



Constitution Committee

Corrected oral evidence: The governance of the Union: co-operation, consultation and legislative consent

Wednesday 6 March 2024

10.15 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Anderson of Ipswich; Baroness Andrews; Lord Beith; Lord Falconer of Thoroton; Baroness Finn; Baroness Goldie; Lord Thomas of Gresford.

Evidence Session No. 2

Heard in Public

Questions 11 - 36

Witnesses

I: Professor Jim Gallagher, Visiting Professor at School of Law, University of Glasgow; Philip Rycroft, Former Permanent Secretary at Department for Exiting the European Union.

USE OF THE TRANSCRIPT

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Examination of witnesses

Professor Jim Gallagher and Philip Rycroft.

Q11 **The Chair:** Good morning, everyone. Today the Constitution Committee is taking evidence in its inquiry into the governance of the union, looking particularly at intergovernmental structures, the Sewel convention and legislative consent. This morning, we are taking evidence from Professor Jim Gallagher, former senior civil servant and government adviser on devolution and constitutional issues and visiting professor at the School of Law at the University of Glasgow. Good morning, Professor Gallagher, and welcome. We will also take evidence from Mr Philip Rycroft, former Permanent Secretary at the Department for Exiting the European Union and currently an academic at Edinburgh University and the Bennett Institute at Cambridge University. Between you, gentlemen, you have considerable knowledge of the corridors of Whitehall, which I hope we will benefit from in your answers to our questions this morning.

I hope you have had some indication of the questions we want to ask but before I go into opening questions, are there any opening comments that either of you wish to make?

Philip Rycroft: Not from me.

Professor Jim Gallagher: We are happy to respond to your concerns rather than lecture you.

The Chair: That is a very positive start; I want to quote that to future witnesses. Lots of people have lots of questions, but I will open up on intergovernmental relations because that is one of our specific focuses. How effective are the new intergovernmental relations structures that were introduced in January 2022? In your view, how effective are they in maintaining and improving relationships between the UK Government and the Governments of the devolved nations?

Philip Rycroft: You did not mention in your introduction that alongside my Brexit responsibilities, I was also responsible for constitution/devolution issues. Indeed, that goes back to mid-2012, so I was essentially responsible for this bag of issues between 2012 and early 2019. In and among all that we did through that time, we made an effort to reform the intergovernmental relations machinery between 2014 and 2016. Indeed, we got to a JMC plenary meeting in October 2016, where that attempt fell over at the last minute with objections from, eventually, both the Northern Ireland Executive and the Scottish Government.

So I watched with interest the new efforts that were made to review the arrangements, and the result that has come out is substantive. It is an improvement. The things that are an improvement on the old arrangements are that you have the baking-in of prime ministerial involvement; it is a Prime Minister and Heads of Devolved Governments Council, so you expect the Prime Minister to turn up to that if and when it meets. You have the reinforced dispute resolution mechanism. In my day, the UK Government could essentially say, "We do not think that is a dispute so we can ignore it", which they did over one particular issue in

the Brexit time. It also establishes an impartial secretariat. But I think the most important thing is the expansion of the interministerial groups. In theory, these arrangements on a regular basis will encourage interaction between the devolved Governments and Whitehall.

That is all useful and good. Structures are important and necessary, but of course they are not sufficient. The critical thing is the spirit that informs the use of these structures. Are these interministerial groups actually meeting? Is the Prime Minister and Heads of Devolved Governments Council meeting? When they meet, are the discussions substantive? Do they seek to advance policy or is it just a bit of a show and tell? As Jim will have done, I have sat in quite a lot of JMC meetings in my time, and it is probably fair to say that the discussions generally were not terribly productive. It was just a bit of a stand-off generally, and positioning across the table. Has that changed? That is where it gets interesting. Have we seen a substantive change in the way in which intergovernmental relations are conducted through these new structures? I have been out of the house now for coming up five years but from what I can see, I suspect that the jury is very much still out on that.

The Chair: Professor Gallagher, do you want to add to that?

Professor Jim Gallagher: I go back even further than Philip and have watched this for a longer time perhaps, but I agree with what he said. Structures are important, and the structures that have been put in place are potentially an improvement. They are important for the reasons that Philip says and for another reason, which is that the set of ministerial structures and meetings can be shadowed by a set of official structures of meetings, which gets the officials working together. If I have a perception of the change in relationships, particularly between Edinburgh and London over the long period since devolution, it is that official relationships have become more distant. They are not so closely engaged.

The formal structures may enable official meetings. Whether the politicians use them well or wisely is an open question, and whether they sustain the commitment—particularly, I am afraid, from the UK end. Intergovernmental relations are front of mind for the devolved Administrations but are back of the house for the UK central government and can be perceived as a nuisance.

Lord Falconer will remember in the first Labour Administration after devolution that we started some earnest joint ministerial committees but they ran into the ground because people were too busy doing other things. That is why a greater formality in these structures matters and, as you may wish to come on to, perhaps even a legal basis, to ensure that they are given more priority than nature might give them otherwise.

- Q12 **The Chair:** We are going to come on to dispute mechanisms so I do not want to particularly develop that at this stage. But on this point—structure is important but not sufficient, and the jury is still out—in securing consent and the consultation that precedes securing consent where policies affect the areas of devolved competence, from your

perspective, do you think that these new structures are improving that sharing of consent or are other factors still militating against that?

Philip Rycroft: The brief answer is that it depends. Too much of this whole construct is still reliant essentially on individual ministerial choice and, to an extent, official choice as well as to how far they prioritise it from the Whitehall end. If you are advancing a piece of legislation or new policy, at what point do you pick up the phone to the officials or to Ministers in the devolved Government to say, "We are thinking of doing this and we are interested in your views"? If you look at the record of the number of meetings of interministerial groups, it gives you a reasonable map of how used Whitehall is to doing that sort of thing.

The Defra interministerial group has met quite a lot but some of the others have barely met at all. In my experience, that maps very closely on what I saw as an official in Whitehall in terms of the understanding of devolution, the willingness to engage with the devolved Governments and in a sense the willingness to take some risks with that.

One of the concerns that Whitehall—both Ministers and officials—often have is: "We don't quite know where this policy is going. We haven't had ministerial sign-off, write-round or"—if it is a piece of legislation—"sign-off for the precise structure of that". You know, as a House, just how often legislation now is coming into the system half baked. There are lots of government amendments part way through the process, so the ministerial mind is unmade, and it is quite risky then to expose that to the devolved Governments, because you are showing your workings. That becomes an excuse to leave it late in the process, and of course the later you leave it in the process, the more annoyed the devolved Governments are likely to be and the more difficult the whole thing gets.

My argument is that Whitehall and Westminster are a long way off yet having this institutionalised, marbled into the way that people work. It is just what you do. From an official perspective in Whitehall, far too many officials really do not understand devolution and the devolution settlements—you have done inquiries into this as well. They are not confident in understanding devolved politics so they are wary of engaging.

Then you add to that the extraordinary churn of Ministers that we have seen down here over the last five or six years. It is hardly surprising, frankly, that this system, albeit with a reasonable structure, is not functioning at the level that in my view it should do.

The Chair: Baroness Goldie, I think you wanted to develop a couple of these points.

- Q13 **Baroness Goldie:** Mr Rycroft, you have taken us on an interesting journey. I was very struck by two things you said. You said that perhaps there is a culture issue at Whitehall about what devolution is. I am limited in my experience; I can really talk only from an MoD perspective, where I was a Minister for four years, but with responsibility for the devolution engagement. Within MoD, we had a devolution department, which therefore meant that legislative matters would very much be on my radar

screen, so officials and I were looking to see whether this impacts on the devolved legislatures. Within the MoD we certainly had a structure, and it included me having to proactively engage with the devolved legislatures, which I endeavoured to do. Is that uniform throughout Whitehall? I should know but I do not.

Philip Rycroft: Again, in my experience, which encompasses the Scottish referendum time, when there were very high stakes, the MoD was among the good guys in all of this, partly because it institutionally needs an understanding of what is going on across the territory—self-evidently, with bases across the UK, and particularly in Scotland, with the importance of Faslane and so on. From an MoD perspective, the understanding of the integrity of the territory is so important because of the importance of that to the overall defence effort. I personally had many interesting discussions with the MoD, and it understood this.

All departments are meant to have some arrangements for dealing with devolution: devolution teams, Ministers responsible for it, even these days one of the non-execs on the departmental boards with an overview of devolution. In my day, we required departments to have devolution plans. These are all the things that Whitehall does to try to get departments to focus on things. But as with the intergovernmental relations structures, you can put in place the requirements but the spirit has to be willing as well. That was very often the problem. Where it did not work, you would have a devolution team and it could be made up of good, engaged officials who were really helpful, but the department dumps anything devolution-related on them: “It is nothing to do with us, we will let those folk deal with it”. The department itself would not see this as important on its priority list. This has been systematic. Has it improved since my day? Possibly, but as I said earlier, it still does not permeate the culture.

You think about how important this is. I am going back a wee way now, but if you think about the referendum campaign—the Scottish referendum campaign, not the other one—that was an existential moment for the United Kingdom, so you would have thought it would have been an absolutely top priority right across Whitehall to see this thing over the line in a way that would preserve the United Kingdom. But in my experience through those years, it was quite hard work to get the minds focused. That is a wee bit of history, but it is very illustrative of the approach that Whitehall has taken over time to this.

Baroness Goldie: Thank you, that is very helpful. Convener, may I have a question to Professor Gallagher?

The Chair: Yes, carry on. I will come back, though, on the statutory footing point, so perhaps you could pick up your other point.

Q14 **Baroness Goldie:** Professor Gallagher, good morning. It is lovely to see you again. We, in the most respectable sense, go back a long way, much of it in accord.

Stepping back for a moment, I am trying to understand this from a general perspective over 25 years of devolution. It seems to me that the

devolution road for Westminster has gone up some hills, down some valleys and round some corners, but we came to an Everest when it hit Brexit. I fully understand that Brexit introduced completely new challenges and very complex difficulties. From a general perspective, do you think that is a fair analysis? Is it optimistic to hope that we might settle down again with the new structures into a slightly more navigable road?

Professor Jim Gallagher: You are certainly right, Baroness Goldie, that Brexit was an earthquake for this purpose. It would have stretched any constitutional arrangement, whatever constitutional arrangement the UK had; extracting the UK from the EU, whose tentacles reached everywhere, was always going to be problematic. Even if we had had a formal federal constitution with it all written down, the stress would have been considerable.

The fact that our territorial constitution was, at best, on a bit of a shaky peg anyway made Brexit much harder to deal with. It is analogous to the point that Philip made. Departments and Ministers do not instinctively understand that power has been distributed across the UK. They instinctively assume that it resides in the centre. That was the difficulty over Brexit. Had the assumption been that, for good or ill, because of the odd constitution we have, certain matters that are affected by Brexit are the responsibility of the devolved and we have to square them, we might have had a less painful Brexit but it would not have been painless.

It is interesting to see that even now, after Brexit—I suppose I can say that because in the technical sense we have left, although we are still coping with the consequences of it—the areas where there are problems over legislative consent are substantially those that have been caused in the backwash of the Brexit changes. In principle, I do not think that we are going to do another Brexit, so we probably will not hit the same extreme problems, but as time goes on—I make this as a forecast rather than demanding that it should happen—the UK's relationship with Europe will continue to change. It may develop and may deepen; I do not know what it will be, but it will become different, and the same issues will arise if we slide closer to Europe as arose when we broke radically with it. So I am afraid that you cannot look forward to complete peace and quiet.

Baroness Goldie: Following on from that, Professor Gallagher, I think you are saying that, outwith any structures we care to introduce and have as a fundamental mechanism to try to achieve some degree of clarity and mutual understanding, there is arguably a parliamentary culture that has to look at the broader tapestry of political life as it unfolds, regardless of who is in government and what political hue they are. We have to have a change of culture, as you say, that Westminster understands that there has been a distribution of power and, therefore, there has to be a mutual interest in sharing of information.

Professor Jim Gallagher: Certainly. I always reach for my gun like the man when somebody talks about culture—but yes, there needs to be a cultural change. In my view—this is perhaps a slightly wider question than the one we are dealing with today—the underlying problem with

much of the UK constitution is an obsession with a misunderstood conception of sovereignty. Sovereignty, the supremacy of Parliament and so on do not equate to the supremacy of government and the sovereignty of Ministers, or still less the sovereignty of a Prime Minister. Our problem is that the formal structures that put some boundaries on the exercise of that power are insufficiently well developed. That is another quite deep question that we can go into, if you like.

The Chair: We want to interrogate this issue of sovereignty and the tension between good governance and political realities so I do not want to develop it too much at this point.

Q15 **Baroness Goldie:** At the end of the day the heavy hammer is: do you have some statutory clout behind all this? I am interested in the views of you both as to whether that introduces a rigidity and consequent problems with enforcement or whether you think that is a brilliant idea.

Philip Rycroft: To pick up on the conversation you just had about the impact, of course it has real-life impacts. We saw that in the Covid time when—this is notorious now—the lack of understanding of where power rested with health issues led to huge confusion in Scotland, Wales, and, to an extent Northern Ireland as well, when the Prime Minister of the country was standing up and making an announcement that seemed to be on behalf of the whole of the UK but extended only to the boundaries of England.

This was a very clear example of this working out in real time where there was a combination of ignorance of, and ignoring, the devolution settlements. The Department of Health and Social Care had not had to think about this very much, because in a sense it is an England-only department, to a very large extent, but that combined with a wilful ignoring of the realities. There was a Prime Minister who was reluctant to accept the limitations of his own power in a moment of crisis. It is now well explored and a very good example of how this can impact on real-life decisions. How do you deal with this?

Putting something on a statutory basis can limit the possibilities for bad behaviour but it cannot compel good behaviour. If I was to be advising Ministers on putting intergovernmental relations into statute, you would look at something quite high level. You would put in statute the structure we have discussed and would probably legislate for an independent secretariat. You would probably have something within that around the funding to ensure that you could function over time. You might even say that there would be a statutory expectation that the Prime Minister and Heads of Devolved Governments Council, for example, would meet, for the sake of argument, once a year so that you put some statutory boundaries around the performance of intergovernmental relations. If you drop too deep into it, you spend a lot of time arbitrating about whether those details have been met or not.

With statute you are essentially raising the bar. You are making the price of poor behaviour higher. Whitehall is attuned to statute. That is what it

does; it lives by and breathes statute. If you make something statutory, it just encourages the whole system to go up a gear or two.

So, frankly, warm words are not enough any more. The trust is so eroded; the impact of Brexit in that regard was so important. If future Governments looking at this want to use what might be a time of relative calm on the constitutional debate, they would be well advised to look at doing something like this to rebuild that trust.

The Chair: Could we stay on this question? I will call in Baroness Andrews and Lord Falconer, and then move us on because there are some other issues we need to interrogate.

- Q16 **Baroness Andrews:** Mr Rycroft, I really enjoyed your paper and appreciated the breadth and the depth of it. I want to pick up one specific point, not related to Covid although the reference is to Covid. When Mark Drakeford was giving evidence to the Covid inquiry, he talked about being at the mercy of the ministerial whim in terms of communication, so if Whitehall Ministers wanted to get in touch they would get in touch, and so on. On the asymmetrical arrangements that we all know about, which you and Professor Gallagher have documented, is there any sense in which the inhibition that the DAs feel about getting in touch with Whitehall in the first place could be addressed?

Professor Gallagher said that relationships at official level are worse. I will come on to that in the context of common frameworks later. Do you feel that there is a lack of capacity or lack of confidence in the DAs, which if we could identify and find remedies for in some way might make it easier for them to take the initiative rather than being dependent not just on ministerial whim but on official whim in Whitehall?

Philip Rycroft: That is a very good and fair question. Not every devolved Government at every moment in time has a willingness to make intergovernmental relations in the UK work, because they do not believe in the United Kingdom. My personal experience of seeing that was when the JMC operated and you had two political parties in the room who were not committed to making those institutions function. You always have to discount the politics that are playing out from the devolved side of the argument. But as Jim said earlier, I happen to believe that the greater responsibility rests with the UK Government because they are ultimately responsible for making this function across the piece.

There is the political side of this and there is also a capacity side—these are smaller Administrations than Whitehall. But there is an asymmetry of knowledge as well. That is the most important point. If you do not know what Whitehall is thinking about, you do not know what questions to ask. You cannot go on a constant fishing expedition to say, “Are you thinking of doing some more immigration legislation?” or something else. Whitehall, as you know, can hold this stuff very tight, as I said earlier. So the burden of proof, in a way, rests more with Whitehall than with the devolved Governments.

Jim mentioned earlier—he goes back longer than I do—one of the big changes since our days as officials. Both of us grew up pre-devolution in

the Scottish Office, where Scottish legislation came through this House and the other, and that perforce meant that there were very close relationships built up because officials from the north and the south spent a lot of time together. You built that network, web of relationships and understanding. Of course, over time that has eroded; that is just a natural consequence of devolution.

The last Scottish government official who I worked very closely with retired last year, and this was one of the remaining links to the old days—it makes me feel very old. You cannot easily substitute for those links. It is another line of inquiry. Of course, Whitehall has endeavoured, with the co-operation and collaboration of the devolved Governments, to address that through 'Devolution and You', a programme that was kicked off in my day, increasing exchanges of all sorts. That is very necessary to try to improve that connectivity.

I come back to the point that there is the asymmetry of information. Westminster-Whitehall is by far the bigger nexus—by definition, because it is dealing with reserved areas as well as devolved areas and it covers a far broader reach of policy and legislation. There is more onus on it to be proactive in sharing its information.

Professor Jim Gallagher: Can I add something to that? Some of the things that Philip describes are inevitable results of the structure and the different sizes, but you can put effort into getting around the problem. Some of that falls upon the devolved. I am not sure I would be worried about their lack of confidence. They can be as confident or unconfident as they like. Remember that there are bits of Whitehall, which are often neglected in this conversation, whose job is to make that set of relationships work; I am talking about the territorial departments.

They are the humblest departments in Whitehall and are very small. They are, nevertheless, potentially much more useful than I think they have been. That is partly because Whitehall rather disregards them and gets confused about what they are: "Whose side are these people on exactly?" They are also under-resourced on any sensible measure for the task that they have to do.

It is often quite helpful to think of how the Republic of Ireland behaves in respect of the United Kingdom. It has very deep interests as a neighbour and in the context of the arrangements in Northern Ireland. It puts huge efforts into finding out what the UK Government is up to. It is called diplomacy, of course, in that context but that is what it does. It is very well represented by some extremely skilled people and has deep engagement with the Northern Ireland Office, as you would expect it to. I think it is a trick that we did not take in 1999—to define properly and resource properly the territorial departments that remained. Again, Lord Falconer will remember the first Secretary of State for Scotland, who was extremely angry because he had nothing but doormen and lawyers, he said, and he should have some more staff.

The Chair: We are coming on to the territorial departments, I do not want to go there yet but I have registered the points.

Q17 Lord Falconer of Thoroton: It is very good to see you both. Your experience and the evidence you have already given is incredibly illuminating. I am very interested in what you both said about the pandemic. Philip, you mentioned the fact that the UK Government did not seem to realise, to start with at least, that their writ did not run simply by the command of the Prime Minister. Constitutionally, the regulations they were passing were being passed under an England-only Act, therefore only extended to England.

Asking only about Scotland, could you both consider what structural changes to the devolution settlement, or to the position in relation to the pandemic, would have improved the relationships? On the one hand, you have each area having its own responsibility. You have a Government in Westminster unaware of the way to get the territorials on side and not really thinking about them, and a Scottish Government keen from time to time to demonstrate difference. What legislative structure—I have that in particularly in mind—would have made a difference to improve that?

Professor Jim Gallagher: You could imagine an extreme version of the legislative structure—rather like in the war book, which you might find if you were to dig into the cupboards; I do not know if it still exists—in which government changed radically in an emergency. That is probably going a bit too far.

We failed to do this at the beginning—I have every sympathy for the politicians involved because they were transformed from one day to the next into a completely different mode of existence for which they were not selected, trained, and so on. Nevertheless, the virus did not know whether it was devolved or not—no one had told it. We should have had a uniform, UK-wide approach, perhaps by agreement. To be blunt, the job of the Scottish Government under those circumstances is to ensure that the resources of the devolved state work together with the resources of the reserved state to deal with a problem in a common manner. That of course requires a pre-existing relationship to make that happen. I am reluctant to go down the defence of the realm route and legislate for this, but I would like to see the behaviour.

The Chair: Was not one of the issues, though, that they had to rely on public health legislation, which is devolved; that is, the legislation available to the Government at the time the pandemic broke had as much influence?

Professor Jim Gallagher: Both the legislation and the executive action were devolved. They each operated under their own legislative framework but they could do what they needed to do the same, despite the differences in legislation.

The Chair: I am just saying that it depends on what question you are answering: was the legal framework available to the UK Government at the time the pandemic broke fit for purpose and, therefore, they had to rely on pre-existing legislation, which created some tension?

Lord Falconer of Thoroton: You could have passed primary legislation in the UK Parliament saying, "All regulations concerning Covid shall be, if

the UK Government think this, nationwide". They could have done that had they wanted to but they did not.

Philip Rycroft: You could have had a legislative approach like that, but you would have still needed the collaboration and the co-operation to make it work. The Department of Health does not have any infrastructure in Scotland or Wales by definition, because it is devolved territory. It all comes back to how you approach this, whatever the structures or your legislative framework. If you go a bit deeper into the Covid time at the start, officials and ministers from the Scottish Government, the Welsh Government and the Northern Ireland Executive—I cannot remember whether they were in existence at the time—would have been invited to COBRA meetings, so there was an endeavour to fold them in.

These structures have been around for a long time. They have not been used that often, but in moments of crisis, when interests of the devolved Governments have been engaged, they are invited into these structures. There is nothing unusual about that. Later on in the Covid crisis, Michael Gove—recognition where it is due—who was responsible at that time, instituted very regular meetings with devolved Government Ministers that began to settle things down. I think that engagement was appreciated. But you had this time in the middle where it all fell to bits and where the UK Government, for reasons unknown to me, seemed to walk away from holding the devolved Governments close. Then I think also the Scottish Government in particular saw a political opportunity there, and then—all this has been played out in the Covid inquiry—the whole thing fractured in a way that then debilitated the proper delivery of cross-UK solutions for a virus that, of course, did not respect or understand the nature of borders.

The approach more broadly again comes back to a habit of mind and thinking, particularly right at the centre of Whitehall. It is not just about the devolved Governments of course; it was about local government and the metro mayors. You know the story on all this. It was about the Cabinet itself. Can you imagine how different the Covid inquiry would have sounded if the former Prime Minister had been able to say, "Do you know what? We were taking a decision. We were in a completely novel situation and we did not know what was going on, but we put the effort in to make that as a collective set of decisions. So we had deep debates in Cabinet; we used that institution for what it is meant to do. We brought in the devolved mayors and the devolved Governments, and the decisions we took were well founded. They were collective decisions." How different that would have been. Even if they were not the right decisions, you would know that that process had been gone through.

You see what happened elsewhere in the world. In Australia or Germany and so on, where they are more used to operating like that, that was the sort of approach they took. These things do not require legislation or structure that might help but they do require the willingness to collaborate.

Lord Falconer of Thoroton: Neither of you are suggesting—indeed you are specifically saying it would not have made a difference—any

legislative structural change to cover it. Except, when Jim refers to the defence of the realm, there is in fact an Act called the Defence of the Realm Act and there is a Civil Contingencies Act that you could make apply to national emergencies.

Professor Jim Gallagher: It is conceivable that you could, in a time of peace, not in a crisis, develop a crisis management set-up that had the features that Philip described. The Australian one was interesting. In dealing with an emergency you are not doing politics but operations, therefore you can put politics aside to some degree, which is what the Australians did. The Australian Cabinet sat with the members of the states or provinces—I cannot remember what they are called there—as colleagues. I can certainly remember that happening once after devolution, in 2001 or 2002. We had the fire service strike, which was a COBRA-managed operation where the devolved sat round the table and it all worked fine because people wanted to do it that way.

The Chair: We must move this on. Professor Gallagher, very briefly, Baroness Goldie feels you did not get the chance to answer her point about the pros and cons of putting intergovernmental relations on a statutory footing.

Baroness Goldie: Professor Gallagher did not get a chance.

Professor Jim Gallagher: I broadly agree with what Philip had to say. We do need to apply some tool to this problem to move it along a bit, and the legislative tool is certainly one we could apply. I think that there are three areas where it might be necessary or helpful.

The first is, as Philip mentioned, a statutory framework for the intergovernmental institutions whatever—we are calling them this week the JMCs and the ministerial councils, whatever they might be—with a minimalist requirement that they exist and that they meet and a role for a secretariat that is a bit more active than the rather passive one we have had historically.

The second might be to take a leaf from the EU's book and structure this alongside a statutory expectation of co-operation. If you remember, the EU treaties have an obligation of sincere co-operation, and we could have something like that.

The third area where I think it is possible we should do something, although the drafting is complex and difficult, and the processes are what matter, goes back to Sewel and seeking consent and the extent to which that might have a statutory basis as well. We had a go at that, if you remember, in 2016, but the Supreme Court took the guts out of that.

The Chair: Let us leave that because we are going to put the issue of statutory basis for Sewel, and we are coming back to duty of co-operation. But we have your three key areas and we can interrogate some of those in later questions.

Q18 **Lord Beith:** I have a quick factual point on what Mr Rycroft said. Was it not the case at some stages during Covid that COBRA was, in effect, a meeting involving devolved Administrations and effectively, therefore, a

multiparty COBRA?

Philip Rycroft: In the early days of the crisis, COBRA and the devolved Governments were in the room, to my understanding—I was not around at the time. This has not been unprecedented in previous crises. Jim has mentioned how, in the fire strike and through foot and mouth and other disease contexts, these structures functioned. Even in the Brexit time, which was not necessarily a terribly easy time, as we were doing the planning for, in particular, a potential no-deal Brexit, it was not a COBRA mechanism but there was a prime ministerial-chaired Cabinet committee that met weekly towards the end of 2018 into 2019. The devolved Governments were invited to attend, not every meeting but every other meeting, something like that, and ditto the official group that mirrored that.

So these things can and do happen. Of course, in that context there was absolute disagreement on the ultimate objective because we were not out of the EU at that time and, of course, the devolved Governments were very resistant to that as an outcome and the Brexit they wanted was not where the Government were heading. Nevertheless, because we needed to have that cross-government working to plan for Brexit in whatever form it might happen, they came into the room and participated, and appreciated the opportunity to do that. You could not plan for Brexit on a separate England, Scotland, Wales and Northern Ireland basis, because you had to do it on an across-the-UK basis, for the most part.

The Chair: Lord Anderson, some of the stuff you were going to touch on has been covered, but do you want to ask about the avoidance of disagreement and resolution of disputes?

Q19 **Lord Anderson of Ipswich:** Quickly on that, I suppose the worst of Covid was behind us by January 2022, when the review of intergovernmental relations recorded the commitment of the UK Government and the devolved Governments to promoting collaboration and the avoidance of disagreements. You have stressed already the importance of good will—the centrality of what Mr Rycroft called the spirit of co-operation. How would you say that commitment has worked out over the last two years?

Philip Rycroft: My understanding is that the formal dispute resolution mechanisms have only been—

Lord Anderson of Ipswich: I will come on to that.

Philip Rycroft: On the broader spirit, there are two notorious examples where it has not worked out in the Scottish context, which is the gender recognition reform Bill and the deposit return scheme. In a way you have there two very good examples of where there was clearly a cross-border impact of these pieces of legislation, a common interest in dealing with the underlying issues, whatever route you choose to take, and where, for whatever reason, those issues were taken not into a “Let us see if we can sort this out” domain but into a “Let us have a fight about it” domain. I wrote a blog about this at some point, so I put on the public record what I am saying now.

I saw in that both Governments, the Scottish Government and the UK Government, seeing political opportunity in having that argument. That, of course, would militate against putting it into a formal dispute resolution mechanism, because they wanted to have that argument in the public space and thereby lost sight of the underlying objectives of what they were trying to achieve.

That said, of course, that is not the be-all and end-all of what has happened over the last couple of years. I think that we will come on to common frameworks later, but it is worth saying that beneath the surface of a lot of these things there has to be a huge amount of daily cross-border working in order for government in all parts of the UK to function. We often lose sight of that. It is not just about distributed power these days but about shared power. Particularly post-Brexit, there were so many more domains where essentially power is shared in a way that has cross-border impacts. Following the 2016 Act, for Scotland, and for Wales the 2017 Act, you have the devolution of tax and, in Scotland's case, welfare. All that requires day-to-day working between the Governments. You can lose sight of that beneath the dogfights that are going on above us, but those were two slightly unedifying examples of how not to conduct intergovernmental relations.

Professor Jim Gallagher: Could I just add something on those two? I think that they are very educational in two ways. First, going back to the question of whether the devolved Governments are confident, I have never seen such a shambles as the GRR legislation in Edinburgh. It was extremely badly done, whatever you think about the underlying issue. There was a clear unwillingness to engage with the cross-border implications—or indeed, to engage with any other implications. It was an unusually bad piece of policy-making.

If that kind of thing happens and that behaviour is seen, intergovernmental relations will not fix it. We all rushed to the back end of the Scotland Act to find the powers that were used by the Secretary of State and thought, "Crikey, we have forgotten those were there". There is a general point here. There is quite a lot in the initial legislation that we have forgotten that could have been used to avoid some of the difficulties we have had.

These are headline examples that demonstrate that it does take two to tango in this. It is very easy for us, particularly for Philip and me, who know Whitehall and know its weaknesses, to forget that the devolved Governments have a responsibility too. In those cases, they failed to exercise it.

Lord Anderson of Ipswich: Do you draw the same distinction that I think Mr Rycroft was drawing—I do not want to put words into his mouth—between the big showcase issues where somebody is spoiling for a fight and the less high-profile issues where collaboration below the surface is working well?

Professor Jim Gallagher: There is day-to-day stuff that goes on that you never hear about and you never want to hear about, and that is fine. What is striking about the devolution that we created in 1999 was how

strong the fences were—how little overlap there was. If you look at the Scotland Act 1999, there is a section that talks about shared competence and it is almost empty. The world has changed since then in marked ways but the structures have not caught up with that. As Philip said, welfare is an interesting example, where some of the politics makes it difficult but we now have two parallel welfare systems in Scotland and they do not interact well. There is not much effort, successfully at least, going into making them work well. More is needed on that certainly.

Q20 Lord Anderson of Ipswich: The secretariat, as you alluded to, set up a dispute resolution procedure whereby an issue can be escalated, I think, to an Interministerial Standing Committee with an independent or neutral chair. There can be third-party advice and even mediation following that. Do you think that procedure has any utility—or indeed, an even prior question, has it been used, and how far has the escalation gone?

Professor Jim Gallagher: Nothing has yet been escalated all the way to the top. For all I know, there is one bubbling away now, although I do not think so. The design is not bad and, in particular, it was never going to be possible to have arbitration unless you were going to court for a legal decision, but mediation makes a lot of sense. The question is: will the people involved, including the potential mediators or independent people, be of sufficient weight to be able to bring the politicians to the table and get them to do a deal? I think experiment will determine the answer to that question.

Lord Anderson of Ipswich: Is it your view that the procedure is potentially useful but it is useful not in the big stand-off case where people are spoiling for a fight, and it is unnecessary, of course, in a case where collaboration is working well?

Professor Jim Gallagher: One can imagine a place where issues fall into the middle. The historic Welsh dispute issue was with the Treasury—it always is—over the Barnett consequential for the Olympics, I think. The dispute resolution in that case was just to keep talking. That did not produce a resolution. It is potentially the case that the procedure that is now described would have worked better for that. That is in the middle space.

The Chair: Mr Rycroft, is there anything you would like to add?

Philip Rycroft: My experience of the old dispute resolution procedure was that it was not triggered very often. The case of the Olympics consequential was one of the few examples that I encountered in my time, and that was resolved only when the Treasury decided that it was—it was not worked through as a negotiation but was more of a decision by the Treasury. The notorious one, which I alluded to earlier on, which did not become a dispute, and did not go into the mechanism because the UK Government would not recognise it as a dispute, was the £1 billion—I do not know what the correct technical terms is—bung due to the DUP in 2017 after the election. The Scottish and Welsh Governments said, "Hang on a minute. This ought to attract Barnett consequential. We would like

a share of that as well”, and the UK Government said no. I was party to that and that was that. We said no, so it never went into the system.

For dispute resolution to work, you need trust that it will work. You have a problem that is exercising two or more of the parties and taking it into this procedure will advance it. In the case, the UK Government would just sit on it or in the Olympic issue earlier, which was in the system but the UK Government effectively sat on it, why bother triggering a dispute resolution mechanism?

The structure is an advance because the UK Government are now inhibited in saying, “No, that is not a dispute”. My understanding is that if one of the other parties says it is a dispute, it has to go into the system. But why would you use it if you do not think you are going to get a useful consideration of the issue in the round? We will see. The Northern Ireland Executive triggered one but that went into abeyance with the Executive; presumably it will come out the fridge now the Executive are happily restored.

The Chair: I want to come on to frameworks. I am conscious we have some big issues to get to and we are eating up our time. I will call you in, Lord Falconer, but could you keep it brief?

Q21 **Lord Falconer of Thoroton:** I am very interested in the gender recognition issue and how it worked. Jim, you described it as a shambles. There was a legitimate legal dispute about what you do with a certificate in Scotland, which is self-identification; how does that apply in England, where they have much more stringent requirements? Why was that not a classic issue? After all, how you deal with that is a practical difficulty. Why did the IGR secretariat not certify that as a sensible dispute to have and then escalate it to the Interministerial Standing Committee, which could have debated it? I cannot see why it was not in the UK Government’s interests to air this genuine problem. There would then have been an attempt by the Interministerial Standing Committee to say, “This is what the Scots say, this is what the UK says, and we cannot agree because—” Then the legislatures, as I understand it, would have had the benefit of that report, and each legislature of Scotland and the UK would have reached a conclusion.

Professor Jim Gallagher: I do not think they even thought about using the intergovernmental processes—I am reading this from the outside—once you had a piece of the Scottish Government determined to produce this legislation and occasionally consulting the relevant Whitehall department.

Lord Falconer of Thoroton: Were either side not using that because they did not know about it or because they wanted to have the political row?

Professor Jim Gallagher: My impression—Philip may have a different view—is that the people pursuing the Scottish legislation were so wrapped up in the legislation and its issues that they did not look beyond the end of their noses.

Philip Rycroft: By the time that they realised we are running into these things it was in a sense too late because these processes, as you know, gather a momentum of their own politically. It would have become quite difficult for the Scottish Government to have said, "Hang on a minute, we've got a potential issue here. We're going to talk to those folk down the road, who we do not particularly like, to see whether we can resolve it". The politics of it, from the Scottish Government perspective, would never have seemed right, and I think there would have been much the same consideration from the UK Government perspective.

It is probably a combination of ignorance, people not knowing that that option was available. If they had thought about it, again, from the UK Government side it would have required accepting that there was an issue that needed to be resolved. As you say, going into dispute resolution requires a bit of trust on both sides and requires an acceptance that your view will be exposed to others picking it apart and maybe not agreeing entirely where you are coming from. For it to work requires, as I say, the spirit being willing, and in that case, the spirit certainly was not willing.

The Chair: It is not always conspiracy.

Q22 **Baroness Andrews:** My question is about common frameworks. The bald question is: how important do you think they are terms of an ability as the only innovative post-Brexit agency that has been designed to close some of the gaps—Mr Rycroft was involved in this—in the internal market? How important do you think they are, how effective do you think they have been, and have they added anything to the whole question of collaboration? Behind that question is a long tail, which I certainly will not go into, which we described in the now defunct Common Frameworks Committee as a failure of political leadership and an unfulfilled potential to help to make the union more resilient by enabling and managing divergence, very heavily dependent on the good work of officials throughout the UK.

That is why I picked up on the comment that Professor Gallagher made about poor relations but also with regard to having an implication for where the union sits when it comes to managing the devolution. These were new agencies that had started off in the Cabinet Office and then got hijacked into DLUHC by the Secretary of State. You raised that question in your paper on the role of the Cabinet Office in an overcentralised—you say it is the most centralised state in Europe. There is a wealth of issues there. Sorry, Chair; I have bumped my questions up somewhat.

Philip Rycroft: I think it is worth disentangling the Cabinet Office point. We will come back to that maybe when we talk about the territorial departments. There is rather a good story there on common frameworks. They came out of conflict because we had this huge issue—you will certainly remember this—around the withdrawal Bill when it was still in process to freeze the powers coming back from Brussels that were within devolved competence and being arrogated to the UK Government.

To get an LCM from the Welsh Government, we needed to make changes in all that. Out of that came a less draconian arrangement but still the ultimate power rests with the UK Government. The common frameworks emerged from that context. We had something like—I cannot remember the precise number—over 200 issues when you looked at the range of powers coming back from Brussels that might have triggered cross-border consequences. We winnowed that down, in collaboration with the devolved Government, to effectively now 32 common frameworks, I think it is.

This is a good example of what I was talking about earlier of day-to-day collaboration to make government function. Whatever our constitutional future might be, other than the imposition of a totally unitary state from Westminster, in any other constitutional dispensation from devolution—as we have it now through any other option, including independence of any variety—these collaborations will be required. If you are managing animal health, plant health or rivers, or whatever it is, you have cross-border impacts.

It is completely logical that these powers were held in Brussels because what does Brussels do? It manages cross-border impacts and common policies. These things are important. As far as I can see, they are working, out of sight of the political stramash. This is dull stuff in many ways, but it does function. A lot of them will be related to Defra, and Defra has a long tradition of understanding and dealing with devolved issues.

I think they are a very important part of the mix now, and very necessary to handle the post-Brexit dispensation. Indeed, I would go so far as to say that I think they make the UK Internal Market Act, broadly speaking, unnecessary from the dimension of the UK internal market. I was asked my advice at the time, when people were saying, “Should we do a UK internal market Act?” I said, “No, you do not need an internal market Act. The model of the common frameworks is that we have a problem and a set of issues; this is how you deal with them.”

Professor Jim Gallagher: To add to that, I agree with all of what Philip says, and he knows much more about the common frameworks than I do. They were an appropriate response to what was, in a sense, quite a theoretical question: maybe things will go wrong because the devolved will do something wicked in the UK and the internal market will vanish. This was never a real issue; it was a non-question. For this non-question we have now two answers but even one answer to a non-question is enough. If we are to have only one of them, it should be the common frameworks. As a result, going back to Baroness Goldie’s question at the beginning, the eruption of Brexit produced a whole series of disputes, many of which were wholly unnecessary, notably the ones around the internal market Act. Some of the Sewel disputes that I have seen, certainly in 2022, were unnecessary as well. People were legislating because they felt they had to in case a bad thing happens, rather than working from the bottom up and dealing with the issue if it arises.

Baroness Andrews: Thank you very much. I have one follow-up question, which in fact has two parts. On the internal market Act, yes, absolutely—I could not agree with you more, not least because of the political furore provoked, which was completely unnecessary. A synthetic problem was created and, as you say, basically it could have been handled by the common frameworks. In fact, the common frameworks became a victim of the internal market Act and had to be rescued in this House.

What it exemplifies in a way is the problem that we identified in the common frameworks, which was that originally the real value would have lain in their ability to bring together policymakers and Ministers to make common policy, not common processes. Do you think that still holds as a potential and that it is a question of just maturity and growing trust between officials, or do you think it will take a step change in political leadership to achieve that?

Philip Rycroft: The potential is absolutely there and there is nothing to inhibit that sort of outcome, other than political will, essentially. Almost ineluctably, over time, we will get there, because the cost of constant niggle and constant dispute is very high, and people get weary of it. For the good governance of the country and in the interests of people either side of all the borders, you need these things to function and to work. Again, I reinforce the point that below the surface, a lot of work goes on that can resolve and settle issues where they arise.

For the most part, there is not a great divergence in the outcomes people are seeking. It is just about how you make sure that you have consistency to allow those outcomes to be achieved. As Baroness Goldie said earlier, you hope that some of the heat comes out of Brexit. Within a year there will be an election and an incoming Government will have the opportunity—whatever the nature of that Government—to push the reset button. You would hope that if they take a dispassionate view, they will say, “These things work well; let’s build on them and see how far we can take that”.

Professor Jim Gallagher: Just to build on common frameworks should not be an objective, but with the behaviours that underlie the common frameworks approach, in any individual policy area, start with the problems that are in front of you rather than the ones that you imagine might come.

The Chair: Thank you. Baroness Goldie, a very quick one.

Q23 **Baroness Goldie:** It has just about been answered, with that fascinating discussion. Going back, Professor Gallagher, to your description of the GRR legislation reform, which you said was extremely badly handled, I think we all see that as a manifestation of a relationship rupture, and statutory provisions were invoked to clarify the issue.

You said very near the beginning of this discussion this morning that one of the benefits flowing from the improved intergovernmental relationships is that officials start talking to each other, not by way of exception but as a matter of course. Is it your view that if that happens more regularly

and on a more engaged basis, you might head off at the pass a future detonation point like that Bill?

Professor Jim Gallagher: It is possible, although you can never be sure. One of the striking things about a comparison between a devolved Government and a Whitehall department is that a devolved Government is inevitably a series of cottage industries—as someone once said—with lots and lots of bits doing different things. Not all of those will have detailed engagement with Whitehall. So there is a bit of the devolved Government that does a lot of the engagement—the Whitehall relations department, let us call it. My impression on the GRR Bill was that the politicians and officials who were driving that particular piece of policy were so tied up in it that they did not really see the outside world as anything but maybe a potential opportunity for their Ministers. It is possible that we could deepen relations, but that risk will always be there in relatively narrow policy areas. Not everyone is going to go to the JMC.

The Chair: We now have the restoration of the Northern Ireland Executive. Baroness Finn, you had a question on that.

Q24 **Baroness Finn:** Thank you for that and thank you for coming. My question concerns the implications of the restoration of the Northern Ireland Executive. I am interested in whether you think this will be important in re-establishing stability, intergovernmental relations, or whether, as has been suggested, there will be very little impact as the Assembly and institutions have been so regularly suspended that everyone is therefore used to operating without them.

Professor Jim Gallagher: That is a good question. First, in principle it is a good thing that the institutions have been restored. Secondly, they should participate as fully as possible in the intergovernmental process because they need to, just as the other devolved Administrations need to, and they have particular interests to pursue.

There is a possibility that having three rather than two devolved participants widens the scope of IGR more than you think it would. It turns into more of a territorial constitutional body for the whole United Kingdom. I hope that it will make it fuller. In my view, it would make it even fuller if they also included the mayors of English northern cities, for example—city regions—on the same basis.

Certainly, there is always a danger that people think about devolution in Northern Ireland, “Well, it gets turned on and off and it could be turned off again tomorrow. There is nothing we can do about that except to try to make it work for now”. To make it simple, I think it has potential.

Philip Rycroft: To briefly add to that, as you will recall, we set up JMC European negotiations in late 2016 to handle—as it says on the tin—the European negotiations of the Brexit process. The Northern Ireland Executive Ministers were part of that in the very early days but then the Executive collapsed in early 2017 and they were absent from the room, basically, throughout the rest of the process. I think that had a debilitating impact on the engagement of Northern Ireland in our work on Brexit. The officials were in the room and that was enormously helpful, of

course, but you had no political voice. Subsequently, with the DUP doing a deal with the Government to sustain them in power, essentially the voice of one community became very dominant in the consideration of Brexit. That certainly exacerbated the issues that have become so problematic with the Northern Ireland protocol.

To some extent, it made our lives easier because you had fewer political voices around the table—do not forget that Northern Ireland comes in double because you have the First Minister and Deputy First Minister and their representatives in the room—but it was absolutely damaging ultimately to the interests of the people of Northern Ireland. The restoration of the Northern Ireland Executive, their re-engagement politically with these processes and with the other aspects of the Belfast agreement framework, the British-Irish Council, and so on, is enormously important. Let us hope that it does work and that it helps to settle some of the issues that Northern Ireland has faced.

Professor Jim Gallagher: It might also encourage the United Kingdom Government to remember that the devolved Administrations have their own legitimacy and status. The Northern Ireland process has different underlying legitimisation mechanisms and has the interests of the Irish state as well.

Q25 **Lord Beith:** Professor Gallagher, you argued earlier that the territorial departments were not big enough for the job that they had to do. I wondered whether you thought that job needed to be enlarged or whether, to the contrary, the territorial departments have a role that is about facilitating, flagging up problems when they are going to arise, understanding process and educating the other departments on the process. In reality, practical co-operation is between departments that deal with the substance of policy and operations, not with the process of devolution. To enlarge the territorial departments and to increase their role is to neglect the fact that, if you are an official in charge of agriculture in the Scottish Government or the United Kingdom Government, you want to talk to the person who also understands payment schemes or fisheries protection, rather than everything you try to achieve being mediated through another department with generalist officials who do not know what you are talking about.

Professor Jim Gallagher: I agree that there are a lot of generalist officials in Whitehall who do not know what they are talking about. There is of course truth in both the propositions you have put. If you are the agriculture department in Edinburgh or in Cardiff, yes of course you want to talk to Defra and build relations with them. However, to take an example from the earlier discussion, if you are the official dealing with gender equality issues in either north or south, you do not necessarily have that relationship. One of the points of the territorial departments is to facilitate its creation, to spot the absence and spot where the problems are.

To go back to a point we were discussing earlier, we now have a much wider range of shared responsibilities between the devolved Administrations and the UK Government in respect of Scotland and

Wales. To take the Scottish example, welfare is now huge and it is not clear to me—despite their efforts, to be fair—that the integration of welfare policy between the Scottish Government’s agency that they have created for this purpose and the DWP is all it should be.

Perhaps even more significant, the longest standing shared policy space between the two Governments has always been the economy and economic development. One of the interesting things that has happened since I left government has been the UK Government taking a more direct interest in economic development north of the border, some of it well focused and some of it very badly focused. A job for the Scotland Office, and indeed similarly for the Wales Office, is to help focus the UK Government’s “interventions in Scotland”, the programmes that they are running, in such a way that they work better and work well with the devolved Administrations.

To go back to a point I made very early on in this, when we started off in 1999, the first Secretary of State for Scotland felt he was bereft and, actually in retrospect, he was bereft. We thought he was just being grumpy, but he was not. He was right. He had no policy capability whatsoever but, nevertheless, he was expected somehow to represent and bring it together in the UK Government in their role as Government of Scotland, as well as the Scottish Government’s role as Government of Scotland, and the role of the territorial departments is certainly to do that. It is also to go around Whitehall and bang people on the head to make sure they do what they should, but it is also to be present in Scotland, very definitely.

Lord Beith: I will ask Mr Rycroft for his view. That fits with what I might call the Boris Johnson view of how the relationship should work, in which you look to see what powers you have so that you can produce a rival Government in Scotland, a rival—

Professor Jim Gallagher: No, it is absolutely not the Boris Johnson view. The Boris Johnson view is to be, as you say, a rival Government, a competing Government, “You will get a better roundabout from my Government in your area”. That is completely inappropriate. What the population expect—including people all across the constitutional debate in Scotland—is that the two Governments should work in a co-operative manner. The job of the Secretary of State includes making sure that the two Governments work in a co-operative manner.

Lord Beith: Turning to Mr Rycroft, let us get back to the basic issue, though. Is there really a role for the territorial departments, which is not basically a process facilitating, encouraging, banging heads together role? Do they really need to or should they get involved in the substance of policy?

Philip Rycroft: In my view, it is not an either/or. They should be doing both. They do not need to be in the room the whole time, but they do need to know what is going on. These folk hold the expertise on the devolution settlements within Whitehall. They also understand, or they ought to understand, what is going on politically in Scotland and Wales, and do not forget Northern Ireland as well. That advice, that

understanding is absolutely critical to guiding Whitehall departments in their policy responses.

If you get into the detailed substance of an agricultural policy issue, of course the experts have to engage but you should have sufficient resources within the territorial departments to be able to keep an eye—to understand those sufficiently—to see where the political issues or the bear traps might be.

I line managed the Scotland Office, the Wales Office and the Office of the Advocate General for Scotland essentially for seven years, so I worked very closely with them over time and with successive Secretaries of State. The system was very reliant on them, and rightly. There were some big constitutional moments when we were doing the Scotland Act and the Wales Act. They were absolutely central to that. Through Brexit, their understanding, their engagement, the fact they have folk on the ground in Scotland, Wales and Northern Ireland was absolutely critical.

I will say one thing that I think is really quite important in all of this. One of our learnings coming out of the Scottish independence referendum campaign was just how weak Whitehall was in understanding devolution itself and deeper constitutional issues as well. They were never prioritised in Whitehall and were dealt with in an almost ad hoc way when there was something to be done. For a commitment to a piece of legislation, teams would come together but then effectively disperse.

One of the things that we did with Prime Minister Cameron and Jeremy Heywood, the Cabinet Secretary, was to set up something called the UK Governance Group in the Cabinet Office, which I ran for the remainder of my time in Whitehall. That brigaded the Constitution Group and the Cabinet Office, with the Scotland Office, the Wales Office and the Office of the Advocate General for Scotland. Our very deliberate intention there was to give the territorial departments the heft of the centre, to give them the authority of the Cabinet Office in their dealings with Whitehall, and that worked quite well.

The other deeper thing was to build up the capability and understanding in Whitehall of the expertise in devolution and constitution issues. You had a cadre of folk at the centre who were steeped in this stuff. You would have more continuity than you normally get in Whitehall - you know the sort of merry-go-round of officials and you keep folk in place. These people would then go off into the departments and maybe come back again to do another stint.

You might say that this is a sort of a lament of someone who is not in the system any more, but one of the great shames of what has happened since I left—nothing to do with my departure, I think—was the way that that arrangement essentially withered. Some of the Constitution Group stuff now sits in DLUHC and some of the responsibilities are still in the Cabinet Office, but that sense of a unity of purpose, the centrality of constitutional issues to the governance of the United Kingdom, has dissipated, which is very symptomatic of the short-term nature of Whitehall consideration of some of the important issues that the country faces. It flickers over these things and then it moves on to other stuff.

Again, for an incoming Government after an election, I for one—and, hopefully, this committee as well—am looking very carefully to see what arrangements are put in place at the centre of government to ensure that constitutional issues get due attention, with the right expertise behind them, at the heart of government. That has, frankly, been lacking for far too long and I think risks short-term, inchoate answers to constitutional problems. We have seen too much of that over the last 25 years.

Professor Jim Gallagher: I very much agree with what Philip has just said. The extraordinary thing about the centralised nature of Whitehall is that it can only look at one thing at a time, and that is what it does. It moves off questions very quickly and then there is atrophy and neglect. You need to set up structures that ensure that there is proper senior political and official attention to these major issues so that they do not just pop up out of the blue, as in some ways the Scottish independence referendum did. Get the structures right: The territorial departments are part of it, but the the central capability in the Cabinet Office to bring these issues together, is absolutely essential.

Lord Beith: Thank you very much for those really quite important answers.

Q26 **Baroness Goldie:** I think that has been a fascinating enunciation of how you see the roles of the territorial offices functioning. Speaking as someone who has known devolution for 17 years and as someone who was a Westminster Minister for over four years, I have to say that I still find the role of the territorial offices opaque. Do you agree with that, roughly?

Philip Rycroft: Yes. I am sorry I did not fix it when I had a chance. I think there is a degree of opacity and inevitably there is a degree of ambiguity because, depending on the issue and what they are facing, they are pointing in different directions. As I have said already, one job is to be the representative of the UK Government in Edinburgh, Cardiff and Belfast, and the other big part of the job is to be looking after Scottish, Welsh and Northern Ireland interests in the debates in Whitehall. Inevitably, people will see them coming from slightly different angles.

They have operated a little bit too below the radar screen than I would have liked, and I think that is a consequence of the relative resource. Talking of the Wales Office, in my day there were maybe 50 to 60 folk. That is everybody. Support for Ministers, admin staff, comms staff and the policy people. The Scotland Office is slightly bigger, but there are only 60 to 70 people. The Northern Ireland Office has a slightly different role but, likewise, it is not that big. In those circumstances, it is difficult to make your presence felt in a way that gives confidence that people understand what your job is, but I think that taking them out of the mix would be very damaging.

Professor Jim Gallagher: I agree, particularly with the last point that Philip made. I think the challenge for the territorial offices, of course, is that it varies from Government to Government, depending on the representation, the internal politics, the personalities and so on, so one

cannot be prescriptive or say that they are going to be like this always. There may have been some particular things in recent years.

That said, they are an important part of the institutional architecture. People in Whitehall, understandably, who have really busy jobs, Ministers and officials, find that somewhere at the end of the process someone says, "What about the Scots and the Welsh?" and they get a bit taken aback because they had not thought about that. They get a bit confused about, "Are you talking about the people inside the Government, people outside the Government? Are you talking about a different Government? Are you talking about my Government?" I am not surprised at that and it is the job of the centre—and both Philip and I have tried this as officials and the opacity that you still see represents both of our failures to indoctrinate Whitehall into understanding what the institutions are and what they can do for you—to say "I'm from the Scotland Office, and I'm here to help you."

Baroness Goldie: I think that is really helpful. It might surprise you, Professor Gallagher, to hear this, but my experience in Scotland from the start of devolution was that the role of the Secretary of State was largely invisible and very often there was job sharing. I believe in two cases they were carrying hefty Whitehall departments as well as their responsibilities for the territorial office. The one person I remember—and I saw this as a seismic change—was Jim Murphy, who suddenly burst on to the horizon in Scotland as the Westminster Government's man in and for Scotland. It was different and it was refreshing.

Professor Jim Gallagher: Yes. The extraordinary thing is that Mr Murphy managed that with exactly the same resources as everybody else has had. He was very skilled politically.

Baroness Goldie: Yes, the reason I posed that example is that I certainly start from the premise that we need the territorial offices. When I suggested that the roles were slightly opaque—and that is something with which this committee might well be able to assist—I think we need them at the heart of government and Whitehall and in the Cabinet. Where I am less clear is how we dovetail their responsibilities with other Whitehall departments.

I engaged directly as a Defence Minister with the Scottish Government. We had a big tranche of people moving up to Moray for Lossiemouth and the Scottish Government said very reasonably, "Can you help us by telling us what kind of skills these people and their spouses and partners are bringing?", which was a perfectly reasonable question. They then said, "We can go into the local geography and see how we begin to absorb these skills". That was done directly by the MoD, which had the information and the Scottish Government that needed the information. I suppose, as a matter of courtesy, we would inform the territorial office. I think that we have to be clearer about this potential dichotomy and be cleverer about how we engage at the Whitehall end, but, equally, I think the territorial offices can really make their mark physically and literally in their territories.

Philip Rycroft: I agree with that and, again, it is a great example of good cross-government working. In that sort of case, I would have expected the MoD officials to touch base with the Scotland Office. The Scotland Office obviously will have seen these things happen before, because there is always basing decisions and they are often quite controversial. There are problems with hackles on caps, and all the rest of it. The decisions made by the MoD have an impact in Scotland. In a way, the Scotland Office should hold that collective memory so that when the MoD says, "We are thinking of making a change for good" or if it is reducing the presence or whatever, it can remember what happened last time: "This is what worked; this is what did not work; watch for this; watch for that", but then, "Fine, you have that advice; now get on with it. You do not need us in the room to do that detailed discussion about how you manage that transfer of personnel."

In an ideal world that is how it works. By the same token, in the Scottish context, people in Scotland know that you come to a budget, for example, individuals, business interests and others know that they can talk to the Scotland Office and they will see the representation of their interests through the Secretary of State in the input into the Chancellor in that budget process. We did that all the time. Obviously, that never goes into the public domain.

Then there are some of the very big visible issues and big investments—for example, in Wales the Swansea tidal lagoon barrage. We also spent a lot of time talking about the Wylfa nuclear power station. For one of those big investment decisions, the territorial departments come into their own again to argue the case for those—in both of those cases, ultimately, unsuccessfully—through the nexus of Whitehall, often engaging with the Treasury and then No. 10.

As I say, I worked for a lot of Secretaries of State for Wales and Scotland. I am not going to name names, but where they were skilful they could insert into the process something that ultimately popped up as a benefit for Scotland or Wales. In my case, I did not look after Northern Ireland, but seeing it working for the others from behind the arras, as it were, it could be very effective indeed.

Baroness Goldie: To summarise, what you are saying is that, if we look at the furniture in Whitehall, it is a bit clunky and a bit clumsy and a bit diffuse. We really need to get back to a central territorial office access point where the Secretaries of State can clock in and engage and discuss. Then the other departments actually have somewhere to feed the stuff into as a receptor.

Philip Rycroft: We need clarity for everybody on where the authority rests on the constitution and devolution issues. I personally would have a First Secretary of State. I think it is so important. This again is a neglect generally of the importance of constitutional issues. With the First Secretary of State and the territorial Secretaries of State, you then have a powerhouse of political authority within the system to think about and to manage both constitutional and devolution issues. In a way, nothing is

more important, at the end of the day, in thinking about running the country.

One of the things I did manage to do in my day was to make the first objective of the Cabinet Office as sustaining the territorial integrity of the United Kingdom. If you think about that, it ought to be pretty much top of the list for every Prime Minister.

Professor Jim Gallagher: Could I add something to this? We have been focusing, rightly, on the mechanics of government and on the tasks of government. The territorial offices do have a task, as Philip has described. The other thing we need to think about here is the symbolic nature of the organisation of government. One of the things that we have done in the UK over the last 25 years is create devolution, which has been a response to national identity and a desire for autonomy and so on. We have created a very untidy symmetrical quasi-federal state. However, as well as decentralisation of power, you have to say to the small nations that they have a voice at the centre as well; otherwise they feel oppressed.

That means giving them rather more power and authority than the numbers would suggest, but all federal countries do that. The small places get overrepresented in all sorts of crazy ways in different places. In the US there is the same number of senators for California as Rhode Island. However, the territorial offices and having a Secretary of State for Scotland, for Wales and for Northern Ireland is a way of saying to the people that it is not merely that we have devolved all the business to them and forgotten them; they have been remembered at the centre as well and they have a voice there too. It is not merely a mechanical question but a symbolic one.

Baroness Goldie: I am glad you mentioned that. Playing devil's advocate to Mr Rycroft, on the First Secretary concept and subsidiary territorial offices, I can see people in the devolved territories saying that they are being told by someone in England what to do. They forget the other presences of the territorial offices.

Professor Jim Gallagher: I used to favour the idea of a single Secretary of State for the union or devolution. I have gone off it now, for the reasons that I have just given.

Q27 **Lord Beith:** What experience have you had, and how should we deal with the situation, where a Minister is at the same time representing the United Kingdom and representing England? There could be a situation in which it is in the United Kingdom's interest that a compromise is reached and a deal is agreed to and it is not in England's interests, not in English farmers' interests or any other group of people in England. How do you handle that in this system?

Professor Jim Gallagher: It is a very difficult question and it is one that Philip should answer. You are right, of course, that a problem with our asymmetric constitution is that the Government are both the Government of England and Government of the United Kingdom. We talked earlier about the departments that have done well. MoD got good marks from

Philip, but it is a wholly UK department. It does not have an England-only function of any sort. Over time, Defra has learnt these lessons. Going back a while—Philip is more up to date than I am—I remember that working with Defra you would often find that the Defra Secretary of State wore the UK hat and his Minister of State wore the England hat in discussions with the devolved Administrations.

One needs to be absolutely clear what the UK interest is. Is it what the best outcome is on the policy question for the whole country and what is an agreed outcome in the interests of the country. Does a Defra get more leverage than the devolved, or perhaps are there some international issues where the UK might have to play a trump card? That goes back to a point that I raised earlier. There are surprisingly large numbers of reserve powers lurking in the back of the devolution legislation, which were thrown in quite late in its preparation. They have now been used once. In particular, there is one in respect of international relations, which could almost certainly have avoided a lot of nonsense. Reliant on that, they would have avoided all that nonsense about the single market Act, which was completely unnecessary.

The other thing that you might choose to do, and it has been suggested, is to be a bit more careful about your departmental construction and be clearer about getting England-only departments into existence, or England and Wales departments, depending on the mixture. An obvious example is Lord Falconer's old ground of justice. It is not at all clear that the Ministry of Justice should be a UK and not an England and Wales department.

Lord Beith: Most of these departments have some UK responsibilities, even the Ministry of Justice, because tribunals exist in both countries under the same jurisdiction. However, let us get back to the original substance.

Philip Rycroft: There is no doubt that there is an England-shaped hole at the heart of all of this. If you think about the normal function of intergovernmental relations, your federal entity in other dispensations can act as an honest broker if there are issues arising within the territory or can respond to if there is a united concern from the subnational Governments themselves. It is very difficult in the UK context because you are never quite sure whether the Secretary of State or the Prime Minister are talking for the UK or for England. That introduces a dissonance for the devolved Governments, but it is also a problem from the English perspective because if the UK government does make a concession to the devolved Governments, the suspicion in some quarters in England is that that is them doing England down. England has interests in all of this and those interests are more visible politically perhaps than they once were.

Dealing with this because of the asymmetry is far from simple—I agree with Jim. Part of the answer is to be a lot clearer about where Whitehall is functioning for England, whether it is health, education, justice, bits of DCMS and so on, and quite a lot of Defra. You could make that way more manifest in the way that Whitehall goes about its business.

It would also clarify the point of what is devolved and what is not devolved. It would help Whitehall understand the limits of its competence. Through that, you could construct an England Cabinet committee; you could have a Minister for England. You could then inject that into the intergovernmental framework in a way that gives England its due place. It will always be a bit artificial because you cannot abstract England from the responsibilities of the United Kingdom Government, but at least it would make it cleaner when Ministers were speaking on behalf of England.

You could go further, as Jim has suggested, in some policy areas, if there is a significant movement, for example, to comprehensively devolve something like skills to combined authorities or their equivalents across England. When you are talking about skills policy, it might be sensible to have the mayors in the room as well as the devolved Governments. The devolved Governments will be very jealous on this point, of course, because they will not want to be seen to be demoted to the level of a combined authority. However, with good will, the right mix and a bit of flexibility about the structures that you use for that, you could improve this. That ultimately benefits the United Kingdom Government because they can then be seen more evidently to be thinking about the interests of the United Kingdom as a whole. At the moment, that is often obscured by the fact that they are talking inevitably for England as well.

Q28 Lord Falconer of Thoroton: The big debates between the devolved Governments and central government, apart from specific issues like gender or the pandemic, are on the economy and welfare. How do the relations between the Treasury on the one hand and the devolved Ministers on the other operate for macroeconomic policy, where the focus may well be on England for political reasons and it may have bad consequences for Scotland? That is one area—the other is the overall figures for public expenditure—which will not involve detailed discussions between the Treasury and Scotland but the envelope is very important to Scotland.

Philip Rycroft: Clearly, there is an extensive debate about the settlements for the different parts of the UK. You know from the structures of intergovernmental relations that the finance variant of the interministerial committee has to meet quite regularly. The Treasury, it will come as no surprise to you, guards its brief on economic and the overall fiscal position quite closely. We have a Budget today and in contrast to a previous era everybody seems to know what is in the Budget before it is announced. However, generally speaking, the Treasury holds its position on the high level on macroeconomic fiscal policy pretty close. I do not recall any deeply meaningful conversations on macroeconomic or macro-fiscal policy where there was a substantive discussion that might have changed the direction of travel for the Treasury. That was not in the ether.

Lord Falconer of Thoroton: This may be an unfair question. As far as the territorials are concerned, Scotland, Wales and Northern Ireland, to what extent do they have a voice in determining macroeconomic policy

for the UK? Can you identify—you have already answered this question—any occasion where their voice in debates between the devolved authorities and the UK Treasury has had any impact on UK macroeconomic policy?

Philip Rycroft: Define what you mean by macro. There is a lot of input on detailed policy. There is some very useful collaboration, if you look at the city deals, for example, in the delivery of economic development. I sense that you are answering your own question by asking it, because if we did know of those occasions, they would have been bruited abroad. The influence at that high level is very limited.

To broaden that out, we may see respect for intergovernmental relations more extensively on the day on which a UK Government Minister stands up publicly and says, “I have just been sat in a room with the Heads of Government of Scotland, Wales and Northern Ireland”—and perhaps with metro mayors in the room as well—“and, as a result of those discussions, we have decided to change UK Government policy”.

Lord Falconer of Thoroton: I have in mind £1 billion for a Northern Ireland post-2017 election, which is an element of macroeconomic policy. I do not know if you recall—and I am not making a comment on this—that we were in a period of austerity and this was contrary to the policy of austerity. That was, on one view, a triumph—not, I suspect, of the skilfully prepared devolved government arrangements but because of politics.

Philip Rycroft: There was no Executive.

Lord Falconer of Thoroton: There was no Executive, but there were a number of DUP Members of Parliament.

Philip Rycroft: That deal was essentially a bilateral political deal.

Lord Falconer of Thoroton: Can you think of any other example?

Professor Jim Gallagher: There is an annual conversation about the duty on whisky. If that is macro, it is one example. Think about the conversations, which are variable in quality and nature, on the future of the North Sea, on the North Sea tax regime, on the licensing regime. There is a lot on energy policy, for example on where you build your interconnectors, if that is macro. There is certainly big stuff that can be on the table.

Lord Falconer of Thoroton: Who is more important in those discussions? Is it the devolved Administrations, or is it the Secretary of State? Who is more likely—this may depend upon who is the Administration—to be able to persuade central government: the Secretary of State for Scotland or the devolved Administrations?

Philip Rycroft: It depends. The most important person in the room for all of these debates is the Chancellor of the Exchequer. Therefore, the internal mechanism may be decisive at points, saying, “Because of the political interests in Scotland, Wales and Northern Ireland, if you do this, that will help enormously”. That may coincide with where the devolved Governments are coming from as well. However, because of the

centrality of where the decisions are taken, which is within the inner recesses of Whitehall, those who have some access to that will be more influential.

Lord Falconer of Thoroton: Presumably, if you had a seriously powerful First Secretary of State who was responsible for looking after the territorials—we have had First Secretaries of State in the past. Take two of them: David Lidington on the one hand and Peter Mandelson on the other. I suspect that Peter Mandelson was a more powerful political figure than David Lidington in political terms. If the First Secretary of State was saying that he or she was concerned to protect the territorials and that they are not going to do this because that degree of austerity will have social, economic and political impacts on Scotland or Wales, that might have more of an impact than what the DAs said.

Professor Jim Gallagher: Of course it would, yes.

Lord Falconer of Thoroton: The question is: would you ever have a situation where a powerful First Secretary of State had time or bandwidth politically to spend time on Scotland, Wales and Northern Ireland?

Philip Rycroft: I worked with David Lidington—

Lord Falconer of Thoroton: He is an absolutely admirable person.

Philip Rycroft: With a different hat on, I worked with Lord Mandelson as well when he was in the business department. Seeing the way that that operates, there were many occasions where someone like David, working with the Secretaries of State for Scotland, Wales and Northern Ireland, would be putting a pitch to a combination of Treasury and No. 10 and that would deliver an outcome, not at the macro level, depending on your definition, but it might have been on some of the instances that Jim cited—whisky duties or the tax regime on oil and gas.

That was part of the job. We deployed that influence as best we could. The Treasury, depending on the circumstances—and who was the incumbent at the time—understood that, in any big fiscal event, they had to lean a little bit into what was going on in the devolved parts of the UK because they liked to present a Budget that was seen to be inclusive. In the Osborne budgets, for example, you would always find that there was a nugget of some description so that he could say, “I have done this for Scotland, I have done this for Wales, I have done this for Northern Ireland”.

Professor Jim Gallagher: If you go back to the pre-devolution world, which some of us can remember, the great challenge for the Secretary of State then was the false question: are you the Cabinet’s man in Scotland, or are you Scotland’s man in the Cabinet? Of course, the Secretary of State was both. What is interesting in the context that we are now in is that, from the point of view of the small country, Scotland or Wales, the Secretary of State is, potentially at least, a voice at the centre that they do not have otherwise. That is why I think that we should keep the office. Secondly, it is potentially—depending on the politics, obviously—an ally for the devolved Administration. If we had not spent the last 15 years arguing about independence, it is conceivable that the devolved

Administration and the Secretary of State could have been close chums in pushing domestic interests.

Q29 Lord Falconer of Thoroton: Suppose that there is an election in the next year. Whether it be a Conservative or a Labour Government that win, treat them as having the slate wiped clean by the election. What advice would you give to that new Administration as to how to construct a political Cabinet that gave the loudest voice to the territories?

Professor Jim Gallagher: Philip may have a different view, but there has to be an individual in the Cabinet at Cabinet member level, a Secretary of State, who has the individual territorial badge on his or her forehead. There has to be a Secretary of State for Wales and a Secretary of State for Scotland. We have tried making it a part-time job along with transport or defence. It was not a great success; it did not work. It was worse than not having it, in presentational terms, because it said that this does not matter.

There should also be, as Philip has rightly said, a powerful central constitutional Minister who would do devolution and other constitutional things. I would certainly advise an incoming Administration to go back to the future and have a functioning Cabinet committee dealing with these issues, chaired by that central Minister, most likely, with the territorial Ministers and with relevant departments on it, to steer the Government's constitutional policy. I would certainly advise that in both the Scottish and Welsh cases; the Irish case is a bit different.

A thing that has happened since Brexit is that the UK is institutionally filling the space that the EU filled in respect of regional policy. That regional policy function, for Scotland and Wales at least, is one that must be led by the territorial Secretary of State. The work that that individual does is about bringing those bits of UK funding and UK intellectual resources—what the Treasury can bring, what the business department can bring, what other Whitehall departments can bring—to the argument of what do you do with the economy of Wales, what are the strengths on which we wish to build in Wales and how can we work not in competition but in collaboration with the devolved Administration. It is easier in Wales, depending on the politics, to drive the development of the Welsh economy—or the Scottish economy.

I would certainly advise the incoming Secretary of State in both places to be noticed and be present in Scottish or Welsh political life, to be seen about the place, not to be down here all the time, and to construct the department accordingly, which probably means one or two junior Ministers, one focusing here and one focusing there. There would also be lots of political advice that I would give them, but that is maybe not for here.

The Chair: Can I pause there? We have two big issues that we have not got to yet and we will run out of time. One is legislative consent and the other is sovereignty. Could people put the questions sharply and could you make the answers more concise rather than expand with examples?

Otherwise, we will not capture your view on the big issues. Lord Falconer, can you start on legislative consent?

Q30 Lord Falconer of Thoroton: To what extent are the devolved Administrations consulted prior to legislation being introduced in the UK Parliament where legislation introduced alters the executive competences of the devolved Ministers? What impact has this had on the executive competences of the devolved Ministers?

Philip Rycroft: To give you a very brief answer, it depends. There is no consistency. In my experience, there are some very good examples of very close collaboration. I have already referenced the Scotland Act and Wales Act and there is the withdrawal agreement Bill in Brexit time, where even Mike Russell gave us credit for the extent to which we had shared clauses and so on. Then you see something like the internal market Act, where there was not a lot of collaboration. It comes back to the debate that we have had already about individual ministerial preference, political preference and so on. The key point is that it is not consistent and it ought to be consistent.

Lord Falconer of Thoroton: Do you think that respect for the Sewel convention eroded over time?

Philip Rycroft: I think that you probably know the answer to that one.

Lord Falconer of Thoroton: I am not giving evidence here; you are. Answer the question.

Philip Rycroft: Yes, of course it has. This was one of the big and, in my view, malign impacts of Brexit. It destroyed that ambiguity about the devolution settlements on where—that dreaded word—“sovereignty” lay. Scotland and Northern Ireland voted to stay in the EU; it did not matter. This was going to be asserted because the England and Wales majority, through the Westminster Parliament, was going to assert this outcome. That is what happened and it is completely unsurprising in that context, that the Sewel convention broke down comprehensively.

In a way, there was salt in the wound—as Jim referred to earlier. We put the Sewel reference in the Scotland Act 2016 with a “not normally” clause. This was ambiguous in a way. It was deliberate; we knew what we were doing. We were not creating something that we thought would be justiciable. We were creating something that we thought would reinforce good ministerial behaviour. The Supreme Court said that it was not justiciable and the whole thing crumbled.

Lord Falconer of Thoroton: Jim, could you answer the question as well and also address the question of whether it was only Brexit?

Professor Jim Gallagher: There is a hysteresis effect here. Once you have done it once, you can do it again. Brexit was the first breach. You could argue that Brexit was not normal and that Brexit was an extraordinary event, but nevertheless it has opened the door to being able to do it anyway, which is deeply unhealthy. Something should be done.

As Philip said, the whole idea of having Sewel as a convention was to enable it to be reasonably flexible and cope with circumstances as they arose. As you know, constitutional conventions are potentially immensely powerful but also a bit vague. That was potentially helpful for us, but we will now have to crystallise it in some way. We can discuss what that might be, but we have to recognise two things. First, it is conceivable that there are exceptional circumstances in which the legislation would go through without consent because, in the end, the UK has to be able to change its constitution. You cannot have a complete bar on constitutional change. However, it should be jolly difficult and be a matter of special solemnity rather than the urge that a Minister has one afternoon to get his Bill through, which is rather what we have seen. When I look at most of the post-Brexit breaches of Sewel, I regard most of them, in practical terms, as meaningless and unnecessary.

Lord Falconer of Thoroton: You have given an answer, and I am interested in Philip's view. Jim is saying that, subsequent to the Brexit crisis, and we have seen it on this committee, there has been a series of Bills that are not directly or do not appear to be directly Brexit, where there has not been, as far as we can see, proper consultation or compliance. We have recently had the Economic Activity of Public Bodies (Overseas Matters) Bill—you will probably know it well—that prevents local authorities and others banning goods from particular countries whose politics they do not like, saying that that cannot be done. That has an effect on the executive competence within the devolved Administrations.

Philip Rycroft: It is not inevitable that things do not work well. There is an energy Act now where Edinburgh gave a legislative consent Motion but Cardiff declined. Having talked to some folk about this, there you see quite good discussions with the Scottish Government about a big, important issue.

On trade, clearly there have been difficulties. It is a post-Brexit thing coming through as to how the UK runs its affairs. Whitehall has to learn how you integrate the devolved interests in negotiations on trade so that you are not giving them a *fait accompli* with a piece of legislation attached, particularly in the case, for example, of New Zealand and Australia, which will have a big impact on agricultural issues in Scotland, Wales and Northern Ireland. Whitehall is capable of doing it, but I come back to the point that it is not doing it consistently and thoroughly enough.

Lord Falconer of Thoroton: We have reached this point; things may change, depending on the politics of what the landscape looks like after a general election and then after the next DA elections. However, what about a statutory duty to co-operate, which you have mentioned earlier in your evidence, similar to the one in the EU? If it is not going to work by all these people becoming genuine co-operators, make them co-operate.

Professor Jim Gallagher: "Make them" is a strong term in that what is co-operation—

Lord Falconer of Thoroton: Consultation as a minimum.

Professor Jim Gallagher: Yes. I am in favour of a statutory duty but, as Philip says, it is a conditioning thing rather than, "You have been rude to me, so I am taking you to court". I am absolutely in favour of it and it reflects what the population would expect. It is not unknown in other constitutions, notably the EU. On its own, it is part of the solution, but it is not the entire solution.

Q31 **Lord Anderson of Ipswich:** I have two specific questions. First, is there a case for updating the devolution guidance notes and, if so, how?

Professor Jim Gallagher: Almost certainly. This takes us into DGN 10, which is about Sewel. We should probably have a good look at this issue in a slightly wider context. In recent years, we have seen Sewel being breached, as we have just described. We have also seen Scottish legislation trespassing into the reserved space and the use of the powers in the Scotland Act. We now see, particularly as the responsibilities overlap a bit more, that we have a fuzzy boundary where the legislation in one Parliament or promoted by one Government can affect the responsibilities of another in either direction.

It is about time that we looked at this more symmetrically. Good practice would be for the UK Government to share in confidence their legislative intentions at the centre with the Scottish Government. We used to do this and it has fallen into disuse now. We never asked for the opposite. We never asked the Scottish Government to share their legislative intentions with the UK Government, but that should happen too. We need to look at it in the round and decide how to put a bit more beef on the Sewel convention. That probably requires legislation, but precisely what the legislation is we could talk about. It is not just, "You must not do this"; that is too simplistic.

Philip Rycroft: I had seven years, and it was always on the to-do list and we never did it. It is out of date now. I would look at it in combination with the Cabinet Manual as well, because in a way the Cabinet Manual is more important in the way in which Ministers are holding this—it is the point of reference at a higher level. However, absolutely we need to refresh the expression of the way that these things are done. You would not do the Cabinet Manual in consultation with the devolved Governments—or it is unlikely—but, certainly, the devolution guidance notes have to be a collaborative exercise, so in its own right it would be a good thing to do as an example of collaboration on thinking about how the settlements work.

Q32 **Lord Anderson of Ipswich:** My other question relates to something that you have already touched on, which is the duty of sincere co-operation, as it is referred to in EU law, now finding form in Article 4 of the Treaty on European Union. I want to probe more on what you had in mind. You will know that that duty begins with a rather anodyne admonition to the Union and the member states to assist each other in full mutual respect. However, it then goes on in provisions that have been extremely heavily litigated—I should declare an interest as having litigated a few of these

issues myself on behalf of the United Kingdom Government—to require member states to “facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives”. How much of that model, if any, should we be following?

Professor Jim Gallagher: When this was proposed, and I have been suggesting it, I did not think that we should go for the preamble. The Union is a different institution. It is a union of states that have their sovereignty—I will come back to that one in a minute—only partially pooled. The UK is different. Talking about the UK's objectives is not appropriate in that context.

What is appropriate is a very general statement that says that the law and the constitution expect the Governments to co-operate and that they will be held to account in some very broad way. As Lord Falconer says, you at least have to talk to each other. You give it substance through, in particular, the obligations to have the Joint Ministerial Committees or the Joint Ministerial Councils or whatever you choose to call them. I do not expect it to be litigated to say, “You did not agree with me, and that is not co-operating.” But “You did not have a meeting of the JMC” - that is potentially justiciable.

Philip Rycroft: You have a variety of choices. You can have the IGR on a statutory footing and you can do something with Sewel or have a duty of co-operation. All of this, as we have said, is about raising the bar on the expectations of all Governments; it is not just for the UK Government. The UK Government have the greater responsibility to make this work. The question for an incoming Government, if they are interested in this space, is whether sonorous declarations of intent are good enough now, given the destruction of trust over the last little while. My view is that they need to signal the seriousness of that intent through some legislative route.

Incidentally, the Welsh independent commission on the constitution, of which I was a member, has recommended similarly in this space. We had seen it from the Welsh perspective and I agreed with that. I am very much in favour of an incoming Government doing something substantive on that set of issues.

Lord Anderson of Ipswich: Would that be a justiciable duty?

Philip Rycroft: In some respects, but in limited respects. Your aim would be not to have to use it in anger because your aim would be for it to be something that enforced a level of behaviour that then people would accept. However, at the margins, if the devolved Administrations or the UK Government felt that the other was crossing a line that did breach statute, the Supreme Court ultimately should have a say.

Q33 **Baroness Goldie:** Professor Gallagher, when you gave evidence to the House of Commons committee back in November, you said graphically, “There is far too much muscle ... There is muscular nationalism as well as muscular Unionism.” You went on, helpfully, to introduce the subject that you have just been talking about, which is to “move back to a world in

which, in private and in confidence, Governments share their proposed legislative programmes with one another". At what level did that sharing take place? Was it a territorial Secretary of State to a First Minister, or was it some other arrangement?

Professor Jim Gallagher: Going back to when I first dealt with these matters, it was a sharing between the Cabinet Office legislation secretariat and the equivalent in Scotland—in those days, to start with, it was only the Scottish Government, because at the very openings of devolution the legislative competence of the Welsh Senedd was much more limited. It was official to official and facilitated by the fact that they all knew each other anyway as former colleagues inside the same Government. It shared some quite sensitive information. The Queen's Speech had not been delivered and, therefore, the contents of the Queen's Speech were secret. They still may be nowadays, just like Budgets are still secret somehow.

The intention was to identify, if they have not already been identified, potential areas of difficulty. It never happened in the other direction, and it certainly should. That work should be in the context of an understanding of how we are going to manage the fact that we will occasionally put our feet on the other person's lawn, the other Parliament's lawn, and how we will deal with that.

Baroness Goldie: You say that that confidence was always respected.

Professor Jim Gallagher: Yes, it was, in my experience. Philip may know better than I. I do not know when that process atrophied. I am going back 20 years.

Philip Rycroft: Before my time. The problem comes back—similarly with individual pieces of legislation and the content thereof—to the issue that, when the King's Speech, as was my experience with the Queen's Speeches, is being put together, the arguments would carry on until the very last minute. That was some days before the actual Speech, because you had to write the thing on parchment and the ink took a while to dry. That was the deadline. UK Governments are not in the habit of having a very visible manifest programme of government, unlike the devolved ones that are more into that space. It would make life a lot simpler if an incoming Government did have a very visible programme that was set out with associated legislation in advance so that there was an artefact around which you can have those debates and discussions. The fact that it is so proximate and so contingent makes it very difficult to have those more strategic discussions about the direction of travel of legislation, the macro economy or anything else. There is something here about the dysfunction at the centre of UK government that is very telling. That is another subject, of course.

Q34 **The Chair:** We have talked about the problems, but is there any scope to strengthen the Sewel convention and, if so, how? That is the overarching question that I put.

However, in putting it, can I also put the supplementary that was expressed so clearly by Lord Keen in a question that he put to our

witness last week? I put it this way, borrowing his words, which is to explore a more fundamental proposition that the best thing to do with the Sewel convention would be to abolish it, remove it altogether and replace it with an express statutory provision that Westminster will not legislate in devolved areas. What lies behind that is: is there a need for Westminster to wake up to the idea that devolution exists and should be acknowledged properly rather than to proceed on the basis of the Sewel convention, which implies a lack of trust in the competence of the devolved Administrations? There is the overarching question and the specific subset.

Professor Jim Gallagher: One can imagine a world in which there is a very hard line—what I will call the Keen world—in which Westminster, by some means or other, simply does not legislate to affect devolved matters. It is an unrealistic world for two reasons. The first is that the statute book is still quite interconnected and it often makes practical sense, on odds and ends, to have a bit of devolved and bit of reserved in the same legislation and you are just giving people extra work if you do not do that.

Secondly, to be blunt, such a ban would be unenforceable because the legislation that wished to trespass upon devolved matters would merely say, “Notwithstanding the provisions of the Scottish devolved independence Act of 2025, we propose to legislate for the following devolved matters”. Given the doctrine of parliamentary sovereignty or supremacy, that legislation would override the previous legislation. Therefore, it is a pipedream and not a particularly comfortable pipedream.

There is, however, a need to give the Sewel convention more teeth so that it cannot be overridden randomly or at the whim of whatever Minister happens to be running whatever Bill it is and considers it to be the most important Bill ever passed by Parliament and, suddenly, the Sewel convention and the constitutional constraints are mere pettifogging nonsense that, because we are a sovereign Parliament, we can override.

This is not easy, because you cannot describe in detail in advance all the circumstances that might arise. My view is therefore that you need a process answer rather than a drafting answer. The process is one that you must follow rather than there be a procedure that must be followed to consider whether there might be some scope not to follow the Sewel convention. The position that I favour is one that is part of a wider constitutional reform, which is to use the second Chamber of Parliament as a constitutional safeguarding Chamber so that a piece of legislation that broke the Sewel convention could not be passed simply on the whim of a Minister or on the whim of a Commons majority but would require the consent of the upper Chamber of Parliament. Using upper Chambers as a constitutional safeguarding mechanism like this is a relatively common thing worldwide. That is my favoured way of dealing with the Sewel convention.

Then we would develop a set of habits and case law, but the proposition would be that the constitutional split was one that was given and would

only be changed by a process that was akin to a constitutional reform—that is, a special role for the second Chamber of Parliament. That is a very short summary of a quite complicated proposal, which includes other things that you might or might not like.

Philip Rycroft: I follow that. The necessity of doing something to raise the bar has already partly answered this question. We need to do something on the Sewel question. Can you do something on Sewel absent that wider change in the way that we deal with constitutional statute? I think that you can. It would be good to have those further checks and safeguards, but in the first instance, as Jim has described, ensuring that UK Government Ministers have to run through a process to deliver on Sewel so that if you are into exceptional space—you may seek to define that in legislation, which would not be easy—then you are very clear that you are going into that exceptional space for exceptional reasons. In other words, you are trying to turn back the clock on the habit of Sewel.

Pre Brexit, there were relatively few instances—there were more in Wales. The agricultural wages dispute was a particular one that led into some of the changes in the Wales Act. For Scotland, there was only one substantive dispute over however many years. That was the norm. What we are trying to do is go back to that being the norm. That means putting a process, backed by legislation, in place that UK Ministers are expected to follow. If they breach that process, the political bar on that is quite a high one.

Lord Falconer of Thoroton: There already is a process called the Sewel convention, which has been broken a lot. Therefore, you need something different. A legal process, for the reasons that Jim says, can easily be overridden by a statute that says, “Notwithstanding the legal process and notwithstanding the content of a previous Act of Parliament, none of it will apply to this particular Act”. You have difficulties unless you entrench statutes in some way. On what Jim is suggesting, even now the Lords could do this. We would regard ourselves as the protector of the constitution to some extent, recognising that the Parliament Acts can be used to override our refusal to pass legislation. Are you saying that we need a wholesale reform of the second Chamber before this happens, or could we perform that function now?

Professor Jim Gallagher: One could do it step by step. For example, you were asking earlier what advice I would give an incoming Secretary of State for Scotland, and I would give this advice to the incoming Secretary of State for the union, if there were such a person. In advance of, not even necessarily in expectation of, a fuller reform of the second Chamber, a Government could undertake to obtemper the view of the second Chamber on any breach of the Sewel convention. In other words, hand this responsibility to the second Chamber and agree that it would be the referee in a dispute between the Scottish Parliament and the House of Commons over some piece of legislation.

You would then design an internal process here in the Lords, which might, surprisingly enough, involve the Constitution Committee. You would then invite the Constitution Committee to report on a particular

piece of legislation and debate it on the Floor of the Lords as part of the legislative process. Then the Lords would say, "Yes, this is an unusual and exceptional circumstances, and we therefore conclude that it is right to breach the Sewel convention here, and here is why", or the Lords would say, "No, this is yet another piece of power grabbing, and we should not be doing that at all". In extremis, of course, the Lords could invoke its delay power—perhaps a more sensible use of the delay power than fox-hunting ever was. However, one would expect and hope that an incoming Government would realise that something has to be done about this and would exercise a self-denying ordinance and agree to follow the judgment of the Lords in this case.

Philip Rycroft: If you look at this in the sweep of history of the territorial arrangements in this country, there always has been that sense of a self-denying ordinance on the part of the UK Government, and indeed to some extent on behalf of England, that they do not exercise their clear predominance in the union in population and economic terms to the detriment of the interests of the rest of the UK. The nature of sovereignty, as you know far better than I do, in terms of how it essentially becomes recursive, is that Governments with a majority—the Fixed-term Parliaments Act, a piece of statute that embedded a requirement for a two-thirds majority, was a classic example—can get rid of the underlying statute and off they go.

The important point in this is that, whatever process, legislation, statute you put in place, the Governments undertake to respect the spirit of that. There is a degree of a self-denying ordinance in there for the UK Government or whoever commands a majority in the Commons. Having put in the Scotland and Wales Acts, obviously, we could not now get rid of the devolution settlements without the consent of the people of Scotland or Wales, but that could be overturned overnight—but no sensible Government would go near that. That is essentially a good example of that self-denying ordinance being part of the furniture. It is how to constantly remind Ministers that that is their duty as part of their responsibility to the constitution. The reinforcement of Sewel, whichever way you go about it, would be important.

Q35 **The Chair:** To take the full parameter of the issue that we are grappling with, the Sewel convention does not apply to delegated legislation. The Lords generally has a concern at the Government's use of delegated legislation to cover policy. You have probably read the *Democracy Denied?* report. However, it has a particular impact on the devolved Administrations because of the increasing evidence of delegated legislation allowing Governments to stray into areas of devolved competence without consent or consultation. In looking at ways that we could strengthen Sewel, we also have to bring things back into Sewel. I pause in case Baroness Andrews or Lord Anderson wants to add any comments before I finally invite you to answer on that.

Baroness Andrews: That is an important loophole. If you have been involved in the Welsh commission, Mr Rycroft, you will know how powerfully the Welsh responded to the chaos that was created over the

European retained law Bill. It was egregious. There is one additional question about the Henry VIII powers; otherwise, we have covered the issues.

Lord Anderson of Ipswich: Are Henry VIII powers ever acceptable to alter an Act of a devolved legislature?

Philip Rycroft: This nests within the wider framework. There may be times when there is agreement to use delegated powers to change things, but it ought to be done properly with the agreement of the devolved Governments. It nests within that wider context of the state of legislation and the nature of legislation that is coming before Parliament. This House has had its problems with the Henry VIII powers and the way in which post-Brexit legislation has been presented. A well-ordered legislative programme would be producing legislation that is fit for purpose when it is introduced, whatever means you use to achieve that. Part of that is ensuring that you have addressed the devolved issues adequately and, ideally, you know that you will get that consent because you have covered those issues off, other than in very, very exceptional circumstances.

Everything that we have said about primary legislation applies to delegated legislation and to the Henry VIII powers. The big question that we are facing now is what do you do to enforce that good behaviour. That should be a big issue for an incoming Government.

Lord Anderson of Ipswich: However Sewel may be reformulated, it should extend in future to delegated legislation?

Professor Jim Gallagher: Of course. It is outrageous to think that something that Parliament should not do a Minister can nevertheless do. That is completely unacceptable. It links to the question of sovereignty that we have touched on several times and the underlying root of much of the issue here. The slope goes from the assertion of parliamentary supremacy to the assertion of parliamentary sovereignty, to the assertion of the sovereignty of the House of Commons—because the Lords is relatively weak—to, therefore, the assertion of the sovereignty of a majority of the House of Commons, to the assertion of the person who controls that majority, which is the Prime Minister. We have seen that we have had at least one Prime Minister who considered himself to be so sovereign that the Supreme Court had to tell him that Parliament was in charge and not him. This use of delegated powers to legislate in matters that Parliament itself should not be legislating in is a very good example of the poisonous notion that the person who is sovereign is the Minister. The Minister is not sovereign.

Baroness Andrews: Mr Rycroft, you used the term “enforce”. How do you enforce good behaviour or incentivise good behaviour? Other than trusting in the belief that Ministers believe in a robust, resilient, human, fair, equitable, symmetrical union, what can we do to incentivise it?

Philip Rycroft: That is a very deep question, and I suspect I have about 30 seconds to answer it. Obviously, the political process and political parties have a big part in all of this, who come in to form a Government.

The fact that we have seen that erode over recent years is, I believe, a consequence of the depth of bitterness of the debate over Brexit. It is a bit of a bellwether for the health of our wider constitutional infrastructure and our constitutional system. You have seen all the data about trust in democracy and about the inequalities across the UK, both personal and interregional. You know the shambles—or, to be slightly more charitable, the unfinished nature—of devolution within England.

My view is that it behoves responsible politicians of all parties to pitch to the country in a forthcoming election what their commitments are to restore a sense of faith in our democratic system. That includes, self-evidently, the people of the devolved parts of the UK and what confidence they can have that an incoming Government will respect their interests. It goes very, very deep into the state of our political dispensation. Ultimately, it is politicians who have to take the lead in walking us out of the mire that we have got ourselves stuck in.

Professor Jim Gallagher: There are two aspects to this. I absolutely agree with Philip in that, if there were to be a change of Administration within the next 12 months, they have to start with a clean behavioural sheet and say that they are not going to do these things. However, the lesson of the last decade or so is on what Peter Hennessy called the “good chap” theory of government. Unfortunately, that does not work when the chaps are not good. That means that we have to write down more of this, make more of it black-letter law, whether that is for personal behaviour or corruption but also for the following of constitutional norms, which we thought that we could do by convention because good chaps followed conventions. We have to beef them up considerably and write down more of them.

Q36 **The Chair:** I am sorry I pushed you at the end, but we do have a time constraint and people have other duties that they have to go on to. Your replies were very rich and reflect the experience that you have both had and we have benefited from that. We will read at leisure the detail of some of your comments.

I have two requests. The first is to Professor Gallagher. We would benefit if you could give us a written note, if that is not an imposition, on the Australian model for crisis management.

Professor Jim Gallagher: I am sure I could find someone who could give you one.

The Chair: If you know a man or a woman who could, that will do.

The other one I would like to leave with you, if you would like to drop us a note, is that public sentiment impacts on the health and stability of the union. We talk very much about the parties who are elected or appointed to engage in intergovernmental relations, but little is said about public sentiment. What key actions could we take collectively—those of us who care about the health of the union—to get ordinary people to understand their constitutional settlement and the importance that devolution has? For most English people, the moment that they discovered that they could not drive into Wales was the first time during Covid when they

understood what the implications of the devolved settlement was. That is a big area for me that I think is neglected: the engagement with the public on the devolved settlement—first, what it is and, secondly, why it is an important part of our constitutional settlement.

Philip Rycroft: As a quick response to that, we said a lot about that in the Welsh commission report. It was our finding absolutely that people felt disenfranchised and did not understand the devolution settlement. You cannot address the disenfranchisement point unless people understand their relationship to where power lies and how they can influence power. I commend that report to you.

Professor Jim Gallagher: I am more sceptical about civic education. People expect the governmental processes and the plumbing that lies behind them, which is the constitution, to work for them. It is only when they stop working that they find out what is wrong with the plumbing. They should be allowed to expect that our constitutional arrangements work without the necessity for them to study them in great detail.

The Chair: They may not need to understand them in greater detail, but they may need to understand the principles of their constitution. Let us leave it there. We are grateful for your contribution. It was very rich in content and we will certainly study it. Thank you very much for coming.