



HOUSE OF LORDS

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Witnesses: Professor Ailsa Henderson and Professor Nicola McEwen

Members present

Lord Lang of Monkton (Chairman)
 Lord Brennan
 Lord Cullen of Whitekirk
 Baroness Dean of Thornton-le-Fylde
 Lord Hunt of Wirral
 Lord Judge
 Lord Lester of Herne Hill
 Lord MacGregor of Pulham Market
 Lord MacLennan of Rogart
 Lord Norton of Louth
 Baroness Taylor of Bolton

Examination of Witnesses

Professor Ailsa Henderson, University of Edinburgh, and **Professor Nicola McEwen**, University of Edinburgh

Q83 The Chairman: I welcome our two distinguished guests, both from the University of Edinburgh. Unfortunately, Professor Charles Lees of the University of Bath has had to call off but is sending us some written evidence. We are grateful to you for coming. You both have distinguished backgrounds with all kinds of exposure to constitutional matters. We very much look forward to hearing what you have to say.

I will start the questioning with the first point that we wanted to raise: are there any common principles underlying the distribution and exercise of power in other countries with multilevel government systems—either in other countries or in the UK, if you think that is appropriate?

Professor Nicola McEwen: Only in a very general sense in that all federal or multilevel systems tend to be based on the principle of wanting simultaneously to recognise diversity and to maintain unity. That idea of balancing unity and diversity is the underlying principle for all of them. Of course, how you do that and how you give institutional expression to that principle will vary from case to case, but all systems have a balance between self-rule—recognising autonomy and self-government—and shared rule, facilitating a process for the constituent units to participate in decision-making at the central, state level on matters that concern their competences.

In the UK, at least with respect to Scotland, Wales and Northern Ireland, we have tended to focus rather more on the self-government aspects and have really neglected the shared rule dimension. There is probably rather a lot that we can learn from looking at other systems about how to begin to address that.

Professor Ailsa Henderson: I agree. In terms of common principles, one thing that is clear from the literature is that there is not one way to do things, so often the literature focuses on the variation rather than on what is shared. If we are looking at constitutions or documents proposing change, obviously diversity is something that crops up frequently. Sometimes that is recognition of diversity in terms of the existence of constituent units or recognition of diversity in terms of constituent communities—linguistic or ethnic communities. That crops up frequently, and sometimes there is an overlap between those constituent units and those communities. Then there is the notion of unity and social solidarity. Often we find in constitutions, particularly of federal states, that there is an attempt to link those; for example, the notion of diversity in unity that is referred to in the Swiss constitution.

Another thing that crops up often is the notion of equality. Equality is sometimes referred to in a formal legal sense—everyone is equal before the law—but particularly in a multilevel context it also refers to equal opportunity or equal access to programmes, and it surfaces often in the notion of mobility rights; that is, if you move from one part of the country to another, you will have equal access to different programmes and services; and particularly when there is linguistic diversity within a state - that a particular region is not seen as a ghetto for individuals and they should be able to move outside their region - in which there is linguistic difference, and still be able to access services and programmes throughout the state.

The Chairman: Do you think there is a danger that we can focus too much on principle-driven approaches to relationships between devolved parliaments and nation states and that we would do better to focus on the political reality—the horse-trading, the pressure groups, the demand-led devolution and all the problems that arise—as perhaps being a more practical approach?

Professor Ailsa Henderson: If anything, I think the reverse is possibly true. If you do not spend enough time thinking about the principles, the practice will not ever really work. You need to know what you are doing. You need to have a discussion—what are the first principles of this political, social or economic union? What kind of union is it? What are the fundamental values that are animating it?

Professor Nicola McEwen: I probably have a different view. The problem with that, particularly in a clearly multi-national state such as the UK, which in many ways is a series of unions rather than one union, is that if you try to define and lay down those first principles, you will inevitably please some and alienate others. What the union means will vary in different parts of the country and will be mediated through other territorial identities and perspectives. I do not necessarily think it is an either/or. If you are going to go down a

principles route, I would keep it at the very abstract level. Nor do I necessarily think that you should be led by short-term political behaviour and pressures, but I would think more in terms of the institutions that would express your principles and the practices and procedures that might express those principles in terms of a practical way forward.

Q84 Lord Lester of Herne Hill: I suspect that we are still dealing with the causes and effects of the French Revolution and the reactions to it. Taking the hint from the Lord Chairman about principles, the very idea of principles seems alien to our system in some ways. Take comity as an example. Obviously that is cultural, but can you give us some practical examples of where it has made any difference because somebody in some country has complained of a lack of comity, as a result of which a court has said, “Yes, there is a lack of comity here”? Can you think of any examples of that kind where it has made a positive difference rather than being what some would regard as simply rhetorical?

Professor Nicola McEwen: I think it depends on how it would be expressed in practice or institutionally. You asked whether a principle of comity might be enforced in some way. To me enforcement seems almost at odds with the principle: if you have comity, it has to evolve; it has to be the practice rather than something that you can enforce. In any set of relationships that kind of mutual trust has to be earned, learned and acquired through experience rather than something that can be a top-down measure. Some of the examples that Ailsa gave—things such as the equality of rights and supporting mobility throughout a state—might build into that. But even where you have those sorts of provisions, it does not necessarily follow through into practice. I was struck when I was in Canada in the summer that some of the criticisms of the then Government were that they had lots of things at the centre—they have Ministries of Intergovernmental Affairs in the constituent units and the federal level—but nobody at the federal level was working at it. They were not working at making the federation a success. That was seen then as a problem and it may be different under the new Government.

Professor Ailsa Henderson: Fundamentally, you are looking for a harm principle—you can have difference but you will not do undue harm to either another constituent unit or residents in those units. There is a distinction between perceived unfair treatment for jurisdictions and perceived unfair treatment for individuals. The reference to non-detriment in the Smith commission report is an attempt to get at that. Another example would be that when the Canadian Government finally recognised the existence of Quebec as a nation, they tried to do it in such a way that enforced the unity of Canada, with Quebec as a nation within a united whole, a united Canada. In constitutions you often find this statement about unity and common purpose. The Swiss constitution refers to a common purpose. So there are attempts

to state that it exists, but I think Nicola is absolutely right: how do you enforce trust? How do you enforce social solidarity? There is also a distinction between different treatment and unfair treatment. Jurisdictions could reasonably claim, “We are being treated unfairly if we do not have a seat at the table”, but in terms of individuals, it is a difficult judgment call about whether being treated differently is evidence of unfairness. That is the problem that you are trying to resolve.

Lord Lester of Herne Hill: I am very interested in what you are both saying. Of course in the House of Lords, we have various statements to guide us, like that there should be no asperity of language—I have heard that enforced on one occasion—or that we act on our honour. That is certainly something that has had to be enforced in our 17th-century procedures. So I understand the cultural advantages of certain kinds of statement. Are you saying that we are not in an area of law where judges will come in and rebuke for lack of comity, we are dealing with political and cultural matters that need to be reinforced and it is a good idea to write that down in some document? Am I getting it roughly right?

Professor Ailsa Henderson: Roughly, yes. There is a spectrum. On the one hand you have to identify that it is useful if we all trust each other and work on a common purpose. But to then act on that, if you perceived that someone was acting contrary to that, you would need some kind of definable wrong that had occurred that you would be punishing. You would need something concrete that you were finding to be wrong, rather than that they were failing to exercise trust.

Professor Nicola McEwen: There is a difference between a citizen perspective on this, where you can have specific rights, if you like, or duties on citizens wherever in a multilevel state they reside. That can be enforced. If you are talking about the relationships between Governments, it is useful to have a set of principles to guide and perhaps steer behaviour, but the principles in and of themselves will not be sufficient. We have had principles in the UK, and we had that in the Memorandum of Understanding, but it does not necessarily follow through into behaviour.

Lord MacGregor of Pulham Market: Professor McEwen, you said that you were struck in Canada this summer by the lack of an institutional structure that tackles the federal situations and establishes some of these things. Is that a weakness? How would you put it right?

Professor Nicola McEwen: It is not so much that there is a lack of a structure but a lack of the use of that structure. In the Canadian context, there are a multitude of forums for intergovernmental affairs but they are not statutorily based and they can be rather ad hoc. Sometimes the federal and provincial relationships and intergovernmental committees will be

initiated when the federal government of the day wants them to be. The previous Government took a rather distant approach to working at the federation through those multilateral intergovernmental forums. Certainly, from the perspective of some of the provinces, that was seen as a problem. Do I think you need an infrastructure? Yes I do, but how you establish it and how routine and institutionalised it is expected to be will shape how it is used as well. It has to be there not just for the sake of it; it has to matter if the Government at different levels will engage meaningfully with it. You also see that in relationships between nation states. I did some work looking at the Nordic countries' relationships with each other, and bodies like the Nordic Council of Ministers are not terribly important because they do not do very much. There is not much at stake on its agenda for senior Ministers to engage in. It has to be meaty enough to bring them to the table and to make it matter.

Q85 Lord Hunt of Wirral: In exploring the symmetry, we have to deal with the predominance of England, both demographically and economically, so we are almost looking at parallels. My question to both of you is: do any other devolved federal states have significant sub-state regions or nations without devolved powers? Can administrative devolution to regions substitute effectively for legislative devolution? Are there comparable examples to England?

Professor Ailsa Henderson: No, is the short answer. Asymmetry is not uncommon at all in federal or multilevel states, but the norm is where the majority of the constituent units have a base level of power and then others, for whatever reason, have slightly more than that. We sometimes find that within other regions of federal or territorialised states, such as the special regions in Italy and particular autonomous communities in Spain. You also find it sometimes when there are overseas territories or protectorates, so Greenland and Denmark, an otherwise unitary state, or the Åland Islands. More rare to find is where you have regions with a base level of autonomy and then regions with significantly less autonomy than that. So, with Spain's autonomous cities that are not territorially contiguous with Spain, they have significantly less autonomy. But nothing compares to England, in terms of the scale of difference and level of self-rule available, but also the asymmetrical demographic size of the units. It is usually a very small unit that has significantly less power. A useful example is Canada and Australia, where they have provinces and states, and then they have territories. The territories have smaller populations and less self-rule and shared rule than the provinces and states. There has never been much call for the territories to become provinces or states, so they are on a completely separate trajectory.

Professor Nicola McEwen: It is probably helpful to think of the UK as a unitary state with three special-status regions. That sort of structure is not uncommon; there are a lot of examples in the world today and historically where you have special-status regions, usually on the periphery of a country. Most of those are small, often remote, sometimes island nations or territories, if you like, so Åland in relation to Finland or the Azores in relation to Portugal are examples of that. In Europe, probably the closest parallel to the UK would be Italy for much of the post-war period until the most recent reforms, where you had five special-status regions within Italy, again on the periphery. The constitution in the post-war period recognised regional units in the rest of Italy but it never did so in a meaningful way. It never followed through until relatively recently. That is probably the closest parallel, but I agree with Ailsa that there is nothing quite like the structure that we have here.

Q86 Lord Norton of Louth: Following on from that point, we are exceptional in the extent of the asymmetry but you stressed that asymmetry is not unusual elsewhere. My question is really to explore the consequences in the context of the UK, if we look at it from the point of view of political stability. We have received somewhat conflicting evidence. Professor Tomkins suggested that asymmetry should be seen as a virtue. Other witnesses such as the PSA and Rob Hazell, among others, suggested it can underpin instability. What is your view about what we could learn from elsewhere in how we assess asymmetry?

Professor Nicola McEwen: There are asymmetries in every system. Even those that are constitutionally symmetrical will have asymmetries in other respects—cultural, linguistic, economic or political—and those have to be balanced. The size issue is often talked about in relation to England, that you could not have an English Parliament because it is so huge compared to the other devolved nations. Hugeness in and of itself is not necessarily unusual. For example, in Germany, Bremen comprises about 4% of the population of North Rhine-Westphalia; Prince Edward Island is even smaller vis-à-vis the size of Ontario. The issue is not just that England is so much bigger than the others but that it has the overwhelming proportion of the population. If you were to try to think of a federal structure for the UK, the experience globally—we do not have many experiences in our comparator countries, I guess—is that one would think of that as a potential source of instability. On the other hand, you can find examples both of asymmetry potentially creating instabilities and of a failure to accommodate asymmetry as potentially creating instabilities as well. If you have cases where there are grievances or territorial distinctiveness and you do not recognise those, either symbolically in terms of the recognition of national status or constitutionally and institutionally in terms of the powers that are afforded to those nations, that also becomes a

source of instability. There is no right answer to your question, I am afraid. You can find examples of both.

Professor Ailsa Henderson: Obviously there is a distinction between de facto and de jure asymmetry. One useful example is the existence of provincial opt-outs in Canada. When the Canadian Government have shared-cost programmes and they legislate in an area of provincial jurisdiction, provinces can choose to withdraw from the shared-cost programme. Until the 1960s if you chose to do that you just bore all the costs of creating your own programme by yourself. There is now a system whereby you can be compensated for that financially by the federal Government. That offer is made to all provinces but typically only Quebec takes it up. This is seen as generally less problematic than what the NDP proposed in the last federal election, and what happens with immigration, which is that Quebec is given the right to exercise judgment on immigration and run its own programmes but that right was not offered to other provinces, including Ontario, which takes the bulk of immigrants. The existence of that and the NDP proposal that if Quebec did not want to be part of any programmes at all, not just shared-cost programmes, it would be able to do so and would receive full financial compensation for that, was seen as deeply problematic. Offering all provinces the right to opt out and letting different ones choose is seen as less problematic. That said, even that situation has its critics, because it creates instability for the federal Government. They are never really sure who is in and who is out. It raises risks in terms of economies of scale—what if the larger ones all opt out and you are left running a programme just for the smaller provinces? It is agreed on a rolling set of five-year agreements and nothing is ever set in stone. For the provinces, it also creates vulnerabilities because the federal Government can stop running programmes. There are lessons to learn, not necessarily how not to do things but maybe how to tweak things. There is obviously a distinction between opting out in the Canadian example and opting in in the Spanish example.

Baroness Taylor of Bolton: Could we have an example of the kinds of programmes you are talking about?

Professor Ailsa Henderson: Yes, the kinds of things that they opt out of have included, over time, funding for highways; funding for universities, hospital insurance, —

Professor Nicola McEwen: Childcare as well.

Professor Ailsa Henderson: The 1982 constitution included an amendment which said that you would be compensated financially if it was in the area of education and culture. So most of the opt-outs are within that realm, but not exclusively.

Professor Nicola McEwen: Often they are in areas that are within provincial jurisdiction but in which the federal Government can intervene and develop shared-cost programmes. If you are Quebec, you may already have a programme in that area or you want to keep those institutional identities to yourself and meet what are perceived to be distinctive needs. The tendency of whoever is in government would be to opt out and do it separately.

Professor Ailsa Henderson: The main criticism of those is that even if you opt out, you still have to follow the general principles set by the federal Government. So you have the autonomy to spend your own money and implement the programme yourself but you do not have the autonomy to make significant changes to the basic principles, which are set by the federal Government. So it is a funny kind of autonomy. It is the autonomy to spend your own money, in a way.

Lord Lester of Herne Hill: Do we not have examples from our own history of the disadvantages of asymmetry, such as the history of the founding of the Irish Republic or what happened under Stormont in Northern Ireland for 50 years? Do those examples indicate that the old system did not function very well and we allowed asymmetry and it had rather severe consequences north and south of the border—or is that a bad example?

Professor Nicola McEwen: I think it is a difficult example, because many of the problems that emerged in Northern Ireland were not caused by asymmetry in and of itself. It might have been a contributing factor alongside many others. Going back to the discussion about principles, one of the lessons from Northern Ireland is: do not devolve power and then just ignore it. You have to work at it. The experience of devolution in Northern Ireland over much of the 20th century was that there was an element of neglect and reluctance to intervene until intervention became absolutely necessary. Northern Ireland and Ireland in general are always going to be a difficult example, given the sectarian nature of the issues that have emerged there.

I will give one other example, which I am thinking of as something that could potentially be followed in England. In Spain, with the transition to democracy and regionalisation, there was a general constitutional framework but the autonomous communities negotiated their arrangements bilaterally with the state within that general framework. That has tended to lead to a mainly symmetrical system, apart from a few exceptions, but it gave them the space to come to arrangements and to do that at the pace which was suitable for each of the regions. Potentially that could be applicable within England in any future regionalisation.

Q87 Lord Norton of Louth: This question moves from the merits to the practical aspects. If one is going to further develop devolution or even a federal system, it is about how we get

from here to there. What are the lessons we may learn from practice elsewhere? Sometimes there is a problem that there may be a lack of regional identity or you may be creating artificial constructs in some parts of a nation. Are there any lessons we can learn so that we do not reinvent the wheel should we want to move further in that direction?

Professor Ailsa Henderson: Obviously, I know the Canadian example best. In 1867, just four units were part of the federation; a fifth existed but did not join. But in the late 19th and early 20th centuries a series of provinces and territories were created. It is worth distinguishing between why one might become a province and why one might become a territory. Fundamentally it had to do with population—the population of the settlers rather than of First Nations or aboriginal peoples. It was the size of the population. It was the concentration of the population. It was also whether there were pre-existing institutions of government. If you had a large enough population, it was relatively concentrated and you had pre-existing institutions such as a legislative council, you were likely to become a province. If you had a smaller population and the fundamental issue was about identifying a piece of land that was not too large to govern, you were a territory. The territories and provinces were slowly carved out of the Northwest Territories. The overriding concern with the territories was size—what is manageable? How big is too big? “Let’s carve out little bits at a time because the rest is too big”. You can see these two different logics running alongside discussions about what you do with England. If the issue is self-government for England as England, that leads you towards the provincial model. If the issue is that England is too large to govern as England—

The Chairman: We will pause there.

The Committee paused for two minutes’ silence.

The Chairman: Professor Henderson, you were in mid-flow. Would you like to continue?

Professor Ailsa Henderson: There are two different logics in the different visions of what you might do. One prioritises self-government and the other is focused on territorial scale.

Professor Nicola McEwen: Again, thinking of the Spanish example, one pattern that has been evident there, and that you might see in some other cases, is the catch-up dynamic. In Spain they call it *café para todos*. When you have regional government in one place, it might act as a demonstration for others. You can do that by design—by setting up a framework to facilitate that sort of process—or it may happen as a result of the political pressures that that generates; a demand for regional government in other places if they see that they are missing out on something. That may well happen in the English case. It is not inevitable that it will, but it may well do. I do not know if that answers your question.

Lord Norton of Louth: Whether or not one has a formal imposition of an overarching structure, you are implying that it is about having a degree of flexibility and adaptability in the light of experience in responding to demands.

Professor Nicola McEwen: Yes, that is absolutely the case. Sometimes, regional government happens from central direction, for functional reasons, efficiency of government or whatever. But a lot of the time, it happens because of the pressures that are generated, often through party competition. The classic example there is Belgium, which became a federal system over the course of my lifetime—from 1970 until the 1990s. That happened after the parties regionalised, so, in a sense, the parties drove that process. The parties drove the process in Italy also. Party competition can be a big driver of these things.

Lord Lester of Herne Hill: Just to get my mind around this, are you saying that these parallels, in Spain and elsewhere, indicate that you could have a charter, constitutional document or framework document of some kind and then a kind of opt-in position? That way, you do not coerce, as we did with the allies in occupied Germany after the war, and simply say that we are going to impose a framework upon those who do not want it; that way, we would be saying that we are going to do it differently, as an opt-in. If that is what you are saying, I would be jolly interested to know how it works in Spain. Did it in fact work well in Spain? As I understand it, it is exactly the kind of thing that their system has.

Professor Nicola McEwen: That is what I am saying. Echoing Lord Norton, flexibility is the key, as well as a degree of pragmatism. Spain is a very different context. It was a transition to democracy and there was a constitution that aspired to develop a regional structure throughout the country. But it did so at a different pace in different parts of the country. The historic nations were fast-tracked to regional autonomy; the others moved more gradually. It did so on a bilateral process. That bilateral nature continues now, so you have revisions to statutes of autonomy that involve both the national Parliament and government and the autonomous community as well. They are negotiating a settlement for each of the autonomous communities but within a national framework. So, yes, that is, in a sense, what I am suggesting as one possible route.

Professor Ailsa Henderson: I would urge some caution, though, in the sense that it depends how fluid you want the situation to be. You could find yourself in a situation where regions opt out to things when they do not like, say, the Government of the day, because they believe that they are going to make certain kinds of changes to social policy. So, for the duration of that Government, they will opt out of things. Then, when the Government changes and they like things, they will opt in. That is something that you might think of as an advantage of the

system. But it does carry risks that would need to be examined, partly because of the cost of starting up and closing down programmes and shifting jurisdiction back and forth. You might like to look at term limits of five or 10 years; that would not be unreasonable to my mind.

Lord Norton of Louth: Just a quick question as a follow-up to that. Are there any examples of that excessive flexibility that you have just identified as a potential problem? Has it been realised anywhere in practice?

Professor Ailsa Henderson: The Canadian example provides the structure for that. We found in Canada that, because they are shared-cost programmes, it is often not the province changing its mind but the federal government. Because they are legislating in an area of provincial jurisdiction, they can, at times, decide that they are going to cancel a programme. So provinces that are in shared-cost programmes find themselves suddenly in a situation where, if they want to continue the programme, they all of a sudden have to adopt the full cost. The risk has been surfacing in the other way, but it illustrates how it might work in a different direction. There are five-year arrangements in terms of investigating those. But the federal government can, with no notice, cancel a programme. That does have costs.

Lord Lester of Herne Hill: Are there risks of not doing things as well as doing things? We talk about the risks of an opt-in programme, and I understand that, but what about the risk if we simply go on as we are now, doing nothing?

Professor Ailsa Henderson: I would not urge doing nothing.

Q88 Baroness Dean of Thornton-le-Fylde: Good morning. I would like to back-track a few moments to the issue of opt in and opt out. This is the first time that we have really looked at it and been presented with it. I would like to probe a bit deeper with you the issue of social welfare, and national cohesion and the integrity of the state with regard to that. A number of witnesses have said—and I paraphrase—“Well, what are you worried about? It works”. Look at Scotland: university fees, elder care charges and the National Health Service. That almost touches on an opt-in system, in the sense that the settlement provided that the health service would be run in Scotland by the Scottish Parliament but on a budget that is voted on in London. Scotland does have provision to raise taxes to support shared costs if it wishes to, although that has never happened. At what point do we really start to question the national integrity of the state on devolving social and welfare benefits? In a small nation, if you opt out of a provision where you can do different things in different regions—although we are currently looking just at independence and separation—at what point do you say, “That won’t work”? We are geographically a small nation. If you have different regions, someone living in Yorkshire or Lancashire might live in one place and work in the other. They would potentially

have very different social and welfare structures. Is there any evidence where that has happened and created problems?

Professor Nicola McEwen: First of all, I would say that there has always been a degree of variation within the welfare state, long before devolution. It was never as homogenous as we sometimes might think given the current nature of the debate. In some countries, one way to try to address that is to have framework legislation at the national level, so that the national Parliament sets guiding principles, or the framework within which regional governments and parliaments can then develop their own distinctive policies and programmes while agreeing to a minimum set of national criteria. However, that is incredibly controversial when it is applied and creates resentment. Again, I go back to the Spanish example, as Spain operates a system of framework legislation for things like health and education. That creates resentment in Catalonia and other historic nations where they want the autonomy to do things differently. I would not recommend that sort of system for the UK. There are other ways. In a way, this goes back to our first principle of unity and diversity: if you have a multilevel system, you have to accept that it will create differences in different parts of the country, and the system will have to be able to cope with, accommodate and respect those. In a democratic system that is often a matter of political choices. So I would be very cautious about trying to override that in ways that seek uniformity in some respects. You can have a minimum standard, in a way, or a system which enables different parts of the country to reach a certain standard. Often, federal countries will have equalisation systems or something equivalent to that, so that a poorer region has the ability to deliver a set of services to its citizens that are at least comparable to those in a wealthier region in another part of the country. But there will still be variations, which will be a matter of political choice. I think that is okay. It is one of the things that we have to live with in the context of multilevel government.

The Chairman: Before bringing in Professor Henderson, I am slightly worried that the clock is against us and we have a lot of other things we want to ask you about. Perhaps everybody could bear that in mind

Professor Ailsa Henderson: I was going to say something fundamentally similar to Nicola, so I am perfectly happy to move on to the next question, if that would work—I could not agree more.

The Chairman: I hate to inhibit contributions. Are you sure?

Professor Ailsa Henderson: We have lots of data on this. People have a strong sense of regional identity, and a strong sense of regional solidarity follows that, but that does not always come at the expense of state solidarity. Sometimes it does, but it is not a zero-sum

game. Our argument suggests that you can have a strong sense of both regional and state solidarity. There are softening measures, which Nicola pointed to. I am happy to move on.

Q89 Lord MacGregor of Pulham Market: I am interested in which powers you think need to be reserved to maintain an effective state or union. Some are fairly obvious—defence, security, macroeconomic policy and so on—but we have had differing evidence from elsewhere. Scotland in Union has given quite a long list of things which it thinks need to be reserved at the national level. What is on your list?

Professor Nicola McEwen: If you are thinking specifically about social solidarity, in a lot of countries you find that the national level is keen to hold on to social security, although Canada is an exception here in that it is mainly a provincial responsibility. It is also commonplace in other countries that there is a distinction between social security, which is more narrowly defined than we have it, and social assistance, for which the responsibility is often at the regional scale. That might be things like family allowances, child benefit and some benefits for the elderly, which come under the area of social assistance and are commonly handled at the regional scale. But you might want to have some means of enabling central government to exercise the power to redistribute across a country at a territorial scale, for example some mechanism to distribute resources from the wealthier to the poorer regions. I cannot think of another example—perhaps you can, Ailsa—where there is no income tax at the federal level. That is where we are heading in Scotland with the Scotland Bill in 2015, where all income tax, leaving aside the savings element, will be devolved to the Scottish Parliament. I cannot think of another example of that. I think that is risky. It is risky from a Scottish perspective, because of the inflexibilities that surround it, and it is risky from a union perspective because of the symbolic significance that income tax has as the contribution to the social contract between the citizen and the state—the exchange of rights and obligations. Of course, other taxes are collected centrally, and national insurance may fill that void a little bit, but from a citizen's perspective, income tax has that symbolic significance, and that is about to be lost at the central level. I do not think I would have gone there.

Lord MacGregor of Pulham Market: To look at it another way, let us say powers are devolved for tuition fees, social care and so on—or whatever it might be—to Scotland. Does it not follow to a certain extent—possibly quite a large extent—that tax-raising powers have to be devolved at the same time, otherwise there is a real tension between the two?

Professor Nicola McEwen: Absolutely. There is a very strong case for having revenue-raising capacity at the regional scale, and there are many examples of ways you can do that. My point is that having a heavy reliance on income tax as part of that carries risks both for the Scottish

Government, in terms of the responsibility that that brings to them, and correspondingly from the union perspective. It is very common to have regional income taxes and federal income taxes, and to have a share of different taxes such as sales taxes. We cannot do the latter in the EU, but it is those sorts of things. It is commonplace to have that, and sometimes there is an agreement to work together and effectively make it a national system. With Canada and the other provinces, except Quebec, for example, you have tax harmonisation. So yes, I take your point, but there are other ways that that could have been done.

Professor Ailsa Henderson: I would just ask in whose eyes it is effective: from the perspective of the voters—we know what voters want to be devolved and what they want to remain with the UK—or effective for the functioning of the state? To answer that second question, there needs to be a debate about what the state is for, what we are trying to do and who we are. We cannot make a list of things we want until we know what we are for and what we are doing. I would not so much answer your question as rephrase it for later witnesses.

The Chairman: I think the witnesses have answered your question already, Lord Lester, about regions applying?

Q90 Lord Lester of Herne Hill: You have answered the question about possible models for opting in but I was struck by Professor Henderson referring earlier to a principle of equality and how that could be invoked. When we are considering all this difficult stuff about devolution and federalism, we do not have any federal rights or federal constitutional principles, do we? What we have is EU law, a European Convention on Human Rights and a Human Rights Act, but we do not have anything in the way of federal rights and principles. Take the case of defamation, which I keep on citing—if Northern Ireland does not want our defamation law, it does not have to have it. Take abortion—if we decide that women should have the right to safe abortion, but Northern Ireland does not want it, so be it. We do not have any trumping federal principles other than what we find in the Convention on Human Rights or EU law, do we?

Professor Ailsa Henderson: There are two ways to answer that. First, do we have anything written down in one place which tells us the operating principles of our law? Not really, but that does not mean that there are not guidelines that help us to navigate our way through things. We have already mentioned the memorandums of understanding. In those we can see fundamental principles of what is best practice in terms of how we are moving forward. If you are asking me if it would be easier if it was written down in one place, I would say yes, but I do not think that needs to be in a constitution. It could be in a piece of legislation or a framework agreement. That is often where the principles come from. If we look around the

world at where we find the principles, they are sometimes not in the constitutions. They are often in the documents arguing for change, so they are in Calman, the Silk commission and the Social Union Framework Agreement in Canada.

Lord Lester of Herne Hill: I have given you two examples where it is not working. Whatever the memorandum of understanding or guidance, it is not working. I am inviting you therefore to say something about that because it seems to me that, looking at practical things, it is not working.

Q91 Lord Cullen of Whitekirk: In its previous reports on intergovernmental relations, this committee has criticised the lack of adaptation in Westminster and Whitehall to the existence of devolution, and in the course of this inquiry we have heard of undue focus on Westminster and Whitehall, allied with the feeling that Ministers need to behave as if they believed in the union. So my question is, how do the institutions of the central state accommodate the sharing of powers between the state and substate nations or regions?

Professor Ailsa Henderson: I have a short answer. There is a distinction between interstate and intrastate federalism, and you need both. Intrastate is where you have representation from the regions within the central machinery of the state, so often the organising principle becomes the regions. It is done informally through ministerial posts and in Cabinet or formally in representation in an Upper House. So that is one mechanism by which the constituent parts of the union can have a say in the centre. The other obvious one is interstate federalism, where the Prime Minister and the premiers or the heads of all the constituent units and the Governments that they represent come together—the Ministers come together or the heads of government come together and they discuss issues of the day. From the comparative literature, the warnings are that you need both, not one.

Professor Nicola McEwen: One of the things to bear in mind about the UK is that it is not just multilevel but multinational. For that reason, if we were to ever follow through on some of the suggestions that are periodically aired about a territorial second chamber, that in and of itself would not resolve some of those problems. It would have to be done through the intergovernmental arena, perhaps alongside some other mechanisms, but I think that needs some attention. To go back to the point I made at the very beginning, we have neglected the shared-rule element of multilevel government in the UK. This Parliament has not coped very well with the fragmentation of politics that we have seen in this country. From the outside looking in, it must look very odd to have this Secretary of State for Scotland and this shadow Secretary of State for Scotland, given the political make-up and representation that the general election produced. The government/opposition dynamic that emerged with the two-party

system is quite a unitary idea and vision of the UK. The UK does not look like that anymore, and I do not think it will look like that anytime soon. So even if political representation changes in different elections, and that is inevitable, the underpinning fragmentation that is there is unlikely to disappear anytime soon. So there needs to be within this Parliament ways to accommodate that institutionally as well as using the intergovernmental arena to have meaningful shared-rule mechanisms.

Lord Cullen of Whitekirk: Does that suggest again the idea of Ministers responsible specifically for intergovernmental relationships across the border?

Professor Nicola McEwen: Possibly. That is certainly one option, but it is also about thinking about what intergovernmental relations are for. One example, I suggest, is the issue of constitutional reform. So in the cases of Spain and Italy, when the statute of autonomy or the competences of the regional level are under review or revision, that is a bilateral process. Here, it is not. There are features of discussion and consultation, and of course we had the Smith commission, which was a very peculiar example in the Scottish case. In a sense that was a “Made in Scotland” party-brokering deal, which was then developed into legislation by one level of government. However, if there was a more bilateral, co-operative process at the outset, then it would be more likely to secure legitimacy. You would not have the situation that we had in Wales the other week, where you have a Wales Bill that the First Minister sees as outrageous. If you have the co-operation built into the process, you are more likely to secure the legitimacy. The constitution is just one example of that but there might be other areas, too, where reserved matters clearly impinge on and shape devolved competence. Those jagged edges between what is reserved and what is devolved need somehow to be managed and mediated through the intergovernmental framework in a way that does not necessarily happen just now.

The Chairman: We are running short of time and are not going to be able to cover the remaining three questions. So I am going to ask if you would be kind enough to send us written answers to two of them. The clerk will confirm to you which they are—they are numbered 10 and 11 on our list—but that gives us a chance briefly to ask question 12.

Q92 Lord Brennan: Last year we debated independence for Scotland. In Spain at the moment, the constitutional court is likely to be asked to declare the Catalan vote of this week to be an unconstitutional attempt at secession. Canada has had a rocky road. We are asked to give views on this. Using Canada in particular, what are the dos and the don’ts that we should bear in mind?

Professor Ailsa Henderson: I suppose that the dos and don'ts depend on what you want. Different sides of the argument would see strengths and weaknesses, or successes and failures, in different things. The Canadian example in Québec is interesting, because there were completely different trajectories with the two referendums. After 1980, the promise in the campaign by Prime Minister Trudeau was that he would interpret a No vote as a desire for change, and promised change led to expectations about change. The change was never defined; it came in the form of constitutional patriation. People in Québec were not satisfied, so as a result there were constitutional negotiations at Meech and Charlottetown. Frustration about a reaction to the referendum in its immediate aftermath is what eventually led to the second referendum. If you look at the Scottish example right now, the election of 2015 looks an awful lot like the 1993 election in Canada, so Scotland and the UK are almost moving at an accelerated pace through that first trajectory.

The trajectory after 1995 is completely different. After the loss the sovereignists said "Look, we're not going to put you through this unless we have winning conditions: a clear lead in the polls, favourable economic conditions and a popular leader. Then, and only then, will we ask the question again". The federal Government's Clarity Act set out rules for how you could conduct a referendum and while it made clear the steps you could take to secede from Canada, which was remarkable, it sets the bar rather high. It makes it rather difficult for Governments to run another sovereignty referendum.

The Québec response has been to take advantage of the autonomy that they have access to and govern as if they were sovereign. They were calling it sovereignist governance, and essentially saying, "Let's just do as much as we can with the autonomy we have and take advantage of all those opt-outs. Let's move forward. If we want to raise taxes, let's raise taxes. If we want to have a different Québec model of welfare, let's do it". That is part of what has led to support for independence declining. However, we have also seen a rise in anti-immigrant sentiment from certain sections of society, and that alignment with the nationalist cause is also making independence less popular. People are very devoted to a civic, inclusive message of nationalism and when it seems to be ethnic and exclusive, it is less popular. The general trend since 1995 has been for decreasing support for independence. The one exception to that was when the scandal about using federal money to promote Canada inside Québec broke, and then support for independence rose for a little while. It then fell again. **Professor Nicola McEwen:** The way that you phrased this in the questions as we were sent them was, "How did Canada get past the period of constitutional crisis and referendums?". Yes, it has passed a crisis but the underlying issues were not really resolved. I absolutely agree with

everything that Ailsa has said, but I do not think that the decline in support for sovereignty is as a result of anything that the federal Government did. It is more about internal explanations. I think the UK did reasonably well in the procedural aspects in the run-up to the referendum, so I would not necessarily suggest trying to do anything over and above that which would deliberately set a high bar. The Clarity Act was extremely controversial in Québec and, if anything, it probably had the opposite effect—

Professor Ailsa Henderson: On sentiment.

Professor Nicola McEwan: Yes, on sentiment at the time. For the UK, and thinking specifically in relation to Scotland here because Wales is rather different, there are two possible paths. One is towards a looser arrangement, almost on the model of associated states or a federacy—something that was a UK model and that suited our purposes, so a looser union as regards Scotland. The other is a more interdependent union. If you go down that road you need to then find the mechanisms to make it real, and they are not there at the moment. The Scotland Bill 2015 is a mishmash of those things. I have spoken to this committee before about my thoughts on the Bill but there are elements in it that I think will have repercussions further down the line—but we have a minute left, so let's not get into EVEL.

The Chairman: I will bring in Lady Taylor, if she wants to come in. No? Anybody else?

I apologise for squeezing out two questions and for asking for written homework from our witnesses. The issues are on fostering a sense of national identity and informing people what the structure is of their forms of government, but we will send you more literature on that.

I thank you very much indeed. It has been extremely useful and very interesting. You have been very helpful and we are most grateful.