

Scottish Affairs Committee

Oral evidence: [Intergovernmental relations: 25 years since the Scotland Act 1998, HC 149](#)

Monday 13 November 2023

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Members present: Pete Wishart (Chair); Alan Brown; Wendy Chamberlain; David Duguid; Sally-Ann Hart; Christine Jardine; Ms Anum Qaisar; Douglas Ross.

Questions 1-79

Witnesses

[I](#): Lord Dunlop, the right hon. Lord Wallace of Tankerness KC and the right hon. Lord Robertson of Port Ellen KT.

[II](#): Professor Ciaran Martin, former Constitution Director, Cabinet Office, 2011-14, and Professor Jim Gallagher, former Director-General for Devolution, Cabinet Office, No. 10 Policy Unit, and Ministry of Justice.



Examination of witnesses

Witnesses: Lord Dunlop, Lord Wallace of Tankerness and Lord Robertson of Port Ellen.

Q1 **Chair:** Welcome to the Scottish Affairs Committee, and our first evidence session on intergovernmental relations 25 years after the Scotland Act 1998. I think you can sense the Committee's excitement about pursuing this inquiry. To start things off, we could not have three more venerable veterans of the early days of the Scotland Act. We asked them to leave their ermine robes at the door, because it is a trio of their lordships. We are thrilled to have you here to help us with the inquiry, and to kick things off. We will let you introduce yourselves, and give a short introductory statement, with the emphasis on "short". I know that Lord Robertson will supply us with one.

Lord Robertson: My name is George Robertson. I was the shadow Secretary of State for Scotland from 1993 to 1997, and so supervised the progress towards an eventual devolution agreement.

At the time, the Scottish constitutional convention was operating, which included four Scottish political parties, the Scottish Churches, trade unions, local councils and a wide variety of civic groups. It did not include the Conservative party or the Scottish National party, both of which refused to participate, the SNP on the basis that we were not willing to include the possibility of independence—although, ultimately, the then leader of the SNP agreed to promote the outcome of the convention.

That was, without any doubt, the widest ever level of agreement in Scotland on a scheme for devolved government. Lord Wallace will agree that it was not at all an easy task to get agreement among that disparate group of people, but I managed to get the convention adopted by the national Labour party—unusually, because it was the only part of the 1997 manifesto that was not determined through the normal processes. It was agreed in toto, because I made it clear that it was a package that we had negotiated in Scotland and therefore had to be taken in toto. The constitutional convention's output then became the basis of the Scotland Act.

I was also responsible in part for the decision to have a pre-legislative referendum; we announced that to Lord Wallace's surprise, and to the surprise of many other people in Scotland. It was announced in advance of the Labour party's manifesto being put to all its members for endorsement. The timing was decided by the then party leader, Tony Blair, on the basis that we could not put the draft manifesto to the party members without saying what we were going to do about devolution—to have done so and only later said that we were going to have a pre-legislative referendum would have been, at best, dishonest. Therefore, the decision was taken quickly to announce that we would have that referendum.



HOUSE OF COMMONS

I will just say, because it is important in terms of anchoring the devolution settlement, why we believed that we had to have a pre-legislative referendum. Why we did it by surprise is not a mystery: as with devaluation, if you leak it in advance, it has dramatic consequences. The reason was that it became increasingly obvious to those of us in Scotland that if there was a very small majority—at that time, we believed that we might only squeak in—this huge project could easily become bogged down in the House of Commons, and almost certainly in the House of Lords. During Maastricht, I had experienced what the House of Lords can do, but the House of Commons might well have produced a lot of problems, which would almost come as a surprise to a lot of new Labour MPs.

A pre-legislative referendum therefore made absolute sense; it would give at least some grounding for the legislation. I believe it also grounded the Scottish Parliament in a way that could not have been done without a referendum. The 74% yes vote in the referendum gave an anchor point for devolution, so that it was inconceivable that any future Government of any complexion would unwind the devolution settlement.

Q2 Chair: Fascinating. It is really important that, in the opening remarks on this inquiry, you have set out how the convention worked. We have to come to Lord Wallace after that. Did you feel that you were bounced into the referendum?

Lord Wallace: We certainly did, and I think George and I exchanged words at the time—

Chair: Give us a flavour of that.

Lord Wallace: So secret was the referendum that I was told about it only the night before; Tony Blair told Paddy Ashdown, who told me. I think I found George in a Lobby, just before Parliament rose that night, and he was very embarrassed that I had already found out—but probably not as embarrassed as when I told the Labour party's Scottish constitution spokesman, John McAllion, the following morning as he was arriving. I asked: "What are you guys doing with this referendum?" He said: "What referendum?" I think he resigned his position later that day.

There are two reasons why I was not happy. First, we had had this debate interminably on the constitutional convention, and agreed that there should not be a referendum. We may even have argued for it during the constitutional convention but lost the argument, and then turned that around afterwards. Secondly, I think there was a suspicion that the Labour party—because it was a double referendum, both on the principle of the Parliament and on the tax-varying powers—wanted us to find a way of slipping out of the commitment to the tax-varying powers.

In retrospect, with the benefit of hindsight, George was right: the referendum did actually ground the Parliament when it was established. We know that constitutional propriety is that one Parliament cannot bind another, but it is politically impossible to reverse the referendum without having another referendum to reverse the Scotland Act. George's point



HOUSE OF COMMONS

about the House of Lords was probably right, too. Quite an important argument, which Ministers in the Lords deployed, was that it had popular consent. These were the reasons why we were not happy, but when Parliament passed the referendum Bill, we played a full part in that referendum campaign and were quite intent on getting a good majority for it, which we did. It is to the credit of the incoming Labour Government in '97 that it implemented the constitutional convention proposals, including the system of proportional representation.

Q3 Chair: I think all of us were starting our political journeys around that period. I am thinking of how detailed the White Paper, and then the Scotland Bill, were. Was the intention always that you would propose and prepare a piece of legislation that practically covered all facets and aspects of the devolved settlement, with all its various schedules and so on? It did seem to be an extraordinary exercise to try to cover every aspect of the constitutional settlement.

Lord Wallace: I think it is fair to say that the constitutional convention was quite detailed. It is to the Labour party's credit that, in government, they implemented not just the spirit but, to a large extent, the letter of it. I was leading for the Liberal Democrats—indeed, we were the largest Scottish party in opposition at that time—and I remember Donald asking me to discuss the White Paper before it was published. He said, "We're changing something from the constitutional convention." The constitutional convention recommended that everything be reserved, except what was expressly devolved, and Donald said, "We're going to change that."

Q4 Chair: That was Donald Dewar's idea, wasn't it?

Lord Wallace: It certainly came from within Government. We had argued for that in the constitutional convention and lost the argument. When he told me that, he was actually coming some way towards some of the arguments we had put forward, so I was delighted to accept that. I think the White Paper quite faithfully reflected the constitutional convention agreement, including the system of proportional representation. It is not very often in political history that a party gives up what might have been perceived as an opportunity for an overall majority, if they had opted for first past the post, but they did not; they stuck with the agreement.

We had lots of debates during the passage of the Scotland Bill, including some very good ones, but by and large we were satisfied and content with what we had agreed in the convention. George is right: there were difficult times, as we both well remember, but we stuck to the overall shape of what we had agreed, and we were quite happy to give it support.

Q5 Chair: I will come to you in a minute, Andrew, because I am interested in your views on the early days of devolution, but we have these two gentlemen reflecting on what happened 25 years ago. In this inquiry, we are looking at the intergovernmental machinery—that is where you could maybe help us—and how intergovernmental relations have worked since the Scotland Act came into force. Lord Robertson, when you look back 25 years, was there enough work done in the Scotland Bill on



HOUSE OF COMMONS

intergovernmental relations? Was what you proposed for the machinery of intergovernmental relations robust enough to sustain itself through 25 years of different Governments, and different politics being played out, probably every few years? Tell us what you think about where we are with intergovernmental relations and what you proposed.

Lord Robertson: Remember that my detailed involvement with the devolution settlement ended on 3 May 1997, because I became the Secretary of State for Defence. A lot of people claimed that that was a demotion, and occasionally I had to go along with that mythology, such as the parochialism in Scotland. In the lead-up to the election, there was certainly a view that devolution had to be seen in the context of enriching the United Kingdom, and that it wasn't to be seen solely and simply as a method of making the Scottish Office more accountable, although that was one of the big arguments being used. I think Donald Dewar, in his original statements, made it clear that this was the revitalisation of the United Kingdom.

Once the referendum had passed, the legislation was through and the Parliament was created, maybe there was a bit of a sense in the UK nationally of, "Let the devolved Administrations in Cardiff, Belfast and Edinburgh just get on with it, and let us deal with the things that are reserved to Westminster." In the lead-up to the election, we saw the devolution settlement as part and parcel of the way the United Kingdom was to be run, and I think that was missing. My view, certainly at the time, was that Ministers in the devolved Administrations would be part and parcel of the Government of the UK on a regular and consistent basis, but that wasn't necessarily the view of London as a whole.

Q6 **Chair:** Of course, you famously told us that devolution would kill independence "stone dead". I'm wondering whether that is still your view, and whether you think devolution achieved that objective that you set.

Lord Robertson: Respectfully, Mr Chairman, I have yet to be proved wrong, and the way things are going, you could make a prophesy. I anticipated I was going to get the "stone dead" comment.

Douglas Ross: I'm surprised it took so long.

Lord Robertson: I know. It took quite a long time to come to it. We will see. The prophesy was not that it would happen instantaneously.

Q7 **Chair:** Maybe this is the point at which to bring in Lord Dunlop. I don't know how much you were involved in the early days of devolution.

Lord Dunlop: I am not sure I can remember what I was doing in 1998 or 1999, but unlike these two gentlemen, I was not involved actively in politics at that stage.

As you know, I was invited by Theresa May to undertake a review of UK Government Union capability, and looked at intergovernmental relations. While I was doing that, I interviewed people from that period, to try to get underneath what was going on at that stage, and I suppose the conclusion



HOUSE OF COMMONS

I came to was that there was an assumption, when the devolution settlements were established, that these would be consensual relationships. It was clear, because you had Labour-led Governments in Edinburgh, Cardiff and London, that there was a tendency to use informal party channels more than the structures that were laid down at the time when the Scottish Parliament was set up. It was probably a great shock to the system in 2007 when you had the election of the minority SNP Government, because suddenly you had two Governments who, instead of being collaborative, were in competition with each other. The structures that had been anticipated had probably, over time, atrophied; by 2007, they had probably fallen into disrepair and weren't fit for purpose.

Q8 Chair: Before I pass on to Christine Jardine, who I am sure will have several questions for Lord Wallace, I would like to ask you a question, Lord Wallace. Given your experience, from the early days of the constitutional convention through to the Scotland Bill—of course, you were deputy First Minister and First Minister for a while—have things roughly worked out how you expected? Twenty-five years on, you are sitting in front of the Scottish Affairs Committee and talking about it. When you set out on this journey, did you think we would roughly be where we are?

Lord Wallace: No, I didn't, but so many things can happen in 25 years. Going back to the question of whether there was much thought about intergovernmental relations, I do not think there was, in terms of formal structures. I recall that there was meant to be a monthly meeting between the Secretary of State and the Scottish First Minister. I recall Donald telling me about meeting John Reid once or twice, but I don't think those meetings ever became properly established. Certainly when I was acting First Minister, I never had that kind of formal meeting with the Secretary of State.

A lot of this was down to personalities and relationships, and, by and large, it works. I remember Donald saying to me quite early on that he foresaw this problem down the track, when people did not know each other quite so well. Although I was a Liberal Democrat, I had been round the House of Commons long enough to know a lot of people who were in the Labour Government in Westminster. Most of my departmental engagement with Westminster was done on a departmental level. When I was a Justice Minister in Scotland, I dealt with Jack Straw and occasionally, depending on the subject, with the Lord Chancellor, Lord Irvine. Very rarely did we go through the Secretary of State for Scotland.

Likewise, when I was subsequently Enterprise and Lifelong Learning Minister, I had relationships, particularly in relation to higher education and education, with Charles Clarke and Alan Johnson, who was the deputy. We didn't always agree, but we had an agreement: no surprises. It was that sort of relationship. I remember that Donald was certainly quite conscious that over time, although these relationships would not break down—these relationships were okay—people were coming up in both our parties, both in Scotland and in Westminster, who did not have that knowledge of and relationship with each other.



HOUSE OF COMMONS

I recall a British-Irish Council meeting—I think it was on the Isle of Man—at which I was accompanied by Andy Kerr, who at the time was either the Health Minister or the Finance Minister in Scotland. He was a Labour Minister in the coalition. I had to introduce him to John Prescott, because they did not know each other. It struck me then that these relationships, which had held us in good stead, were fraying—not through ill will or anything like that, but just through the passage of time. If that was important for us as Ministers, I think it was also important for officials. There were quite a lot of secondments, which were always very useful, but over time, it came to be that people didn't know their opposite numbers quite so well.

- Q9 **Wendy Chamberlain:** To bring things forward 25 years, Lord Wallace, my impression as a 2019 intake MP is that building cross-party relationships has been more challenging because of covid. What do you think the impact of covid has been on relationships, as we look back on those 25 years? Lord Robertson, can I come to you?

Lord Robertson: I am not as intimately connected. I sat on a House of Lords Select Committee—one of these annual ones that lasts for a year—on risk management and risk assessment. It was quite intriguing. All but one of that Select Committee's recommendations were accepted by the Government. It was quite eye opening; there were two former Defence Secretaries on that Committee, and we were quite startled by what we found.

In 2016, there was a full-scale national—that is, UK—exercise, Operation Cygnus, based on a pandemic. It was a flu pandemic at that time. It is still on the internet, and it is still worth reading, because you can see what was involved in it. One of the things that our Committee came out with was the absolutely essential nature of the devolved Administrations' being involved in any future pandemic or any other risk assessment that was going to be necessary—and not just as a sort of add-on, but as part and parcel of it. The way the constitution has changed in this country means that, without some form of established statutory mechanism, the informal connections that previously worked will not automatically work in the future. Covid has highlighted what our Committee said about how these things should be dealt with in the future.

- Q10 **Wendy Chamberlain:** Particularly with decision making—as we see with the covid inquiry progressing—being more difficult.

Lord Robertson: It will be intriguing to see the outcomes of both the UK inquiry and the Scottish one and to see what lessons can be drawn. At the moment, we are involved in the personalities, and that is controversial enough. Going beyond that, lessons will need to be learned.

Lord Dunlop: I would make a couple of points. I think it is clear from looking over the course of the covid pandemic that the relationships and decision making with the devolved Governments ebbed and flowed. At the start, they were part of the Cobra system, and we might go into why that changed. In the summer, the way it all worked was different, and we



HOUSE OF COMMONS

began to see some of that tension coming out. Later on, we had Michael Gove getting more of a grip on intergovernmental relations, and there was some good joint working—planning for Christmas and all that kind of thing.

The other point is that, if you look at some of the Whitehall Departments that were critical during the covid pandemic—the Department of Health, the Department for Education and—I cannot remember what it was called at the time but what is now Levelling Up—

Wendy Chamberlain: Communities.

Lord Dunlop: Yes. They were Departments that probably had not been much exposed to the devolved Governments, so they had a very steep learning curve. That probably showed during covid, but the good point is that they now know a hell of a lot more about devolved government than they did before. Hopefully, that will serve us well in the future.

Q11 **Wendy Chamberlain:** Do you have any final thoughts, Lord Wallace?

Lord Wallace: I can only go by what I saw on TV and read in the newspapers. I had no insight into what was going on either in Holyrood or in Whitehall, but the impression I had was that it—I think Andrew used the phrase—ebbed and flowed. There were times when it did look as if there was some reasonably joined-up decision making. At other times, it looked as if there was difference for the sake of difference.

Q12 **Wendy Chamberlain:** Do you think it exacerbated the fraying that you said Donald Dewar described?

Lord Wallace: It probably was the case that when the crisis came, there was not that level of understanding or mutual trust. I think trust is important, and I suspect that that mutual trust was not there at a time when it was needed. Andrew made a very perceptive point that the Departments which were most important were probably the ones which had had the least connection with what had been going on in Scotland: Health, Education, and Communities, Housing and Local Government. There was quite a steep learning curve. I hope that, at the end of the day, there was a better understanding. That may be one of the issues that you want to look at as part of this inquiry.

Q13 **Wendy Chamberlain:** And, potentially, the role of the Scotland Office in helping to bring those Departments more up to speed. It is about being an effective interlocutor.

Lord Wallace: Yes, that's right—to facilitate it. I still think that there is a question of secondment: to what extent does that happen or not happen these days? And there is also education: to what extent do English Departments in the UK Government understand, and understand that there are differences too? Certainly, my experience as Advocate General for Scotland was that they had to be reminded from time to time.

Wendy Chamberlain: With good reason. Thank you.



Lord Robertson: May I make a point here? It may sound tangential, but my experience in NATO is, in many ways, relevant. NATO was set up in 1949 essentially to stop Stalin—dominos falling—but it was quite ingeniously created. The permanent representatives were appointed at a very high level. They had to meet—the North Atlantic Council had to meet—at an hour’s notice for any individual thing. The countries had to be represented round the table. From 1949 until now, every security issue affecting the Euro-Atlantic area was resolved because, essentially, the countries were round a table all the time, so anything that came up had to be dealt with. You could not really leave the table without some agreement being there, so there was a binding necessity for people to come to some sort of consensual agreement.

It seems to me, from my experience looking now at the devolved Administrations, that if there were some mechanism whereby people were obliged to sit round a table and deal with the issues, even competing Governments could come to an agreement. In my day, 19 countries were around the table, and they did not all agree on everything. They had 19 different populations and 19 different politics, and sometimes the arguments could be quite intense, but at the end of the day you got a consensus agreement—you had to get a consensus agreement. That is not a bad example of how the myriad relationships involved in the United Kingdom might be better organised.

Q14 **Christine Jardine:** This is an almost surreal experience for me, given my experience in government with Lord Dunlop and the Scotland Office. Going back to what you said about the relationships between the Governments, Professor Jim Gallagher has described that intergovernmental relationship machinery as being more “technocratic” than anything else. You have all touched on that and the importance of personal relationships and trust. With the benefit of hindsight, do you think the way that the relationship developed between 1999 and 2022 is what you would have anticipated in, say, the constitutional convention or the immediate aftermath of the referendum? How resilient do you think it actually was?

Lord Wallace: George might have a different view on the constitutional convention, but I do not think that we ever did anticipate what these mechanisms would be in terms of intergovernmental. I think a lot of it was down to almost an expectation that there would be enough personalities on both sides who wanted to make it work and would make it work. The longer-term thinking on what happens when these personalities change, let alone when the parties in government change, was probably not given sufficient consideration.

The only formal mechanism or structure that there was was the Joint Ministerial Committee of the Prime Minister, the Deputy Prime Minister, and the First and Deputy First Ministers of Scotland, Wales and Northern Ireland. I remember the first one we held, in Victoria Quay in Edinburgh; it was very exciting, because it was the first time that it had happened, but actually nothing much happened at the meeting. The second one, which we held in Cardiff, was much the same. Rhodri Morgan always had some



HOUSE OF COMMONS

grouse about the DTI, although I cannot remember what it was. By the time we came to the third one, which was held in 10 Downing Street—I think I said this when I gave evidence to this Committee back in 2019—Tony Blair spent a disproportionate amount of time looking out the window, because nothing much was happening. Other things were happening at an inter-ministerial level, but there was that one formal structure there, and we never held another JMC at that level until Alex Salmond and David Cameron, I think, reinstated it.

There were other efforts at departmental ministerial meetings. I remember one on health in No. 10—it must have been during Donald Dewar's illness, because I was there as the acting First Minister, along with Susan Deacon, who was the Health Minister—and the Health Ministers from each of the devolved nations were there, with the Prime Minister in the chair and the Health Secretary. That was actually very useful in doing one of the things I always thought devolution should do: we all have relatively similar problems, and each devolved Administration and the UK Government were saying how they were dealing with them. There were things to be learned from each other and possibly things not to do, as well as things to do. That was a useful meeting.

There were others that were held once and never held again—there were ones on welfare that I remember happening. At another level, ones where there was important intergovernmental work were on agriculture and fisheries. I know that my colleague Ross Finnie did that before every Fisheries Council and Agricultural Ministers Council, because the EU was a platform or forum where it was important that the devolved Administrations fed in. There was foot and mouth as well. There was a lot of intergovernmental discussion, both at official level and at ministerial level, and for the most part I think it was getting things done.

One problem that I remember Ross raising was that the Secretary of State was an important, key figure and that there were at least one or two Secretaries of State at DEFRA who “got it” and recognised that the UK position was not necessarily the English position, whereas the other ministerial people from DEFRA—whether they be the Minister of State or Parliamentary Under-Secretary of State—would represent the English position, and the Secretary of State held the ring. However, other Secretaries of State could not understand why the English position could not possibly be the United Kingdom position—surely it was self-evident. He said that that changed the dynamic of it.

I think there also is a problem sometimes where, if the UK Minister is in the chair, they have to remember that the English position—these were the days when we were in the EU, but I suspect it still applies, particularly in areas like agriculture and fisheries—isn't, I suspect, even the position within England, because the fishing interests of the north-east and the fishing interests of Cornwall could be very different. I think it is important that that is borne in mind.

Q15 Christine Jardine: Lord Robertson, has it developed and been as resilient as you would have hoped?



HOUSE OF COMMONS

Lord Robertson: I don't think we paid enough attention, in the convention and then the planning for the settlement, to what was going to happen in terms of the relationship. It was hard enough to get an agreement on the bones of the devolution agreement. I don't think we really spent much time at all thinking through what the implications were going to be beyond it.

Before the 1997 election, the Labour party Front Bench were sent to Templeton College, Oxford, for training to be Ministers—four half-days. The totality of my lifetime's learning experience was in the four days there. A lot of it was actually quite useful. I remember one lesson, in particular, where one former permanent secretary said, "Set achievable objectives and achieve them," which I always thought was self-evident but not exactly the model to do with that.

In that session, a lot of my English colleagues were confronted for the very first time with what the Scottish constitutional convention was actually proposing. It was radical and it was difficult for them to grasp the fact that the United Kingdom was going to be a very different place and that their job, if they achieved ministerial positions, was going to be different from what they had expected or, in some cases, had experienced themselves. So we probably didn't do enough.

I have been a bit worried—I am more worried now—about the way things have developed. We were probably too optimistic, and there was too much wishful thinking, because we have seen things develop in a different way now. The Committee structure, which we thought was going to be the equivalent of a second Chamber and to give the scrutiny, has not worked out that way, because one party took ownership of the Committee system and neutralised it. We didn't foresee the degree of centralisation that there was likely to be in Edinburgh; devolution was to Scotland, but not necessarily to the various parts of Scotland. We foresaw the fact that the Scottish Parliament was going to be a discussion forum about some of the great issues that confronted the country, only to find that the plenary sessions in the Scottish Parliament are now highly limited and very small indeed and that the Executive has now become the major driving force, rather than the Parliament itself.

- Q16 **Christine Jardine:** I wonder if we could move on 10 years—if my maths is any good—to the election of the SNP-led Scottish Government in 2007. It must have changed the nature of the relations between Westminster and Holyrood, but to what extent do you think it changed it? Could we come to Lord Wallace first o?

Lord Wallace: Certainly between 2007 and 2010 I was on the outside. I left the Scottish Parliament before the minority SNP Government was elected, and I was in the House of Lords from November 2007. It was always going to be a challenge. It wasn't the same. Even if relationships and personal knowledge of Labour and Lib Dem coalition Members and Labour Government Members over time had become less familiar, another party changed the dynamic. I don't remember it being overly fractious; I



HOUSE OF COMMONS

think there was just a consciousness that it maybe had to be worked at harder.

I can't remember whether it was when David Cameron became Prime Minister or whether it was even before that that the idea was mooted of revamping what had been the Joint Ministerial Committee. There was the overarching one at First Minister and Prime Minister level, and then there was a domestic and a Europe one. The Joint Ministerial Committee for Europe had probably gone on for quite a long time even up to that. I used to claim that I was one of the few people who had served on that Committee on both sides, for the UK Government and the Scottish Government—I'm not quite sure which was the more exciting. It was a good place for issues to be discussed, particularly with regards to upcoming European Councils.

That certainly did continue post 2007, but it was probably post 2011 when it was put on a more firm footing. Again, being almost totally cynical, both sides had the press release written before the meeting took place. Whether that is true or not, it felt and seemed like that. But it was important that that it happened. Things did start to progress from there. Although, ironically, one of the biggest divisions between the Westminster Government and the Holyrood Government was the referendum in 2014, getting to that referendum—to the Edinburgh agreement—actually involved quite a lot of negotiation and hard work at both ministerial and official level. There is a slight irony that the issue that was the most divisive was the one that, in many respects, meant that people had to work together to get something deliverable.

Chair: Anecdotally, I remember Government relations working at their best in the lead-up to the Edinburgh agreement and in the period after. There was more engagement and more of a respect between the two Governments at that point than I have ever seen as a Member of this House.

Lord Wallace: Of course, and alongside that was what became the Scotland Act 2012, which also required quite a lot of discussion and negotiation.

Q17 **Christine Jardine:** How effective do you think David Cameron's respect agenda was in fostering good relations? Apart from the referendum, did it foster good relations between the two Governments, or was there a kind of, "We are working towards a referendum, but nothing else"?

Lord Dunlop: I joined David Cameron at the beginning of 2012. The starting pistol had already been fired on the referendum, so it was about how you agree the rules of the referendum. David Cameron's approach was to try to re-energise some of the formal processes. I think the theme that has come out so far is very much what his approach to it was: to try to make sure that, despite big political differences, you could establish a good, professional working relationship. The constant theme is about building those relationships. Certainly from what I could see, he had a good working relationship with both of the First Ministers he worked with.

You saw that in the delivery of the Edinburgh agreement. There was always the option of legislating in Westminster, but I think the Government was absolutely determined, for reasons of legitimising any result of a referendum, that it should be a referendum that was—you will remember the phrase—“made in Scotland”. Very little was put into the section 30 order in terms of specifying what those rules should be. I think there were only two really: a single question and that the referendum had to be held by a certain date.

The rest was put into that political agreement. That involved a lot of trust on both sides that, when the Scottish Parliament came to legislate, it would adhere to the features that had been negotiated in that agreement.

I think that was the approach, but I don't think that it was limited to the Edinburgh agreement. As Jim already said, there was the Scotland Act 2012; we then went on to implement the Smith commission and the 2016 Act; there was the fiscal framework, which was not an easy thing to get done; and then we initiated a huge and—in my view—significant programme of city and growth deals.

All that requires intensive working with opposite numbers in the Scottish Government. I think David Cameron encouraged that, not just in the political leaders but through the civil service. As a political adviser in those days, I saw it as part of my job to get to know my opposite numbers in the Scottish Government. That meant you could have that frank discussion before the rather formal and formulaic meetings. I agree with Jim in that I don't think the JMCs were great meetings; I sat in on many of them, and it was people reading from scripts. It was more about what happened in the margins—the bilateral meetings. That was really critical to getting those relationships built.

- Q18 **Christine Jardine:** There is one last thing that I wonder about. The intergovernmental relationship over the constitution was all very positive at that point, because both Governments had an interest—if you like—in ensuring that the constitutional issue was settled, in whichever way. That has changed to a certain extent. How would each of you view the coalition Government's approach to intergovernmental relations in comparison to the current UK Government's? Is it smoother? Do you think it is more confrontational or less confrontational?

Lord Wallace: The preamble to your question was that the coalition Government was dealing with this against the background of a looming referendum and the necessity of getting these things done. One big, major thing with the post-coalition Conservative Government was Brexit. Brexit threw up all kinds of problems that no one had really anticipated—certainly, we had never anticipated them back in the constitutional convention. But it did.

I remember spending hours in the House of Lords on the EU (Withdrawal) Bill. At the outset of that Bill, it appeared that everything that was returning from Brussels was to be reserved unless they were then expressly devolved, which, of course, totally stood the original settlement



HOUSE OF COMMONS

on its head. I think that was then, during the passage of the Bill and the negotiation, what was changed. It led to Andrew having to do lots of work on common frameworks and to the subsequent response to that. I think that, in itself, is a catalyst, but let's say that it put a strain on the system that was unexpected and for which the system was not prepared.

Q19 **Chair:** I am conscious of time, gentlemen. I know that we have a couple of other guests to see, and we are only about halfway through. We are going to extend the session, so there is no rush for anybody.

Lord Dunlop: In the spring of 2016, after the fiscal framework was agreed, I think there was a chance that we were entering into a calmer period of relations between the two Governments, and I agree with Jim that Brexit put that off track. The point I would make is that intergovernmental relations can help, but that, where there are fundamental political disagreements, the most robust and best intergovernmental relations machinery in the world will not resolve that. I think some of the evidence you have received reflects that. Quoting from memory, I think that one of them says that we mustn't be "starry-eyed" about it. I think what you are talking about in this inquiry can help, but it won't remove fundamental political differences.

Christine Jardine: Lord Robertson, do you want to add anything?

Lord Robertson: I do not think I have got much to add to that experience.

Chair: Then we will move on. I am very conscious of time.

Q20 **Douglas Ross:** Good afternoon to our witnesses. Lord Dunlop, I will start with you, given today's Cabinet reshuffle. You worked for the former Prime Minister, who is now the current Foreign Secretary. You came in in 2012, I think you have said. We have today published evidence from David Cameron, who responded to our inquiry when he was still a former Prime Minister rather than a Government Minister.

What was the situation like at that time, two years into the coalition Government—something that we had not seen for many years here in the UK—and knowing that the referendum was going to happen? What was the situation like in No. 10 under Prime Minister David Cameron, and how do you feel that relations between the UK and Scottish Governments changed during his time in office, while you were there from 2012 to 2016?

Lord Dunlop: Self-evidently, when you are Prime Minister you have a lot of things to deal with, and the relationship with Scotland and the Scottish Government was just one aspect of his job. However, I always found that David Cameron gave it a lot of attention. I think that he realised the importance of it, and that he was very focused on it. He was determined that we should get to a point where we had agreed with the Scottish Government the rules of the referendum, and that wasn't easy to achieve—your next witness, Ciaran Martin, can go into that in great detail. But he invested time in those relationships.



HOUSE OF COMMONS

When there were formal meetings, David Cameron would always take the time to have a one-to-one with no officials. Even I, as a political adviser, was not allowed in the room. I think that that was about building those personal relationships, and to have that space where you could have a frank conversation. I think that both First Ministers that he has dealt with have said, publicly, that despite big differences, they felt that they had a good, professional, working relationship with David Cameron. I think that that continued right through his period in office, as demonstrated by the things that we were able to get done during that period.

Q21 Douglas Ross: I want to come on to that. Based on his evidence, which I think people will find interesting, one point that I had never heard about—maybe I had missed this—was that he said that he offered annually to go to the Scottish Parliament to be scrutinised by a Committee of MSPs, but that that was not taken up. Do you think that that would be a good thing?

We struggle; we have never been able to get a Scottish First Minister to appear before our Committee, and indeed we have challenges at the moment about SNP Ministers coming here, so I was quite taken by the fact that David Cameron, when he was Prime Minister, offered to go to Holyrood to be questioned by MSPs. And, unfortunately, it was never accepted.

Lord Dunlop: I think it is unfortunate that it was never accepted because I think that he was determined that all his Ministers should make themselves available to reasonable requests by the Scottish Parliament to appear before its Committees, and he wanted to reinforce that by making that offer to come before the Scottish Parliament and be questioned by Members of the Scottish Parliament. I do not know the reasons why that was never taken up, but I think that it was a good idea and perhaps it is something that should be thought about again.

Q22 Douglas Ross: A final point to you, Lord Dunlop: David Cameron highlights that, during his time in office, one of the particular achievements for Scotland was the city and region growth deals. You will have seen them, both as a political adviser to the Prime Minister and as a Minister in the Scotland Office.

How successful do you think that those deals have been, given that they now cover all 32 local authorities? At times, they have ensured that some projects have gone ahead, but at other times they have created some friction about which Government invests in which area. Do you think that, on the whole, they have been a success and have allowed both Governments to work together, or do you think that they have sometimes been used by either party to cause a debate where there really should not have been one?

Lord Dunlop: I think that, overall, they have been a success, if you think of the substantial sums that have been invested all over Scotland. I feel that intergovernmental relations have sometimes been about damage limitation and, "How do we manage grievance?"



HOUSE OF COMMONS

The big thing about city and growth deals is that they are something positive to work on. Thinking about how to do intergovernmental relations, and certainly my aspirations for intergovernmental relations, devolution has been a great thing, allowing different parts of the country to do and try different things, but it shouldn't be at the expense of coming together to work on things where there is a common interest in solving common problems. I hope that as intergovernmental relations mature and become embedded, people look more at the opportunities rather than simply managing the risks in the relationship.

Q23 Douglas Ross: This is a connected question; I will go to Lord Robertson first. In your discussions and debates in your shadow role, formulating the policy that would become the Scotland Act 1998, what proportion of interest was there in the Lord Advocate for Scotland being someone who would go on, through that Act, to be not only in charge of prosecutions in Scotland but a Government Minister appointed to sit in the Cabinet of the Scottish Government?

Lord Robertson: I don't think I can help you with that at all. I don't think that was really thought of as being an issue. It was one of the granular issues that was going to follow when the legislation came forward. Remember, we were looking at it in incredible detail but not to that degree of granularity. An interesting issue has obviously come up since then, but Lord Wallace is in a better position to say how that was developed and invented.

Q24 Douglas Ross: Thank you. Lord Wallace, as someone who scrutinised the Scotland Act in your role as the lead Lib Dem spokesperson at the time, and who served as a Justice Minister in the Scottish Parliament and Advocate General in the UK Government, are you content with the current model of the Lord Advocate being both the head of prosecutions and investigating deaths in Scotland, and a Government-appointed Minister who can attend Cabinet?

Lord Wallace: No, I am not, and I think I am on the record about that. Whether I was raising that before 1998 or not, I can't remember, but as for why it happened like that, the truth of the matter is that it was a position pre-1999. Although the Lord Advocate wasn't in the Cabinet, they were a member of the Government and also the head of prosecution in Scotland. I don't remember a great debate about it, but it was the natural thing.

The historic position of the office of the Lord Advocate was that they should be the adviser to the Scottish Government, and the Scotland Act provided that the Lord Advocate and the Solicitor General, if they were not Members of the Scottish Parliament already, should be able to sit—albeit not vote—in the Scottish Parliament. In some respects, it was a continuation of what was there before.

I can't remember when I first expressed this. I think there is an advantage in having a split in responsibility between the prosecutorial role, and arguably the one for the investigation of fatal accidents and deaths, and



HOUSE OF COMMONS

the political role. I think that they are distinctive, and although I don't think that any of the holders of the office have abused it, perceptions are important too. I don't have a problem with the Government's principal legal adviser having a party affiliation, but that is not necessarily a good thing if you are the head of the prosecution because it could give the wrong impression.

Q25 **Douglas Ross:** We are in that situation at the moment. There is an ongoing case. We can say what is in the public domain, which is that the former First Minister was arrested and investigated, and that will have gone, at some stage, through the Crown Office to the person whom she appointed to the role of Lord Advocate.

Lord Wallace: I stand to be corrected if I am wrong, but I think that the Lord Advocate has recused herself from that, and quite properly so.

Q26 **Douglas Ross:** But someone in the Crown Office, which she runs, had to sign that off. Ultimately, people who work for her are involved.

Lord Wallace: Yes, but that is a big change, and I have advocated in times past—

Chair: Could I come in here? We have to be very careful when we are discussing live investigations.

Douglas Ross: I haven't said anything that isn't in the public domain.

Lord Wallace: Hopefully neither of us has said anything. I just wanted to make it clear that the present Lord Advocate has, to my knowledge, recused herself from that investigation. That will not change tomorrow, but it is something that should certainly be considered.

Having had the experience of being a law officer in the UK Government, I should say that the role of the lawyer very often is to be able to tell your client, "You can't do this." But if you have a political understanding, you can say, "I know what you want to achieve. Here is a better way of doing it, which is consistent with the law." You need some political insight to be able to fulfil that function as the principal adviser to the Government. There is a distinction.

As you have raised the point of the Lord Advocate, can I put on record that my relationship as Advocate General for Scotland with the Lord Advocates who were there at the time, both Elish Angiolini and Frank Mulholland, was very constructive? If there were issues coming up that were problematic, we sought to discuss them.

Also—I am not sure how well known this is; it might still be the case—when I was in office, Scottish Government Bills were shared with the officials in the Advocate General's office two to three weeks before they were published, which allowed an opportunity for discussion. Sometimes things were changed or taken out because they could see coming down the track that there might be a problem. Sometimes we had to deal with problems after the legislation was published. That was a good example of



HOUSE OF COMMONS

constructive working between officials to try and minimise friction, which is probably one of the reasons why no case went to the Supreme Court in the first 20-odd years.

Q27 Douglas Ross: On that point, going back to David Cameron's evidence, he said that during his period in office there were 24 LCMs and the Scottish Government gave approval to all but one, which shows that good working—

Lord Wallace: It went both ways.

Q28 Douglas Ross: Yes. Finally, looking at the Scottish Parliament 25 years on from the Scotland Act and 24 years since the re-establishment of the Parliament—some of you have already touched on this; Lord Robertson, you spoke about the plenary sessions that are not well attended et cetera—do you think it is working as anticipated?

Lord Dunlop, I know you were not involved in '98, but what is your view on how well it is doing with the devolved functions and its crucial role in scrutinising the Government of the day? I am particularly wondering about the Committees. Lord Wallace, you have appeared in front of many in this place and in Holyrood.

Lord Wallace: I have appeared as a UK Government Minister in front of a Scottish Parliament Committee, too. I think that is why Lord Robertson mentioned it.

The way things have evolved has been one of my big disappointments. It is an external view, but it is a view that has been expressed to me by current Members of the Scottish Parliament. The Committees are not functioning as many of us sought at the outset. Indeed, that was the reality at the outset. The party discipline has been such that there is not much scope for dissent in the Government party. In contrast, as a Minister I used to appear before Scottish Parliament Committees, and got turned over mostly by people on my own side—Liberal Democrat MSPs in the coalition.

One example I can give was the run-up to the 2001 census. There was an inquiry by the Equal Opportunities Committee, which wanted a religion question in the census. Putting a question in the census is quite an expensive thing to do. The Scottish Government were not sure what would be done with the information, so could we justify the expense? Moreover, it required primary legislation because the questions were basically set out in the 1920 Act.

If we wanted to add something as fundamental as a religion question, we would have had to amend the 1920 Act. We took the view as a Government that we could not justify that. I appeared before the Equal Opportunities Committee, and to say I got turned over is putting it mildly.

We accepted the Committee. I said to them, "Look, you've expressed your view," it was cross-party and I brought forward the legislation. I said, "This is how I see the Parliament working: on a cross-party basis, you have given the Minister a hard time, you have come to a conclusion, and



HOUSE OF COMMONS

we have responded to it in the spirit of your conclusion. The one thing I ask is that you don't rub our noses in it, because that takes away from what you have achieved." I cannot see that happening in recent times.

- Q29 **Douglas Ross:** Lord Dunlop, from your position as a special adviser in the Scotland Office, how did you view deliberations by the Scottish Parliament?

Lord Dunlop: I echo what Jim has said. I would quote the late Nigel Smith—for those who don't know him, he ran the yes campaign for the referendum prior to the establishment of the Scottish Parliament, so he had huge aspirations for the Scottish Parliament. On the 20th anniversary, I think, he produced his assessment of how the Scottish Parliament was performing. In terms of the robustness of the scrutiny of Committees and such like, I think it is fair to say that although he felt it was a great thing that the Parliament had been established, he was disappointed by how it had evolved.

Douglas Ross: Lord Robertson?

Lord Robertson: Yes, I think there is disappointment. It may have been due to over-high expectations about what it was going to do, which we helpfully raised ourselves at the time, but you can make the comparison with what went before, when four Ministers ran Scotland almost like a private fiefdom. I have had some arguments with Michael Forsyth about those days, but four Ministers were running Scotland at that time and there was pretty ferocious politicking about it. I do feel disappointment that the Committee system has not been as robust as we hoped, and that the party discipline has been far too tight and has therefore not allowed a flowering of debate and discussion, with the variety of views that you would normally have expected.

Chair: Thank you for that. I am conscious that we have three other Members who want to come in, and I want to start the next session at 4.20 pm, so that is five minutes each.

- Q30 **Ms Qaisar:** Thank you, Chair. I thank our witnesses for joining us today. I am keen to learn a little more about the state of the relations between the Scottish and UK Governments. Lord Wallace, do you think the new machinery of intergovernmental relations introduced in 2022 have led to improved relations at a political level between the Governments?

Lord Wallace: I will put my hands up and admit that I have been out of the game for one reason or another—I have been moderator of the General Assembly and I have also been quite ill for a while—and I haven't fully caught up. Based on what I managed to read ahead of this Committee, I think the structure in place is better. There is some suggestion that in many ways it has worked to some extent. A new financial agreement was struck without any of the trouble that Andrew had with the early one. I think the potential is there; it is a question of seeing how it works out in practice.



HOUSE OF COMMONS

To repeat what I said when I was on the Calman Commission: it needs to be more transparent. I am not saying that there should be a ministerial statement after each meeting, but there should at least be a written parliamentary answer, in each of the devolved Administrations and here, about what has taken place, to get a bit more transparency. But I think the jury is probably still out.

Ms Qaisar: Lord Dunlop?

Lord Dunlop: I think it has hugely improved, but it is a work in progress. The key concerns about the previous system were that it was something the UK Government did to the devolved Governments—it was not a partnership—and that the engagement was unpredictable and uneven. The review has certainly addressed those two aspects. For example, you now have a secretariat that is explicitly jointly appointed and jointly owned, and that can determine whether a dispute is genuine, rather than the UK Government being judge and jury.

Although we are in early days with all the inter-ministerial groups, the fact is that those groups exist. We talk about building relationships, and the very fact that people are meeting more regularly is a step forward, but there is a long way to go.

I agree totally with what Lord Wallace said about transparency. The quality of information is very uneven. It is very difficult for you people who are scrutinising this process to get your teeth into it. How do you judge whether things are working effectively when there are no objectives? Do you know what work has been commissioned by these groups or what outcomes they are expecting? Until we get to that more mature state, it will be a work in progress.

Q31 **Ms Qaisar:** On the topic of meetings, my understanding is that the Prime Minister and Heads of Devolved Governments Council has only met once since January 2022 and some inter-ministerial groups are yet to be established. What does that tell us about the approach to intergovernmental relations? Following on from that, what mindset do you think is required from both Governments to ensure that intergovernmental relations remain strong?

Lord Dunlop: For me, and speaking from a UK Government perspective, the key is for Whitehall Secretaries of State to see this as an important part of their job. They are dealing with lots of different subjects, but they should regard working with the devolved Governments as an important part of what they do.

Q32 **Ms Qaisar:** Lord Robertson, would you like to add anything to that?

Lord Robertson: No; I agree entirely.

Q33 **Ms Qaisar:** Brilliant—a short, snappy answer. My final question is to all three of you: to what extent do you think the UK Government's intergovernmental relations have changed since Rishi Sunak became Prime Minister?



Lord Wallace: I wouldn't know!

Lord Dunlop: During covid, the relationship ebbed and flowed. We have had quite a number of Prime Ministers in recent years, and the relationship has ebbed and flowed with those Prime Ministers. I did not think it was a good thing that Liz Truss did not pick up the phone and speak to the leaders of the devolved Governments when she became Prime Minister. Under Rishi Sunak, we have seen a commitment to hold the Prime Minister and Heads of Devolved Governments Council. I would expect him to hold at least one a year, and I think he has committed to that. We are in November, so he still has a few months to go, but I am sure he will deliver.

Q34 **Sally-Ann Hart:** Section 35 of the Scotland Act was used for the first time earlier this year in relation to the Gender Recognition Reform (Scotland) Bill. That was often described as unprecedented. Do you think it has set a precedent for the UK Government to be bolder against the SNP Scottish Government's mission creep? Did the use of section 35 demonstrate that there are tools in the devolved framework to address challenges in the working relationship that may arise from time to time? Lord Robertson, can you answer first?

Lord Robertson: I am an outsider on that. It was always designed to be a devolution settlement inside the United Kingdom. If there are to be measures passed by the Scottish Parliament that trespass on the interests of the United Kingdom, there must be a mechanism for ensuring that it is pulled back, which the legislation enshrines. In that case, the gender recognition Bill crossed a line in terms of the Equality Act on a UK basis, and the United Kingdom Government were therefore absolutely right. The Supreme Court will eventually make a decision, but everyone knows the likely outcome. We did not set up a separate Scotland; we set up a devolved Scotland inside the United Kingdom, so the United Kingdom must still have the power to make its view known.

Lord Dunlop: I agree. Section 35 was written in as a safety valve, to be used in exactly these circumstances. It would have been preferable, I think, if the two Governments had been able to come to an agreement in advance of that button being pressed. It was regrettable that when the UK Government communicated their concern to the Scottish Government, the Scottish Government did not at that point put the Bill on pause to see if a solution could be found to what seemed to me to be a very legitimate concern, which others had been raising. That is the way that good intergovernmental relations should work. It is an important safety valve and I think its use was entirely legitimate.

Q35 **Sally-Ann Hart:** Lord Wallace, I have one more question linked to that. Were you surprised that section 35 was invoked when it was, and did the use of section 35 suggest anything to you about the state of the intergovernmental relationship at that time?

Lord Wallace: You were right to say that it was unprecedented. It was literally unprecedented. I went back to check the debate, thinking that



HOUSE OF COMMONS

before I commented I should see what I said when that particular clause came before the House—clause 33 in Committee stage of the Scotland Bill, on 12 May 1998, if you want to check.

Donald Dewar's view was that it was meant to facilitate and to oil the wheels of devolution, because there would inevitably be times when—in particular in cases of private law, which was devolved, but could overlap into reserved areas—something could be passed by the Scottish Parliament that although primarily in a devolved area could technically stray into a reserved area. The argument that Donald Dewar deployed, which I think I generally supported, was that this was to stop anything going too far. If it went too far, there was a mechanism there to stop it, but if it were incidental almost, the UK Government would not intervene.

The other interesting thing I found was the accusation that this was a governor-general power. It was bandied about generally, but in particular by the Conservative Front Benchers. That shows you how time passes.

I would not want to pre-empt the court decision on what will happen. Lord Dunlop suggested this, but it would have been better had intergovernmental relations been such that these things could have been sorted out, or addressed at least, because I do not think that they were addressed on an intergovernmental basis before the Bill passed its Third Reading in the Scottish Parliament. It would have been better had that been done then.

In the circumstances, it did not surprise me, because the signals were there that something was going to happen, but the fact that most people had forgotten about section 35 until it was invoked suggested how unusual it was. My sincere hope is that it will remain very much the exception, rather than become normal now that the precedent has been set. If we have to wait another 24 years for it to be invoked again, that would be a good thing.

- Q36 **Sally-Ann Hart:** Listening to all three of you this afternoon and in our experience—my experience in the past four years and beforehand—rather than forging a closer Union between our nations, devolution has caused fracturing of our Union. What policies do you think that the UK Government need to pursue to overcome that?

Lord Dunlop: I recommend a very good review to look at all of this.

I am not sure that I would agree with the premise of your question, that devolution has caused a fracturing of the Union, particularly if there were more English devolution. I think that it requires a change of mindset in the way the country is governed. That is very much the basis of my review: that instead of command and control from Whitehall, we need civil servants who have the skills—negotiation and mediation skills—to work constructively with different parts and levels of Government to produce what everyone wants. Everybody is involved in government and politics because they want to make life better for the people who elect them. If



HOUSE OF COMMONS

there was more of a focus on that rather than on constitutional positioning, that would be a very good thing.

Lord Robertson: In my view, far from fracturing the United Kingdom, devolution has united and kept it together. That was my profound belief at the beginning. If we had not had a proper devolution settlement, the United Kingdom would not exist today. You would have a separate Scotland, you might even have a separate Wales, and you might have a united Ireland. Devolution for Scotland was the method by which we actually bound Scotland into the United Kingdom, so I do not accept the premise of what you are saying. It might not have been as wonderful as we made out or as we thought it could possibly be; it has its imperfections, but it is certainly better than it was when four Conservative Ministers who had no public support in Scotland at all were running the whole mechanism of government north of the border. It has to be an improvement on that. It might not be perfect, but it has kept the United Kingdom as the United Kingdom.

Lord Wallace: I endorse that. It was ahead of steam before 1997, and if there had not been devolution then the dam would have burst.

Q37 **Alan Brown:** Lord Robertson, earlier you made the joke that when you became Defence Secretary you went along with the joke that it was a demotion. You actually said, "such is the parochialism in Scotland". How many of your colleagues thought Scotland was too parochial at that time?

Douglas Ross: That's not what he said. He didn't say "parochialism in Scotland".

Alan Brown: He did. He said, "such is the parochialism in Scotland".

Douglas Ross: No, he didn't.

Alan Brown: He did.

Chair: Let's let Lord Robertson reply.

Lord Robertson: There is a degree of parochialism that we have north of the border. I live in Scotland. I have never been away from it or part of it as well. The "Here's tae us; wha's like us?" sentiment is still quite strong. I was in the lounge this morning along with other people, including guys in kilts on their way to Georgia. They looked to me like prosperous middle-class businessmen, but they were still dressed in T-shirts, kilts and boots.

Q38 **Alan Brown:** I'm not sure of your point with the observation about guys in kilts, but did attitudes like that influence the powers that were given to the Scottish Parliament when it was set up?

Lord Robertson: No, not at all. Donald Dewar took over the Scottish portfolio from me because Tony Blair wanted it to be given the highest rank. He was Chief Whip in Opposition. It was about giving him something that he believed in very strongly, and with the clout and authority that he had within the national Labour party. They wanted me to go to Defence



HOUSE OF COMMONS

because they wanted somebody there to be able to handle the issues that were facing the country at that time.

- Q39 **Alan Brown:** I want to look at the setting up of the Scottish Parliament. Quite often we are told that it is the most powerful devolved Administration in the world, but looking at it in a UK context, welfare, including pensions, is fully devolved to Northern Ireland, as is energy policy, apart from nuclear energy. Northern Ireland are way, way more powerful in those aspects than even the Scottish Parliament.

Douglas Ross: Tax-raising powers?

- Q40 **Alan Brown:** Is there a rationale for why that approach was taken there, while Scotland did not get as many powers?

Lord Robertson: Scotland has increasing powers all the time, and they are not being used. The late Nigel Smith, who was chairman of—

- Q41 **Alan Brown:** But my question was why some of these powers were devolved to Northern Ireland, when it was deemed, while setting up the Scottish Parliament, that Scotland should not have control of these matters. Obviously when the Scottish Parliament was set up, it had much more limited spending and borrowing powers. Some of that has subsequently changed, with the two subsequent Scotland Acts, but it was quite a tight set-up in terms of the powers that were given to the Scottish Parliament.

Lord Robertson: They were huge powers. They were all the powers that had been exercised before, when the Scottish Office was there and the Conservatives were in power, plus a lot of extra powers; there was also the basic principle that all powers would go to Scotland except those that were reserved to Westminster. That was not even conceived of by the constitutional convention, even in its most ambitious time, so that was a major step by the UK, in terms of the devolution settlement.

- Q42 **Alan Brown:** I turn to Lord Wallace on the powers and responsibilities of the Scottish Parliament. One of your colleagues, Malcolm Bruce, speaking at a Lib Dem conference in Wales back in 2000—not long after the establishment of the Scottish Parliament—said, “The Scottish Parliament itself will not be able to meet the aspirations of the Scottish people, however, until it has control over their own revenues.” Do you agree with Malcolm on that?

Lord Wallace: We have done an awful lot since, in terms of revenues.

- Q43 **Alan Brown:** He is advocating for full control over revenues.

Lord Wallace: There is no more control over revenues. The tax-varying powers, which were increased first by the 2012 Act and subsequently by the 2016 Act, have made a considerable difference. You don’t do everything at once—we didn’t do everything at once—but I think that everyone at the time thought that what was included in the Scotland Act 1998 was very substantial indeed. George made this point: everything was devolved except for things that were expressly reserved.



HOUSE OF COMMONS

Q44 **Alan Brown:** Do you agree with his premise that the Scottish Parliament should have full control over all revenues?

Lord Wallace: I would want a definition of “all revenues”, because there are some things that one would not necessarily want to include; some taxation has to go from Scotland to a central pot. I have the strong view that one of the benefits of the Union is that it is as important to tackle poverty in Gateshead as poverty in Glasgow. If, by paying my taxes in one form or another, I can make a contribution to alleviating poverty in Gateshead, Glamorgan and Glasgow, that binds us together. That is quite important. Saying, “I want my money to help resolve poverty only in Glasgow; stuff the other places,” is not what I believe in.

Q45 **Alan Brown:** That sounds as though you think that your colleague Malcolm Bruce was saying that, because I was asking about his comments.

Lord Wallace: I’m not sure that he was. I would want to see the whole speech, rather than one sentence taken out of context.

Q46 **Alan Brown:** On intergovernmental relations, the roles and responsibilities of the Scotland Office have changed over the years. I will stick with you, Lord Wallace. I quote a 2007 article from *The Herald*: “Prime Minister Gordon Brown was called upon today to scrap the Scotland Office after it was branded the ‘most pointless department in Whitehall’.” That was your colleague, the MP for Orkney and Shetland, calling for the abolition of the Scotland Office. That was actually a Lib Dem policy, but then, obviously, there was the 2010 coalition Government. What was it about the ministerial cars that changed your mind about the benefits of the Scotland Office?

Lord Wallace: I think I am on record—you quoted Alistair Carmichael, but you could have quoted me if you had done a bit more research—as calling for the abolition of the Scotland Office. I think that I did so again in evidence to a similar inquiry of this Committee’s in 2019. As I said earlier today, most of my relationships, as a Minister in the Scottish Government, were with departmental Ministers, and not through the Scotland Office. I think I said, when David Mundell was Secretary of State, that David Lidington had far more clout in Government than the Secretary of State for Scotland. The Scotland Office, I think, did a good job at the time of the Scotland Acts 2012 and 2016—

Q47 **Alan Brown:** Why would you want to have two Lib Dem Secretaries of State for Scotland, after wanting to abolish the Scotland Office?

Lord Wallace: Because there was no Tory to be Secretary of State for Scotland, other than David Mundell.

Q48 **Alan Brown:** Might that not have been the time to abolish it, then? If there was no Tory to fill the post, and you agreed that it should be abolished, why would you then fill that position?

Lord Wallace: Because it was a coalition Government, and there was no coalition agreement to abolish the Scotland Office, but some of us have



HOUSE OF COMMONS

since continued to argue that the Scotland Office should be abolished. I think that it did a good job during the passage of the Scotland Acts 2012 and 2016—it had an important part then—but otherwise, I think it is far more important to develop relationships at the departmental level, and not at the Scotland Office level.

Chair: I will have to wind up, Alan.

Q49 **Alan Brown:** Can I ask one more question to Lord Dunlop? Lord Dunlop, we have spoken about intergovernmental relations. You have done a review, and said that the Prime Minister is more favourable to working collegiately with the Scottish Government, but not that long ago, there was an announcement that seven towns in Scotland were getting £2 million a year for 10 years, and there was no consultation with the Scottish Government. My local authority is getting £2 million a year for the town centre of Kilmarnock. Obviously, I am not going to argue against money coming into Kilmarnock—

Douglas Ross: Good.

Alan Brown: But there was no consultation with East Ayrshire Council in advance of that, so where is the transparency, and the development of intergovernmental relations, when Westminster says, “Here are some towns that will get £2 million a year for 10 years”? You could argue that there are other ways in which the £2 million could be spent in towns and villages in my constituency. Why is Westminster deciding that Kilmarnock will get £2 million a year, which can be spent only in Kilmarnock?

Lord Dunlop: I will make two points. One thing that I regret about devolution is that there hasn’t been onward devolution from Edinburgh to local areas in Scotland. I am not sure about the details of the particular projects in Kilmarnock, but my understanding of the way this works is that these are local priorities that come to the UK Government, and they fund those. From what I can see, that is hugely popular across Scotland.

Alan Brown: There was no bid process; there was no dialogue. It was just, “£2 million a year is coming.”

Douglas Ross: There was a rationale provided. This isn’t for the witnesses.

Chair: Order.

Alan Brown: I was making the point that there were no discussions with the local authority or the Scottish Government.

Chair: Order. This has been a really good-natured session, so please let’s keep things orderly if we can.

Q50 **Alan Brown:** Finally on that, there are sometimes further calls for Westminster to bypass the Scottish Government and send money directly to councils and local authorities, or to pay for transport projects; obviously, transport is devolved. Again, how does that work, as regards



HOUSE OF COMMONS

intergovernmental relations going forward?

Lord Dunlop: My preference is for the two Governments to work together. If you have two parallel funding streams that never meet, it may be suboptimal. A lot of this is about creating the right incentives for more collaborative behaviour. My view in my review, which wasn't accepted by the Government, was that you should use these funds to encourage that sort of collaboration. I am on public record saying that, and the Government chose not to go that way. One reason why the UK Government may not have gone down that road is that they put in billions of pounds into city and growth deals, and didn't always get the recognition for the money that was put in, so it is much more explicit now what the UK Government are investing in.

Chair: We will have to leave it there. That was a very interesting point at the end about getting recognition; thank you for that. Thank you ever so much. We knew that this would be an interesting and informative session—even entertaining. We certainly got that today. Please get in touch if you feel there is anything else that would help this inquiry. You have been here before, Lord Wallace, and you were very helpful to us last time, so please get in touch with anything else that you feel would help.

Lord Wallace: Thank you, Chair.

Examination of witnesses

Witnesses: Professor Martin and Professor Gallagher.

Chair: Welcome back to the Scottish Affairs Committee. We now have two professor gentlemen who were heavily involved in the early days of devolution. They have had a variety of roles in the ongoing conversation about devolution. I will let them introduce themselves, starting with Professor Gallagher.

Professor Gallagher: Hello there. I am Jim Gallagher. These days, I am an honorary professor at the Universities of St Andrews and Glasgow. I have been around devolution for far too long. I worked in the Scottish Office before, and made a very small contribution to the Scotland Act. I worked for Prime Minister Cameron on IGR. In 1999-2000 I was in the Cabinet Office. I was back there in 2007 with Prime Minister Brown. I left the Government a dozen years ago, and have continued to interest myself both academically and politically in the Scottish question.

Professor Martin: Good afternoon. I am Ciaran Martin. I teach at the University of Oxford, at the Blavatnik School of Government. I was in the civil service for 23 years until 2020. My principal role in devolution matters came between 2011 and late 2013 under the coalition. Among other things, I helped Prime Minister Cameron and Secretary of State Moore with what became the Edinburgh agreement of October 2012. Other roles that touched on devolution matters were more junior roles in the National Audit Office, Treasury and Cabinet Office. My last role for seven years was



HOUSE OF COMMONS

head of cyber security for the UK Government, which of course touched on relations with the Scottish Government, and all the devolved Governments, on matters of national security.

- Q51 **Chair:** Excellent. Thank you for those concise introductions. Can we come right up to date and discuss the current condition of intergovernmental relations? We are looking back at a 25-year-old Act. At a meeting of an interparliamentary forum in Edinburgh, in the Scottish Parliament, it was said that they have never been so bad, and that Government relations had rarely been in such a poor condition. There was a sense from devolved Administrations that instead of things being done with them, they were being done to them. There was a sense that they were not being listened to by the UK Government. Because of innovations such as the UK Internal Market Act, there was a bigger sense that perhaps devolved Governments were to fall into line with the general view of the UK.

How did we get into a situation with intergovernmental relations where devolved Administrations feel so alienated and out of the loop? Is there something in the design of this that led inevitably to this situation? Or has this happened because of changing relationships, the changing dynamic and the whole structure? I start with Professor Gallagher.

Professor Gallagher: The short answer is Brexit. As I said in the written evidence that I submitted to the Committee, a well managed Brexit would have strained intergovernmental relations very substantially, for two reasons. The first is political differences on the question of leaving or staying across the devolved/reserved boundary. Secondly, when the devolution settlements were designed, there was an implicit, and indeed explicit, assumption that the UK would remain part of the EU.

As it happened—I am not making a particularly partisan point here—we did not have a well-managed Brexit process. We had a Brexit process for which the Government did not have a plan, and for several years they did not have the capacity to deliver anything, so we had about three years in which the UK Government seemed effectively paralysed. The UK has now left the EU, but much of what you describe is the collateral damage of that process.

On the relatively small plus side, the structural changes made following the Dunlop review, to which you referred, Chair, and the new ministerial councils have at least the potential to be a better foundation for intergovernmental relations than the previous Joint Ministerial Committees. That is for a variety of reasons, which we can go into if you like. Potential has to be delivered, and in the end, that depends on attitude, behaviour and, as you heard from previous speakers, the degree to which trust is built, across the boundary, between the two Administrations. That requires changes on both sides.

Chair: I can remember, Professor Martin, when you were in the Cabinet Office advising the Prime Minister; it was between 2011 and 2014, which is roughly when Lord Dunlop was there. There should have been the



biggest fracture, or most disruption, to intergovernmental relations in the lead up to the Scottish independence referendum, but there was not. There were actually reasonably good relations.

Professor Gallagher indicated dissent.

- Q52 **Chair:** I can see Professor Gallagher shaking his head—possibly not in agreement. But it was nothing compared to the difficulties we have encountered since Brexit. Is there any particular reason why Brexit has had such a dramatic impact on intergovernmental relations? How could it have been done better, so as to put us in a better situation, where there is more trust between devolved Administrations and the UK Government?

Professor Martin: I concur with what Professor Gallagher said: even a well managed Brexit would have strained intergovernmental relations. Like him, I am not trying to make a partisan point. I think it was an external shock not envisaged by those framing the devolution settlement, particularly given the way the vote went in different constituent parts. Obviously, this Committee is centred on Scotland, which had the largest remain vote of each of the four parts of the United Kingdom, so it was going to be particularly difficult there.

I might extend the argument by saying that I think Brexit was one of three shocks that have made the atmosphere in the 2020s different from a decade ago. Another is covid. I have experience of much shorter-term national crises that were much less serious, thankfully, in areas such as counter-terrorism and cyber security, and by and large the devolution and intergovernmental mechanisms worked extremely well. Both the seriousness and longevity of covid frayed that in ways that the system found very difficult to cope with. It became very political. We are now seeing that narrative contested in the inquiry.

The third reason—this is perhaps contentious—is the Scottish referendum of 2014. There is a UK-wide strain of opinion that a 55% to 45% vote for the United Kingdom to stay together is much too close for comfort. There is an opinion that Lord Cameron’s view about the collaborative period, which he refers to proudly in his memoirs, is complacent. Again, I am not trying to make a partisan point; I am reflecting views that were expressed in the debate. Perhaps the UK central Government were excessively indulgent at the time and need to toughen up. For example, you see in the rhetoric of former Prime Minister Johnson’s statement to the covid inquiry that when he was Prime Minister, he did not want to chair a meeting with devolved leaders because the UK was not a mini EU. That is strikingly different in tone from, say, Lord Cameron’s memorandum.

- Q53 **Chair:** There is one term that comes to mind. I don’t know if it is a fair description, but I am increasingly familiar with the term “muscular Unionism” or “aggressive Unionism”. This has come to describe the way that successive Conservative Prime Ministers have approached devolution. Do you think there is anything in that, or have the Scottish Government been unduly sensitive when it comes to intergovernmental relations?



Professor Gallagher: There is far too much muscle, but there is muscle on both sides. There is muscular nationalism as well as muscular Unionism. What the Scottish people clearly express is a desire for autonomy, but not separation. The trouble with muscular folks at either end is that one set of muscles is pulling in the direction of autonomy, and another is pulling in the direction of separation. We need to find a more collaborative approach across all this stuff. If you were to ask me whether I am in favour of muscular Unionism, I would say certainly not, but you cannot look at it in isolation.

Q54 **Chair:** Professor Martin, is this your view too? Is this something that you are observing when you are looking from afar at what is happening in Scotland? Is there any validity to this term “muscular Unionism”? Is it something that you feel has actually been used in practice?

Professor Martin: As a political narrative, it is stronger in UK-wide debate than it was 10 years ago, and certainly 20 years ago. As a feature of Government policy, it is sometimes present, but I think it can be overdone. For example, some of the outcomes, and the processes that led to those outcomes, of the Brexit process were pretty muscular, whereas I would not myself take the view that the invocation of section 35 of the Scotland Act 1998 for the first time was muscular Unionism. As we heard from the previous, more expertly political panel, it is a design feature of the devolution settlement, whether you like it or not, and there is nothing untoward or improper about its use under lawful circumstances, which are now being tested. Yes, there is a creed of muscular Unionism that is gaining some strength in some parts of our political system, and it sometimes manifests itself in Government policy, but it is very easy, from the devolved end, to invoke anything that you do not like as muscular Unionism, and that is not entirely fair.

Chair: That is fair enough. Thank you for that.

Q55 **Douglas Ross:** Professor Gallagher, you mentioned how Brexit was a shock that caused a strain on intergovernmental relations, but in your written evidence you cite 2007 as a shock from which intergovernmental relations have never fully recovered. Do you mean the election of a nationalist minority Government?

Professor Gallagher: There was a series of things that changed. I do not have the evidence in front of me, but I think that it was intended to say that it is the series of shocks that has not been fully recovered from.

Douglas Ross: You said two: 2007 and 2016.

Professor Gallagher: The political divergence in 2007 was a shock to the system. I know that because I had been in the No. 10 machine under the previous Administration, the Blair Administration, when intergovernmental relations were pretty easy and informal, for the most part, and in my view rather neglected—certainly after I left. In 2007, there was a sudden realisation that it was possible that there would be people who were not in the same political party running the devolved settlement. That was a



HOUSE OF COMMONS

shock to the system, because the system was not ready for that kind of divergence. Brexit was another shock, obviously.

To pick up on what Ciaran said, in one sense the Scottish referendum was both a shock and not a shock. It was possible to agree the process, and I think that Ciaran and his colleagues did a good job on that; I would not have done it quite that way, but the general proposition was perfectly good. What we did not plan ahead for was the outcome of the referendum. No doubt people in Edinburgh were planning enthusiastically for a victory for the yes side, but they didn't get it. I do not think that we thought through what the outcome that we got would mean, because it did not settle the question. There were people who were not prepared to accept no for an answer, and that has been a strain issue ever since.

Add to that Brexit, which was not merely a referendum outcome that some folk didn't like—myself included—but a set of changes that were disruptive to the fabric of the devolution settlement. Put all of those things together and it would be a surprise if intergovernmental relations this year were sweetness and light. But we do need to do something to improve them.

Q56 Christine Jardine: Thank you both for coming along. I was fascinated by what you said about the shocks, Professor Gallagher. One that you have not mentioned is 2011, when the victory by the SNP was much bigger than in 2007 and led directly to the referendum. It also led to the two branches of the civil service being almost in opposition to one another. Their job is to promote Government policy, and the two Governments' policies were completely different. Did you notice at that time, and have you noticed since, any sort of divergence in the relationship between the civil service in Westminster and the civil service in Holyrood?

Professor Gallagher: I think a bigger factor than having divergent Ministers with divergent political objectives—this was referred to in the previous evidence session—is simply the passage of time. I must be getting old because I know almost none of the civil servants at St Andrew's House now, from my time there. Although a number of them have had Whitehall experience, we do not seem to have the kind of exchange programmes that Jim Wallace referred to earlier, which we once had.

We do not have something that we had before devolution, when the civil service saw itself as working—well, it was working—for the same set of Ministers and was therefore very collaborative and open across Departments. Now, any intra-civil service relationship comes with a health warning: "I can't really commit my Minister to anything" or, "I can't really tell you what he thinks," which is not quite how it is inside a Government.

Again going back to the previous session, we do not have the structures that build the relationships and the trust, which you need when things get tough. There is no point just having meetings when you are in crisis, because you have no idea who your interlocutor is—each of the individuals on the other side of the table. That applies as much in the civil service as it does at ministerial level.



Q57 **Christine Jardine:** Professor Martin, did you notice a discernible change or evolution in the relationships when you were a civil servant?

Professor Martin: Actually, no. You can debate whether the system works optimally for whatever political objectives particular people have, but it is a remarkable feature of the British system that—probably the most remarkable period was between 2011 and 2014, when you had a literally existential question for the country—you have a single civil service. It has been devolved in Northern Ireland, but in Scotland it has never been devolved. You had—I remember slightly incredulous Spanish interlocutors talking about this—a situation where the UK Government civil service was producing a set of analysis papers in support of the case for remaining in the UK and, strikingly from the Spanish point of view, the Scottish Government was allowed to use the civil service to make the contrary case.

At the time, it seemed quite febrile, although perhaps in the light of the last decade it is comparatively less so. There was a certain amount of commentary about, for example, Sir Peter Housden as Permanent Secretary to the Scottish Government and people like the late Jeremy Heywood and Lord Macpherson in the UK Government. Actually, as Suzanne Heywood's biography of Jeremy Heywood makes clear, behind the scenes, that period that the Chair was talking about was a relatively harmonious one, despite the underlying huge tensions. That was oiled in part by good civil service contacts, in a way that muscular Unionists might not like.

Further down the line, I was not involved directly in any of the Brexit negotiations, nor really in the covid period, although I was a Crown servant for the first eight months of covid. In my own fields—for example, cyber-security, even though it engaged devolved equities frequently—the relationship was co-operative, I think partly because no one had a political incentive to politicise it. But the talk around the profession of the civil service around things like Brexit was that the single civil service was attempting to act as a calming and cohesive influence where possible, amid pretty rancorous political division, in a professional way.

You can say that is a good thing or a bad thing, but I think that the cohesion of the civil service, as evidenced, for example—although I am reluctant to get into personalities—when the former First Minister, Nicola Sturgeon, chose as Permanent Secretary someone from the ranks of the civil service in Whitehall who was a specialist in the administration of social security. That, I think, shows a certain amount of continued cohesion in the system, which is perhaps less different in 2023 from what it was in 2013 than you might have predicted.

Q58 **Christine Jardine:** Thank you. Professor Gallagher, you said that you felt that relations between the two Governments had deteriorated. Do you think we are aware in both Parliaments of what needs to be done to improve relationships, or do you think we are just allowing it to happen? Can you discern some sort of determination to improve it for the benefit of everyone?



Professor Gallagher: That is a hard question but an important area. I will go back quite a long way to the report of the Calman commission, of which I was the secretary. One of the areas that the Calman commission opened up, which I think we have not taken to completion, is interparliamentary relations. It is a notorious aspect of intergovernmental relations worldwide that they are a great place for Governments to avoid scrutiny, because you go away to the negotiating table and go, "Ah, it's the best I could do for you," and that cannot really be questioned. One of the challenges that Parliaments have—worldwide, not just here—is having some visibility of that. I do think that part of the issue in the route towards fixing this, but only part of it, is a greater degree of transparency and scrutiny of the intergovernmental relations process.

As I said in my written evidence, we need a reset of that process. It has hit pretty much rock bottom. It has hit rock bottom in terms of trust. Ciaran Martin mentioned the covid process. Thank goodness I was hiding behind the sofa throughout that process, so I had nothing to do with it, but it is pretty plain that the distrust at ministerial level got in the way of doing effective intergovernmental co-operation, at least at the beginning of the process. That is deeply unfortunate in those circumstances.

Secondly—and I am sorry to have to say this—the UK's systematic habit of breaching the Sewel convention is deeply unhelpful. If we say to the people of Scotland, "You've got a legislature and we won't interfere with it unless there's some exceptional circumstance, and perhaps not even then," and then, apparently routinely, cease to follow that convention, I think there is a thing to be done. Conversely—because it takes two to tango all the time in this—there is a tendency towards autarky in St Andrew's House, and poor preparation of legislation material, which gets you into the kind of fankle that requires Governments to use section 35. Both sides need to contribute to that process of rebuilding their relations.

One place to start would be to move back to a world in which, in private and in confidence, Governments share their proposed legislative programmes with one another to avoid the UK Government, either accidentally or deliberately, breaching the Sewel convention, or to avoid the Scottish Government so trampling over reserved law or a similar issue that the UK Government find themselves using the powers in the Scotland Act. There is an opportunity for a fresh start in that we have a new First Minister who has not been long in office—the poor man is still finding his feet, I think it would be fair to say—and we seem to have a slightly new Administration in Westminster only today. There is the chance, and there are structures that in principle could be used properly to do that, but it does require a change in behaviour.

Chair: I am conscious of time because I want to help Professor Martin, who needs to leave a bit early. We have half an hour left, if that is okay.

Q59 **Christine Jardine:** I was only going to ask whether it would be fair to characterise what you have said as perhaps pointing in a way that we might have avoided the recent controversies over things like GRR and the deposit return scheme if there had been better co-operation between the



HOUSE OF COMMONS

Governments before legislation was put forward.

Professor Gallagher: Manifestly. I regard those two pieces of legislation as an example of how not to do devolved legislation.

Q60 **Douglas Ross:** Thank you to our witnesses. I apologise that I also have to leave; I am heading over to the Treasury to fight for our whisky industry in the autumn statement.

Professor Gallagher, you said something quite interesting in response to an earlier question. What would you have changed if you were in charge of the referendum in 2014? You said to Professor Martin that you wouldn't have done it.

Professor Gallagher: That is a fair question. I think that the process was too long and drawn out—it was not a six-week campaign; two years was too long for everyone—and we under-planned what would happen afterwards. We thought that would be it: either there would be a yes vote, in which case all sorts of things might happen, but we didn't think ahead to what would happen afterwards. I was as guilty of that as anyone else because I was so caught up in the campaign that I did not think beyond the date.

Q61 **Douglas Ross:** Professor Martin, what do you think of that?

Professor Martin: I think it is fair. The two years is a fair criticism. Also, the UK Government were unprepared for the constitutional trauma of contemplating this question. We did not understand the law until, for example, Lord Wallace really gripped it. Obviously, you are not allowed to talk about Law Officers' advice, but put it this way: as a private citizen, I was reasonably confident of how last year's Supreme Court judgment would pan out, having worked with Lord Wallace. But we had not done that work before 2011, which was a mistake of statecraft, frankly—to have set in place a strong devolved Parliament, which, although clearly it did not have the power to legislate for the referendum, certainly could elect a majority in favour of one, pass a motion and apply a lot of pressure. There were mechanisms such as section 30. We did not really know enough about that sort of thing, so we were slightly caught on the hoof. For example, you can chart your way through 2011, when the then First Minister, Alex Salmond, was saying things like, "It'll be in the second half of 2014." It is a very different environment now, because people understand the law, but back then that was accepted as, "Well, that's how it's going to be." We should have been better prepared.

For the aftermath—I suspect you will take a different view, and I think Professor Gallagher and I disagree on this—one of the things was under what circumstances this would ever happen again, in the event of something that did not put the issue to bed, followed, unexpectedly, by a major shock to the devolution system. If we meant a generation—let's say 20 or 25 years—there was no reason not to put that in the Edinburgh agreement, if we really meant it. It is quite hard to sustain something that important, after that close a vote followed by Brexit, as just an almost ephemeral construct.



At the time, the nationalist side had to project confidence that they were going to win and therefore there was no need to discuss what might happen in the event of a reasonably narrow result. From the Unionist side, there was the pretty catchy and effective slogan about not having “neverendums” and so forth. But if you were looking for responsible, stable governance, it might have just been better to say at the time, “If you want an explicitly Westminster-backed, legally signed referendum, this cannot take place for another 20 or 25 years,” or, “It cannot take place until there is a vote of x in the Scottish Parliament,” or something. The complete absence of planning for that left us in a tricky situation in 2021, which has now passed but could arise in the future.

- Q62 **Douglas Ross:** That answer alone could open up another three hours, let alone 30 minutes. I want to put across two short points. The Presiding Officer in the Scottish Parliament has a role to play in certifying that anything coming forward to be voted on is within the competencies of the Scottish Parliament, but we have seen issues raised through section 35 that suggest that the UK Government do not agree with that. Do you think that power is being correctly used and advised on to Presiding Officers, currently and in the past?

Professor Gallagher: I think the premise of your question is not quite right. The Presiding Officer is required to certify whether legislation is within competence, but that does not stop the legislation being considered because, in principle at least, changes could be made to the legislation during its passage in order to make it competent. The whole point of section 35 is not that the legislation is incompetent; it is that the legislation is competent but has knock-on effects in a reserved area. Section 35 is not a competence issue. In fact, I had to dust off section 35. I thought, “Crikey, what’s this?” I had forgotten all about it, because it had not been used for 20 years.

Section 35 is a consequence of the widely drawn powers of the Scottish Parliament. Anything that is not reserved is devolved, and the reservation test is that legal test “relates to”. “Relates to” means “is mainly about”. Legislation that is mainly about a devolved matter, and not mainly about a reserved matter, can nevertheless properly affect reserved areas without being outside of competence. There needs to be a bit of a safety net to say, “Yes, it does have that effect and really that’s not on.” Oddly enough, section 35 is a sign of the power, not the weakness, of the Scottish Parliament.

- Q63 **Douglas Ross:** And widely drawn powers, as you say, in contrast to what Mr Brown said earlier on.

Finally, in terms of intergovernmental relations and the state of them, if we take out a pandemic, because I think we could always look to a pandemic and see that there are extreme circumstances there, do you think that the public really understand or care if the two Governments sometimes bicker or don’t get on particularly well with each other? You would probably expect a Unionist Government and a nationalist Government to take different views. Surely, they are looking specifically



HOUSE OF COMMONS

in Scotland at devolved competencies, in terms of their health service, the police system, the justice system, education for their children and funding to local government. Do you think that this has cut through with voters in Scotland if there aren't good relations, and would improved relations really make a difference to taxpayers and voters in Scotland and to the public services they receive?

Professor Martin: If you look at the various polling trackers on trust in the various institutions, across the UK they tend to be higher for the devolved legislatures than for the Westminster ones, by and large. Do voters spend a great deal of time thinking about these things? No. Do they notice tension? I am afraid I can't really answer that without referring back to the pandemic, even though you tried to exclude it from the question—

Q64 **Douglas Ross:** That is a more extreme example, though.

Professor Martin: It is a more extreme example, but I think that it showed a desire for strong devolved Government in key areas, where if there was tension, there was at least a noticeable desire for that tension to be managed away.

I was conscious, for example, of Lord Dunlop's point in a previous answer and exchange with Mr Brown about, for instance, the UK Government perhaps being more reticent about some of the more joint endeavours, because they felt that they hadn't got sufficient credit for them. In the past few years, it has been hard to sell joint endeavours successfully to the benefit of both sides.

Professor Gallagher: On whether the public would be happier if the Governments got on better, in a sense I don't really care. What I would want to happen is that the outcomes were better, so that, for example, the process of recycling cans and bottles was made to work, rather than running into the sand.

What we see if we look at the polling, however, is that 75% of the population, when asked if the Governments co-operate well enough, answer, "No", and the public are right in that. Our job—those of us who have been involved or who are still involved in the governmental processes of the country—is to make sure that in the engine room of Government, all the bits work together effectively. The public don't want to look at the engine room very often, but they do want to get somewhere. So, it's outcomes for the public that matter and co-operation is essential to deliver those.

Douglas Ross: Thank you both very much.

Q65 **Sally-Ann Hart:** We have seen in the last few years—since 2019, really—Bills passed in the UK Parliament where devolved legislatures have withheld their consent. As you have said, Professor Gallagher, the one overwhelming reason is leaving the EU, which wasn't a normal event. That has necessitated legislation across the UK and the SNP Government—the Scottish Government—doesn't agree with that. There



are also, as witnesses have highlighted today, political differences of opinion between the various Governments—particularly looking at the Scottish and UK Governments. How would you therefore describe the UK Government's current approach to the Sewel convention and what does that demonstrate about the wider intergovernmental relations?

Professor Gallagher: First, the Sewel convention was enunciated way back in 1998. It deals with the problem of our not having a codified constitution in which some bits of responsibility belong only to one level of Government. That is the characteristic of a federal system. In the US, for example, there are some things that the states have that the feds cannot touch. However, in our system of parliamentary sovereignty, it is quite hard to hand down legislative responsibility because Parliament, in theory, retains it.

The principle of Sewel is to say that we are creating a legislature that has power and responsibility of its own, and Parliament will not interfere with it. In the end, people said "normally", which I think was possibly an error. Of course, Brexit was not normal, and, in that sense, the words of the Sewel convention have been obeyed but the spirit of it has not. In particular, the internal market legislation was, in my view, first unnecessary and, secondly, imposed on the devolved Governments inappropriately. It will also not ever be used very much. It could have been fixed without any legislation at all, in my view.

I think that that has caused a real problem and that the present Government, or its successor, should rebuild the trust in the Sewel convention. However, as I said earlier, it takes two sides to build trust, and we need a change of behaviour in Edinburgh as well as in London. We should go back to a world in which Governments routinely and privately share their legislative programmes with one another to ensure that, if there are going to be problems, they are known long in advance. That should have been done in relation to the GRR Bill, but also in relation to various bits of Brexit-enabling legislation. In fact, on the internal market stuff, my view is that the framework of the agreed common frameworks across those areas would have been adequate to do the job.

Sally-Ann Hart: Professor Martin?

Professor Martin: I have very little to add. In my national security days, I was once at a meeting where a very senior British security chief explained the concept of a convention to a rather baffled foreign partner, saying that in the British system a convention is something that always applies until we decide that it doesn't. I think that we have reached that stage with Sewel. I do not know whether Professor Gallagher agrees with this, but although almost entirely in the unique and unusual circumstances of Brexit, it has now been breached so often and fundamentally that I am not sure that it merits the term "convention" any more. Professor Gallagher said "rebuild", but I think that we are almost into semantics as to whether it is still a relevant part of the system.

Q66 **Chair:** Would it not just be better just to say that Sewel has not worked



HOUSE OF COMMONS

and it is better to do away with it totally? There is no point in it being there if it is not being observed. It was there as a safety net; it wasn't to ensure—

Professor Gallagher: I would go to the other extreme and say, "It has not been observed, and it should be observed, so it should be given teeth."

Q67 **Chair:** So we need to have it in statute, as was suggested.

Professor Gallagher: It is in statute already.

Chair: So have it in statute that it should always be observed?

Professor Gallagher: Quite. And we would need a mechanism for observing that, but that takes me into reforming the entire UK constitution, which is maybe beyond where you want to go today.

Chair: Yes, it certainly is.

Sally-Ann Hart: It certainly is.

Professor Gallagher: But there are proposals to do precisely that.

Q68 **Sally-Ann Hart:** What, like a federal UK?

Professor Gallagher: No, the proposals of the Labour party's commission on constitutional reform, which Gordon Brown chaired, deal with precisely this issue. This may not be the day to explain the full mechanics of it, but if you are interested, please do ask.

Q69 **Sally-Ann Hart:** Looking at the recent legislation, you mentioned the UK Internal Market Act and the retained EU law Act; what do they say about the UK Government and how they are managing the policy and political differences with devolved Governments—particularly Scotland's because we are looking at Scotland—post EU exit? Professor Martin?

Professor Martin: Sorry, what does the internal market Act say about the relations?

Sally-Ann Hart: Yes, and about how the UK Government are managing policy and political differences.

Professor Martin: I think that we are now in a different phase. There was a—

Sally-Ann Hart: We are post Brexit now.

Professor Martin: Yes. I think in the period of Brexit, as you mentioned in your question, Ms Hart, there was withholding of multiple legislative consent motions and the imposition of the Internal Market Act, but not really its use. That was a very disruptive, almost traumatic event for devolution. I think that is now stabilising, partly because of underlying political circumstances. As you say, we are post Brexit now, and fewer of those ruptures are happening; there are fewer reasons for them to happen.



HOUSE OF COMMONS

I think it is partly attitudinal as well. We heard from the previous panel of former politicians about the period where there was a full tenure, albeit a short one, of a Prime Minister not talking to the devolved Administrations. That situation has now passed. While I do not want to say too much about this, because of the pending Supreme Court judgment, I thought the way in which the Secretary of State for Scotland framed the section 35 intervention was actually rather astute. It was not a highly politicised intervention in terms of the actual language used. I am sure that that was partly on the basis of legal advice, but it was also partly trying to locate or place that intervention firmly in the context of the devolution settlement, even though, as you said in your question to the previous panel, it was literally unprecedented in the true sense of the word. It was presented as the implementation of a normal feature.

I think we are in an interesting phase. We are in the final year of a Parliament. The underlying optics have stabilised a bit. There is less scope for clashes. We are in a period, frankly, of choice. A reset has happened. Professor Gallagher has called for a reset, and I think that one is almost happening by default, so there are now choices post Brexit and in the end of this Parliament, the beginning of the next Parliament and the transition of political leadership. There are choices to be made about the relationships.

Chair: I know we have to let you away, Professor Martin, and we still have Mr Duguid and Mr Brown to come in with questions.

Sally-Ann Hart: I will call it a day there. Thank you.

Q70 **David Duguid:** Thank you both for coming along today. I have been making notes ever since you both started speaking, so I will go back a little over some old ground. First, Professor Gallagher, one of the key points you mentioned that I was particularly interested in was the idea of the two legislators coming together, even privately, at the start of each session to compare notes on what they were declaring, not necessarily to avoid any conflict but to at least know in advance when those conflicts might come up and be better prepared for them. You mentioned the gender recognition Bill as one example; the deposit return scheme was another. HPMA—I have to mention those, as the MP for Banff and Buchan, where fish are very important—were possibly another one. Would it be fair to say that the actual causes behind the initiatives—the good intentions behind some of these attempts at changing the law—have been harmed by that failure to actually progress in the way that you describe as being a better way to do it?

Professor Gallagher: Yes, I think that is entirely fair. I will go back to what now seems like the late middle ages, when I was running the Cabinet Office legislative programme for the UK Government and we were in the habit of sharing that programme with the devolved Administrations in confidence, which was always respected. We flushed out the issues at an earlier stage when we did so. It never worked in the other direction, partly because people did not really think about it, to be honest.



You mentioned two examples. I am not well-informed on fisheries at the moment, but the gender recognition material is a classic area where you have what could be described as a shared space between the Government's equalities laws on the one side and gender recognition on the other. There are more of those shared spaces now than there used to be. There is a shared space in economic development, which has always been there; there is a shared space in welfare, and now that we are outside the EU, there is a shared space in agriculture, fisheries, environmental protection and many other areas that used to be EU responsibilities. The argument for co-operation, prior notice and officials—to go back to the civil service question—to work together is stronger than it has ever been. We need Governments on both sides who are prepared to do that and not be obsessed with their sovereignty on the one hand, in Westminster, or their desire for sovereignty on the other hand, in Scotland.

David Duguid: That sounds like a worthy future to aspire to.

Professor Gallagher: I live in hope.

- Q71 **David Duguid:** As you were giving me that answer just now, I wrote down the expression “shared space”. It sounds like a good thing; it sounds like the ideal scenario for collaboration, but from what you said, it sounds as though—correct me if I’m wrong—Brexit has created more of these spaces that are shared by the UK Government and devolved Administrations, because previously they were EU spaces. Even though a lot of those powers have come back from Brussels, through Westminster and to the devolved Administrations, is it fair to say that the increase in the number of shared spaces, and grey areas, where it is unclear who is responsible or who wants responsibility, has added to the problem?

Professor Gallagher: I think the territory is not as well mapped-out as it should be. Paradoxically, agriculture, which was mentioned, is one of those areas where the Governments shared a space, when it comes to influencing the EU. There, intergovernmental relations worked very well, historically. I don’t think they are working quite so well at the moment, because the UK hasn’t quite sorted out in its own head who is responsible for what, but there is the opportunity to do that. There will perhaps be an opportunity to reset this, and I very much hope that it is taken.

- Q72 **David Duguid:** Thanks for that answer. Professor Martin, a series of Ministries or directorates in the Scottish Government seem to be, at least at face value, completely and utterly reserved, such as the constitution. We have a Minister for the constitution, and we have energy Ministers, Ministers responsible for international development—or foreign affairs, I think—and Ministers responsible for international trade. When Ministers and officials in a devolved Administration are working on functions that are completely reserved to the UK Parliament, how should that work?

Professor Martin: It is a very political question.

- Q73 **David Duguid:** Is it?



Professor Martin: Yes. There is a technocratic and a political aspect to this. Take external relations from a sub-nation-state unit. I went to a very interesting discussion on cyber-security between Europe and the United States, hosted by the Bavarian mission to Brussels, so this does happen in other countries. Under our system, a United Kingdom Government and Parliament could expressly forbid activity and spending by devolved Administrations on such matters, if they wished. It might require legislation, and it could be tested in the courts.

On the model of a single civil service, a huge political issue during the referendum campaign—I alluded to this in the discussion with Ms Jardine—was: should the Scottish Government, as distinct from the “Yes” campaign or the Scottish National party or whoever, be allowed to put forward the prospectus for independence? The Cameron-led coalition decided that it would not object to the civil service machine supporting the Scottish Government in writing and publishing, at public expense, the independence White Paper. It is a very political decision.

More recently, the former Foreign Secretary—now Home Secretary—issued guidance to British missions abroad saying that Scottish Ministers are not to have discussions unsupervised. I think it takes you into expressly political territory. By international standards, the British state has so far been quite benign—

Chair: David, we really have to wind up.

Q74 **David Duguid:** I have one last question for Professor Martin—I know you need to get away—on that 2012 Edinburgh agreement I think you were referring to. Dr Paul Anderson of Liverpool John Moores University says in written evidence that the Edinburgh agreement “represented a success for inter-governmental relations and avoided much of the acrimonious wrangling that is found in other states with electorally successful pro-independence political parties.” It was seen as—I think this was the expression used at the time—a gold standard for predicting a successful referendum result. At the time, David Cameron also described the agreement as the greatest proof point for the success of the respect agenda, but as I think Professor Gallagher said, it clearly didn’t settle the question of independence.

There are two questions. One is: what went wrong? I think I know what the answer will probably be to that. Probably more within your experience is: what can we learn from that period? What if we got to a point where the agreement was generally recognised as being the gold standard, if we can be colloquial about it, of devolving legislation, at least temporarily? The constitution was decided on by the Scottish Parliament—with everyone’s agreement; it was voted for and passed here, in Westminster, as well. What can we learn from that, to move forward and improve intergovernmental relations?

Professor Martin: A lot of this has been covered already, and I know the Chair wants me to be brief. On what went wrong, I think you’re expecting me to say “Brexit”. I will say that the referendum was relatively close;



HOUSE OF COMMONS

55:45 is not recount territory, but it is close in a relatively small voting population. As people in the Brexit debate have said, if it had been a 52:48 vote to remain, we would probably still be arguing about membership of the European Union in 2023 in the UK, because it was a reasonably tight vote, and the issue might not have been settled simply by virtue of that vote.

As for the future, there have been a lot of very interesting contributions from Jim and the previous panel. There is actually scope for strategic thinking in both capitals and, if possible, a strategic conversation. For example, if you look comparatively and internationally, we can talk about British exceptionalism and so on, but it is genuinely exceptional that this democracy is relatively, by international standards, relaxed about its own peaceful break-up, but relatively incurious about the mechanisms by which that discussion might be held over time. It really is. Look at what happened in Spain in 2018. The constitution says the kingdom of Spain cannot be divided. Now, of course, there are negotiations going on in Spain. It's quite messy—

Chair: We'll maybe leave out Spain.

Professor Martin: Anyway, I do think we need to think strategically about how to manage the constitutional intentions in this country, which are quite unusual.

Q75 **Alan Brown:** Professor Martin, how effectively do you think the IGR machinery was used during the covid-19 pandemic response? Also, to set this up, because we don't have much time, we heard recently in the UK covid inquiry that Dominic Cummings sent a message to Boris Johnson when he was still Prime Minister. He was talking about Cobra and he said, "NOT with the DAs"—devolved Administrations—"on the" effing "phone all the time either so people can't tell you the truth." What do you think about that? As a civil servant working for Government, that was his attitude to the devolved Administrations.

Professor Martin: Covid was so serious and lasted for such a long time that it broke all the crisis management systems of the state, including those that related to devolution, and there is plenty of profane language about all sorts of aspects of that. It broke the crisis management system, including the devolved aspects; it was so unusual.

One of the features of devolution all the way through, whether it is Labour-led and Labour-led, coalition and SNP, or single-party Government, a Conservative Government, and the SNP, is that crisis management by and large has worked reasonably well where people have been grown-up and sensible and have exchanged information. I remember very clearly, because I was in the Cabinet Secretary's office, the Glasgow Airport bombing attempt in 2007, just after the SNP minority Administration came to power. Everybody maintained confidences. There was trust immediately. Covid is so exceptional, and we need to look as a state at managing something of that magnitude.



HOUSE OF COMMONS

Q76 **Alan Brown:** But Dominic Cummings also said involving the devolved Administrations was just a “performance”; it was just a show.

Professor Martin: In many other crises in which I was directly involved, and which were—pardon the phrase, given the seriousness of some of them—“more normal” than covid, the procedures worked well. Information was shared; trust was built; and posturing was not the predominant activity.

Q77 **Alan Brown:** Yes, but given the seriousness, clearly, of the covid pandemic and people dying, surely that should have made the sharing of information more inclusive instead of exclusive, without that posturing I just detailed.

Professor Martin: I think there are some aspects of the covid pandemic that worked pretty well at various stages of it. I am thinking of the four-nations approach at the start, and the joint working between the chief medical officers. This is all stuff that makes for less sensational evidence sessions at the inquiry, but look at, for example, the widely acknowledged work of the Joint Biosecurity Centre, which commanded the trust of the Scottish Government in building an information picture that the Scottish Government could draw on.

I am not trying to say that the covid devolution arrangements worked particularly well. My former profession, the civil service, should have a period of introspection, where we have a hard look at all sorts of aspects, including the devolved aspect. There are anomalies in the devolution settlement. Was it really sensible to have Mark Drakeford expressing surprise that he was allowed, briefly, to set his own international travel policy? There are things that we should look at. It was such an extreme situation, but I don’t think we should have a blanket dismissal of the co-operative approach taken in multiple crises since devolution came into force.

Q78 **Alan Brown:** Could I go back to the 2012 agreement? My colleague David mentioned the phrase “gold standard”, which has been used to describe that. You said that, from a Unionist point of view, it should maybe have been written that there should not be another referendum for another 20 to 25 years. Do you really think that would have been a credible position, and how would that correlate with what was deemed a gold-standard agreement? It does not matter how people vote in the future if there cannot be another referendum for 20 to 25 years.

Professor Martin: As Mr Ross said before he left, this is a long discussion, but I would echo Professor Gallagher: we probably did not do enough planning for a no vote. That was one idea. I think Professor Gallagher takes a different view, but we are in the unhappy position—this works better for Unionists than nationalists—where although the pursuit of independence is seen as entirely legitimate, there appears to be no clear mechanism by which it can be obtained. That could have become quite problematic in 2012. As it turned out, it didn’t, but there is the potential for that to become a sore in British politics again in the future.



HOUSE OF COMMONS

Q79 **Alan Brown:** Is that something that needs to be addressed?

Professor Martin: I would prefer that, but I don't see the political appetite for it.

Chair: Thank you, both. Sorry to have detained you a bit longer than we expected, Professor Martin, but thank you for your time today. We knew that this would be another informative exercise—a quick skip round 25 years of the Scotland Act—and we managed to get there. We got some pretty good conclusions out of all that.

Professor Gallagher: There is a year we missed out!

Chair: Thank you very much.