long ago, somewhat idiosyncratically, that federation involves two spheres of government, separately organised, to which power is relatively unimportant. This understanding has underpinned a jurisprudence that fiercely protects the institutions of each jurisdiction from attack by the other while dramatically expanding Commonwealth power through constitutional review.

The United Kingdom already has considerable experience of judicial review of the devolution arrangements. The devolution legislation itself, quite unusually, prescribes the technique to be applied in determining whether an Act ‘relates’ to a prescribed matter, by reference to ‘purpose’ having regard to ‘effect’.<sup>28</sup> By 2015, enough cases have been decided on devolution questions for some tentative observations about an emerging jurisprudence to be made. The meaning of ‘relates to’ as the touchstone for determining whether a challenged law is within power has been spelt out in a small handful of decisions from Scotland and Wales that, interestingly, at least for the moment, attach no significance to the differences in the context in which the term is used.<sup>29</sup> Likewise, there is now a small body of authority about the scope of the incidental power,<sup>30</sup> although variations in the formulations used could prove significant over time.<sup>31</sup> At a more conceptual level, the Court has accepted that the Devolution Acts are constitutional statutes; that Acts of the legislatures they establish are primary legislation; and that the policy assessments of these democratically elected

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<sup>28</sup> Eg Scotland Act 1998, section 29(3).

<sup>29</sup> *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [25] per Lord Mance, Lord Neuberger and Lord Hodge in agreement.

<sup>30</sup> Government of Wales Act 2006 section 108(5)

<sup>31</sup> *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [29] per Lord Mance, Lord Neuberger and Lord Hodge in agreement



legislatures are entitled to a degree of deference in determining consistency with Convention rights. These holdings are important markers in devolution jurisprudence in this country.

Even on the basis of the current devolution settlements, foundational questions remain to be resolved. Some flow from the still-ambiguous nature of the devolution Acts. Should they be interpreted in a way that relies on their constitutional character and, if so, what might that involve?<sup>32</sup> Alternatively, if their statutory nature is emphasised, do all the rules of statutory interpretation apply including, for example, the principle of legality?<sup>33</sup> This latter line of inquiry has the potential to further limit the competences of the legislatures of Scotland, Northern Ireland and Wales. These are already vulnerable to treatment as second-class legislatures for the purposes of judicial review, as some of the reasoning in the recent Welsh reference shows.

Many, although not all, of these questions would persist under a codified Constitution, although the framework of reference for them would differ. Much of the groundwork now being laid in terms of doctrine and principle would be likely to remain influential. The stakes for judicial review would be dramatically changed, however. Most obviously, questions of competence would become more acute, given the relative difficulty of constitutional change. This reality could be expected to feed into the methodology of review, in terms of both technique and underlying assumptions. What that would mean in practice would depend on the model adopted, which in turn would be a response to assumptions about the likely effects of constitutionalisation. Designation of powers as exclusive or concurrent and the treatment of residual powers make different demands on the methodology of constitutional review.

## 5. Conclusions

Devolution in the United Kingdom has added new dimensions to comparative experience with federal-type systems. Much of the devolution settlement is distinctive but five features stand out in particular, at least for me: the acceptance of asymmetry; the progressive transferral of competence; the effective reliance on self-control by the centre to maintain the boundary with devolved competence; the explicit recognition of the democratic rationale for devolution, particularly in the courts; and the tolerance of the possibility of secession. It is far from clear that any of these can be cloned for use elsewhere, dependent as they are on local conditions including historically distinct and territorially bounded communities, developed democratic institutions, a strong tradition of constitutional pragmatism, a practice of sophisticated discursive reasoning in the judiciary and a

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<sup>32</sup> Cf Hale, 19

<sup>33</sup> Lord Reed, AXA [153]

generally relaxed approach to the concept of the state. Even if only as an example, however, devolution in the UK offers insights for many countries in transition, struggling with the imperative to provide for local self-determination but apprehensive about whether it will work and where it might lead. And it holds lessons for many developed federations as well, including my own, which is much less comfortable with asymmetry, even more jealous of central authority and slow to recognise the democratic advantages that federalism can bring.

My intention this evening was to place the United Kingdom in comparative perspective not only to identify what devolution offers but to explore where it might go next. You may think that either full-blown federation or an entrenched written Constitution is unlikely in this state and that a combination of both is entirely implausible. On present indications, I would be inclined to agree. On the other hand, there is plenty of evidence, including from the United Kingdom, that constitutional opportunities sometimes present themselves suddenly, as a result of a conjuncture of personalities and events, in ways that cannot be foreseen. And on any view, it is likely that devolution in the UK will move further down each of these paths.

On that assumption, comparative experience suggests a range of issues that are likely to need attention, even from the standpoint of effective devolution. In no necessary order of importance, these include: the institutions of shared rule; the degree of detail with which competence is devolved and withheld; unnecessary asymmetry, particularly in relation to the model for devolving power; and the structure and transparency of intergovernmental arrangements, with an eye to the demands of democracy and the rule of law. Underpinning them all is the imperative for the development of a federal culture, to give devolution substance and depth.

Many thanks for attending tonight. I am conscious of my cheek in talking on this topic to such an informed audience. I hope that my remarks have been of some interest. I also hope, although I am by no means confident, that Sir David would have approved.