



# “Saving the Union...?”

## Sir David Edward

**5pm Friday 7th February.  
Parliament Hall**

**ILCR PUBLIC LECTURE, ALL  
WELCOME**

Sir David Edward is a Scottish lawyer and academic, and former Judge of the Court of Justice of the European Communities. He holds an honorary fellowship at Oxford University, an honorary professorship at Edinburgh, and is an honorary sheriff of Tayside.

His lecture will address a range of issues including the Calman Commission, the Smith Commission, the independence referendum, the Brexit Referendum, and the possible legal, constitutional, political, and practical conditions for a workable and stable future.



University of  
St Andrews



# SUBJECT TO REVISION

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DAVID EDWARD

Tam Dalyell, of blessed memory, predicted that devolution and the creation of a Scottish Parliament was “a motorway that would lead to the demand for independence, with no exit points along the way”. George Robertson – happily still with us - said that devolution would “kill the SNP stone dead”. So far, Tam has proved the more reliable prophet. So there are those – notably Gordon Brown - who believe that urgent steps must be taken to “save the Union”.

By contrast, there are those – amongst them, apparently, the present Government in London - who believe that nothing need be done; that, given time, the SNP will lose credibility; that the dangers and disadvantages of life outside the Union will become ever more apparent; and that the devolution settlement is perfectly sound and stable as it is. They may be right. But what if they are not?

Are we on a motorway that leads inexorably to independence, or is there still an exit point along the way? More concretely, is there a workable basis on which a stable relationship can be established between, on the one hand, the Scottish Parliament and Government and, on the other, and the Parliament and Government of the UK?

Let me say at once that I am neither a nationalist nor a committed Unionist (as I used to be) – I have become ambivalent. So, I don't argue from either viewpoint.

I'm afraid that we have got beyond a point at which purely political solutions will suffice. We can urge Westminster and Holyrood to treat each other with respect, but they don't. We can urge them to work together in Joint Ministerial Committees, but this presupposes a willingness to *work* together, otherwise the Committees become no more than a talking shop (words used by the former First Minister of Wales).

The arguments to and fro are admirably summarised by the Public Administration and Constitutional Affairs Committee of the House of Commons in their Report entitled “Devolution and Exiting the EU: reconciling differences and building strong relationships”.<sup>1</sup> Sadly, the Report ends up with many recommendations as to what people “should” do, in spite of all that we know about what they are likely to do.

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<sup>1</sup> Eighth Report of Session 2017-19, HC 1485.

As to what might be done, there are those who argue for a form of federalism. I don't personally find this helpful, for several reasons:

First, as a strongly unionist Professor of Constitutional Law put it, away back in 1910:

There is a great danger of our being enslaved by the poverty of our political vocabulary. The term 'Federalism' is put to such new and alien uses as to darken counsel and confuse thought"<sup>2</sup>

Second, there are many types of federation – United States, Canada, Switzerland, Germany – all 'federal' and very unlike in origin, conception and working. For myself, I prefer the approach of Madison, the father – or at least the principal author - of the US Constitution, writing towards the end of his life:

The more the political system of the United States is fairly examined, the more necessary it will be found, to abandon the abstract and technical modes of expounding and designating its character, and to view it as laid down in the charter which constitutes it, as a system hitherto without a model; as neither a simple or a consolidated Government altogether confederate ; and therefore not to be explained so as to make it either, but to be explained and designated, according to the actual division and distribution of political power on the face of the instrument"<sup>3</sup>

In other words, the relevant question is, what powers are to be allocated where? And how is their exercise to be controlled?

Third, working federalism implies some degree of uniformity of the component units – not, of course, complete uniformity of size, wealth, or influence – but not such vast disparity as there is between England, Scotland, Wales and Northern Ireland. In particular, the position of Northern Ireland requires special consideration and special treatment

In other working federations, disparities in size, wealth and influence tend to be ironed out – though not totally eliminated – by the number of component units. It would be unrealistic to treat the regions of England as if they were on a par with Scotland, Wales and Northern Ireland – quite apart from the clear evidence that there is no appetite for such treatment (important as it may be to satisfy their grievances in other ways). In short, as Professor Wyn Jones put it in his evidence to the House of Commons Committee,

The position of England within the UK constitution is the elephant in the room that we constantly ignore.<sup>4</sup>

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<sup>2</sup> J.H. Morgan (Professor of Constitutional Law at UCL) in *The New Irish Constitution – An Exposition and Some of the Arguments*, 1912, republished by Kennikat Press, Fort Washington NY, 1971, p. 3.

<sup>3</sup> James Madison, *Notes on Nullification*, December 1834 (completing the abbreviations in the original), in *The Writings of James Madison*. ed. Gaillard Hunt, GP Putnam's Sons, New York & London, Vol. IX, p. 599-600.

<sup>4</sup> Report, paragraph 69.

Fourth, there is no evidence of an appetite in England for the creation of a Parliament of England separate from the Parliament at Westminster. So long as the Parliament at Westminster remains the Parliament of the UK, the members from Wales, Scotland and Northern Ireland – even if they were all to vote in the same way – could almost always be outvoted by the members from England or a working majority of them. This disparity has been aggravated by the reduction in the number of members from Wales and Scotland since devolution, though there are other justifications for that. And English Votes for English Laws (EVEL) doesn't seem to work harmoniously either

Fifth, a federal-type “Senate of the Regions” – replacing the House of Lords - would inevitably suffer from the same disparities, even if it might help in other respects to ensure the continuity of the Union.

Having said all that, I don't say that we can't learn from the experience of federal systems and institutions elsewhere. Ideally, a federal instrument will seek to strike a balance between certainty through a clear definition of constitutional competences and the flexibility which comes from avoiding excessive precision.<sup>5</sup> From this point of view, the allocation of powers in the Scotland Act 1998 seems in many ways to strike a reasonable balance between certainty and flexibility. Nevertheless, as the call to save the Union shows, something more fundamental is lacking.

The problem, so it seems to me, lies in the unqualified claim to supremacy of the Westminster Parliament that lies at the heart of the Scotland Act in Section 28. After empowering the Scottish Parliament to legislate, the Act provides that

This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland<sup>6</sup>.

Before discussing what this means in practice, and the effect of the so-called Sewel Convention, it is worth looking at the history of Westminster's claim to supremacy. It has had some beneficial and some unhappy consequences, of which the first was the loss of the American colonies.

Amongst the complaints of the American colonists set out in the Declaration of Independence (1776) was that the King

Has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws, giving his Assent to their Acts of pretended legislation:

For suspending our own Legislatures and declaring themselves invested with power to legislate for us in all cases whatsoever.

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<sup>5</sup> D.A.O. Edward and R.C. Lane in “European Union and the Canadian Experience” in (1985) 5 Yearbook of European Law, Oxford 1986, p.4 (passage written by Robert Lane).

<sup>6</sup> Section 28(7).

[N]or have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. ...

Despite the setback of 1776, the British Empire continued to grow, establishing colonies with their own legislatures - but subject always to the supremacy of the so-called "Imperial Parliament". That expression continued to be used well into the last century, although no attempt was ever made to change its composition to reflect its 'imperial' pretensions. It always was, as it still is, the Parliament of the United Kingdom, in which England plays a predominant role.

During the early part of the nineteenth century, questions arose as to the validity of laws passed by colonial Parliaments because there were, or were said to be, inconsistencies between them and the laws of the Imperial Parliament – a state of affairs known, in lawyers' jargon, as "repugnancy".

This had proved to be a particular problem in South Australia where legislative havoc was created by an obstinate Yorkshireman, Benjamin Boothby. He had been sent out by the Colonial Office to be a Justice of the Supreme Court of South Australia. Once there, he struck down a number of local statutes on grounds of repugnancy. He held that a newly elected Parliament of South Australia had not been validly constituted, and he challenged the appointment of two new Justices on the ground that only barristers trained in England or Ireland were eligible for appointment.

Partly in consequence of this, in 1865, Westminster passed the Colonial Laws Validity Act, which prescribed with some precision the circumstances in which a 'colonial law' might be declared void for repugnancy. And to overcome the depredations of Benjamin Boothby, the Act also provided for the absolute right of colonial legislatures to establish courts of law, to provide for the administration of justice, and to determine the constitution, powers and procedure of the legislature,

The process of statutory interpretation prescribed by the 1865 Act is analogous to the technique known in England as "reading down" – interpreting statutes to bear a meaning that is constitutionally valid (described by an Australian scholar as "good law for the 'bad man'"<sup>7</sup>) This in turn is analogous to the so-called *Marleasing* method of interpretation to achieve compatibility where EU legislation appears to conflict with national legislation.

Along the same lines, only last year, in the case concerning the conflict between the UK Parliament's Withdrawal Act and the Scottish Parliament's Legal Continuity Bill, the UK Supreme Court conducted a close comparison between the terms of a Westminster statute and a Holyrood statute to see how far they were compatible.<sup>8</sup>

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<sup>7</sup> David Hume « The Rule of Law in reading down: Good Law for the 'Bad Man', (2014) 37(3) Melbourne University Law Review p. 620, taking up the 'Bad Man' theory of Justice Oliver Wendell Holmes in "The Path of the Law" (1897) 10 Harvard Law Review 457.

<sup>8</sup> *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – a Reference by the Attorney General and the Advocate General for Scotland (Scotland)*, [2018] UKSC 64, from paragraph 98.

Statutory interpretation is often found to be a dry subject for those who have the misfortune to be lawyers. But it has political consequences as the experience of Canada shows.

In 1867 Westminster enacted the British North America Act. This laid down the governmental structure of a new 'Dominion under the Crown' - to be known as Canada - with its own Parliament of two Houses – a Senate and a House of Commons. The Act allocated power between the federal Parliament and the legislatures of the Provinces, each of which was given 'exclusive powers' over a wide range of topics.<sup>9</sup>

The powers of the Parliament of Canada were (and still are)

*“to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects ... assigned exclusively to the Legislatures of the provinces ...”*

The list of matters falling within the exclusive legislative authority of the Parliament of Canada is added “for greater certainty”.<sup>10</sup>

The Yin and Yang of two sets of exclusive powers was policed by the Judicial Committee of the Privy Council, which had become the ultimate court of appeal for the Empire (presided in many cases by a Scottish judge, Lord Watson). The judgments ('advice') of the Judicial Committee tended to favour the Canadian Provinces, on the basis that the Act was clear: the federal Parliament could not intrude upon the exclusive powers of the provinces.

This approach has been criticised on the ground that it undervalued the overriding obligation of the Parliament of Canada “to make laws for the peace, order and good government of Canada”, and effectively subordinated the federal power to the power of the constituent Provinces. It has been argued that this was because the Judicial Committee approached interpretation of the Act as if it were an ordinary statute allocating powers between subordinate authorities, rather than an embryo constitution calling for different canons of interpretation.

The limitative approach of the Privy Council made it necessary for Westminster to pass a series of British North America Acts to allow the Parliament of Canada to legislate on a variety of matters, such as the accession of new Provinces, the jurisdiction of the Provinces over natural resources, the jurisdiction of the federal Parliament over unemployment insurance, and power to pass legislation on old age pensions.<sup>11</sup>

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<sup>9</sup> Section 92.

<sup>10</sup> Section 91.

<sup>11</sup> [References to be added]

The British North American Act never reached the stage of becoming the constitution of an independent and highly influential state until it was 'repatriated' by the Canada Act of 1982, the 1867 Act then being retitled in Canada as the Constitution Act 1867.

The Canadian experience illustrates, I think, three points that are relevant for our purposes:

1. Problems arise where exclusive powers are allocated to different levels of government,
2. Conflict between exclusive powers can be policed by a court, and
3. The approach of the court may help or hinder the solution of problems that are hidden behind the legalism of statutes.

One of the strong arguments against the Privy Council's approach has been that, while the allocation of *exclusive* powers to the Provinces may have been appropriate to the economy of Canada in the mid-nineteenth century, it proved to be a legislative straitjacket as the modern economy developed. Thus, for example, the exclusive powers of the Provinces enabled them to maintain or erect non-tariff barriers to internal trade.<sup>12</sup> In other words, they stood in the way of the creation of a single economic market in the Dominion.

Contrast, in this respect, the way in which the EEC Treaty, which outlawed covert restrictions on trade, opened up the single market in areas as unexpected as free movement of tile-layers, lawyers and picture conservators.<sup>13</sup>

(I am not in a position to assess the economic consequences for Canada, but the experience may act as a warning in relation to the coming re-allocation of powers between Westminster and Holyrood that will be "repatriated from Brussels" in consequence of Brexit. Watch this space for a dreary battle to come.)

An opposite point of view expressed by Pierre Trudeau, who remarked that, without the Privy Council's support for provincial autonomy, "Quebec separation might not be a threat today; it might be an accomplished fact". The 1867 Act provided for the special circumstances of Quebec as a former province of France, speaking French and living under a civil law legal system. And the protection of minorities became a constant refrain in the case law of the Privy Council – for example, in relation to the rights of the native Americans – or, perhaps more accurately, on the power of the Provinces to regulate their privilege of hunting or fishing, or to dispossess them of tribal lands.<sup>14</sup>

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<sup>12</sup> See Edward and Lane, *op.cit.* [and further references to be added]

<sup>13</sup> [References to be added]

<sup>14</sup> See, for example, *St Catherine's Milling and Lumber Company v The Queen on the Information of the Attorney General of Ontario*, [1888] UKPC 70.[and other references to be added]

In another continent, a nineteenth century traveller in India reported having come across a village in which the people were offering a sacrifice to the Judicial Committee for returning their lands to them.<sup>15</sup>

In 1929 the approach of the Privy Council to constitutional interpretation underwent a sea change in the so-called the “Persons Case”.<sup>16</sup> The 1867 Act provided for a two chamber Parliament – an elected House of Commons and a Senate of “qualified persons” appointed by the Governor-General.<sup>17</sup> The question that arose was whether women were “qualified persons” eligible for appointment to the Senate. The Supreme Court of Canada held, by a majority, that they were not.

The case was appealed to the Judicial Committee of the Privy Council. Writing for the Committee, the Lord Chancellor, Lord Sankey, said that

The exclusion of women from all public offices is a relic of days more barbarous than ours....To those who ask why the word “person” should include females, the obvious answer is why should it not.

In arriving at this conclusion, Lord Sankey set out an entirely new approach to the interpretation of constitutional statutes:

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a constitution to Canada. Like all written constitutions it has been subject to development through usage and convention ...

Their Lordships do not conceive it to be [their] duty – it is certainly not their desire – to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

Decisions of the Judicial Committee on the rights of minorities did not find universal favour. One decision on an appeal from New Zealand led to public protests in the streets by lawyers and judges, and to a judicial statement that New Zealand courts should not follow the decisions of the Judicial Committee.<sup>18</sup> In the end, however, New Zealand was the last of the old Dominions to abolish the right of appeal to the Privy Council. Whatever its practical merits, the right of appeal to a court sitting in London had been seen “a badge of inferiority”.<sup>19</sup>

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<sup>15</sup> [Mohr, p. 16]

<sup>16</sup> *Edwards v Attorney General of Canada* [1929] UKPC 86

<sup>17</sup> Section 24

<sup>18</sup> [Reference to be added]

<sup>19</sup> [Mohr, p.13.]



The Canadian Persons case was decided in 1929. In the meanwhile, the issue of Westminster supremacy had been discussed at Imperial Conferences in the Conferences in 1926 and 1930. The outcome was the Statute of Westminster 1931, which declared that

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

The Dominions in question were the 'old' Dominions: Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland.

With the mention of the Irish Free State, we can turn nearer home to the vexed saga of Irish Home Rule, which offers some lessons for our situation. I go no further back than the Government of Ireland Act 1914. The coming into force of that Act was suspended on the outbreak of the first World War, and it never came into force.

The Act began by providing for the creation of an Irish Parliament, "consisting of His Majesty the King and two Houses" – a Senate and a House of Commons. But it went on to declare that

Notwithstanding the establishment of the Irish Parliament ..., the supreme power and authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things in Ireland and every part thereof.

Subject to that, the Act went on to empower the Irish Parliament to make laws for the peace, order and good government of Ireland, but subject also to a long list of exceptions. Section 3 prohibited laws interfering with religious equality – a provision which was deemed necessary to afford statutory protection to the Protestant minority in what would become an Ireland of 32 counties with a Catholic majority. Section 28 transferred the ultimate court of appeal from the House of Lords to the Judicial Committee of the Privy Council.

After the War, the Act of 1914 was never brought into force. A new Government of Ireland Act was passed in 1920 providing for 2 "Home Rule Irelands": the 26 counties of the south and the 6 counties of the north. The Parliament of Northern Ireland, constituted under the Act, came into being in 1921.

Although the scheme of the 1920 Act differed considerably from that of the 1914 Act, it still provided that

The supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matter and things in Ireland and every part thereof.

This proved to be a major bone of contention in the negotiations that led, after much bloodshed, to the Anglo-Irish Treaty of 1921.

The Treaty provided for the creation of a new Dominion, to be known as the Irish Free State, and sharing the same position as the other Dominions. It provided for the Parliament of Northern Ireland to vote to join the Free State, but it did not do so.

As we have seen, Westminster's claim to supremacy in relation to the Dominions was formally ended by the Statute of Westminster, although the representatives of the Free State maintained that it had already been ended by the Anglo-Irish Treaty.

The appellate jurisdiction of the Judicial Committee, which continued after 1922, had an unhappy history – and on one occasion an inglorious one. In a case concerning the remuneration of civil servants who had been transferred to the service of the Free State, the Privy Council held that they were entitled to higher compensation than that to which the Irish Supreme Court had held they were entitled. It turned out that this was due to an error as to dates, for which the former Lord Chancellor, Lord Cave, who had chaired the Committee, had been responsible. It did not help that Cave was himself an ardent Unionist.

The Privy Council was accused of 'criminal ignorance' and the Irish Courts were urged no longer "to prostrate themselves perpetually in awe before the majestic presence of the Judicial Committee". Eventually, when Cave was already on his deathbed, the other members of the Committee, led by Lord Haldane, had to stand up before the House of Lords and admit that they were wrong. Lord Dunedin declared that it was no pleasant matter to "stand in a white sheet and say that you were wrong" but that it would be "cowardly for a man to run away and not accept his share of responsibility". Lord Finlay, another Scot avoided this humiliating exhibition by pleading ill health.

Eventually, the Free State abolished the jurisdiction of the Privy Council in 1933.

The history of the relationship between the UK authorities and the Parliament of Northern Ireland was rather different. Notwithstanding the Westminster claim of supremacy, Sir Ivor Jennings, one of the foremost constitutional experts, argued in 1959 that

It would be unconstitutional for [the United Kingdom] parliament to exercise its legal power of legislation in the matters delegated to the parliament of Northern Ireland, except with the consent of that parliament".<sup>20</sup>

In light of recent events, the reason for this policy of non-intervention is not entirely clear. But the clue may lie in one of the discussion papers submitted in 1973 when the UK government had to decide what to do after abolishing the Parliament of Northern Ireland:

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<sup>20</sup> Ivor Jennings, *The Law and the Constitution*, University of London Press, 1959, p. 157.

There is a view that any new legislature should not be called a Parliament. ... [T]he title [Parliament] and adoption of elaborate Westminster procedures have not only been out of proportion to the real functions, independently performed, and to the size of the population covered by them, ... but has also promoted a false view of 'Stormont sovereignty', which has been positively harmful.

One malign consequence of non-intervention was that it allowed the Parliament of Northern Ireland to do precisely what the Government of Ireland Act had tried to prevent – discrimination against minorities. The aim had been to protect the Protestant minority against a predominantly Catholic Parliament of all Ireland. Because of the policy of non-intervention in Northern Ireland, the precautions put in place did not prevent discrimination against the minority Catholic population. The consequence, as we know to our cost, was the Troubles.

After that long – perhaps overlong – tour round the history of Westminster supremacy, I come at last to see how the lessons learned from past experience can be applied to our present situation.

First, the fact that the Scottish Parliament is a 'Parliament', and not an 'Assembly' (as was proposed in the failed Scotland Act of 1978) has a particular resonance. Perhaps this is because of the insistence on the 'sovereignty' of the Westminster Parliament. But there are many Parliaments round the world that do not insist on their absolute sovereignty or supremacy.

Indeed, a close study of Dicey's work on the constitution shows that he was concerned with the legislative sovereignty of Westminster – understood as the Monarch, the House of Lords and the House of Commons acting together. Moreover, he recognised that there are practical limits to legislative supremacy:

A sovereign may wish to do many things which he either cannot do at all or can do only at great risk of serious resistance. . . It would be rash of the Imperial Parliament to abolish the Scotch law Courts and assimilate the law of Scotland to the law of England. But no one can feel sure at what point Scotch resistance to such a change would become serious. <sup>21</sup>

'Sovereignty' – that dusty desert of abstractions, as James Bryce called it<sup>22</sup>– is yet another of those words that "darken counsel and confuse thought". We are better off without it if we are to determine how the powers of the Westminster and Holyrood Parliament should be allocated and controlled.

As we have seen in the case of Canada, it would be possible to approach the problem by the allocation of exclusive powers. This has, in one respect, been done in the Scotland Act by allocating reserved powers to Westminster. But the powers of Holyrood are clearly and explicitly not exclusive.

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<sup>21</sup> P. 79

<sup>22</sup> [Reference to be added]

A system of exclusive and shared powers was envisaged in the embryo constitution drawn up by the Scottish National Assembly, led by John MacCormick, father of Professor Sir Neil MacCormick. You will find the text printed as an Appendix to John MacCormick's autobiography, "The Flag in the Wind", which has been republished by Birlinn with a fine filial Introduction by Neil.

Incidentally, the Scottish National Assembly, or the Scottish Covenant that followed, was not the work of the SNP. John MacCormick ('King John') had been forced out of the party in 1942 by a faction led by Douglas Young, a graduate of this University and later a lecturer here. MacCormick stood as 'National' candidate in opposition to Labour in the Paisley by-election of 1947 was supported by such Tory worthies as Walter Elliott, Peter Thorneycroft, Reginald Manningham Buller and Lady Tweedsmuir. He went on to win legal fame as the pursuer in the "E II R" case.<sup>23</sup>

The most powerful argument against a system of mutually exclusive powers is, I think, the economic argument - that the rigidity of exclusive powers militates against the flexibility that a modern economy requires. The scheme of the Scotland Act 1998 (unlike the failed Act of 1978<sup>24</sup>, is flexible to the extent that, having reserved specified powers to Westminster, all other powers are left to Holyrood. The problem lies in the assertion of unqualified Westminster supremacy in Section 28 (7).

The current solution to this problem is the so-called 'Sewel Convention', based on an assurance given by Lord Sewel (then a government minister) during the passage of the Scotland Bill through the House of Lords. This says that

The Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.<sup>25</sup>

This led to the system of Legislative Consent Motions by which the Scottish Parliament consents to legislation by Westminster. For a long time, this worked well and some 160 LCM's were passed.

Notwithstanding the relative success of the system, there was pressure for the Sewel Convention to be placed on a firmer footing than a ministerial assurance to the House of Lords. The Smith Commission recommended that the Convention should be placed on a statutory footing. This was done in the Scotland Act of 2016, so that it now reads:

This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

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<sup>23</sup> *MacCormick v The Lord Advocate* [Reference to be added]

<sup>24</sup> [Reference to be added]

<sup>25</sup> [Check text of what Lord Sewel said in the Lords]

But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

The interpretation of this provision came before the Supreme Court in the first *Miller* case about the power of the Executive to give an Article 50 notice of the intention to withdraw from the EU without Parliamentary consent. In a few brief paragraphs, the Court held that, despite statutory enactment, the Convention remains no more than a Convention.

The policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.<sup>26</sup>

I confess that, for me, that was a lost opportunity. It is true that the statute had enacted the terms of the Convention. But, as I see it, the intention was to place the Convention on a statutory footing, and so remove it from the sphere of non-justiciable Conventions.

So, what can now be done? It has been made abundantly clear in the contorted process of enacting the EU Withdrawal Act, that the present government does not regard the statutory enactment of the Sewel Convention as being in any way binding upon them or on the Westminster Parliament. The Scottish Parliament has simply been told to get on with its day job.

For myself, if the Union is to be saved, it is essential to introduce some form of independent institutional policing of the relationship between Westminster and Holyrood.

Past experience may suggest that the boundaries of that relationship should be the work of a court. In the Scotland Act as originally enacted, this was to be the Judicial Committee of the Privy Council, a jurisdiction now transferred to the Supreme Court.

However, the exercise of judicial oversight in the various Brexit and Prorogation cases has been questioned in a rather ambivalent way by Lord Sumption and others who see a clear distinction between law and politics. For myself, that is an absurd binary distinction that bears no relationship to the real world. It seeks to draw “a boundary where there is none”.<sup>27</sup>

More importantly, however, the present Westminster Government seems to be determined to clip the wings of the judiciary rather than enlarge their jurisdiction. Indeed, it may be questioned whether the Supreme Court - the ultimate court of appeal in a very wide range of legal issues - is best placed to act as the referee in issues between Westminster and Holyrood.

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<sup>26</sup> [Reference to be added]

<sup>27</sup> Sir Stephen Sedley in the *London Review of Books*, 12 September 2019, pp. 4-5.

That leads me to wonder whether a more imaginative solution might be found in the jurisdiction of the Privy Council. The Judicial Committee is, after all, simply a *committee* of a larger body, selected or appointed to perform specifically judicial functions.

The Privy Council, as such, is a very large body from the membership of which it would be possible to compose a Constitutional Committee to act as a constitutional policeman. This could include, as well as judges and other lawyers, members with experience of government and public affairs, whether as politicians, civil servants or many other ways.

Whatever may be the best solution – and mine is very embryonic - the current stand-off suggests that we are speeding down Tam Dalyell's motorway. Political assurances of good behaviour and the establishment of more inter-ministerial or inter-parliamentary committees will not lead us to a secure exit.

After all, it is in the nature of politics to disagree and to seek and exercise power. The question is how that power should be divided and distributed, and how that division and distribution is to be policed so as to ensure "peace, order, and good government".

