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The Select Committee on the Constitution

Inquiry on

INTER-GOVERNMENTAL RELATIONS IN THE UK

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WEDNESDAY 7 JANUARY 2015

10.50 am

Witnesses: Professor Richard Wyn Jones

Professor Nicola McEwen and Professor Alan Page
Members present

Lord Lang of Monkton (Chairman)
Lord Brennan
Lord Crickhowell
Lord Cullen of Whitekirk
Baroness Dean of Thornton-le-Fylde
Baroness Falkner of Margravine
Lord Goldsmith
Lord Lester of Herne Hill
Lord Lexden
Lord Powell of Bayswater
Baroness Taylor of Bolton

Examination of Witness

Professor Richard Wyn Jones, University of Cardiff

Q1 The Chairman: Professor Wyn Jones, we are very glad to welcome you today, not least because Professor Alan Trench unfortunately has been unable to be with us. We were conscious, when we arranged these meetings, that we were trying to squeeze quite a lot into a relatively short timeframe, but we now have about 40 minutes or so for a solo interview with you. I hope we will get through the questions that we have set as a basis for our discussion. Perhaps I should start the ball rolling with a rather general question, which will give you the chance to make a second reading speech, if that is what you feel inclined to make. What should be the purpose of inter-government relations? Do you think there are shortcomings in the present arrangements? Would you like to give us some examples of notably good practice and notably bad practice?

Professor Wyn Jones: This will probably strike you as being a typical academic answer, but there is an important conceptual point at the start about what we mean by inter-governmental relations. There is a tendency, maybe in particular at the London end, dare I say it, to view this in almost narrow technical terms, as an issue of the plumbing, if you like, of a system. Amongst academic observers, and more generally in the devolved territories, there is a view of IGR as relating more to the nature of the union—the post-devolution UK. It goes beyond the relationship on a day-to-day basis between Cardiff and London. It is about what the union is for and how it is organised.

I know we will come back to the broader constitutional issues towards the end, but in terms of the current structure of the UK constitution it is very striking that, from the perspective of the devolved territories, there has been an almost revolutionary change since 1999. There has
been huge institutional change, a new political class has developed and so on. On the other hand, if you look at the central institutions of the state, almost nothing, frankly, has changed. We still have the territorial offices. We still have, down the corridor, the territorial Select Committees. There has been very little change at the centre, and you have had this fundamental change in the devolved territories. One of the difficulties of the discussion about IGR is that, in the devolved territories, when we refer to IGR it is often shorthand for wanting to talk about the nature of the post-devolution union.

We have this interesting and slightly troubling situation where we are having, currently, discussions about Scotland, about Wales and about Northern Ireland. There is an emerging discussion about England. Nowhere, however, is there a discussion about the union and the implications of devolution for the core institutions of the central state. That is a general point, but it is worth making. There may be a tendency at times for people to talk past each other. The constitutional plumbing is important; the detail matters. However, there is also the bigger picture, which needs to be recalled when we are talking about this.

The Chairman: Do you think there is an undertone of sensitivity over the fact that it is about devolution? The central Government may have the feeling that, having devolved power in certain areas, they should stand back and let the devolved process make its way. In the devolved Parliaments, Assemblies and other bodies, is there a sensitivity that, “It is ours to do now; we do not want them interfering”? Do you think that has overshadowed the recognition of the need for better Administration?

Professor Wyn Jones: That is not quite how I would put it. There is a phrase very closely associated with devolution in Wales, and in particular with the former Secretary of State Ron Davies, who said famously that “devolution is a process, not an event”. That is the view in Scotland, Wales and Northern Ireland. The joke has been that in Whitehall, devolution was seen as an event, not a process. That is the feeling that people have more generally in the devolved territories. There has not been a shift in practices, or certainly in the organisation of the core of the central state. There are, of course, issues of sensitivity. It is also important to point out the asymmetries that we have. The Welsh devolved settlement has been very different from the Scottish, and extraordinarily complicated and convoluted, which has made it quite difficult for non-specialists to keep up with what has been going on in Wales. Asymmetry is an issue, which I am sure we will return to in the discussion. That is also part of the issue. There is certainly lots of evidence of frustration in the devolved territories at the lack of knowledge. I do not think it is an issue of malign
intention but simply lack of knowledge of how different the settlements are and how they work.

**Q2 Lord Brennan:** Can we talk about what you call the constitutional plumbing? The Scotland Act, the Wales Act and the Northern Ireland statutory history are parliamentary decisions about the constitution and how it is going to work. This memorandum of understanding in the JMC is declared by all its participants not to be legally binding. I am going to ask you first of all: should we agree that this system is not, in itself, based on any constitutional foundation? It is a reaction to practical necessity. However, within it, disputes will arise that have to be resolved in order to make the statute work as intended by Parliament. If we divide the political and administrative stuff from real issues, arbitration apparently is not acceptable in London. Independent mediation, or expert advice when there is a dispute, is a suggestion, but it is not an effective solution unless the parties agree to be bound by it and by the decision they come to.

To finish off, surely now that the Acts of Parliament have established this system, there should be a constitutional base by statute, or a parliamentary declaration of convention, to resolve disputes that cannot be resolved politically or legally through the Supreme Court, if the Supreme Court is not available?

**Professor Wyn Jones:** You are obviously correct in saying that the status of the memorandums is different from the statute that underpins the devolved legislatures and Governments. In terms of how the system works, I should perhaps say that I have chaired two practitioner seminars for the UK Changing Union project, which has been interested in the issue of inter-governmental relations.

If one talks off the record to the people involved in running the current system, they will say that they get things done—that they can make things happen, often in quite circuitous ways. One of the interesting things, for example, is the extent to which in fairly recent times in Wales things have been done by bypassing the territorial office. Rather than the Wales Office, to use the correct nomenclature, being the bridge, as it should be in theory, it has had to be circumvented to make things happen. The system works, in a narrow sense. Things that need to get done do get done, but often in ways that bear very little relationship to the theory, if you like.

Implicit in what you were saying was the thought that there should be more constitutionalisation, moving on to a statutory basis in terms of the memorandums and a different conflict resolution mechanism. The best piece of work that we have on this, until your report, obviously, is the Silk commission work, which I would commend to you. It has a
chapter on inter-governmental relations, which is rather well done. They collected useful
evidence in that process, and obviously it was not quite as curtailed as the Smith process.
That is a really useful body of evidence. They certainly make some suggestions on dispute
resolution.
Also, I think, one of the things in there, which is a very simple suggestion that I think has a lot
of merit, is to have an independent audit on a regular basis of inter-governmental relations.
There are things that can be done, but, as you implied, the UK Government have not shown
overwhelming keenness to go down that route so far. Maybe that changes post-Scottish
referendum.

**Baroness Taylor of Bolton:** If devolution is a process rather than an event, what is your take
on what has happened not just to policy implementation but policy development? When we
started off with devolution, we had a Labour Government and Labour Assembly in Scotland
and in Wales. Some of the decision-making undoubtedly was informal, as you say. Have the
institutions managed to really move on to talk about not dispute resolution about policy but
joint policy development? Where do you see that going in the future?

**Professor Wyn Jones:** I do not think there is much joint policy development. It varies. I go
back to the point about asymmetry here. The Scottish settlement and the competences of the
Scottish Parliament are different from those of the National Assembly for Wales, and there
are still the residual England and Wales elements, which have an effect. There are two issues
in the question. One is competence, and the other is, if you like, party congruence—the same
party in power at different levels.

In terms of competence, one of the problems with inter-governmental relations over the last
15 or so years in the Welsh context has just been the deeply unsatisfactory nature of the
constitutional dispensations that we have had, which have been pretty conflictual. One recalls
the LCO system. Maybe you do not recall the LCO system; maybe you are blessed with not
recalling the LCO system that we had in Wales between 2007 and 2011, which was a very
cumbersome and conflict-laden way of making primary legislation. We now have a different
constitutional dispensation, which is the one that was offered for Scotland in 1979 but then
rejected for Scotland as the potential model after the referendum in 1997. It has been
implemented in Wales and, lo and behold, we have had two pieces of Welsh legislation sent
to the Supreme Court, which is obviously not particularly satisfactory. There are problems
with the Welsh dispensation and the nature of the way that the competences of the National
Assembly are set out. There is the competence issue.
In terms of policy-making, and this goes back, Chairman, to your initial point, we see that the devolved Administrations in particular cherish their autonomy. There is limited joint policy. In terms of congruence, there is lots of interesting evidence that the move from having Labour in power in London, Cardiff and Edinburgh has had an impact, and has on occasion made inter-governmental relations more conflictual and more complicated, as you would naturally expect, but also in interesting ways. For example, one of the things that happened after 2007, when the SNP formed the Government in Scotland, is that, despite having a Labour-dominated coalition in Wales, the relationship between Wales and London got more complicated, because they were getting caught up in the Edinburgh-London tensions.

Baroness Falkner of Margravine: Were they using the Edinburgh-London tensions at all to their advantage? Were they trying to co-operate with people in Scotland, in any party, in terms of turning the screw for resolution of any of their problems, or getting the experience?

Professor Wyn Jones: I do not think there is much evidence of the territorial combination. There is some discussion on some issues. For example, there was bilateral co-operation between Cardiff and Belfast in its difficult relationship with Michael Gove, when he was Education Secretary. There is some of that, but there is no ganging up, not least because obviously not all the territories have the same interest. From a Welsh perspective, for example, we talk about fair funding. Scotland is quite happy with the current system, thank you very much. We do not have obviously the same interests in some of these discussions either.

The Chairman: Not all of us are happy with it, but this is a digression. We will go on to party politics instead.

Q3 Lord Lester of Herne Hill: The question I have been asked to ask is, “How do party and political differences between the different Administrations affect inter-governmental relations?” I will add to that “and the rights of individuals”, as part of it. But before I formally ask you the question, to try to get a bit of the context, when Labour first thought about devolution, the idea was, “No judicial review. All conflicts should be settled politically by the Secretary of State, with an override”. There were big arguments in the Government as to whether that made sense. Then, mark 2 brought in judicial review, but of course the courts, as a source of dispute resolution, can only look at each individual statute, of Scotland, Wales or Northern Ireland, without any broader, let us say, federal type of statute. The only national UK limitations, other than the four corners of each statute, would be European Union law, European human rights law, and the notion that you have limitation of powers. That is what I understand to be the present situation.
First of all, I know you are not meant to be answering constitutional legal questions, but is that roughly your understanding? I am trying to describe a system in which there is no national overall set of statutory or constitutional criteria, except EU law, the European Convention on Human Rights, and the notion that each Administration must act within the four corners of its own statute.

Professor Wyn Jones: Yes, I think that is broadly correct. As a slight tangent, but one that is relevant to your question, I mentioned earlier the role of the territorial departments, and the idea that they were supposed to be the doorkeepers, in some sense, of the relationship between the devolved territories and the central institutions of the state. One of the problems that we see in the current arrangements is that, with the best will in the world, the territorial offices are pretty junior offices. The Secretary of State for Wales, certainly, was where people were banished. It was the Siberian nuclear reactor kind of job in a previous Government.

One of the things that we have is an interesting and quite striking lack of expertise at a senior level in Whitehall in terms of the devolved territories. One of the possibilities that is often raised when there is a reshuffle is that the territorial offices should be disbanded and replaced by a department of the union, or something, with maybe a more senior level team. I see a former Secretary of State for Wales maybe disagreeing with me around the table, but I think there is a lot of merit in the idea of recasting the relationship between the devolved territories and the central state institutionally. The main relationships are bilateral, department to department, so from within the Welsh Government, within the Scottish Government, and the equivalent department in Whitehall. There would then be some kind of department of the territories, or the union or whatever you call it, with an oversight role, as a place of expertise with more senior-level expertise and actual institutional memory in Whitehall. One of the problems that bedevils inter-governmental relations, and certainly it has been the Welsh experience post-devolution, is that often somebody is trained up to mind Wales in department X. Of course, we all know that in Whitehall people shift posts very quickly, and that expertise is lost very quickly. That is a source of great frustration. That is at a junior level, and it is also the case at a more senior level.

Lord Lester of Herne Hill: I shall be rebuked by the Chair for not being able to put the question properly, which I have not yet done. The reason I asked you the questions I did was really just to set the scene, which is that there are no overall national constitutional criteria that any Supreme Court at the moment can use. Therefore, we are looking at each form of asymmetrical devolution in its own compartment. Now I come to my question.
Professor Wyn Jones: There is one thing I would like to clarify in my response. You have a distinguished constitutional lawyer just over the table who can explain this far better than I, but the Supreme Court has developed one very important principle in its judgments. They have laid great stress on the democratic mandate that underpins the actions of the devolved legislatures. That has been a very important principle, which has played through in the Supreme Court pronouncements on devolved issues. It would be a mistake to say that there are no overall principles. The Supreme Court has really stressed that, whatever the asymmetries and whatever the differences, the fact that they are democratically elected legislatures matters hugely in the way it regards the actions of the devolved legislatures. There is one overwhelmingly important principle.

The Chairman: We must move on, if you do not mind, Lord Lester.

Lord Lester of Herne Hill: I have not even put my question properly.

The Chairman: No, I think you drew out a lot of very useful information. Lord Cullen did ask to have a quick intervention in support, or perhaps not.

Lord Lester of Herne Hill: That is fine.

Lord Cullen of Whitekirk: A few moments ago, it seems some time ago, you mentioned the idea of an inter-departmental government department that would deal with relations. I wonder what you think about the alternative, which has been suggested, I think, by Professor Trench, of a revamped approach to the territorial Secretaries of State, making them effectively able to act as a true bridge of communication between the UK Government and the territorial Governments.

Professor Wyn Jones: I have to say that I am pretty sceptical about that. The overwhelming impression that I got, in talking to officials and politicians in the devolved territories, is that they view the role of the territorial offices often with some suspicion. It does vary from post-holder to post-holder. However, they find bilateral discussions with departments more productive, basically for political reasons. The Secretary of State is in a slightly ambiguous position, as the representative of the Government in the territory, not necessarily with a mandate in that territory. There is a problem there. I suspect that the revamping would prove endless.

I am digressing slightly, but one of the things that is striking about the history of the Welsh relationship with Whitehall post-devolution is that there have been these endless initiatives to try to make Whitehall more aware of the nature of the Welsh dispensation. It is one of these things that is like painting the Forth Bridge. Once that exercise is finished, they start again, they start again and start again. I suspect that trying to revamp the Secretary of State is not
what we need. We need a more fundamental shift at the centre that corresponds to the
transformed nature of the union that we inhabit. It is very strange that we still have the same
institutional arrangements, I have to say.

Q4 Lord Lexden: Devolution marches on, and sometimes it seems more like stumbling than
marching, with significant new powers, particularly, of course, for Scotland, but also
significant powers like the devolution of corporation tax that is on the cards from Northern
Ireland. In the light of the onward movement of devolution, how do you think the existing
inter-governmental arrangements should be revised to take account of them? The Smith
commission recommends the replacement or the revision of the existing memorandum of
understanding to accommodate these changes. Do you favour that, or should we move to
some completely new form of arrangement in the light of the significant changes that have
taken place, and the more to come?

Professor Wyn Jones: I think it is implicit in what I have already said, but I will make it
explicit. There needs to be a more fundamental transformation. I know more about the Silk
commission’s recommendations than Smith, and I am sure Alan Trench, if he was here, could
talk more authoritatively on the Smith recommendations. Certainly, there are some sensible
practical suggestions in Silk, which seem to me to chime in large measure with what Smith is
saying.

It is about bilateralising. One of the interesting things is that the experience of multilateral
inter-governmental forums is not particularly satisfactory. They may be symbolically
important and worth while in some way, but, functionally and practically, apparently they
have real difficulty finding agenda items, because of the asymmetries and differences, both in
competence and political interests. The multilateral kinds of forums do not seem to be
particularly productive. There is therefore a stress in Smith and in Silk on more bilateral
work. There are worthwhile things there, I think.

More fundamentally, there needs to be a reconsideration of how the central state responds to
devolution. I do not think having this enormous change on the periphery and yet very little
changes at the centre is sustainable. It is not conducive to good relations, and I do not think it
is conducive to the future of the union, frankly.

Q5 Lord Crickhowell: Can I preface my question by taking up a point you made a long
time ago about what you thought had been poor relationships between the Secretary of State
for Wales and the Wales Office? I suspect it has changed fairly dramatically with the new
Secretary of State and the passage of the Wales Bill, and we need to think in those terms,
although that reveals a point that is central to the debate that you have opened up so well so
far about the need for change. The very fact that the Wales Bill developed in the way that it
did suggests that there is a danger of ad hocery as we move down the constitutional path,
which concerns this constitutional Committee.
I am particularly sorry that Professor Trench is not with us today. In a way, I am sorry that
Professor Page is in the next session. They open up the division. Professor Trench is
basically for bilateralism. Professor Page is, I think, probably in your camp in wanting a new
overall combined devolved centre. My worry about that is that it seems to me that it is likely
that Wales, for example, would be swamped by the concentration on Scotland, and the fact
that Northern Ireland’s matters are so very different.
I wonder whether there is not a different compromise, and this is, I think, the centrepiece of
my question. The ordinary day-to-day relationships and development need to be bilateral.
You need to have a Wales Office or Northern Ireland Office. However, there needs to be a
more effective overall responsibility to look at whether changes and developments are taking
place that are having a broader constitutional impact. Perhaps it should be the job of the
Cabinet Office, but it probably has not been. This is not about dealing with the ongoing
relationships. It is about taking a much broader look at constitutional change and
developments, and whether conflicts are emerging. Could I be right that there is a
compromise here?
Professor Wyn Jones: I think you are. Let me first say that you are absolutely right to say
that there has been a change in the mood of the relationship between Cardiff and London, and
the new Secretary of State. That is absolutely undeniable. What is worrying is that under the
previous regime the relations were such that there had to be so much bypassing in order to get
things done. I worry about a system where you have that state of affairs in place. I do not
think there is a huge difference between what we are saying. I think bilateralism is inevitable
in lots of ways. Simply, because of the differences in competences, and because of the
difference in interests, the record of the multilateral forums does not seem to be particularly
productive. The detailed day-to-day work cannot happen in that kind of a forum, because at
least two of the parties in most discussions have no interest in the discussion. Bilateralism is
inevitable, and there are ways of making that work more smoothly.
I am also suggesting that you need some kind of constitutional overview of the union as a
whole. My view is that the best way to do that is to get rid of the territorial offices, on which
we may well differ, and to have a ministry that has that kind of overview of issues and deals
with problems as they arise in the bilateral negotiations. There are all kinds of issues about
where it sits exactly, but to have an additional Cabinet post on top of the territorials is unlikely, frankly.

**The Chairman:** Thank you very much. These are issues we will be exploring further with other speakers. You have opened some interesting cans of—I am not sure what. We have four questions to cover in five minutes. I do not mind overrunning by five minutes, but can I ask that we keep things very brief in the interests of covering the ground?

**Professor Wyn Jones:** I promise to do my best.

**Q6 Lord Powell of Bayswater:** We have already touched on this question, so it can be quite brief. It is about the balance between formal and informal mechanisms. Quite a lot of the British constitution does seem to operate informally. It operates fairly well, and we contrast ourselves happily with the more formal structures of European Governments, the EU and so on. Is there really a case for mucking up the present system, when it is working quite well? Secondly, if we introduce more formal statutory mechanisms, are we not letting those damn judges in the door?

**Professor Wyn Jones:** I would say that the judges have a pretty good record on devolution. They have understood what devolution means.

**Lord Powell of Bayswater:** Their scope for intervention would be entirely different.

**Professor Wyn Jones:** Indeed. I do not have a particularly strong view on formal versus informal. What I would like to stress again is the need to widen the perspective beyond the simple plumbing issues to the broader arrangements that we have for the union.

**Lord Powell of Bayswater:** Things could go on much as they were, in terms of mechanisms, as long as it has a broader perspective behind it.

**Professor Wyn Jones:** If one were to move to a different institutional organisation, there would then need to be all kinds of changes underneath that. I think, for me, it is the formal institutional structure that we need to get right first, if you like. There is a danger of diving straight into the weeds, which are important; I do not deny that. However, we need to have the conversation about the institutional structures of the core state first, if that makes sense.

**Baroness Falkner of Margravine:** Are there any models that you draw on abroad? Given the way that we are structured here, do you want more co-decision? Do you look at Canada, which is relatively asymmetric?

**Professor Wyn Jones:** One of the problems that we have with all this is that until the debate about England moves forward and is resolved in some way, it is very difficult to have an overall, overarching settlement. I am sure that if Alan Trench were here he would have some interesting things to say about various Commonwealth territories, and so on and so forth, but
my own suspicion is that, because of the sui generis nature of territorial Government in the UK, until the English nettle is properly grasped—

Baroness Falkner of Margravine: Or not grasped, in quite that uncomfortable manner.

Professor Wyn Jones: —or until there is some form of resolution around that, the idea of an overarching settlement is frankly unlikely.

Q7 Lord Lexden: How do you think that scrutiny by the Westminster Parliament of inter-governmental relations should be extended and improved?

Professor Wyn Jones: That is a very interesting question. It is the Commons Select Committees that are key here. Their role post-devolution is, I think, an uncomfortable one. How can I put this diplomatically? There has clearly been a tension between MPs and AMs, and there is a natural fight for territory and attention. Some of the committee meetings have not been particularly edifying at times. There is a lot of point-scoring, I think, which is natural given the different interests of the individuals concerned. To go back to the point I have been stressing time and again, I am not at all convinced that the current structures for oversight, scrutiny or effectiveness, et cetera that we have in place are ideal.

The Chairman: Thank you very much. We are going to call a halt there, Professor Wyn Jones. You have been extremely helpful and open with us, and covered a lot of ground. There was one question that we have not got round to asking, but, looking at it, quite a lot of the territory that is included in it had already been covered. If, when you see the draft minute of the transcript of your contribution, you feel you have something to add that is important, please do not hesitate to write to us. Professor Trench will be writing to us anyway, but I suspect he might call that the right of reply. Time will tell. Thank you very much indeed. We are most grateful.

Professor Wyn Jones: Thank you all.

Examination of Witnesses

Professor Nicola McEwen, University of Edinburgh, and Professor Alan Page, University of Dundee

Q8 The Chairman: Can I welcome both our distinguished witnesses? Professor Nicola McEwen has had a strong link with Edinburgh University since 2001, I think. Is that right, Professor McEwen?

Professor McEwen: Yes.
**The Chairman:** She is well known on the constitutional and political scene. Professor Page has been Professor of Public Law at the University of Dundee, but he has also been a lecturer at the University of Wales, Cardiff, and the University of Westminster. We are very grateful to you for coming today. We have lined up a number of questions that we would like to ask you, and I am conscious that time is relatively limited. We shall try to be as concise as we can, and you are welcome to enlarge on your answers in writing afterwards if you feel we have not dealt with them properly. I would like to ask the first question, which is really to ask you a rather broad question, just to open things up. What is the purpose of inter-governmental relations? What are the shortcomings and benefits of what is in place? Are there any good or bad examples that you really think should be published and highlighted? Professor McEwen, would you like to start?

**Professor McEwen:** Sure. It is a pretty big question. In terms of purpose, in any system, no matter how much you try to separate the powers of one level and the powers of another level, there will always be the need to co-ordinate and interact. There will always be overlaps and interdependence. That is the main purpose of inter-governmental relations: managing that interface and managing that inter-dependence. In our case, there is an inevitable interdependence between some of those areas that are devolved, such as social policy, and those areas that are reserved, like social security. That is an example of ways that you need to engage. European integration also demands the need for interaction, because so much of those areas that are Europeanised are also areas that are devolved. Then there are those policy challenges that defy the constitutional division of powers, such as climate change, poverty and security, and which need co-operation and co-ordination.

How does it work in our case in practice? There is an overreliance on informality—on the ad hoc nature of inter-governmental co-ordination. There are some strengths in that. The co-operation that is evident between senior officials certainly helps co-operation between the Governments, even in times of political difference. However, there is perhaps a need to have a more regular and regulated system that is more transparent. That is one of the main weaknesses, I think.

**Professor Page:** Thank you. I would agree with all that Professor McEwen has said. I would define the purpose in the following terms. The purpose of inter-governmental relations is to foster good working relations between the different Governments who make up the United Kingdom, with a view to the identification, discussion and resolution of matters of common concern. I would simply put it in those terms.
As to how well and how badly it works, it is capable of working well. The first example that springs to mind is the European Union, where there is this external compulsion, or necessity, by dint of the European agenda to work out what the United Kingdom’s position is in advance of meetings at the European level that involve discussion with the devolved Governments. The other example that is usually cited is emergencies. Calman talks about foot and mouth as an example of the system working well. Where it does not work so well—it was picked up by the Silk commission and I would agree with the point—is that observance of the basic tenets, the principles on which the system is supposed to be based, is at best patchy across Whitehall. It is a mistake, in other words, in my view, to look at the UK Government as a single entity or monolith. It is made up of a series of departments, and the departments vary in their responses and attitudes to the fact of devolution. Silk is very clear about that. In Calman, too, there are hints later on in the chapter on inter-governmental relations that awareness of devolution needs to be increased in some departments.

The Chairman: Yes. There are some mind-sets that need to be reformulated, are there not?

Professor Page: Yes.

The Chairman: Let us move on to some of the detail.

Q9 Lord Brennan: It is obviously important for Governments to co-operate with each other within our country, but there may come a time, especially with greater amounts of devolution, especially with financial issues, where you have a political dispute or legal dispute or combination of the two that goes right to the wire, beyond the co-operative arrangements. What do you suggest is the way of dealing with those really serious issues in a plausible constitutional way?

If you will forgive me, Lord Chairman, Professor McEwen, you are a Professor of Territorial Politics. Professor Page only lacks a chair in Northern Ireland to have completed a quadrilateral cover of the nation. What significance should we attach to the word “territory” for this purpose? Are there territories within territories, e.g. England?

Professor McEwen: Yes. That is always going to be one of the challenges. I am a political scientist, so Professor Page will, I am sure, talk about the need for a statutory footing, and I agree with that. Perhaps there is a role for an arbiter. For me, lots of these disputes are political. They are sometimes reflective of democratic differences in different parts of the country, played out in the inter-governmental arena. We had a period between 2007 and 2010 where a lot of the inter-governmental tensions were not territorial, north-south issues. They were intra-territorial, played out between two different Governments trying to speak for Scotland, in a sense.
It is therefore inevitable that politics will come into these disputes, which makes it quite difficult to conceive of a role for an impartial umpire, in a sense. With regards to some of the proposals that the Silk commission was suggesting, I could see a scope for that arbitration role, if it is about a dispute over legal jurisdiction. Where it is more political, around finance, which is often the area of most tension, that is quite difficult. It is not really something that you can objectively pass judgment on. There is, of course, a protocol for dispute resolution within the Joint Ministerial Committee, which has been invoked. If we can learn a bit more about precisely how that is invoked, and how resolutions are reached within that Committee, if it was more transparent, that would be enlightening.

Q10 Lord Crickhowell: Can I just ask one question in this context? Alan Trench, who sadly could not be with us this morning, said in his written evidence that the system is fundamentally skewed in the interests of the UK Government. I have a question mark about that. In what way do you agree with that?

Professor Page: Just to go back to the previous question, if I may, just to begin with, it is important to remember that there is an independent third-party mechanism for the resolution of disputes in the form of the United Kingdom Supreme Court. The evidence, however, is that Governments prefer not to go to court for the purposes of resolving disputes. They prefer to do it through the kind of political process that Professor McEwen has been referring to. At the same time, there is this mechanism, in the new protocol attached to the agreement on the Joint Ministerial Committee, which envisages a procedure for the settlement of disputes that stops short of the independent third-party resolution of disputes. There is provision made for bringing in somebody to form, if you like, an independent view of what the dispute is about, but the whole machinery stops short of providing an alternative mechanism for the resolution of disputes other than through the political process that Professor McEwen has been talking about.

I have some sympathy with that, in the sense that, if I recall the wording of the protocol properly, it says effectively, “There will come a point at which we may just have to agree to disagree. No solution can be imposed upon anyone”. Since the UK Government hold the cards, and are the most powerful actor in the process, that must inevitably mean that the devolved Governments are left with a sense of grievance that they have somehow lost out.

Lord Lester of Herne Hill: I find it easy to think of examples, if I may. You just said, Professor Page, that we have a mechanism called the Supreme Court of the United Kingdom. I want to follow that up to see how that really works. I want to give you the example that Lord Lexden and I agitate about, which is the situation in Northern Ireland. As you know,
under federal systems there will be federal values, federal rights, which are core rights that bind the whole nation. We do not have a federal system; we do not have federal rights. This Parliament spends three years reforming defamation law, and then the hopelessly deadlocked Northern Ireland Administration says, “We are not going to apply it to Northern Ireland”, which produces a ridiculously difficult problem for publishers, who have an old system in Northern Ireland and a new system in England. They have somehow to comply with both. There is nothing that the Supreme Court of the United Kingdom can do about that, except say that somehow it violates the European Convention on Human Rights. The European Convention on Human Rights is little use on that problem, and in theory the Minister is bound to be able to use that as a mechanism. However, what I am suggesting to you is that the present system does not work in that sort of situation. Instead of having federal values that protect the rights of the citizen throughout the whole of the United Kingdom, what we have is an asymmetrical system without any federal values, and I am using that as shorthand, that protect our rights as a kingdom. Do you agree with that?

*Professor Page:* What you are saying is that the law of defamation should, if you like, be reserved or treated on a UK-wide basis?

*Lord Lester of Herne Hill:* No, I am not saying that at all. I am saying that the right to free speech ought to be a core value that goes throughout the United Kingdom, and that the balance between libel or reputation and free speech is a balance that should be able to be struck throughout the United Kingdom, in a way that the Human Rights Act tries to do. That is our best substitute for the proper allocation of powers and rights between the centre and the different parts of the United Kingdom. In other words, I am saying the system requires radical reconstruction into a federal sort of arrangement.

*Professor Page:* I have quite a lot of sympathy with that, if only in the sense that I would argue that Scotland, and I am simply talking about Scotland at the moment, is already in a near-federal relationship with the rest of the United Kingdom. I leave open the question of whether you can generalise from that and treat the whole of the United Kingdom on a federal basis. I do have sympathy with the basic proposition, yes.

*Lord Lester of Herne Hill:* What I am really suggesting is that the Scottish tail should be allowed to wag the English dog.

*Lord Goldsmith:* Sorry, I want to go back to one point of, at least, definition, particularly in the light of what you said, Professor Page, about dispute resolution. The Silk commission talks about arbitration. Is that really arbitration, or is it mediation, or is it something else? I see arbitration ultimately, properly understood, as a method of dispute resolution with a
dispositive decision being given by some third party, after all sorts of processes, rather than an attempt to bring the parties together. I just wondered what you understand those who propose arbitration mean by that.

Professor Page: It is arbitration in the sense that you define it.

Professor McEwen: Yes.

Professor Page: That is what is being looked for: that is to say, independent third-party resolution of disputes—someone we can hand this over to.

Professor McEwen: Yes. If I recall correctly, the proposition was particularly around constitutional jurisdictional disputes, and decisions on that basis.

Q11 Baroness Taylor of Bolton: Can I move on from dispute resolution to the development of policy, the scope for joint development and the hazards of it? Professor McEwen, you mentioned areas where there were difficulties, where there was overlap or consequential issues, when policy decisions were made. You mentioned big issues like climate change, and reference was also made to the EU. Is there really scope for joint working on these areas, before you get to any dispute? Do the devolved institutions feel that they have the facility for putting items on the agenda and raising issues? Does it depend on party balance or individuals?

You mentioned earlier that you thought there was too much reliance on the informality. Would something that was more structured or more formal help in that respect, or even hinder? How do you see policy development going in the future? I hesitate to use your phrase about a near-federal relationship, but how do you see policy development in those areas where there is inevitably not absolutely a clear line, because there are consequences from the decision in one area to the decision in another?

Professor McEwen: Having overlap between policy competencies always necessitates a need to communicate, and to co-operate to some extent. However, we have no provision in the UK for co-decision, which is co-development and co-production of policy. I am sure the devolved Administrations would rather like that in some areas, but that is not the situation that we are in. The area that you mentioned, climate change, is a good example of a policy area that spans the local, the devolved, the national and the EU, and has necessitated working together. There was an inter-governmental accord that the devolved Administrations signed with the UK Government around the Climate Change Act, for example, because in order for that to take effect, it needs things to happen. It needs everyone to agree and sign up to that process. That does work to some extent.
Where it is more difficult to work is where the initiative is taken on the part of the devolved Administrations. If they want something to happen, it is much harder than if the UK Government is driving the process. More formal structures may help, but what matters most is the interpersonal relationships and the trust that can be built up between departments. Having people in Whitehall that understand devolution is crucially important. Mainstreaming that understanding across Whitehall departments is important. You see variation between different Whitehall departments. In fisheries, for example, and on environment and agricultural issues, there will be more of an understanding of the devolved issues than there has traditionally been within the DWP, for example. That will have to change with the new settlement. There is definitely variation between departments and between individuals within departments. That is probably the biggest hindrance to positive working relations.

**Baroness Taylor of Bolton:** I think you hinted earlier that some of the reliance on informality was a weakness. Do you see more formal structures, and how?

**Professor McEwen:** Formal structures help the informal as well. It is a weakness if you solely rely upon it. However, in many countries, whether within federal countries or between countries, having formal structures helps to facilitate the informal networking that is so important as well.

**Lord Lester of Herne Hill:** The question is, “How do party political differences between the different Administrations affect inter-governmental relations?” I have already mentioned the Northern Ireland parallel, but how would you react to that question?

**Professor McEwen:** It depends on which party differences, in a way. Up until the independence referendum, and perhaps I will come to that in a moment, the most contentious period was when it was a Labour Government here and an SNP Government in Scotland, at least with respect to the UK-Scottish relationship, because of the competition between those parties within Scotland, not just on a north-south basis. Things got better, initially, from 2010. What made it difficult was the dominance of the independence referendum issue, which brought more tension into the relationship, diminished trust and created difficulties with access.

Even in that context, things still happened. Co-operation still took place in more functional areas. We have to be careful not to exaggerate the significance of party political difference. What it did mean was that there needed to be greater reliance on the machinery of inter-governmental relations at first. It was not quite as easy to resolve differences over a cup of coffee with your colleague, or a quick phone call. You needed to be able to use formal channels, and that has been the main lesson since party incongruence has emerged.
Professor Page: I would agree with that. It makes a massive difference that there is no political congruence between the two systems and between the two Governments. That has been a fact of life since 2007, and it is going to remain one, in all likelihood. What one needs, therefore, is a system that will work despite the existence of party and political differences.

The Chairman: This Committee produced a report in 2002, I think, and I was on the Committee at the time. A lot of the arrangements were dead on the vine at that time. It has taken a long time for them to come alive at all, but we have still some way to go.

Lord Lester of Herne Hill: From the perspective of the central Government, when you have devolution, and when you have a real breakdown, as I think is the case in Northern Ireland, with two extreme parties in deadlock with each other and unwilling to comply with any diktat from Westminster, and you are looking at that kind of situation through Whitehall eyes, there is very little that Whitehall can do about it at the moment, because the powers are devolved. There is very little that parliamentarians can do, because they are not allowed to ask questions about it, under our own conventions, if it is to do with the exercise of devolved power. Is that right?

Professor Page: As you say, under convention or under a self-denying ordinance on the part of the Westminster Parliament, questions cannot be asked about matters that are devolved. There is, in all probability, a lot to be said for that. However, I do not think that should result in a position of indifference or neglect, or disinterest, as to what is happening in the devolved parts of the United Kingdom. The history of Northern Ireland between 1922 and 1972 bears testimony to that. It was arguably as a result of that neglect and indifference on the part of Westminster that things came to the pass that they did.

Q12 Lord Crickhowell: One of the central disputes that has arisen this morning, certainly in our first session, is between what I might describe as the Alan Trench point of view, which is that, on the whole, relationships should be bilateral and informal between the departments, and what I might call the Page view, which is that we need a bringing together and a collective cohesive management of the whole thing and probably the abandonment of the individual Secretaries of State and their departments. There is a difficulty, it seems to me, about that solution, which has arisen, in a way, in the conversation we have just had about Northern Ireland and the very difficult situations there, and the unbalancing that would, I suspect, arise because of the scale and importance of the Scottish issue for the Welsh. I do not see that if necessary you could get the sort of effective balance that we want.

On the other hand, as we saw in the passage of the Wales Bill, you can get ad hocery development of the constitution. Is there a compromise somewhere: that you do need
bilateralism to deal with the separates, but that you need some kind of co-ordinating operation
to deal with the major constitutional issues, and the major differences? I am not sure what the
solution would be, but we are groping for it and already there is an argument developing.

**Professor McEwen:** Yes, I agree with that. To some extent we already have that mixed bag. There are the quadrilateral meetings within the Joint Ministerial Committee, which we can criticise and improve upon. There are those quadrilateral meetings that take place outside of that formal framework around finance, for example, and those ad hoc issues that emerge from time to time. Then, there is the emergence of semi-formal bilateral arrangements, mainly focused on implementing new settlements. The Joint Exchequer Committee, for example, has been set up initially between the Scottish Government and the UK Government to oversee the implementation of the Scotland Act 2012. Presumably, it will extend to oversee implementation of the new arrangements that emerge from Smith. A Joint Exchequer Committee was set up between the UK Government and the Welsh Assembly Government to oversee some financial relationships there.

One of the things that was striking about both the Smith report and the Silk report was their emphasis on the need for more formal bilateral arrangements. I understand the concern about bilateralism perhaps having knock-on effects for other bits of the UK, which may be unfairly disadvantaged. However, it is interesting that they all seem to want a more formal direct relationship. I do not think it is an either/or. There is a place for both more formal bilateral arrangements and more formal multilateral arrangements alongside the informal things that we have been talking about as well.

**Lord Crickhowell:** Professor Page, you have strong views expressed in your paper.

**Professor Page:** Yes, the bilateral character of the relationships is inevitable, to a certain extent. My argument is that it can be taken too far, and that there is a need for an overall view of the relationships, which can in part be provided by multilateral machinery, but my argument is also that there needs to be an overall view taken within the United Kingdom Government. Retaining territorial departments in a sense really just reinforces bilateralism. No one is taking an overall view of these relationships, and that is what is essential.

**Q13 Lord Powell of Bayswater:** We have just been talking about the balance between quadrilateral and bilateral. There is also the balance between informal and formal. Indeed, Professor McEwen has now added semi-formal, so we have formal, semi-formal and informal. My impression from some of the answers in the earlier session, and indeed today, is that you do not see a strong need for more formal, justiciable statutory mechanisms, but you do see a need for better informal mechanisms. Would that be a fair way of putting it?
Professor Page: That is not my view.

Professor McEwen: That is not my view either. There is a need for more regular formal machinery. The formal machinery that we have is very ad hoc at the moment. Compared with any other multi-level state or any federal state, it is very unstructured in the UK. I think, as devolution develops and as the system becomes more complicated, and indeed if we do move towards a situation where the lower chamber changes in its territorial composition—in a sense, if English votes for English laws comes to pass—then it almost heightens the importance of the inter-governmental arena for overseeing and managing those inter-dependencies. There is a need for more formal and more regular inter-governmental co-operation, and more transparency and scrutiny of that. That is very important.

Professor Page: Yes. I argue in my submission that the whole thing should be put on a statutory basis. It is not enough to simply rely on the memorandum of understanding and the concordats that were drawn up at the time, and have been adjusted since, but it is the missing element, if you like, in the devolution settlements. Silk talks about embedding inter-governmental relations in the Welsh devolution settlement. That simply, in my view, reinforces the bilateralism of the whole system.

I would see an argument in favour of putting it on a proper statutory basis. People normally say, “Oh, we could not possibly do that. That would be the end of the world as we know it”, but we have done it in relation to the Civil Service with the Constitutional Reform and Governance Act. We set out the basic principles there. The world, as far as I am aware, has not come to an end as a result of it. As I argue in my submission, I see considerable benefit in making plain that this is not just something dreamt up between Governments but has popular sanction. This is the expectation of the legislatures of the United Kingdom of the way in which relationships will be conducted.

Lord Powell of Bayswater: One of the papers says that the concordats had got a bit out-dated. It may be yours; I cannot remember, I am afraid. That rather suggests to my mind that people do not see a particular need for them, and that they are happier with the less formal structures.

Professor Page: I suppose that is one possible interpretation. My preferred interpretation would be—I am talking about the Scottish settlement in this case—that they are symptomatic of the fact that Scotland has simply been forgotten about. These things have been allowed, as the Chairman said, to wither on the vine. I do not think that is satisfactory, because you cannot point to a thoroughgoing and effective system of informal relations that makes all that irrelevant. That is not the situation that we have at the moment.
Q14 Baroness Falkner of Margravine: Professor McEwen, you commented on the importance of formal mechanisms. You did not go so far as to go to statute. What would be your view on that?

Professor McEwen: I am not sure I have a strong view, to be honest. I am not a lawyer. I bow to the knowledge of my colleagues who are. I do not have an issue with it. In addition to any legal ramifications that would have, I could see it also as having positive, symbolic implications, attaching a heightened significance to relationships, which is not there at the moment. Sometimes there is a cultural problem, and statutory arrangements can help to shift cultural practices. That is the bigger issue, in a sense, and it is particularly an issue in central Government. There needs to be greater awareness of devolution, and of how it is changing and developing, but also of where the inter-dependencies emerge and how you need to manage them. It is a spirit and cultural thing.

Baroness Falkner of Margravine: For both of you, having said what you have said about how the current system is inadequate, are there any models overseas, with our particular level of asymmetry, that you think might be applicable here?

Professor McEwen: Yes, there are many examples of different ways of working: committees, councils and so on. I would be very happy to provide a paper on that, if that would be useful to the Committee. However, I cannot think of another system that is as asymmetrical as the UK. That is always going to be the difficulty. We can take inspiration from other cases, but we will have to find the solutions internally. I noticed that the Silk commission was particularly taken by the North South Ministerial Council on the island of Ireland. The Calman commission was particularly taken by the co-operation amongst officials of EU member states in COREPER. Those are some things that might be useful for us, but the solutions are going to have to come from the machinery that we have, and, developing that, what is suitable for the UK.

Professor Page: Yes, I would agree with that, and I would be wary of off-the-shelf solutions adopted or drawn from other systems. The system that has to be put in place has to be one that works for the United Kingdom. We have the massive benefit of 14 years’ experience. We know what works; we know what does not work. It is about taking the best bits of it and reinforcing that and generalising that across the system. I would be entirely confident about our ability to come up with a bespoke solution that met the needs of the United Kingdom.

Q15 Lord Lexden: I have two simple but large questions. The first is: in what practical ways should the existing arrangements for inter-governmental relations be changed in the
light of the pending devolution of more power to the devolved institutions in general, and the Scottish Parliament in particular?

**Professor McEwen:** The new emerging settlement, at least with respect to Scotland, will increase the powers of the parliament, and increase dependence on the UK Parliament. In taxation, the Smith report talks about income tax being a shared tax. I do not think that is quite right, but it is a shared policy space within which both Parliaments will be operating. The social security inter-dependences are very evident within the new settlement, so there is more of a need to co-operate than there has been before. I am not sure that that need has been recognised yet. It was within the Smith report, but that will still have to filter down.

Interestingly, developments in Wales are going in the opposite direction, in a way. If the reserved powers model is developed, that will help to disentangle things that were very complicated before in Wales, whereas we seem to be going in an opposite direction in Scotland. I think, because of those complexities, there is a very real risk that there are accountability issues that emerge. There will be more need to co-operate, but because it is so hidden and lacking in transparency just now that it will be very difficult for the parliaments and the electorate to be able to understand who is responsible for what.

In terms of practical measures, I would like to see the sorts of bilateral arrangements that have been set up to oversee transitional arrangements being seen on a more permanent basis. I would like to see proper annual reports. The Joint Ministerial Committee annual reports are about a page and a half of very generously spaced text that says nothing at all, other than the items that were on the agenda. I understand the issues around confidentiality and the political sensitivities, but after the meeting has taken place, why can we not see what was discussed, who raised which issues and who came to which resolutions? In a democratic system we should be seeing that in the reports, that should be tabled to Parliament, and Parliament should have an opportunity both to input into these meetings and to scrutinise the outcome.

**Professor Page:** On the first limb or part of what Professor McEwen has just talked about, in answer to your question, I would be wary of just a simple proliferation of committees without addressing what we both see as the underlying weaknesses of the current system. Smith could be read as advocating that we should have a Joint Committee on this, a committee on that, and a committee on the other thing. The danger is that you end up with a whole lot of committees, and no one with a very clear idea of why they are meeting, and we have not progressed at all. Things need to be done, but I would not just favour a committee-based solution or imagine that that somehow would bring about the best of all possible worlds.
Lord Lexden: In what practical ways could scrutiny by the Westminster Parliament of inter-governmental relations be improved?

Professor Page: It is a good question, and I am slightly sceptical of this business of an annual report. Calman talked about an annual report that would be scrutinised by a Joint Committee of the UK and Scottish parliaments. I see that as pretty much a futile exercise and as not really adding very much to anything. I would therefore prefer to approach it in terms of UK governmental arrangements. If you have a department for inter-governmental relations, you have a focus for scrutiny that could be a lot more meaningful and get into the actual detail of what is happening, rather than being presented with a three, four, five or six page report and not being very sure who to ask about it, and not really getting much information either. I would see scrutiny as working not on an annual report basis but in terms of the system as a whole, and how inter-governmental relations and the devolution settlements are working. The McKay commission recommends, and it is a very good recommendation, that there be a devolution committee. They were obviously talking about the House of Commons, but it does not need to just be about the House of Commons. Again, it is coming back to this point about the need to take a pan-UK or cross-UK view of the arrangements. Yes, an annual report would be part of that process, but I would not see it as central or critical.

Professor McEwen: An annual report is important. Some reporting mechanism is important, with much more detail than we currently see. The communiqués also tell us nothing. There is no real need for that. They can be more substantive, and that would help any scrutiny process. I guess it would be for each Parliament to decide the best ways in which to engage in scrutiny, but there are clearly some committees and some policy areas that are more affected by inter-governmental relations than others. With regards to finance, the Treasury Select Committee has a very busy agenda, but might want to periodically consider that inter-governmental dynamic.

I am not so sure about channelling everything into a devolution committee, because that seems to me to have similar risks to channelling things within Whitehall departments to small devolution teams. You nurture a small unit of experts, and the problem then is the rest, where you lose that cultural understanding of devolution that you need across the system. If we are serious about the UK as a union that is multinational, inter-dependent and multilevel, you need to have a broader understanding of that across the piece.

Q16 Lord Lester of Herne Hill: I do not think either of you could give very good marks to successive Governments since the Kilbrandon report, and the shelving of the memoranda of dissent by Crowther-Hunt and Peacock. I do not think you would give very high marks to the
ability of successive Governments on constitutional reform in this area. I doubt that you could. Certainly I could not. As I listen to you, I am unclear, especially with Professor Page, whether your view is that we could still, over the next five or 10 years, take what we now have and turn it into a coherent constitutional framework, with a proper allocation of powers and rights and responsibilities across the whole of the United Kingdom. I am unclear whether you have this unionist view, or whether you think it is beyond the capacity of this country to do anything of the kind, because of our geographical and political asymmetry. Are you, in that sense, an optimist or a pessimist? Do you think it is possible, or do you think it is not possible? Do you think it is realistic or not?

**Professor Page:** It is possible. Whether it will happen or not is another question. It is perfectly possible. It is not beyond the wit of man and Government to come up with a coherent, workable, effectively functioning system.

**Lord Lester of Herne Hill:** If we do not, then do you think that the present asymmetrical framework, with a more formalised system, can cope, or do you think that in the end it is going to lead more likely to a centripetal situation, in which breakup becomes more likely?

**Professor Page:** An ever looser union, which is one way it has been expressed, is a very real possibility.

**Professor McEwen:** There is perhaps a need to have a proper debate about what the union is for—that general purpose that might be relevant for the whole of the UK. One of the strengths, historically, of the UK has been the ability to adapt to arrangements that suit different parts. There will always be a difficulty in the UK because of the size of England and because, for now and the foreseeable future, the lack of an English Parliament makes any sort of federal-type solution very difficult.

I would not necessarily score as low as you on the past practice, in that the 1998 Scotland Act was a good one in that it set out very clearly what the areas of reserved responsibility ought to be. It did so after a long period of reflection and debate, not just and perhaps not primarily within Parliament but within broader society. I am very concerned about the way that the process has unfolded now, post-referendum, which is very quick. It is very rapid. There is not enough time for reflection by anybody. It is moving away from that clarity that we had with the original devolution settlement, and making something much more complicated and messy, without thinking through the consequences of what that will be. I am sure there will be lots of unintended consequences that emerge as a result.

**The Chairman:** On that challenging note, I would like to thank you both very much indeed. You have been extremely informative and admirably concise, but you have given us a lot of
very valuable information. We are very grateful for the way in which you have placed your experience at our disposal, and the two submissions you have also sent us. As I said earlier, please feel free to add to your answers when you see the transcript. I hope we will produce a report in due course that you can live with, if I cannot put it higher than that. In the meantime, thank you very much indeed for coming.