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Thinking about Constitutions

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A Definition of Federalism

Federalism is defined as 'a system of government in which central and regional authorities are linked in an interdependent political relationship, in which powers and functions are distributed to achieve a substantial degree of autonomy and integrity in the regional units. In theory, a federal system seeks to maintain a balance such that neither level of government becomes sufficiently dominant to dictate the decision of the other, unlike in a unitary system, in which the central authorities hold primacy to the extent even of redesigning or abolishing regional and local units of government at will.'

(*New Fontana Dictionary of Modern Thought*)

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Thinking about Constitutions

Professor Sir David Edward



Foreword

This is the first of the Federal Trust's European Essays for 2005. Its content could not be more timely or telling. Over the next eighteen months, and particularly after the General Election expected in May of this year, a vital constitutional question will be moving inexorably to the top of the political agenda, namely the promised referendum on the treaty 'establishing a constitution for the European Union.' The campaign surrounding that referendum will inevitably range across the whole spectrum of arguments, statistics, misunderstandings, misrepresentations and caricature which comprise ninety percent of the European debate in this country. It would be a brave prophet now to foretell the outcome.

The lecture of Professor Edward which follows is not conceived as a partisan contribution to the incipient debate on the European Constitution. The Constitution's critics and its friends will find the lecture equally informative and stimulating. In a remarkable mixture of history, analysis, methodology and interrogation, Professor Edward seeks to refine and reinforce his audience's ability to think coherently and effectively about constitutional questions. He rightly has little patience with the lazy idea that constitutional thinking and speculation have made little or no contribution to the present state of the British polity. Keynes tells us that 'practical men' are often unconsciously in thrall to the ideas of long-dead economists. Many current British politicians who pride themselves on their pragmatism appear to stand in the same relationship to long-dead lawyers and political theorists.

It is undoubtedly true that one reason why the institutional structure of the European Union can provoke in the United Kingdom (perhaps particularly in England) such resentment and misunderstanding is that it often confronts us with unwelcome questions about the appropriate relationship between various elements of British domestic governance. Cardiff and Edinburgh, not to mention Birmingham and Liverpool, may well wonder whether the British government practices domestically the principle of subsidiarity to which it attaches such importance in the European context. English Regional Assemblies have now disappeared from the political agenda for the foreseeable future. But the constitutional questions to which they were designed as an answer have not. Professor Edward's lecture encourages us to think more confidently and creatively about the whole gamut of constitutional questions, regional, national and European. The more politicians and commentators who follow his encouragement in the months leading up to next year's European referendum, the better.

Brendan Donnelly, Director
February 2005

Thinking about Constitutions

Sir David Edward - Honorary Professor, University of Edinburgh

This is the revised text of the first in a series of lectures at the University of Edinburgh dedicated to the memory of Professor J.D.B.Mitchell. I called it "Thinking about Constitutions" for two reasons. First, because I believe that, as citizens, we must try to think more clearly about the constitution of our own country and the proposed constitution for the European Union. Second, because that is what John Mitchell sought to do from the time when he took up the Chair of Constitutional Law in 1954 to the time of his sudden death as Professor of European Institutions in 1980. He foresaw, not only the need for a new approach to constitutional and administrative law, but also the way it would have to develop and the difficulties that would be encountered along the way.

Britain has probably written more constitutions for more countries than any other nation. Many of them have been federal constitutions. But most people in this country still seem to believe that constitutions are all very well for others - especially the French and other benighted continentals - but not for us. At all costs, any taint of federalism must be avoided. John Bull is a pragmatic animal and, as Anthony Trollope observed:

"To produce Utopian theories of government is especially the part of a Frenchman; to disbelieve in them is especially the part of an Englishman."

John Mitchell believed that we have lived for far too long in an isolated world of constitutional self-righteousness. I would now go further. We have become constitutionally illiterate, to the extent that we do not understand our own constitution and cannot begin to understand why the European constitution is important to others. I will explain why I think this is so, but let me begin by confessing that I have quoted Trollope out of context.

Trollope visited the United States in the middle of the American Civil War when it was not certain that the Union would survive. He wrote a book entitled *North America*, published in 1862, which includes a chapter on the American Constitution.

Trollope mocked the French propensity for "Utopian theories of government framed by philosophical individuals who imagine that they have learned from books a perfect

system of managing nations". (That is the context of my quotation.) But he went on to say that the American constitution is "a written constitution in which no Englishman can disbelieve and which every Frenchman must envy". It is 'the splendid result' of the failure of the Articles of Confederation.

In pointing the contrast between "Utopian theories of government" and "a constitution in which no Englishman can disbelieve" Trollope reminds us that a constitution is not in itself a theory of government and need not reflect any such theory. That, I think, is the key to our problem.

Five years after the publication of *North America*, the British Parliament passed an Act creating a federal constitution for Canada. This was followed by a series of constitutions (mainly federal) for the self-governing dominions. These constitutions, and the federal principles on which some of them were based, were not the fruit of some un-British theory of government. They were, after all, drafted by people who regarded themselves as British even if they lived in the dominions. In conception and content each of them was a pragmatic response to the needs of the country for which it was devised. Their success is demonstrated by their longevity.

The attitude of the British to our own constitution may not reflect a Utopian *theory* of government such as Trollope attributed to the French. But it is not pragmatic either. What it reflects is a Utopian interpretation of British history ("the Whig interpretation") that hardly withstands serious scrutiny today.

In 1848, when most of the rest of Europe was in constitutional turmoil, Lord Macaulay wrote in lyrical terms:

"The sources of the noblest rivers which spread fertility over continents and bear richly laden fleets to the sea, are to be sought in wild and barren mountain tracts, incorrectly laid down in maps, and rarely explored by travellers. To such a tract the history of our country during the thirteenth century may not unaptly be compared. Sterile and obscure as is that portion of our annals, it is there that we must seek for the origin of our freedom, our prosperity, and our glory. Then it was that the great English people was formed. ... Then first appeared with distinctness that constitution which has ever since, through all changes, preserved its identity; that constitution of which all the other free constitutions in the world are copies, and which, in spite of some defects, deserves to be regarded as the best under which any great society has ever existed during many ages."

The significance of Macaulay's reference to the thirteenth century is that in 1818 the constitutional historian Henry Hallam had traced the origins of the English constitution to the reign of Edward I and the creation or emergence of the Great Council of the Realm. The Great Council consisted of the King, the Lords Spiritual and Temporal, and the Commons of England.

However, the thirteenth century proved to be too late for some tastes. By 1874 J.R.Green, in his *Short History of the English People*, claimed to find the origins of the constitution in the agricultural settlements of the German tribes of 'Sleswick':

"The actual sovereignty within the settlement resided in the body of its freemen. Their homesteads clustered round a moot-hill, or round a sacred tree. ... Here the 'witan', the wise men of the village, met to settle questions of peace and war, to judge just judgment, and frame wise laws, as their descendants, the wise men of a later England, meet in Parliament at Westminster, to frame laws and do justice for the great empire which has sprung from this little body of farmer-commonwealths in Sleswick."

According to this view of English history, the Anglo-Saxon race was uniquely blessed by providence in having the skills necessary to create a system of government that became a model for the world and made it possible for the race to fulfil its imperial destiny. Opening the Imperial Conference of 1911, H.H.Asquith, the British Prime Minister, observed that "we were saved from the adoption [of rough-and-ready solutions for the 'Colonial problem'] by the favour of Providence – or (to adopt a more flattering hypothesis) by the political instinct of our race".

By conquest or adoption, the Welsh, the Scots and some at least of the Irish, became participants and, for the most part, willing participants, in this imperial destiny. Wales, Scotland and Ireland were subsumed in the constitution of England and, by the time Trollope published *North America* in 1862, it had become customary, even amongst Scots, to refer to the United Kingdom as "England".

We were not alone in using (or misusing) history to create a sense of nationhood at home and imperial destiny abroad. The nineteenth century was a period of nation-building in Europe and empire-building in Africa and Asia. History, archaeology and even linguistics were invoked – as they still are – to justify the territorial and political claims of ethnic 'nations'. As Renan observed in 1882 (or, to be precise, as Hobsbawn translates him) "Getting history wrong is part of being a nation".

The Whig interpretation of history was challenged by Herbert Butterfield as long ago as 1931. In our own time Norman Davies' history of *The Isles* has offered a more varied perspective, as have the works of Lynda Colley and Tom Devine. Edwin Jones, a pupil of Butterfield writing from the unusual point of view of a Roman Catholic Welshman, has traced the manipulation of history for political purposes back to the Tudors. He calls his book "The English Nation: The Great Myth".

What is important for present purposes is not whether 'the Great Myth' is historically accurate, but its effect on our way of thinking about ourselves. From Macaulay onwards, it has given birth to much fine historical writing, but also to the constitutional self-righteousness of which John Mitchell complained. The reason is, I believe, that the

Myth found expression in one of the most influential law books ever published - A.V. Dicey's *Law of the Constitution*.

The first edition was published in 1885, the year when the crisis in the Liberal Party over Home Rule for Ireland came to a head. Dicey was a staunch Liberal but a resolute, almost fanatical, Unionist. His book provided a legal basis for opposing Home Rule. Read in its historical context, it is as much as a political tract as a statement of the law. That makes it both more readable and more dangerous than the average legal treatise. It is not the less dangerous because Dicey's message has been persistently misrepresented and misunderstood.

Dicey was concerned, as he said in the Preface, with "the constitution *as it now actually exists*". He had no time for the antiquarians and the Anglo-Saxons:

"Let us eagerly learn all that is known, and still more eagerly all that is not known, about the Witenagemót. But let us remember that antiquarianism is not law, and that the function of a trained lawyer is not to know what the law of England was yesterday, still less what it was centuries ago, or what it ought to be tomorrow, but to know and be able to state what are the principles of law which actually and at the present day exist in England. For this purpose it boots nothing to know the nature of the Landsgemeinden of Uri, or to understand, if it be understandable, the constitution of the Witenagemót."

It is in his treatment of Parliamentary sovereignty that Dicey's legal theory marched with historical theory of the Whigs:

"The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions. ... Parliament means, in the mouth of a lawyer ... the King, the House of Lords, and the House of Commons; these three bodies, acting together, may aptly be described as the "King in Parliament", and constitute Parliament. ... The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. ... The one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament."

For a Liberal Unionist the consequence of this dogma was that Home Rule for Ireland, with a domestic Parliament created by but independent of Westminster, was not simply undesirable but legally and logically impossible. Long before Tam Dalyell, Dicey posed the West Lothian Question and anticipated most of the arguments that are still advanced to deny the possibility of workable devolution within the United Kingdom and to oppose a 'federal' constitution for the European Union, or even any sort of constitution at all.

We should not, however, be mesmerised by Dicey – or rather, we should not be mesmerised by the theory he set forth in 1885. A study of his later writing shows that he cannot conscientiously be invoked as authority for the proposition that the sovereignty of Parliament remains absolute, still less for the notion that the ‘sovereign Parliament’ is the elected House of Commons.

The last edition of *The Law of the Constitution* to be published in Dicey’s lifetime (the eighth edition) was prepared in 1914, but the main text was in substance a reprint of the seventh edition published in 1907. Dicey explained that constant amendment of his book was apt to take from it such literary merits as it may originally have possessed. But he added a long Introduction whose aim was to compare the constitution as it stood in 1885 with the constitution as it stood in 1914.

Succeeding generations have been nourished on the text without the Introduction, perhaps because the Introduction is almost as long as the original text as well as being more intemperate and overtly political. (The section on female suffrage would ensure its exclusion from any politically correct reading-list for students.) But a sad consequence is that Dicey’s dogma has survived without his cautions and qualifications.

From Dicey’s point of view, two profoundly significant events, both of which he deplored, had occurred between 1907 and 1914 – the passing of the Parliament Act in 1911 and the passing of the Government of Ireland Act in 1914. Having reviewed the course of events since 1885, Dicey stressed that the legitimacy of Parliament, and hence its claim to absolute sovereignty, was its legitimacy as a body consisting of the King, Lords and Commons *acting together* (the Great Council of the Realm). Even after the passing of the Parliament Act, he said this remained the better opinion. But he went on:

“The Parliament Act ... goes some way towards establishing in England a written or, more accurately speaking, an enacted constitution, instead of an unwritten or, more accurately speaking, an unenacted constitution. ...[It] enables a majority of the House of Commons to resist or overrule the will of the electors or, in other words, of the nation.”

He then argued that the Government of Ireland Act effected a fundamental change in the constitution carried out against the will of the people. This was possible because:

“The Parliament Act gives unlimited authority to a parliamentary or rather House of Commons majority. The wisdom of the House of Lords is in matters of permanent legislation thereby deprived of all influence. A House of Commons majority acts more and more exclusively under the influence of party interests. ... The result ... is that a Cabinet, under a leader who has fully studied and mastered the arts of modern parliamentary warfare, can defy, on matters of the highest importance, the possible or certain will of the nation. ... The Parliament Act is the last and greatest triumph of party government.”

Dicey ended with a strong statement of the case for the referendum as a curb on the House of Commons:

"The referendum is an institution which in England promises some considerable diminution in the most patent defects of party government. ... Some means must be found for the diminution of evils which are under a large electorate the natural, if not the necessary, outcome of our party system. The obvious corrective is to confer upon the people a veto which may restrict the unbounded power of a parliamentary majority."

In an unpublished lecture, he went further:

"Even in England the authority vested in Parliament is rather indefinite than absolute and it would be simply ridiculous to press the theory of representation to such an extent as to make the people of a country the slaves of the very body which exists to carry out the will of the people."

This is hardly a ringing endorsement of the theory that now masquerades under the banner of Dicey – that the law of the constitution requires that the votes of a majority of the House of Commons must always, in the end, be allowed to prevail. The problem is that, having accepted the demise of his ideal constitution, Dicey has no thoughts to offer on where we go from here – except perhaps to have referendums.

But we can at least start from Dicey and recognise that "antiquarianism is not law". At the beginning of the twenty-first century, when we watch the State Opening of Parliament on television (the Queen physically in Parliament with Lords and Commons present), it is picturesque but fanciful to suppose that we are witnessing a sitting of the Great Council of the Realm. Power now lies elsewhere and it is not even certain any longer that, as Professor Wade claimed in 1959, "it is the Cabinet system which is fundamental to Parliamentary government". Dicey was more long-sighted than his successors:

"Throughout English constitutional law and practice the maintenance of old names conceals the growth of new institutions. It is a matter of curious speculation whether a General Election may not by degrees become something like the equivalent to the popular choice of a given statesman as Premier. Should this at any time become the constitutional rule the result would be that our Executive would cease to be a Parliamentary Executive for it would no longer be appointed by Parliament."

So let us begin where Dicey began, but shake ourselves loose from the historical shackles of the Whigs. We might start by recognising that the United Kingdom is not, and never has been, a unitary state in any ordinary sense of that term. Indeed, one of the claims of those colonists in North America who sought to retain their constitutional links with Britain was that Great Britain was truly a federal state.

For many continental observers, it is barely credible that within a purportedly unitary state there should be three distinct legal systems - still less that in the most potent exercise of state power, the pursuit and punishment of crime, the Scottish and English systems are so distinct that they do not even share an ultimate court of appeal. Indeed, I have been told on the high authority of a German professor that this is impossible.

In order to decide where we go from here in Britain and in Europe, we need some principles or guidelines. I believe we can find them in a different school of constitutional thought to which John Mitchell belonged. David Hume observed that "All plans of government which presuppose great reformation in the manners of mankind are plainly imaginary" and this approach can be associated with two further names, James Madison and James Bryce.

Madison is recognised as first amongst the founders of the US constitution that Trollope so admired. He was not a Scot but was deeply influenced by two Calvinist Scots, the Reverend Donald Robertson and the Reverend John Witherspoon. Robertson came from Aberdeen, was educated at Edinburgh University, and became the headmaster of the boarding school in Virginia to which Madison was sent as a small boy. Madison said, "All that I have been in life I owe largely to that man". Robertson introduced him to (amongst others) Plato, Justinian, Montaigne, Locke and Montesquieu.

Madison was persuaded to go to the evangelical Calvinist College of New Jersey (Princeton) rather than the 'decadent' Anglican college in Williamsburg, Virginia (William & Mary). Witherspoon was President of Princeton. He had been born in East Lothian and, like Robertson, was educated at Edinburgh. He was one of the signatories of the Declaration of Independence, and it is claimed that at Princeton he influenced one President (Madison), one Vice-President (Aaron Burr), ten cabinet officers, sixty members of congress, twelve state governors, fifty-six state legislators and thirty judges including three judges of the Supreme Court.

Witherspoon taught a view of government founded on the Calvinist view of man - that man is essentially sinful but capable of good actions. The positive potential of humanity makes self-government possible, but the lingering selfishness and evil in human beings commends a governmental structure that divides power, pitting interest against interest and ambition against ambition. A republic "must be complex, so that one principle may check the other."

In the same spirit, Madison wrote to Jefferson, "Wherever there is an interest and power to do wrong, wrong will generally be done." (Compare John Mitchell: "Governments and governmental bodies have as many reasons for conniving amongst

themselves as they have for opposing each other".) The theory of 'checks and balances', which lies at the heart of Madison's conception of the US constitution, derives directly from this perception of political reality.

Madison was insistent that the American Constitution was a practical instrument to be explained by reference to what it said rather than by reference to any theory or pre-existing model. Towards the end of his life, he wrote:

"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 nor a Government wholly 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."

Born almost a century after Madison, James Bryce was the grandson of a Calvinist minister whose ideas were so special that he found no room for them in Scotland and went to preach them in Ulster. His son came back to Scotland and was a schoolmaster. His son, James Bryce III, was a remarkable man who went to Oxford after Glasgow University and got three Firsts in one year. He was a close friend and colleague of Dicey. Both were Liberals, but Bryce did not become a Liberal Unionist.

At a very early stage in his career Bryce went with Dicey to the United States, to which he later became the British Ambassador. In 1888, he published *The American Commonwealth*, which was for a long time (and for some still is) the best study of the workings of the American political system. The book with which it is most frequently compared is de Tocqueville's *Democracy in America*. Woodrow Wilson, then a Professor of Politics at Princeton, reviewed Bryce's book in the *Political Science Quarterly*, comparing his approach with that of de Tocqueville:

"De Tocqueville came to America to observe the operation of a principle of government and to seek an answer to the question, How does democracy work? Mr Bryce on the other hand came, and came not once but several times, to observe the concrete phenomena of an institutional development into which, as he early perceived, abstract political theory can scarcely be said to have entered as a formative force."

So Bryce, like Madison and, in a sense, Dicey, was concerned to describe things as they are. And, again like Madison and Witherspoon, he recognised that human beings – governors or governed - do not necessarily conform to preconceived notions of how they ought to behave or how government should be organised.

In 1884-85, Bryce wrote two essays. The first, entitled "Flexible and Rigid Constitutions" was quoted by Dicey in *The Law of the Constitution* and has very recently

been translated into Italian and published in a series of legal classics. According to Bryce's definition, the distinctive mark of a rigid constitution is the fact that it is superior to an ordinary statute. It is not the work of the ordinary legislature, and therefore cannot be changed by it. The English constitution is, by contrast, like the Roman, a flexible constitution.

Bryce's second essay is more relevant for present purposes. It is called "The Action of Centripetal and Centrifugal Forces on Political Constitutions". In it, Bryce insists that the constitutional lawyer must always be a historian as well as a lawyer. Institutions and rules must represent and be suited to the particular phenomena they have to deal with in a particular country. It is through history that these phenomena can be identified, and history explains how they have come to be what they are.

The form of a constitution most appropriate to a particular community will depend on the strength of the forces that bind the members of that community together (the centripetal forces) and of those that drive them apart (the centrifugal forces). Bryce analysed the tendencies that may operate as centripetal or as centrifugal forces under two heads: Interest and Sympathy.

The analysis of commercial interest is of particular relevance to the European constitution and provides the answer to those who say that economics have no place in a 'real' constitution, as well as the economic justification for harmonisation of law:

"It is a gain to the trader or the producer that the area of consumers which he supplies without the hindrance of a customs tariff should be as wide as possible. It is a gain that communications by sea and land should be safe, easy, swift and cheap, and these objects are better secured in a large country under a strong government. It is a gain that coinage, weights and measures should be uniform over the largest possible area and that the standard of the currency should be upheld. It is a gain that the same laws and the same system of courts should prevail in every part of a State - and the larger the State the better, so far as these matters are concerned - and that the law should be steadily enforced and complete public order secured. All these things make not only for the growth of industry and the spread of trade, but also for the value of all kinds of property. ... In exceptional cases however, the influences of [commercial] interest may be centrifugal. A particular group of traders or landowners living in a particular district may think they will gain more by having the power to enact special laws for the conduct of their own affairs, or for the exclusion of competing persons, than they will by entering or remaining under the uniform system of a large state."

Under the head of Sympathy, Bryce puts a sense of common belief, intellectual conviction, taste, or feeling; recollection of a common ancestry; use of a common language; enjoyment of a common literature; religion; and the sense of nationhood. The absence of these elements is usually an obstacle to unity, but their presence is no

guarantee for its existence. The bonds and tensions between peoples are facts that the constitution-maker must accept and attempt to deal with. In particular, the sense of nationhood or nationality takes various forms, some good and some bad.

Bryce then identifies three purposes of a political constitution.

- first, to establish and maintain a frame of government under which the work of the state can be efficiently carried on;
- second, to provide security for the rights of the individual citizen, and
- third, to hold the state together by creating good machinery for connecting the outlying parts with the centre, and by appealing to every motive of interest and sentiment that can lead all sections of the inhabitants to desire to remain united under one government.

The first two purposes are fairly obvious, the third – holding the state together - is less so. A constitution can achieve it by setting the centripetal forces to work and by preventing all or some of the centrifugal forces from working.

For students of European integration, it is significant that Bryce identifies trade as “the first and most generally available of the centripetal tendencies that can be promoted”.

“Trade benefits all the producers by giving them a market, all the consumers by giving them the means of getting what they want, all the middlemen by supplying them with occupation. A Constitution can render no greater service to the unity as well as the material progress of a nation than by enabling the freest interchange of products to go on within its limits.”

To those who say that the internal market has no place in a ‘real’ constitution for Europe, I would reply: read Bryce and look at history. History shows that what Bryce said is true.

A constitution can seek to meet the centrifugal tendencies in a number of ways:

- first, by enacting securities against oppression - Bryce gives the examples of Magna Carta, the Petition of Right, the American Bill of Rights and the French Declaration of the Rights of Man;
- second, by varying the general institutions or laws of the state in such a way as to exempt particular parts of the state from any legislation that might be opposed to their special interest or feelings - he gives the example of Scotland within the United Kingdom;
- third, by relegating certain classes of affairs to local legislatures of communities that enjoy local autonomy - he gives the example of Quebec in Canada;
- fourth, by assigning certain administrative and, within limits, certain legislative functions to the inhabitants of local areas, empowering them to act in their own way (as in the United States):

"Provisions of this nature ... are really, in substance, parts of any well-framed Constitution, for nothing contributes more to the smooth working of a central government and to the satisfaction of the people under it, than the habit of leaving to comparatively small local communities the settlement of as many questions as possible. The practice of local government and the love for it are not a centrifugal force, but rather tend to ease off any friction that may exist by giving harmless scope for independent action, and thus producing local contentment. It is only where there exist grievances fostering disruptive sentiments that the existence of local bodies with a pretty large sphere of activity need excite disquiet."

(We did not need Pope Pius XI or the authors of Maastricht to identify the merits of subsidiarity);

- "finally, by excluding certain matters, such as religion, from the competence of the central government, and thereby keeping them out of the range of controversy."

It seems to me that these relatively simple ideas provide a set of criteria by which the merits of our own constitutional arrangements and the proposed constitution for Europe can be assessed. The question should not be whether they correspond to some preconceived model, or whether they are strictly logical or theoretically perfect. The question is whether they respond to the practical need to promote a centripetal tendency or curb a centrifugal one.

Against that background, let me suggest some of the questions that we need to consider and discuss.

(1) As a consequence of the Parliament Act, the European Communities Act, the Human Rights Act, the Scotland Act and the Government of Wales Act, do we now have what Dicey called an 'enacted constitution'? If so, this has consequences, as Dicey foresaw, for the doctrine of Parliamentary sovereignty, in theory and in practice. But perhaps it is more important to consider whether 'constitutional' statutes such as these should be considered individually (as constitutional milestones, so to speak) or rather as component parts (building blocks) of a new structure? If so, what sort of structure are we trying to build? To what extent, or in what sense, is it a 'federal' structure? What should be the role of the component institutions? Are the checks and balances suitable and sufficient?

(2) The West Lothian Question asks whether Scottish or Welsh MPs at Westminster should be entitled to vote on matters affecting England, when English MPs cannot vote on the same matters as they affect Scotland or Wales. Media comment suggests that this remains a live issue, at least in England, and may give rise to a centrifugal sense of grievance. But, if the polls are anything to go by, devolution for Scotland and Wales has weakened rather than strengthened the centrifugal pressure for independence.

Two questions arise. First, does the apparent illogicality highlighted by the West Lothian Question matter if 'limping devolution' is successful in curbing a centrifugal tendency? If it does matter, is it necessary or desirable to promote devolution in England in order to overcome the illogicality?

Second, and perhaps more fundamentally, what does preoccupation with the West Lothian Question tell us about our view of representative democracy? Are the members of the Westminster Parliament to be seen as exercising their office as representatives, or even delegates, of local communities or, once elected, as equal members of an institution? Do we attach importance to the power of Parliament as an institution, or to the voting rights of its members?

(3) In other countries, the structure and powers of local government are seen as a constitutional question, not a mere matter of administration. In our own country, for all the talk about the need for subsidiarity in Europe, successive governments have laid waste the structure and traditions of local government, while the powers of central government have increased. Is government any closer to the people as a result? If not, should we take a more 'constitutional' approach to the structure, powers and prerogatives of local government?

(4) The claims of subsidiarity present serious problems for the efficient working of the internal market in Europe. As Bryce saw, equal treatment in the field of commerce requires some degree of legal uniformity, thereby limiting the legislative autonomy of the individual states. (One state's subsidiarity can become another state's protectionism.) A similar tension is beginning to appear in relation to legislation in the field of Justice and Home Affairs. To what extent can this tension be overcome by the formal (*a priori*) definition, allocation or exclusion of competences? If it cannot, and it becomes necessary to judge each case on its own merits, what criteria should be adopted for deciding whether subsidiarity should give way to uniformity or harmonisation?

(5) As Bryce recognised, charters of rights, such as the European Convention on Human Rights and the EU Charter of Rights, serve a cohesive purpose. They do so, first, because discrimination and inequality of treatment are disruptive, and second, because, for some people at least, they offer a greater sense of security. For some Europeans, no constitution would be complete without a Bill of Rights. Are these good and sufficient reasons for maintaining the Human Rights Act as part of our own 'enacted constitution' and for including the Charter of Rights in the European Constitution?

(6) Should God, or the Christian tradition, be mentioned in the European Constitution? Or should religion, as Bryce maintained, be kept out of the range of controversy?

(7) The central governments of the Member States have consistently opposed any

significant recognition of autonomous regional entities in the new Europe. Their interests are sufficiently protected, it is said, by the Committee of the Regions. To ensure equality, the regions of Luxembourg and Malta are represented on that Committee alongside Bavaria, Catalonia and Scotland. Is this a rational approach to a real problem, or does it pursue theoretical logic to the point of absurdity?

(8) The present allocation of political power in the EU between the Member States and the Council, the Commission and the Parliament is sometimes criticised on the ground that it does not conform to the correct separation of powers between the legislature and the executive. An alternative theory is that conformity is assured by supposing that the Council (representing the Member States) and Parliament (representing the people) constitute a bicameral legislature, on the same lines as the US Senate and House of Representatives, or the German Bundesrat and Bundestag.

Is it relevant, in the twenty-first century, to analyse the powers of institutions in terms of categories defined in the eighteenth? Is it not more relevant to concentrate, as Madison said, on the actual division and distribution of political power on the face of the Treaty? If so, is the institutional structure such that the work of government can be efficiently carried on (Bryce), and have the correct checks and balances been put in place (Madison)?

(9) Common EU citizenship is, or ought to be, a means of holding people together. But is it consistent with the *constitutional* idea of common citizenship that Member States should be allowed, as they are, to treat their own nationals less favourably than they are required to treat the nationals of other Member States (reverse discrimination)?

(10) Lastly, a question to which John Mitchell gave a great deal of thought. We hear much about the unbridled power of unelected judges, both in Britain and in Europe. I am not sure that the critics would be any happier if the judges were elected. What they complain of is that they cannot do what they want. For John Mitchell, the really serious danger lay in:

“the erosion of liberties, by the gradual extension of legitimate powers, so that while in form liberties may still be protected, in substance they largely cease to exist. The maintenance of this substance depends ultimately upon general public opinion, but more immediately upon the activities of legislatures and especially of courts. ... It is not unreasonable to assert that the role of courts has, or should have, something to do with the realities of democracy. Properly organised, it is through them that the individual can play a larger and more significant part in government while gaining a greater sense of security.”

When we are thinking about constitutions, is that not our proper and ultimate aim: that the individual should be able to play a larger and more significant part in government while gaining a greater sense of security?



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