



Constitution Committee

Corrected oral evidence: Future governance of the UK

Thursday 21 October 2021

2.30 pm

Members present: Baroness Taylor of Bolton (The Chair); Lord Faulks; Baroness Fookes; Lord Hope of Craighead; Baroness Suttie.

Evidence Session No. 13

Heard in Public

Questions 171 - 183

Witnesses

I: Professor Richard Wyn Jones, Director of Cardiff University's Wales Governance Centre; Professor Laura McAllister, Professor of Public Policy and the Governance of Wales, Cardiff University.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Professor Richard Wyn Jones and Professor Laura McAllister.

Q171 **The Chair:** Good afternoon, everyone, and welcome to our two witnesses this afternoon, Professor Richard Wyn Jones and Professor Laura McAllister, who has taken on a recent role in this particular area, I gather. You are both very welcome. This is our first visit out of Westminster to take evidence. You are the first people we are talking to, so it should be interesting to hear your responses. There will be quite a few avenues that we wish to discuss that will not surprise you, but by all means add items as you wish to as we go along.

Perhaps we can start in general terms about where we are at the moment, the current state of the union. Professor Wyn Jones, you have made some pretty significant statements about that, talking about tectonic plates drifting away and things being quite fundamental in terms of the changing relationship. Would you like to expand on that and tell us where you think we are? Then perhaps I can come to Professor McAllister.

Professor Richard Wyn Jones: Thank you, and welcome. I have spoken about the tectonic plates shifting. There are all kinds of different metaphors one could use, but in my view it is no exaggeration to say that the union is demonstrably in crisis, and there are several elements that. One is public attitudes. I am sure I do not need to remind anybody around this table about the polling from Scotland, which shows that the support for the union is neck and neck. You will all have been aware, I am sure, of the polling from Northern Ireland, which tends to be a little more variable, but none the less there is significant support for a united Ireland. Even in Wales now, I think you should probably think of Wales as the canary in the coalmine in that one-third of the population supports independence, and that is in a context where independence has never really been part of the political debate until very recently indeed.

That is the headline stuff, but we can look at the evidence. My colleague Professor Ailsa Henderson, who works at the University of Edinburgh—you may have come across her at some point in your travels—and I have shown that in no part of the UK, in none of the four constituent territories, does one find majority support for the union. What you find is a group of people who want independence, a group of people who are ambivalent about the union, and a group of people who view the union as an unalloyed good thing.

In all four territories, the proportion of people who say that the union should be dissolved or who are ambivalent is over 50%. I am sure you will all be aware of the polling on Brexit. I think Ailsa Henderson and I were the first people to do this, but other people, such as Lord Ashcroft, have since confirmed what we found. We found that in England the majority of people on both the leave and the remain sides were happy to give up on the union in order to get what they wanted out of the Brexit

process. If you look at public attitudes and if you are a unionist, you have cause for alarm.

At the UK Government level—I am sure you will be exploring the Welsh Government position at some point—especially in the context of Brexit, which I think is central to all this, there was a pledge to involve the devolved Governments centrally in the negotiation process. Obviously, the UK Government will be doing the negotiation, but there was a pledge to involve the devolveds, which was simply not respected. What we have is a UK Government who are choosing to interpret the mandate of the 2016 Brexit referendum as providing them with a mandate, an excuse—you use whatever language you want to use—to recentralise the UK and reduce devolved competencies. I cannot think of a single example of where the UK Government have moderated their behaviour around Brexit in order to buttress the union.

There is a lot of rhetoric about how valuable the union is. The UK Prime Minister talks about the awesome foursome—I think that is one of his choice phrases for the union—but I cannot think of a single example of moderating behaviour around Brexit in order to try to buttress the union—I realise that I am monologuing, so I will draw this to a close—in a context where Brexit has been profoundly nationally divisive.

It is nationally divisive in two senses. First, we know that we have four different territories that voted in different ways. Two of the territories of the UK voted to remain; two voted more narrowly to leave. This is clearly nationally divisive in that way.

In addition, even within all four territories there are fundamental differences in attitude towards Brexit, depending on your sense of national identity. In England—I published a book on this recently—we know that the more English you feel, the more likely you were to vote to leave. In Scotland and Wales, the more exclusively Scottish or Welsh you feel, the more likely you were to vote to remain. This is a really delicate situation. It is a massive geopolitical change to which people adopt very different attitudes reflecting senses of national identity, who we think we are in the world, where we have come from, where we should go—all those things. This is a very delicate situation and there is not much delicacy about the way the UK Government have addressed these issues.

The Chair: Do you think that any aspects are working well, or were working well, pre-Brexit that we perhaps should consider?

Professor Richard Wyn Jones: I do not think anything was working well, no; the opposite. What was working—and I am sure we will come back to some of these issues as we proceed—was that until 2016 there was at least evidence that between them the courts, the legislatures, the Governments were feeling their way towards making devolution fit within the context of doctrines such as parliamentary sovereignty. All that has, I think, been reversed, especially as Brexit has increasingly become a project of restating a particularly crude form of parliamentary sovereignty. It is very difficult to make devolution fit into that dogmatic

context. I think there is very little evidence that anything is going well at the moment, to be honest.

The Chair: Professor McAllister, perhaps you would like to say a few words in general about where you think things are, and perhaps also say a word or two about your commission.

Professor Laura McAllister: Thank you very much for the opportunity. I agree with a lot of what my colleague, Richard, has said to you.

To elaborate on some of his important points, Brexit is clearly one of the most instrumental factors that threatens the union and the relationship between the nations of the UK. The pretty fragile relationships that existed before Brexit have tended to be ignored. We kind of muddled along and Brexit has exemplified the problems more than anything. I do not think Brexit created the problems, by the way, but I do think it has exemplified the problems, because we had no effective domestic internal structure across the nations of the United Kingdom for how we related one to the other.

One of the most fundamental problems—it is almost an existential problem—was that devolution was never thought of in a holistic, strategic way. Nor were the implications of an asymmetric model of devolution thought through. The politics of that, of course, made it difficult, but we are interested more in how the constitutional realities have played out.

Contextually, also, the handling of the Covid pandemic has illuminated some of the anomalies of the model of asymmetric devolution that we have. Certainly in Wales, where we have still a quite ad hoc, piecemeal model of devolution, despite having a reserved model now—we will probably come on to this later—the handling of the pandemic by the Welsh Government exposed some of the issues to do with justice, the court system, policing and so on. When you put those two things, Covid and Brexit, together, they formed a kind of pincer effect on the already flawed politics that were operating in the United Kingdom.

There are a couple of reasons why this has happened. First, there has been a kind of arrogance about the notion of parliamentary sovereignty, as Richard alluded to, as if that is the only workable model of sharing power, and I do not think that is the case. I do not think we can ever assume that parliamentary sovereignty has a modern relevance in the same way that it had in the past. There is an obvious reason for that, which is that if you create legislatures in the nations with legislative, fiscal and financial authority and with a parliamentary scrutiny process, clearly sovereignty is de facto shared among all the parliaments of the United Kingdom. Some acknowledgement of that is important, rather than a kind of assumption that there is only one form of political sovereignty and that that is vested in the Houses of Parliament. That is a poor mindset, if not an anachronistic mindset, let us say.

That has cascaded in the behaviours of the UK Government towards the other Governments and parliaments of the UK. If you look at the

terminology, the language, the whole lexicon of how intergovernmental and interparliamentary relations work, it has been very much a kind of grace and favour model, a sort of giving out of power, and I think the public has moved in a different direction, which is what Richard was alluding to.

There is, of course, a big age dimension to support for the union versus a more relaxed approach to alternative models, and if you look at the opinion poll research, that kind of mindset of grace and favour, of almost doling out authority from the centre to the peripheries, as we would be seen, is out of sync with public opinion now, particularly in the nations and probably in the regions of England. That poses a fundamental risk to the union.

I will say something about the commission in a moment, but my final point about the state of the union and the risks to it is that I do not see any intellectual and coherent case being made for the value of the union. There is one to be made, without a doubt, but it has become completely enmeshed with Brexit and politics to the degree that it is hard to see now what the case actually is for maintaining a union of the kind we have. Is it based on history, emotion, connectivity and family relationships, or is it an agency model whereby we can do things better together and generate more authority and soft power in our international and global position?

I do not see that case being made anywhere. The more aggressive or muscular unionism that we see in some quarters is more of a risk to the union than is nationalism in Scotland and Wales. I said this in a lecture in the Hay Festival probably about six years ago, and my line was that it will not be Nicola Sturgeon and, at the time, Leanne Wood who destroy the union; it is more likely to be hyper-unionists who fail to understand what is happening on the ground in Scotland and Wales.

You asked me about the commission that has been established, not quite this week because we do not start our work until the beginning of November. Rowan Williams and I have been named as co-chairs of the Independent Commission on the Constitutional Future of Wales. We have been given a remit by the Welsh Government to act as an independent commission. We are charged with looking at how to radically reform the devolution settlement within the union, as one option, but also to explore alternative constitutional models for Wales regardless of what happens anywhere else in the UK or beyond, to assess, I hope quite forensically, what would best suit Wales and deliver best for the people of Wales.

It is a case of Wales taking some charge and some responsibility for its own constitutional future. I think that is quite a brave move by a Labour Government to appoint an independent panel to look at every constitutional option out there. As you can imagine, it does not come without some controversy, too.

The Chair: I can imagine so, yes. Thank you very much for that. My colleagues will want to join in in a moment. You said that the case for the union was not being made, and I think many people would agree with

that, but you almost put it as two options: either defend the history or see it as an agency. Actually, it is possible to do both.

Professor Laura McAllister: It is, yes.

The Chair: I think it is important to remember that. Can I ask about one point that several people in Wales have made? It is that Parliament should not talk about giving out powers; you used the phrase “doling out powers”. Actually, when we put through the legislation on devolution, we were giving powers to Wales. That was not patronising or a wrong attitude on the part of Parliament. We were giving powers away.

Professor Laura McAllister: Yes. I think that is a fair point to make at the outset of devolution, because clearly a new infrastructure of devolved governance had to be put in place. The authority or competence over the areas in this place were very few at the outset of devolution, of course, because we had an executive model of devolution with very tightly conferred powers from Westminster. That has changed now, and the model of devolution we have is much closer—it is not identical, as you well know—to that of Scotland and Northern Ireland. It is a reserved model with more competence over greater areas and, of course, financial and fiscal authority. You are absolutely right, of course. That was a beginning of devolution.

The point I would like to make is that once devolution is in play, everything changes. That is where the alteration to the traditional model of parliament sovereignty has not kept pace with the reality of devolution. Clearly, the Senedd’s 60 members are elected directly by the people of Wales; they gained sovereignty through that mechanism of democratic mandate. The Government emerge from the decisions of the people of Wales in elections, and it seems very anachronistic and unduly centralising to assume that that model chimes with people’s understanding of how politics works now.

The Chair: Okay. We will be very interested to follow your deliberations in the future. I call on my colleagues now to ask questions.

Q172 **Baroness Fookes:** Clearly, you feel that things have really developed in devolution, so do you think the package that the British Government have brought forward to improve intergovernmental relationships will work? They brought this forward in March. Does it meet current needs or not?

Professor Laura McAllister: The proof of the pudding will be in the eating, clearly, because I do not think we have seen a great deal of progress on the proposals or, indeed, on the Dunlop report, in terms of what might roll out in the future.

I would take us back to my point about mindset and mentality over machinery. Machinery and infrastructure are vitally important, because there has to be a structure by which the Governments and the parliaments of the United Kingdom liaise. A lot of that has to be done in a

structured way, with timetabling to ensure that there is effective scrutiny of intergovernmental relations by parliaments.

Some of the ideas about ministerial liaison and so on are positive, but if it does not happen in a way that suggests a partnership of equals and a co-operative mentality, they risk going the same way as other intergovernmental relations infrastructure has gone in the past. Our Government in Wales have been pretty dramatically critical of their experience of intergovernmental relations, and I think that is a very practical first-hand exposition of how it has felt over the process—exemplified again, I think, during the Covid pandemic over liaison and communications at an early stage. With the best will in the world, you can have perfect machinery for intergovernmental relations, but if the attitude and mindset is not one of co-operation and consultation, we are likely to see the same difficulties as exist now.

Baroness Fookes: You mentioned interparliamentary relations. Do you think there might be more force there if there can be a good parliamentary relationship? Would that give some sort of lead to the intergovernmental side of it?

Professor Laura McAllister: That is a really good point and one that I would argue for very strongly. I have always felt that liaison comes best in the first instance from parliaments with a duty and an interest in scrutinising the activities of government. If you have the intergovernmental relations part right but not the interparliamentary relations part, you are almost destined to fail in both.

I have seen lots of reports about IPR and what could be done—the notion of a kind of Speakers' conference with all the Speakers of the parliaments to try to map out in a strategic way how the parliaments work with each other. The weaknesses of IPR have been exposed both with Brexit and with Covid, most significantly with timelines for scrutiny. Decisions are made at governmental level and then the parliaments find there has been no opportunity for them to effectively scrutinise what has happened. By reversing that, and ensuring that you get IPR right, you might generate an improved model of intergovernmental relations as well.

Baroness Fookes: One could lead and the other follow, maybe.

Professor Laura McAllister: Why not? Ultimately, despite what Governments say, parliaments are the most directly connected with citizens of any political infrastructure, so why not?

Professor Richard Wyn Jones: There is a danger that I sound like a prophet of doom sitting here and I apologise for that.

To the first part of the question, I am pretty sceptical about the impact of the changes, because they are pretty small beer. They do not really touch the fundamentals. In my view, the problems are fundamental, so you will not address them at that surface level.

Baroness Fookes: Is it not worth bothering at all?

Professor Richard Wyn Jones: One needs to understand the nature of the problem before one looks for a solution. Forgive my poor memory; I am not sure whether it was this committee or another committee of your colleagues that I spoke to about the way central government has simply not adapted to devolution.

We still have the territorial offices, which are very low down the pecking order in Whitehall, no matter what anybody says, which means that the Cabinet Office ends up doing most of the work. The Cabinet Office, by its very nature, has an incredible turnover of staff. I am sure this is Laura's experience as well as mine. Every couple of years before the pandemic there would be a phone call. "Professor Wyn Jones, I've just got a new job in the Cabinet Office"—doing this, that or the other related to devolution. I'm coming to Cardiff for the first time and I have been told I need to speak to you. Can I buy you a cup of tea?" I would say, "Of course, you may buy me a cup of tea". We would have a lovely chat, and often the person would have been on holiday in Wales once, sort of thing, but then they are gone.

There is a Whitehall machinery issue. I have sat in these chairs so many times saying that. Nothing ever changes. But I have been reflecting recently, and I think it may be even more fundamental than the fact that there has been no significant change in Whitehall. It goes back to the issues that we spoke about first in this evidence session. It goes back to fundamentally different views about the nature of a state, to fundamentally different ideas about sovereignty.

If you have a UK Government who are re-establishing thoroughgoing, and in my view crude, ideas about parliamentary sovereignty, it is not clear where devolution fits in—devolution as a set of institutions that are genuinely autonomous, which after all have a mandate based on popular referendums in Scotland and Wales. It is not just that power was given to them by Westminster, which is absolutely right, but that there were referendums in Scotland and in Wales that were expressions of popular sovereignty.

It is not clear to me how the UK Government's understanding of the state is compatible with these institutions within the state that have autonomous authority rooted in popular sovereignty in Scotland and Wales. Conceptually, making that work is difficult. We have not succeeded. It was not great before Brexit; I absolutely buy that. I still think that there was a muddling towards something, maybe imperfectly, but all that stopped.

To go back to your question, what they are doing is at such a surface level. It may ease things, it may help things around the edges—and by all means, if it does that, that is great, but when you have such fundamentally different notions of the nature of the state, I think it is very difficult for any IGR—intergovernmental relations—mechanism to work. I am currently writing a piece with another colleague, which is called "The Impossibility of IGR". The idea is that, no, it is not literally impossible, but when you have such different concepts of the state, no

mechanism will smooth that over. That would be my prophet of doom take on it.

- Q173 **Baroness Fookes:** Would there be some merit in getting the Civil Service into the visitations, if you could, they worked closely and there were links, secondments or whatever you would like to call it?

Professor Richard Wyn Jones: That is a very good question, and I am not sure I can give you an adequate answer. My observation would be that Whitehall in particular has not adapted in any significant way to the reality of devolution. We still have the territorial offices. We still have the Secretaries of State, even though they are very low down in the pecking order, which inevitably means that the big stuff is kicked up to the Cabinet Office, which is the nature of the Cabinet Office.

If you were to look seriously at the organisation of Whitehall and the way that devolution fits in there, you could have something that is more functional, more useful, than we currently have. But I think I am right in saying that this has been recommended to every UK Prime Minister since Tony Blair, and none of them, when they have had the opportunity of Cabinet reshuffles and whatever, have taken the opportunity to do anything about this.

Baroness Fookes: Perhaps they think it might work too well.

Professor Richard Wyn Jones: No, I think there is huge inertia around it and it has just not been important enough to address. Also, in terms of party management, there would be lots of unhappy MPs if you got rid of the Secretaries of State for Wales and for Scotland.

Baroness Fookes: I was thinking more of the Civil Service. Ministers come and go. The Civil Service is a career. I was thinking that if you had much more interchange, that might help to change the mood over a longer period.

Professor Laura McAllister: I think there is some reality in that position, and I will tell you why I think that.

I think Richard is absolutely right: there has been so little movement, awareness or embracing of the constitutional changes that have happened in the UK over the past 21 years on the part of Whitehall that it has paved the way for constitutional relations to become highly politicised, which is what I think we are seeing in the current environment.

Your point is a good one, because if Whitehall had better adapted to devolution, it might have taken some of the political sting out of relationships. At the moment, we have the pincer effect of well-meaning officials, as Richard said, who come in and try to pick our brains about how devolution works but then disappear—almost a stepping stone to another department—and then we have a quite febrile political environment because of the differences between Governments in Scotland, Wales and the UK/England in some regards.

You make a good point in that if officials had become more attuned to the realities of devolution, it might have at least mitigated some of the politics, but it still would not have dealt with the fundamental fissures that exist in how the United Kingdom operates as a unit.

Professor Richard Wyn Jones: Having thought through your question, at the end of the day I would be rather sceptical about how big a difference it would make to have more people circulating through. This goes to the nature of Whitehall. One of the most striking things about Whitehall is the churn. People stay in post for such a brief length of time.

Baroness Fookes: Oh yes, that rings a bell.

Professor Richard Wyn Jones: Another experience of the last 15, 20 years has been not only lovely people coming to visit me in Cardiff and buying me a cup of tea, but being invited time and again to the latest attempt to educate Whitehall about devolution. I get invited to these things, academics are part of this jamboree, and there is often a huge room full of hundreds of people. We do this, there is huge enthusiasm and it is fun, but they have to redo it every three or four years, or whatever it is.

The Chair: It is theoretical to them.

Professor Richard Wyn Jones: It is because the people who have been trained are through. So, actually, I think it is the structures in Whitehall. Because of the failure to adapt structurally, people have been looking for individual-level solutions, which I do not think work in the culture of Whitehall. My view is that you could do more by adapting the structures of Whitehall, but there is deep reluctance to do that.

The Chair: Do you not think that part of the reason for that is not just the devolve and forget kind of approach that we have heard about over the years but because of the asymmetry between the different types of devolution when you take Wales and Scotland and Northern Ireland? Perhaps one of the reasons why there was never the Cabinet reshuffle to give one person responsibility for all three was because of that asymmetry.

Professor Richard Wyn Jones: It certainly did not help. Also, England is utterly dominant. England is 85% of the whole. Wales is 5%. Scotland is 7%. Northern Ireland is 3%. We have no impact on most of what happens in Whitehall.

Perhaps I may sound a note of scepticism again about how much we can reasonably expect interparliamentary co-operation to achieve. This is a really good example of interparliamentary co-operation. You are here, you are using the space, and I am sure you have been made very welcome and so on, but some of the Welsh experiences of joint scrutiny have been pretty horrible.

You are forgiven for not knowing about Part 3 of the Government of Wales Act 2006, but think of the period between 2007 and 2011. That

was a period where you had effectively the Select Committee for Welsh Affairs in the House of Commons scrutinising legislative competence orders from this place. That was extremely messy. There was not the respect for the other side's mandate that you would hope for, certainly from the devolved level's perspective. I see that you are nodding and remembering the Part 3 period. I am not sure that people respecting their own mandates and respecting the mandates of others, co-operating on that basis, gives you much space for lots of joint detail work. There is a lot of surface stuff, which is good, but I would say that that four-year experience in Wales is a warning.

We might come back to this, but I have just finished a book on the criminal justice system in Wales. The way parliamentary scrutiny of the criminal justice system in Wales falls between all stools is a problem. I am not convinced that joint work will solve that.

I am all in favour of the sentiment, but I suspect that the record suggests that this is not the panacea.

Professor Laura McAllister: Where Richard and I probably differ is that I do not think that interparliamentary relations have been given any resource or serious credibility until now, so things have happened in a pretty ad hoc way, albeit that the period Richard refers to is a very muddy period in Wales's devolution history anyway.

I am a bit more optimistic. I think that interparliamentary relations can be a very useful device, if resourced, evidenced and planned in the right way, to mitigate some of the difficulties that intergovernmental relations face. Of course, you could argue about whether it is worth investing heavily in IPR, but in the current climate, where we know that there are fault lines within the union and, if you are a unionist, that there are risks to the union, I think interparliamentary relations are pretty vital if you are going to give a fillip to the belief that the parliaments of the United Kingdom can work effectively together.

Q174 Lord Hope of Craighead: Thank you. A slightly different topic, although it raises exactly the same problem, I think, is the allocation of post-Brexit funding. Before I come on to that, however, I would like to explore the use of the phrase "parliamentary sovereignty", because I am not quite sure that I understand what you mean by it.

For me, as a former judge, parliamentary sovereignty is dealing with the relationship between the courts and primary legislation. As judges, we cannot question the primary legislation passed at Westminster, but we can, and do, pass judgment, and have passed judgment, on measures passed by the Senedd or the Scottish Parliament, because that is not covered by the doctrine of parliamentary sovereignty in that form. So I wonder whether that really is the problem.

The other point is that I think your complaint is not so much about parliament as the Executive. It is about the way the Executive is behaving rather than Parliament. I think the rules about parliamentary sovereignty are quite well settled. Indeed, as has been mentioned, the

Parliament at Westminster has given power to the Senedd, the Scottish Parliament and the Northern Ireland Assembly, but in each case there is a provision that says that the UK Parliament reserves the right to pass laws applying to Wales, Scotland and Northern Ireland.

Is that your complaint? I do not think it really is. I do not think it is as narrow as that. I think what you are really complaining about, and this is my topic, too, is the way Westminster is behaving—ie the Government, the Executive, rather than Parliament itself. Am I right about that?

Professor Richard Wyn Jones: Yes. This is potentially quite a long conversation. I absolutely accept that parliamentary sovereignty as a doctrine is being used—in my view at least; I do not want to put words in your mouth, Lord Hope—by the current UK Government as a language to justify an executive power grab. I am not wanting to put words into anybody's mouth here.

I think it was Enoch Powell who said that power devolved is power retained. As you say, it is there in all the devolution legislation: "We retain the right to—". That is what I am calling parliamentary sovereignty. It is the notion, "You are there on our sufferance. You may have a separate mandate, there may be referendums that underpin this, but actually not". If we want to legislate away, it is gone.

Lord Hope of Craighead: I wrote a judgment in a case called AXA, which you may know about.

Professor Richard Wyn Jones: Yes, I have read your judgment.

Lord Hope of Craighead: The Scottish Parliament, like the Senedd, is based on a democratic mandate, and it should be given full respect in that respect and should not be questioned except on very narrow grounds. Are you suggesting that the UK Government are not respecting that principle?

Professor Richard Wyn Jones: I think that since 2016 there have been plenty of signs of resiling from that principle.

Q175 **Lord Hope of Craighead:** Coming on to the post-Brexit funding and comparing the way in which the resource was deployed by the EU and the way things are now, do you see that as having changed to the deficit of Wales since Brexit? If so, could you put your finger on exactly what the problem is, which we need to look at because we need to find a solution if we can?

Professor Richard Wyn Jones: The first point to make is that economic development was always a central competence at the devolved level. It was part of the way devolution was solved in the mid-1990s. It has been a key aspect of what devolved government has done until very recently and continues to try to do.

In the context of the follow-on to EU structural funds in particular—bear in mind that the EU structural funds have been really important in the Welsh context—we have seen that the UK Government are trying to

bypass the Welsh Government in the process of working out how that money will be spent. It is a very deliberate attempt to bypass devolved government and work directly with local government.

It is impossible to read this as anything other than ideological. All the expertise resides at the devolved level. We have 22 unitary authorities in Wales, most of which are too weak and underresourced to be credible partners in that process. I will not bore you with Welsh local government, although I would be happy to do so. Cardiff is a big authority with plenty of power, but my own native Anglesey, or Denbighshire, or Merthyr, are small, weak authorities. The idea that you can jump over the devolved level and engage directly with them is only an ideological move.

Lord Hope of Craighead: I think we can understand the problem. The question is: what do we do about it? Before I ask you that question, could I come back to Professor McAllister? Do you have any comment on my questions about sovereignty?

Professor Laura McAllister: Only to say that you are absolutely right. We were both talking about a more expansive understanding of parliamentary sovereignty based on people's connection with the politicians they elect, the rights they have and even principles of subsidiarity in terms of how they operate. I was talking much less about the technical, legal doctrine of parliamentary sovereignty and more about a popular understanding of what political sovereignty is about, which is much more widely dispersed than a traditional legal definition.

To add to Richard's response about European funding, the problem with the way the UK Government are approaching the alternative to the structural funds is that there is no clear rationale for bypassing the Senedd and the Welsh Government and going to local government, because there was a regional structure of European funding in place in Wales before. It was not operated at individual local government level; it was operated regionally.

This is why so many people feel that there is an ideological motivation rather than a sensible, pragmatic, practical one for discharging the responsibility for new funding. I think that is quite dangerous to the perceptions of relationships not only between the Welsh Government and the UK Government, but indeed between local government and the Welsh Government and local government and the UK Government.

Going back to our original point about where the fault lines are in the union, those kinds of approaches deepen the fissures rather than assist.

Lord Hope of Craighead: What can we do about it? We can make recommendations that could be the subject of debate and possibly some action. An alternative is to say to the UK Government that they should simply detach themselves from this and that it should be left to the devolved Administrations simply to be allocated a package of money to dispose of as they wish.

It is difficult to fit that into the internal market Act, but that would be one solution. The other, I suppose, is much greater involvement in the discussion, not with local authorities but with the Welsh Government itself, so that the Welsh Government have a real part to play in the discussion and are not bypassed. Is the latter a more realistic way of dealing with it?

Professor Laura McAllister: The Welsh Government have a programme for government. There is some uncertainty about the detail of that at the moment because of the political negotiations that are happening, but they have it and it sets out their strategic vision for economic development, which of course is a largely devolved area, for housing, for fisheries, for transport and so on.

It seems anomalous that strategic interventions with new funding bypass the Welsh Government, who have their own strategic view of how they want to manage the economy of Wales. That is where the problem lies. Recommendations suggest a much more strategic and constant relationship that could align the use of the new funding with the strategic priorities of the Welsh Government. That, in my view, would be an exemplar of a more mature relationship between the two Governments.

Lord Hope of Craighead: Is there room for that within the existing legislation?

Professor Laura McAllister: I do not see why not. I cannot see that there is anything in the existing legislation that would prohibit that.

Professor Richard Wyn Jones: Forgive me for interrupting. I am very cautious about saying anything about the internal market Act in your company, Lord Hope, because you will know far more than I, but I cannot see why that would make it difficult for the UK Government to say, "Carry on doing what you were doing in this area, because you have the expertise and you were doing it at the Welsh level long before the establishment of this place". If one thinks concretely about the internal market Act—I am not an expert; we have colleagues like Professor Jo Hunt and Professor Daniel Wincott, our colleagues in the university, who know far more than I, and potentially Laura—I think discussions about the frameworks have gone reasonably well.

As far as I am aware, the only complaint the UK Government ever make about the Welsh Government in the context of economic development is that they do not want to dynamite the tunnel in Newport and build the M4 motorway through the Brynglas tunnels. I am not aware of any huge problems in principle between them, and I do not think that the UK Government have decided to try to exclude the devolved level from this because they feel that it is making decisions that they do not like.

I think what is happening here is not only the outworking of Brexit and the way this is leading to a kind of recentralisation, but one of the things that the UK Government persuaded themselves of after the 2014 Scottish independence referendum. I vividly recall being taken to a room in the

Treasury—I cannot remember whether it was with Cabinet Office colleagues or Treasury colleagues, but it was in the Treasury—and they wanted excitedly to tell a group of academics what they had learned from the Scottish referendum experience. It was that they needed to badge things in Scotland and in Wales to make sure that everybody was aware of the benefits of the union. I recall saying at the time—and this is not me being wise after the event—“You do realise that every bypass in west Wales and the valleys has an EU flag on it, and that has not made people love the EU”.

Whitehall has persuaded itself that making the union visible is the way to go. There are all kinds of weird and wonderful pathologies to this. I am not sure whether you are aware of the plan to erect an eight-storey-high union jack in the middle of Cardiff.

The Chair: No.

Professor Richard Wyn Jones: The Secretary of State wisely decided three weeks ago that this was not such a great idea after all, but we see that kind of mentality, bypassing all the experience, all the expertise on economic development, in the Welsh Government to build relationships with local government, which is not capable of bearing the weight. These are various elements of the same kind of mindset.

Professor Laura McAllister: It also fails to take into account the wider governance of European funds—my point about regional tiers—as well as third-sector organisations that have been very much aligned with Welsh Government allocation of funding. Clearly, the UK Government have far fewer of the connections and intelligence around those, so it threatens delivery as well. Some of our debates about politics can become esoteric, but European structural funds were mostly about delivery to the poorest parts of the United Kingdom, and anything that would risk that is, I think, hugely problematic.

Lord Hope of Craighead: Can I close this particular topic off by asking if I am right in understanding that greater collaboration between Westminster and the Welsh Government, at government level rather than local authority level, is the way to go; that the lack of involvement with the Welsh Government is the basic weakness in the present way in which things are being handled, and that greater collaboration with the Government would be the answer?

Professor Richard Wyn Jones: To be honest, my view would be to devolve it within the framework of a broader understanding.

Lord Hope of Craighead: So no longer any engagement by the UK Government in the decisions about the allocation of funding.

Professor Laura McAllister: That in essence is devolution in the areas of competence, is it not?

Lord Hope of Craighead: So that would be the logic behind it.

Professor Laura McAllister: Yes, and if this is in the area of competence, it is the same principle that is being followed.

The Chair: But that was not the situation with the EU, because you had to engage with the EU to get the money.

Professor Laura McAllister: It was and it was not. At one level it was not, in terms of relationships at member state level with the EU, but in terms of delivery and enactment—

The Chair: In terms of delivery it was.

Professor Laura McAllister: Yes. It depends whether you are talking about collaboration on the funding stream or about the delivery of the projects.

Professor Richard Wyn Jones: Can I make one final point? I think this is important. As well as my day job, I am a dean in the university and therefore face out into various circles of life and society in Cardiff and Wales more broadly. One thing that is very palpable at the moment is that all kinds of organisations—public sector organisations and private businesses—feel that the UK Government want them to choose between London and Cardiff, that you have to decide one or other, and that is not what people want to be doing.

People just want to get on with it. You have structures that have been very well established, such as for economic development, and that have been decades in the building, but they are now being thrown over and there is a completely new way of doing things. London has the money, so we have to play ball with London if we want the money. It is pretty crude.

We are used to a way of working that worked pretty well, if not perfectly, but now it seems that we are being forced to choose. That is very toxic. It is part of this flag waving, of showing that the union is important, but it is counterproductive. That is a sense that I get from all kinds of interactions at the moment in this kind of space.

The Chair: Can you give us an example or two of the kinds of issues you are talking about? Are you talking about investment decisions being in line with what Welsh strategic thoughts are or what the flavour of the month is in London?

Professor Richard Wyn Jones: If you are a local government in Wales—let us invent a fictitious local authority somewhere in north-west Wales so that we get the accent right as well—you are in a position where obviously the Welsh Government are central to your daily life because local government has always been a devolved competence, but suddenly—this is a poor area, so we are looking for follow-on from structural funding—the UK Government are saying, “If you need money, it’s all about your relationship with us now”. How does this work politically? You have different parties in power, you have different ways of working. There is a sense that we do not want to be in a position where

we have to choose and there is a sense that you are with us or you are against us.

Q176 Lord Hope of Craighead: I am sorry to come asking more questions. I think this is probably a shorter issue for you. It is the problem of the legislative consent process, the Sewel convention. The perception is that it is not working, and we know that quite a number of cases have been piling in the Senedd where consent has been withheld. The question we are having to address is what can be done about this.

I have to say that the idea of taking “normal” out of the phrase is really not workable. I tried that amendment in the Scotland Act of 2016, as it became, but that was defeated by the Government and there is no sense of movement there at all. They believe that they have won that thing and the Supreme Court decision has sealed the position off there.

No kind of legislation or justiciability or anything like that is workable, but there are things that we may be able to do within the parliamentary process. I wondered whether either of you had any thoughts as to how we might develop an argument along those lines—in other words, greater involvement during the passage of the legislation with the Senedd as to how they may contribute and explain why they are not willing to give consent, or why they would be willing if certain conditions were met, and then see how the legislation progressed through it. Is there a process that we might try to develop to address this very unsatisfactory situation?

Professor Laura McAllister: For me it is about the formality that can be inserted into the process to remove the discretion that currently exists, because anything that is dependent on discretion is not a great basis for something as potentially controversial as some of the consent Motions. I am not expert enough to know how you build in the formality because, as you say, the language is so difficult politically.

Lord Hope of Craighead: The word “normal” suggests to me that it is not just a matter of discretion, that more thought has to be given to it to justify the position as being abnormal, and we have a procedure for that to be developed.

Professor Laura McAllister: Quite, but the problem is that the discretion has allowed more interventions than should have been the case with Sewel, and substance or formality over the process might at least mitigate that.

I think Sewel lands very differently in each of the Governments and parliaments of the UK. You have mentioned Scotland. Our Government in Wales have expressed frustration over Sewel recently and the degree of ad hocness that has come in through LCMS with no rationale or logic to it. I think there were 14 within a period at the end of the last Senedd which the Constitution Committee felt that it was having to deal with. That suggests that even with “normal” in it, there has been no real attempt to codify why Sewel was being used in that way.

I am afraid I am not expert enough to suggest how you might alter that in any real sense, but I do think this is a significant psychological problem about relationships between the Governments and that it probably has more potential to trip up relations than anything else.

Lord Hope of Craighead: Thank you very much. Is there anything that you would like to add, Professor Wyn Jones?

Professor Richard Wyn Jones: I am sure you have had more intelligent thoughts than I have about what you might do.

The fundamental problem is easily described. Given the asymmetries, the health of the union depends on the UK Government exercising self-restraint. There is no legal form of words that I am aware of by which you can force the UK Government to exercise self-restraint. That is the fundamental problem here.

At the end of the day, if they are not willing to exercise that self-restraint, the union has serious problems, because this is, as Laura just intimated, exactly the kind of issue where if unionists are going to persuade especially younger people that the union can work but in a way that is consistent with enabling devolution, it is exactly this kind of problem that they have to find solutions to. It is very hard to do that. The political will is required. No fancy phrasing, I suspect, gets us around that problem.

Lord Hope of Craighead: We will have to see what we can do about that.

Professor Richard Wyn Jones: I bow to superior knowledge and wisdom.

The Chair: We have some ideas.

Professor Laura McAllister: I have read potential solutions such as a memorandum of understanding that would codify some of this, but it seems to me that unless there is a will to relate equally between the Governments, the chances of a memorandum of understanding working well are probably quite slim.

Lord Hope of Craighead: There may be other things that we consider as well.

Q177 **Lord Faulks:** This may fall into the description of just a form of words, but legislation bears a certificate from the relevant Minister of compatibility with the European Convention on Human Rights, for example, so there is that discipline, and the Minister is accountable if there is some departure from that convention. Would it help if there was a similar declaration that carried with it an obligation to go through certain procedures at every stage of the Bill before it became law and that became part of the whole legislative procedure?

Professor Laura McAllister: Do you mean so that there would be an opportunity for judicial oversight?

Lord Faulks: Not judicial oversight. Unfortunately, I think Miller 1 has put an end to that. It would have to be a procedure that is gone through by the Government and by Parliament, but not through the judges.

Professor Laura McAllister: If that was coupled with an understanding that the UK Government would proceed with legislation only in extremis if there was no devolved legislative consent, it might address some of these issues. I am not sure how far that would take us because of the political climate in which these decisions are likely to be made, as we saw with the EU legislation. I think we are back to where we started, which is that these are more likely to be amelioration of problems rather than solutions to problems.

Professor Richard Wyn Jones: I am afraid that I am very sceptical. Just to add to the problems that have already been outlined, we have the UK Government, which acts as both England's Government and the UK Government. We now have three different dominant parties in the three different parts of Britain, setting aside Northern Ireland for the moment. The 100th anniversary of Labour's domination of the Welsh electorate is on 15 November 2022. There are fundamental tensions here, and I have doubts about that kind of approach. By all means try, and I hope it works, but I started my academic career as an international relations scholar, so I suspect that realpolitik triumphs here.

Lord Faulks: We had various suggestions from some witnesses that in the event of there being a disagreement there ought to be an independent body that determined these things. You have probably heard that evidence in one form or another. I do not think that was accepted by Michael Gove when he gave evidence to us. We are groping for some solutions and suggestions as a committee. You are sceptical about a form of words or a more elaborate structure, yet perhaps you would prefer some independent body, some veto.

Professor Richard Wyn Jones: Establishing an independent body has been recommended for years in the context of the Barnett formula. Famously, HS2 is classified as a Welsh project. Scotland is getting a Barnett consequential there, Wales is not, even though the UK Government's own figures suggest that the Welsh economy will contract as a result of HS2. Surprisingly, the Welsh Government are saying that there should be an independent adjudicator that can look at this. This is not the first example; it is the most recent and probably most egregious. There has been consistent refusal to allow that. I would be stunned if there were any openness to allowing an external arbitrator to come in—sadly.

Professor Laura McAllister: Ultimately, Richard and I are political scientists, not legal bods, so we tend to see things through the eyes of real politics of all this. If there was not cohabitation of different Governments in each of the nations, your solution might have some potential traction, but that is not real politics.

Professor Richard Wyn Jones: Even when Labour was in power it was not done. The London Olympics is another example of this.

- Q178 **Baroness Fookes:** We have heard that the Welsh and Scottish Governments have described the UK as a voluntary union of nations. I assume you would broadly accept that view. Should the UK's constitutional arrangements recognise an explicit right of secession for Wales? It does not have that at the moment.

Professor Laura McAllister: That is a good question. The common parlance about the union now uses the language that you referred to there. It is a language that has more relevance than the notion of single parliamentary sovereignty that we discussed at the very beginning of our conversation.

We are talking about the maturity of any state to create within it structures and opportunity for any part of it to cede from that power. I can see a strength in that, because it creates conditions that drive the nation that might consider leaving to consider the options very carefully rather than to create a noise around potential independence without thinking through the route for it happening. Once you move down that path you are effectively moving towards a more tightly codified constitution of the type that we do not have at the moment, especially around devolution. That will probably bring some threats and some obvious opportunities.

Professor Richard Wyn Jones: My only thought was that, given that the potential is there for a border poll on the situation in Northern Ireland, and given that we had the 2014 referendum in Scotland, de facto there is recognition that this is a voluntary union and that there is an option to secede. I know there are some very lively debates in Scotland about how often that possibility should be open, and so on, and there are all kinds of conversations to be had on that. As a basic principle, even though Wales was annexed by the English Parliament, there was no pretence of a treaty, an agreement or a conversation with anybody.

The precedent of Northern Ireland and Scotland suggests that Wales is also now recognised as a unit within the states. To the extent that Scotland and Northern Ireland have options, we potentially have options. I do not know what to say beyond that.

Baroness Fookes: There is nothing built in at the moment. Should there be, or is that adding to problems without solving them?

Professor Richard Wyn Jones: It would be very difficult to do that without going the whole hog on a written constitution. There may be a way of envisaging that as a specific thing, but I am not sure what that looks like.

- Q179 **Lord Hope of Craighead:** One tiny point. The EU, because of Article 40, I think, as the treaty of the European Union, is a voluntary association, because every member state has a right to withdraw. The point I wanted to raise with you is that you cannot just say, "I want to leave, please".

There would have to be some other arrangement, which is what Article 40 was all about, while we had this problem in dealing with a Brexit arrangement. It would have to have that built into it, would it not? There is a lot of investment across the borders and a lot of ways in which ties have to be reorganised. It is not just about breaking the ties but about devising the future relationship, which is also part of Article 40. Would you have to treat this as a package, not just leaving but how it is to be done?

The Chair: This is the point at which to bring in Baroness Suttie with the points she wanted to raise.

Q180 **Baroness Suttie:** I want to move on to the potential federal solution. It is my understanding that the Welsh Government are opposing a federal UK, but there is seemingly very little support for a federal solution, particularly within England. There is a little bit perhaps in Scotland. Is it a feasible solution to have a federal structure for the UK? Could you have a federal structure for the UK without a written constitution?

Professor Laura McAllister: It is tricky, because in many respects the purpose of federalism is to reflect difference and diversity but to maintain unity. To many people that is a relatively attractive prospect, unless you support independence for the nations of the UK. It would be very hard to create a properly federal model without a tightly codified constitution, because there are so many things that have to be bottomed out. We talked about a secession arrangement taking with it responsibilities, rights and duties for splitting us under an organisation, and the same would apply to creating a federal system.

In many respects, we have a quasi-federal system. It is hard to deny that because of the way in which powers are spread, fiscal responsibilities are shared and so on. The elephant in the room is always what you do about England. Where else are there such unbalanced federal systems in terms of size and population? Some people would argue that evidently there are big states within other federal systems that are out of sync with some of the smaller states, but none that would reflect the balance of England versus the other nations of the United Kingdom. It is very hard to imagine a federal system in the UK that has England as a single component. That opens up the discussion about regional government in England, and we know where that takes us or where it has taken us.

It is quite easy to argue that in Scotland that horse has already bolted in that the debate is far more about the union and independence than it is about anything that creates a space between them. I think we are in a different position in Wales in that respect, not just because our Welsh Government talk very openly about their enthusiasm for what they call radical federalism—whatever that means, because that can be interpreted in a whole host of ways—but because the commission I will co-chair is being charged with looking at options in between all those things: home rule, self-rule, association and so on.

Some of this is a matter of language and terminology, but some of it also raises big questions about how Wales and Scotland can determine a future that is not independent—the status quo—without a buy-in or co-operation from England. At the moment, that looks a long way off coming.

Professor Richard Wyn Jones: I have spent a lot of time studying attitudes in England, probably more than almost anybody else on constitutional issues. Laura has described the conundrum very well. England is enormous. There is very little evidence of an appetite for the kind of constitutional change that would be required to move to a federal system. There is certainly very little evidence of appetite for the regional solutions that Scottish and Welsh unionists are very keen to foist on the English because it is convenient for them, so you end up in a very difficult position.

The Welsh Government deserve huge credit. I am very critical of the Welsh Government in all kinds of ways, but they have spent a lot of time trying to think seriously about how you could maintain a union that is a warm home for devolved Governments. They have spent more time than anybody thinking about that. It was interesting to note that the Leader of the Scottish Conservatives was recently brandishing some Welsh Government publications about the union. It is not often that anybody outside Wales has taken much notice of what they have said, but if you read what they say there is still the big black hole with regard to England and what you do with England. They do not have a good solution either, because I am not sure there is one.

As to whether you could do federalism without a written constitution, I do not think you could, especially if you have one unit that is so dominant. That is when you particularly need the written constitution, otherwise might will be right.

Professor Laura McAllister: Apart from England, the other thing to throw in is Scotland, because what powers could be given to Scotland beyond the powers that Scotland currently has to make a federal model attractive, unless you are committed to trying to save some form of union between the nations of the UK? That might be enough, but what is the incentive for Scotland to embrace a federalist model of the United Kingdom? I am not sure I know the answer to that.

Q181 **Baroness Suttie:** It raises lots of questions, but not so many answers. Do you think that a UK-wide constitutional convention would also be necessary in order to move towards the Welsh Government's position of a federal solution?

Professor Richard Wyn Jones: This is where we will probably disagree with each other most firmly. There is a whole trope in Welsh political discussion, which I call constitutional convention envy. Basically, there is a sense that because Scotland had its constitutional convention it got a model of devolution that worked better than anything that has been established in Wales. If only we had had a constitutional convention,

things would have been different in Wales. The obvious rejoinder to that is that the Scottish constitutional convention only involved people who basically agreed with each other.

Baroness Suttie: In fairness, they absented.

Professor Richard Wyn Jones: The reasons why they were not present are not germane to this, in the sense that, if everybody is agreed on the same aim, you have a chance, but not if your convention is aimed at finding common ground between people with fairly incommensurable views. The last constitutional convention held in Ireland in 1920 or 1921 collapsed and the Irish Free State was established. These things can work incredibly well when there is a lot of common ground. It is very difficult to imagine, given the range of views we have in the UK, that somehow 100 people will magically solve this one.

Professor Laura McAllister: I do not disagree with Richard on that. I slightly disagree about the potential that we have in Wales to be—for want of a better term—honest brokers in the conversation about the future of the UK. There are a couple of reasons for that. We have had 100 years of Labour rule in Wales. Labour is a unionist party and our First Minister remains committed to the union, yet it is prepared to open the doors to a conversation about options that range from progression on what we have now to independence. That allows us some space in Wales to have a serious constitutional conversation that will have benefits for the rest of the UK.

I do not disagree with Richard, because it would be incredibly difficult to organise something like that beyond Wales at the moment. The political dynamics are so fundamentally different in Scotland and Northern Ireland, and there is no appetite or interest in England to generate that kind of conversation. Bringing all that together would be destined to fail. Maybe I am being naively optimistic at the start of our process, but perhaps we can look at some of these issues in the context of Wales. It would have quite a lot of relevance to the debate for the wider UK.

Baroness Suttie: It could be a starting point for a wider discussion.

Professor Laura McAllister: Why not? The unionist Government, because we have a unionist Government in Wales, are prepared to have that conversation. That is different from a nationalist Government generating a conversation in another country.

Baroness Suttie: Depressing, but thank you.

The Chair: You made a passing reference to what has been said about radical federalism. What does that mean?

Professor Laura McAllister: Let me have a go at what I understand of it from conversations with individuals who have been behind the concept. It featured in the Welsh Labour manifesto for the Senedd elections and was instrumental in the drive to create some kind of national conversation and commission on the future.

It is a values and principle-based approach to dealing with constitutional change. The will of the people, the right of the people, a social contract between the state and the people, feature quite prominently in that, creating a different kind of politics where devolution happens beyond Cardiff to each of the local areas of the United Kingdom and so on, which is germane to the whole concept.

As defined by mainly Labour people who are drafting the principles documents, it is a progressive form of federalism, so there would be principles upon which international affairs beyond the federal state were organised. Is that idealistic? Is it naive in the current political climate? I am not sure, but it is a decent starting point for having a conversation about a different model of politics.

We started off with conversations this afternoon about whether the union is broken, and we all suggested that if it was not broken there were significant problems with the union. This leaves you with the question: do you wait for one of the nations to cede from the UK or do you attempt to create some kind of alternative and halfway house? That is what the Welsh Government are attempting to do through their notion of radical federalism.

Professor Richard Wyn Jones: I have an observation as a result of publishing a book on Englishness recently. I spent a lot of time talking to various audiences in England, which as you can imagine with my accent leads to interesting conversations. One of the things that comes up very frequently with audiences on the centre left is talk of federalism. It is a word that is bandied around quite a lot, but what strikes me is how different the understanding of what that might mean is in Wales compared with in the north-west of England.

I will hazard sharing some experiences. I have always asked, "What do you mean by, 'We want a really strong regional thing that is part of this federal thing'? What powers do you want at the regional level?" Obviously, from a Welsh perspective, you are thinking that you will have a legislative parliament and a Government. What will you do with criminal justice? Will there be a judiciary?

Even among the keenest people, basically it is a combined authority but with a few more powers. I do not know which fruits we are comparing here, but say it is a grape and a pomegranate. They bear very little relationship to each other. I am not sure how helpful these phrases are, because the debates in Scotland, Wales and Northern Ireland are in such different places.

The Chair: Exactly. That was the essence of my question, because as soon as you use the word "federalism" you are not talking about the nature of politics or decision-making; you are talking about structures. You are not necessarily talking just about structures there; you are talking about attitudes as well. Let us move on.

Q182 **Lord Faulks:** I wanted to ask you about policing and justice, and

possible devolution to Wales. I should declare an interest as a barrister called to the Bar of England and Wales, where I have been greeted with reasonable friendliness when I have appeared in Welsh courts.

We understand about the report of Lord Thomas and the cost of £100 million a year. I notice what you said about the criminal justice system falling between two stools. One might extend concern to the criminal justice system in England more widely, particularly in the context of the pandemic. How important is this?

Can I just preface my remarks by quoting what the Parliamentary Under-Secretary of State said, which is that he was not convinced that there was an advantage to Wales to being separate because being part of the English legal system is quite a strong message to send internationally, with our reputation for the rule of law. I think that is what is probably meant, in the sense that this was effective internationally, and if there was a separate system we might lose some of that. What I would like from both of you is a sense of how important this is. Is it a nice to have or is it central?

Professor Richard Wyn Jones: I literally sent a book to press two weekends ago specifically on this. I currently have very strong feelings about this. First, in terms of the Westminster model, Wales is clearly anomalous in having its own legislature, its own Executive, but the Ministry of Justice at the London level makes it very clear that this is its property—it is not even a shared system—in which the Welsh Government and the Welsh parliament are allowed to proceed in carefully policed routes.

It is even anomalous compared to what is happening in England. There is more devolution of justice in Greater Manchester than there is in Wales. In Greater Manchester, the argument is that it allows better alignment with local health, education, accommodation services and agencies, including the police. The UK Government argue for devolving some functions in this area to Greater Manchester, which they say do not apply in Wales even though devolved power in Wales is obviously far greater than it is in Greater Manchester.

We also have particularly poor outcomes in Wales. We have the highest imprisonment rate in western Europe, which the UK Government dismiss on the basis of, "That's not true. It's higher in Guernsey". The population of Guernsey is smaller than that of Wrexham, where the UK Government have now opened a prison, which is meant to be the second biggest prison in western Europe when it is at capacity. We have the third highest female imprisonment rates in western Europe. A far higher proportion of the Welsh population is under some kind of custodial supervision than in England. Even finding basic data about this is very difficult. You have to FOI constantly to get even basic data about the criminal justice system. That is the background. This is anomalous. There are real problems here, if you can find out about them.

We had very serious reports by the Thomas commission, and the UK Government's response has been entirely unserious. You quoted the

Under-Secretary. Without wishing any disrespect to Mr Philp, the fact that he was—

Lord Faulks: It was not the Under-Secretary I was quoting, but he has come up with similar observations.

Professor Richard Wyn Jones: There was no serious engagement with that report. It deserved far more serious consideration than it has been given. The system is so anomalous and has really poor outcomes. Even the arguments about the legal industry do not stand up, because the legal sector in Wales is smaller as a proportion of population than you would expect on an England and Wales basis. So even if you are saying that the legal system is effectively about lawyers—I hope nobody would want to make that case—I have to say that the legal economy in Wales within the England and Wales system is weak.

You can hear from my voice that I feel quite strongly about this, because some of the stats are just awful. This is a very poorly performing system and nobody is taking it seriously. Even when it comes to accountability, in Westminster the Select Committees that usually do the justice stuff basically leave Wales, because once the justice system starts to intersect with devolved services, which it does all the time, it gets very complicated. They tend to leave it. It is taken up by the Welsh Affairs Committee, which with all due respect is not kitted out for that. Even Her Majesty's inspectorates tend to leave Wales. They tend to do reports on England and say, "We won't cover Wales in this". Chapter and verse in a book coming soon.

There is a real issue here. It is not a big political issue. I am not going to claim that if you walk along Cardiff Bay on a glorious day people will be talking about it, but if you are serious about the social problems of Wales, this is a major issue. I hope it will become a higher priority.

Lord Faulks: Why would the social problems in Wales be improved by devolution? For example, would you lock up fewer people?

Professor Richard Wyn Jones: It would depend on what Government are elected and the exact nature of the policies they adopt. One of the things that is very difficult at the moment is marrying the devolved stuff with the criminal justice stuff. To give you an example, which we go into in some detail, there was an attempt after 2003 to try to ensure that nobody who left prison became homeless in Wales. Unlike England, you did not have to prove that being homeless made you additionally vulnerable. You would have thought that being homeless makes you vulnerable, but in England you had to prove that there was an additional vulnerability arising from being homeless in order to qualify for priority need status, which meant that you got local government housing support.

Lord Faulks: Could you do that now?

Professor Richard Wyn Jones: They tried to do that in Wales. They kept that policy going for about a decade, but eventually, because they

did not know where the prisoners were coming from and they had no control over any of the downstream things in the justice system, the policy collapsed.

You have a jagged edge between the criminal justice elements and the things that have devolved but which the criminal justice system relies on: housing, drug services, all these things. Making them cohere is extremely difficult in the system that we have. Your question is an absolutely fair one, but I would hope, because I am a boring progressive on these things, that any Welsh Government who had responsibility in these areas would be evidence-led; that they would look at this prison work and all these things.

Whatever the Government try to do, the fact is that you have this jagged edge between the criminal justice system and the services on which the justice system relies. The devolved system is responsible for health in prisons. They are completely interlinked with each other.

Professor Laura McAllister: Richard has covered a lot of ground that I would have referred to. The strength of the Thomas report is in pointing out how anomalous it is for Wales not to have control over the justice system compared with other decentralised Governments across the world, not just within the United Kingdom. That has an interface with policy decisions. No one can anticipate how a Government would interpret its interventions in this area. Take something like legal aid. We have seen legal aid deserts in the poorest parts of Wales, the rural and post-industrial valleys. I find it hard to imagine any Government of any political persuasion not looking long and hard at that if it was within their competence to manage it differently.

For me, first, it is the anomalous nature in the first instance. What is the rationale for Wales not having control over these areas? I struggle to see what that is, especially given developments in England in recent times. Secondly, it is the policy interface. If a government have control over significant policy interventions but cannot enforce them through the courts in the way they normally would, that seems to me to be a very strange way of organising a justice system.

Lord Faulks: It is the infrastructure of the justice system rather than the law itself.

Professor Laura McAllister: It is both. The issue of justice and policing suggests that there are ways of smoothing jagged issues such as important policy interventions that are currently encountering all kinds of negative outcomes, such as incarceration, which we have talked about. Rather than crime prevention we see high rates of incarceration. Those are policy choices that have implications well beyond the justice system, yet there are big parts of that jigsaw missing as it currently stands.

Professor Richard Wyn Jones: My approach to this has been about the functioning of the justice system. There is a danger that I monologue at length here, but the organisation of the justice system is simply unhelpful

when it comes to trying to rehabilitate people. I am from north-west Wales. One of my PhD students did some research that involved joining the prison bus in a town called Caernarfon in north Wales taking families to see people in prison. I think Durham was the furthest they got. That is a long way from Caernarfon. He traced a grandmother who came from Deiniolen, a small quarrying village right up in Snowdonia. She had to get two buses to Caernarfon to get the prison bus to see her son who was somewhere in north-west England.

We know that family connections are important for rehabilitation. These things are not part of the operational planning of the system. Even when the MoJ is presented with irrefutable evidence that this is not working, it trivialises. It does not take it seriously. It will not even take the former Lord Chief Justice seriously.

The Chair: I think you have made your case.

Professor Richard Wyn Jones: Sorry, I apologise. Thank you for indulging me, Chair.

Q183 **The Chair:** It has been a very interesting discussion. We have roamed widely. You started off with great gloom and doom talking about the fragility. We are trying to be positive and make suggestions of ways in which we could improve the situation and help the Governments of the UK to function better. Does anything occur to you as a priority that we should pay a little more attention to in order to try to be positive?

Professor Laura McAllister: We have not touched on Barnett in any great detail in talking about funding. I appreciate that the appetite for doing that is low in large parts of the United Kingdom. I am not sure how long we can continue with the vagaries of Barnett and Barnett consequentials, and what projects are deemed England and Wales or Wales or half England/half Wales, as Richard alluded to with HS2. That continues to undermine some of the faith and confidence that people have in fair allocation of funding based on need. Any report on the future of the union has to have a strong strand that deals with a fairer and more equitable distribution system.

Professor Richard Wyn Jones: There are things that I have touched on, such as serious reorganisation in Whitehall to try to make Whitehall fit for purpose in its engagement with the reality of the devolved UK. This has been suggested by many other people who are wiser than I and we have all been ignored, but there are things that should be suggested.

I genuinely think that sounding the alarm is one of the most important things here. If one wants to see the union persist, there is a respectable argument for saying that maybe it would be better not. If you want to see it persist, I am very struck by the changing nature of conversations here in Wales. I referred earlier to Wales as the canary in the coalmine. It is now absolutely standard to have a conversation with very respectable people in Wales—the establishment, to use that old-fashioned phrase—and the position very rapidly moves to, “Obviously, it makes sense for

Northern Ireland to join the Republic after Brexit, and Scotland will go. If I was Scottish—". These are people who would not count themselves as nationalists at all. Then it is, "What do we do in Wales?" England and Wales does not look like an attractive unit to be a part of.

I used to teach in Aberystwyth, and maybe in Aberystwyth you would not be surprised if people said, "I support independence". It is now standard for my Labour-supporting, Labour-activist students to be in favour either of independence directly or of constitutional change that is so radical that it equates to independence. Half of Labour supporters in Wales say that they would vote for independence in a referendum.

This is in the last two or three years, so this is a very rapidly changing situation. This is why sounding the alarm is important. The public attitudes that I described very briefly at the start and all kinds of anecdotal stuff reinforce that in my daily life.

Professor Laura McAllister: This is why the reaction of those who favour the union is so strange, because Newton's third law of motion says that for every action there is an equal and opposite reaction. The more hyper-unionism there is, the more muscular unionism there is, the more likely there is to be a reaction to that, which is where the alarm bell comes in. If you want to break up the union, it seems to me that unionists are going about it the right way. If you turn that on its head, that is probably where the alarm bells should go off.

The Chair: I certainly hope that we are not part of that group who will push it the wrong way. Thank you both for the evidence. You have made it well worth us coming down to Cardiff, although we have enjoyed talking to Members of the parliament here as well. I will be talking to some people outside, so I may get some reaction in the way that you have been talking about. It has been useful to talk to you, so we are very grateful to you for giving up your time. Thank you.