



Constitution Committee

Corrected oral evidence: Future governance of the UK

Thursday 28 October 2021

2.35 pm

Watch the meeting

Members present: Baroness Taylor of Bolton (The Chair); Baroness Doocey; Baroness Drake; Lord Dunlop; Lord Hope of Craighead; Lord Howell of Guildford.

Evidence Session No. 15

Heard in Public

Questions 207 - 225

Witnesses

I: Professor James Mitchell, Professor of Public Policy, University of Edinburgh; Professor Jim Gallagher, Visiting Professor, University of Glasgow.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Professor James Mitchell and Professor Jim Gallagher.

Q207 **The Chair:** Good afternoon and welcome to Professor James Mitchell and Professor Jim Gallagher, who I think are well known to more than one person in this room. This is a very interesting meeting. It is a very good time to have this meeting, because, as you know, we are the Constitution Committee and we have an inquiry into the future governance of the UK. We have been taking written evidence from some time now and we have had various academics, politicians and others come and give evidence. We were in Wales last week and we have been in Edinburgh all day today talking to other people, and we have learned a great deal of what people think, but we would be interested in your general perspective of the state of the union at the moment. We have heard, and we believe, there are quite considerable strains at the moment. I will start by giving you the opportunity to say in general terms what you think the current situation is.

Professor James Mitchell: I think there are strains. When polls suggest that around 50% of people of Scotland want independence in a binary choice—"in a binary choice" is important here, because I do not think that would be the case if there was more choice—that would suggest there is an issue or a problem that needs to be addressed.

Putting that into historical context, you have to recognise that there have always been tensions. That is the nature of the state and that is not necessarily a bad thing. It would be a bit worrying if there were not tensions, to be honest. One of the issues is that since around 2011-12 the debate has become highly polarised and has come to dominate Scottish politics. I will focus mainly on Scotland, because I think the threat to the union is here, and that is my area anyway. I do think that there are issues.

One of the questions that was put to us is whether we thought that independence is inevitable. My answer to that is no. "Inevitable" is far too big a word for a social scientist like me to be comfortable with. I do not think you can say that much in politics is inevitable. Much will depend on a number of things. One is the context of the politics, the expectations and how we move forward. I do think that there is enough evidence to suggest that there is a problem, and we need to address that.

My final point at this stage is to say that we need to be clear as to the nature of that problem before we start providing solutions. I think we sometimes make assumptions about the nature of problem and we might exaggerate certain things. I stress that there have always been tensions. In preparing for this, I looked through some of the things I have written over years. I looked at the Royal Commission on Scottish Affairs in 1954, which referred to the tensions. The tendency of the Scots to be terribly sensitive and the English to be a wee bit insensitive is in part, I think, one of the problems.

As I say, we should not overstate it, and by constantly talking about it maybe we do that. Maybe we should not have turned up today, because we are contributing to this and focusing so exclusively on this issue, that it may be part of the problem. There are certainly many issues that I feel very strongly about and which I feel we should be addressing that are being, if not ignored, then certainly neglected and that worries me a lot.

The Chair: You said several things that we might want to pick up on later about the nature of the problem and what has been ignored. Professor Gallagher, you have the chance to put your view.

Professor Jim Gallagher: I will pick up from where Professor Mitchell finished and say that the issue is to answer the right question. The question is not what about the future of the union. The question is the title of your inquiry: what is the right governance of the United Kingdom? That is the key issue in distinguishing between those two things. It will enable us to arrive not just at an answer to the question, but almost certainly at the answer that will be consistent for a stabilised union.

I think James is right to say that if we construe this and talk about this only as a question of Scottish independence or not, about national sentiment or not, we miss the real point and we exacerbate the divisions that could lead—I think this is entirely possible—to a referendum in which the binary choice led to a majority for separation. Let me be absolutely clear about this: that would be a very bad thing for both halves of whatever division there was.

The question should be answered with an understanding of the governance of the whole UK. In particular, it should be answered with an understanding of the governance of England, to borrow Fortescue's term. That is not merely the English question of how we deal with the fact that English has over the last 20 years in some ways become a political identity, which it was not before devolution.

What you might call the internal governance of England—that is to say, how power is distributed territorially across the territory of England—is one of the very striking things about the UK. Although the UK has devolution to Wales, Scotland and Northern Ireland, it has virtually no devolution inside England. As a result, England is the most centralised state in Europe, and it is also the most geographically economically unequal state in Europe nowadays. That is not a coincidence. Those two things are related to one another. Changes in the governance in England will lead to changes in the governance of the whole UK, which will matter for Scotland and Wales, and slightly differently for Northern Ireland.

Q208 **The Chair:** We have touched on all those aspects, including the inequalities and distribution of wealth and so on, in some of our evidence sessions. It has been very interesting to see that.

Before we come on to some of the details about where we are today, if we rolled the clock back just a little—five, six, seven years—what was working well, because it seems that things have deteriorated, perhaps

with Covid but certainly post Brexit? Were things more stable? I know there was a run-up to the Scottish referendum and all the rest of it, but were there some aspects of the devolution settlement that were working well pre Brexit that we might learn from?

Following on from that, to what extent are the problems political and to what extent are they structural?

Professor Jim Gallagher: Let me offer you my answer to that. Rather than saying that things were very good, because they were not very good, things have become markedly worse in the way in which the present United Kingdom Government, and to some degree their immediate predecessor, have, to put it quite simply, overridden the Sewel convention, which was an important part of the devolution architecture. That in its turn, as I said in my written evidence to the committee, was from a mistaken understanding on the part of Ministers of the importance and nature of parliamentary sovereignty and an unwillingness by them to realise that power is distributed geographically to other institutions inside the UK or indeed at the centre.

As we have seen, the present Administration took the view that they were so sovereign themselves that they could even decide not to have Parliament bothering them. That is something the Supreme Court took rather unkindly to—slightly to my surprise, I must admit, although I am sure that it was right to do so. The root cause of this is a misunderstanding of the concept of sovereignty—a concept that, like the American scholar Don Herzog, I think should be consigned to the wastepaper basket.

The Chair: Interesting.

Professor James Mitchell: I very much agree with Jim on that. I remember writing an article in 1990, I think it was, in which I argued exactly that with respect to sovereignty. I fully accept that for lawyers it may be an important concept, but from a policy point of view, which is where I am coming from, sovereignty is not very helpful. In fact, it stands in the way of understanding these things.

I mentioned at the outset there are issues that concern me that are not being given attention. I think of some of the truly 'wicked problems' that we face. At the moment I am writing and researching on drug deaths in Scotland, and the fact of the matter is that this debate on drug deaths requires engagement and intervention from all—from local authorities, members of the community planning partnerships, the UK and Scottish Governments. What depresses me is how often it gets caught up in this binary adversarial battle, this theatrical battle.

As Jim said in his opening statement, it appears that you have to ask the right question. It is about how we go about getting a system of governance that starts to truly address all the problems, but particularly those wicked problems, as we call them, that cannot be addressed by one level.

The other aspect of this, what really worries me, is that so much of this becomes a battleground—theatrical maybe—between the UK and Scottish Government, and it neglects what I regard as a very important dimension, which is the local dimension in Scotland.

I do find it depressing. The notion, the understandings, of sovereignty that we hear—this kind of unlimited, indivisible, permanence notion—is deeply unhealthy. It may speak to some, but from a public policy point of view it strikes me as not just unhelpful but silly.

Q209 The Chair: We have a situation where people have characterised the attitude of the Whitehall Government as muscular, which has been criticised from time to time. We also have the Scottish situation, where you have a Scottish Government who do not want the arrangements to work. Any comments on that and how we might make some progress, or any recommendations?

Professor James Mitchell: No matter the institutions, if one or two disagree and do not want it to work, you have a major problem. That is what we currently have. In part it is theatre, but with effect. It has real effect because it pushes other things out, and that is what worries me.

One of the things we need to start looking at is the constitution as a whole. We need to look at the implication of change in one place or in other aspects of the constitution. My argument has long been that we have looked at the constitution in constitutional silos. We have looked at devolution without looking at other impacts that it would have on the governance of England. We looked at House of Lords reform without making the obvious link, in my mind, to devolved government.

I do think that one thing we should be looking at is the nature of government in Scotland and the UK. I look at the representation of Scotland and see that the SNP can win 50% of the vote in 2015 and thereby 95% of Scottish seats. The 2019 election again was grossly disproportionate, and Parliamentary representation is not a true representation of Scotland.

Equally, although not quite so bad, in the House of Commons we get this exaggeration. In the past, I was openminded and sceptical about electoral reform. I now think that may be one way forward to ensure that we get proper representation. That representation is not just a part of the political dimension that everybody focuses on; it is the geographical representation that currently exaggerates or understates representation of certain parts of the UK.

What was interesting about 2019 were, of course, the red wall seats. That has created a challenge to the UK Government in having to balance the interests of the different parts of the UK, which they should always have been doing, in my view. That has brought that to light in a way it would not have been in the past, because fundamentally there is that winner takes all theme in so much of our constitutional politics that I find disheartening, to put it mildly. It is evident across the piece. I would like

to see fair representation, and we could do with recognising that neither the UK Government nor the Scottish Government are true representatives of the politics that they purportedly represent.

The Chair: Tempting though it is to discuss electoral reform, I will go back to Professor Gallagher for his comments.

Professor Jim Gallagher: To come back to your question about the two sides that do not want to make it work, the underlying diagnosis of that problem is that at the moment both sides are nationalists. Manifestly, the occupants of the building that we can see from the window here openly acknowledge themselves to be nationalist. They are a nationalist Government; that is their aim. The present UK Government are also a nationalist Government, but their other is not England but Europe. Coming back to what I said earlier, nationalism focuses on the question of sovereignty. If you have two sides who are obsessed with the concept of sovereignty, sharing power is not something they are particularly keen on.

Some of this is ephemeral and depends on personalities. Some of it is, I am afraid, structural. The way out of it, in my view, is to look again at the centre of the UK and consider the extent to which it is designed to acknowledge the distribution of power across the policy and across the geography. If that changes, the habits of the UK Government will change.

As you will know, I spent many years happily working in Whitehall, seeking to persuade Whitehall colleagues that devolution mattered. It was not wickedness that prevented them and made them forget it. It was the fact that it related to only 15% of the UK, which was often out of mind. That is why the asymmetry of the UK in its decentralisation makes good relations between the different levels of a multilevel government quite difficult structurally, as well as the politics that I mentioned a moment or two ago.

Q210 **The Chair:** Centralisation in London is a fact, and we are one of the most centralised countries in Europe. But there is an issue that is not really for us to solve, which is the centralisation in Scotland, where Edinburgh is where it all happens.

Professor Jim Gallagher: That is absolutely correct. If I may just illustrate by anecdote, back in the early 1990s—to get my years right—and for much of the 1980s, I was involved from the then Scottish Office in relationships with local government in Scotland. These were highly fraught because of the politics at the time, but, when I look back, the degree of respect, autonomy and power that local government had is unrecognisable compared to what it has become in the last 10 years of devolution.

Those who were concerned about this issue may have looked at the McIntosh committee report of 1999—I think it started before devolution and finished very soon afterwards—which was concerned with the concept of parity of esteem between central and local government. There

is now no parity of esteem whatsoever between central and local government in Scotland. It is disgraceful.

Professor James Mitchell: I feel obliged to comment here, because it is one of my passions. Jim is absolutely right with regard to the McIntosh report. It is interesting that when McIntosh reported, the feeling then was that local government had been ignored, but it is nothing as compared to today. The comparative esteem and mutual respect were the two key principles with 32 recommendations, some of which were implemented. There is no doubt that many were not, but most importantly those were principles, as Jim has outlined. There has been a phenomenal increase in centralisation, which is having an adverse impact on good policy-making.

The Chair: The word "respect" has come up time and time again, not surprisingly.

Q211 **Lord Dunlop:** To pick on this theme of how the UK works together and the whole issue of intergovernmental co-operation, if you look at the polls in Scotland, whatever people's views of the constitutional question, overwhelmingly people want to see the UK Government and the devolved Government working together. Over the course of this inquiry it has been very much common ground that the existing IGR structures are, to put it mildly, less than satisfactory. The Government published proposals in March, and I think that the emerging mood music is that the Governments are quite close to reaching agreement on a package of reforms.

What do you think of the emerging package of reform, and what contribution those reforms might make to change the atmosphere around intergovernmental relations? Is there anything you would add into the mix?

Professor Jim Gallagher: I think the reforms, which I know you are personally associated with, are a step in the right direction. Having myself been involved in IGR in the early 1990s and in the 2007-11 period quite extensively, I think there are three underlying problems. The first is the asymmetry that I referred to, which makes it easy for the UK Government to forget about the devolved, not through wickedness but merely through the many other pressures that are on officials and Ministers.

The second is the issue referred to earlier: that you have some folk who do not want to make it work. There are obvious political advantages for a nationalist Administration to say that it is not working even if it is, although it has to be said that it was not great before a nationalist Administration either, so that is not the only issue.

I wonder, however, if the third issue might turn out to be more important in the long run. That is, as you rightly say, Lord Dunlop, that the public expect there to be co-operation between Governments. For example, the opinion polling done by Our Scottish Future, which is a little think tank that I am associated with, demonstrated that the overwhelming majority

of the Scottish population want the Governments to work together. Whether they themselves are nationalists or unionists, they expect that.

What is quite striking when we look at this through a constitutional lens is that there is no constitutional acknowledgement whatsoever of that duty. You look at the United Kingdom constitution, and scratch your head and say, "Where does it say that levels of government ought to work together?" It does not anywhere. It does not say so in the devolution legislation, it does not say it in the obligations that fall upon the United Kingdom Government, and it is not expressed in any of the constitutional statutes that we have.

One possibility that I think is worth consideration in that context, therefore, is to borrow a bit from the EU. Perhaps it would be tactically and presentationally unwise, but those of you who are students of what we will call the EU constitution will remember that in coming together in an union there is in fact a duty of sincere co-operation between the member states. It is an interesting question whether that some constitutional provision obliging a duty of sincere co-operation, which could in principle be subject to judicial review and therefore enforcement, might be a way of getting some of the teeth which intergovernmental structures that we have struggled to make operate since 1999 so obviously lack.

Professor James Mitchell: I do not disagree with any of that. I am a wee bit more pessimistic in that I do not think that institutions on their own are enough, and no matter what institutions we devise, if there is not the mutual respect and the good will, there will continue to be problems. That is one of the reasons—I am not going to come back to PR or anything like that—why I think we need to ensure that Governments truly reflect what the public want. You are right to point out that the public want that good will. They want people to work together, because what they care most about, if they are given a chance, are schools, hospitals and such like.

I think one of the problems in the early days, in the run-up to the establishment of the Scottish Parliament, was that too much weight was placed on good will. It is quite interesting looking at the Scottish Affairs Select Committee in 1998 before the Parliament came into being. It noted that an awful lot would rest on good will. In fairness, at the time I think it was assumed that good will—with tensions and disagreements, because we should expect that—would be enough. Ministers and others were giving evidence at the time, and for some time thereafter it seemed, that it would be in the interests of both Governments and it would not be in the interests to disrupt.

My problem is what happens if it is in the interests of one or other to disrupt. Can we create institutional structures to cope with that? I do not think we can. We should not pretend that there is an easy answer, and at least we should be aware of that issue. I am very attracted to the notion that we should have some principle. How much difference it would make I

do not know, but at least it would give others the opportunity to measure and challenge it. At the moment I do not think that is happening.

Q212 **Lord Dunlop:** Can I ask each of you a slightly different follow-up question? Professor Mitchell, on the idea of non co-operation, is it not in both parties' interests to be seen to co-operate, for different reasons? The Scottish Government will try to make the case for independence, but independence will still rely on working with your nearest neighbours. Is it helpful to them to be constantly unable to make agreements with your neighbour next door? I would ask you to comment on that.

Also, the UK Government want to stabilise a situation that is quite volatile and do not want provocation the whole time. Is there not a mutuality of interest there that might go against some of your pessimism? That would be my question to you.

My question to Professor Gallagher is just to probe on statutory underpinning a bit more. I think I am characterising his evidence correctly, but when we met Mark Drakeford we asked him if there should be statutory underpinning for intergovernmental relations. He did not really say, but I got the impression that he felt it should be quite a light touch, because his view is that political disputes should be managed in a political rather than a legal space. Could you comment on that?

Professor James Mitchell: I am going to enter the world of party politics and political behaviour, which is also something I have been involved in studying for many years. I want to suggest that for the two political parties in government it is in their near mutual interest to keep this at the forefront of politics. The SNP needs the constitution to be uppermost because, I would suggest, if it was other issues it would not be doing quite so well in elections.

The Conservatives also benefit from this, because Conservative support in Scotland would not be as high as it is otherwise. It is no surprise that in the last few elections the leaflets I get through my door, particularly from the Conservatives, are about one issue and that is an independence referendum. I believe that if we changed our focus to everyday public policy matters, that would alter politics significantly. In a funny kind of way therefore there is a party political dimension to this as well as a governmental dimension.

I also think it is playing with fire. It is potentially very dangerous, because if we do get to a situation in which there is another binary independence referendum, which you would have gathered I am not at all keen on, it could go either way. My fear is it would not be decided in any rational way at all. It will be emotive. It will be more like the Brexit referendum again. It will be "Take back control" versus whatever the alternative emotional argument is. There is a party political dimension that we cannot ignore, because that is driving so much of the current debate.

At the moment, it works to the advantage of the Conservatives more than the SNP because the issue is alive, they are doing well and we are

not getting a referendum. As long as we are not getting a referendum it will work for them, but if there comes a point where that referendum has to be held, who knows where we would go. We cannot ignore that dimension, because it is the two parties that are driving this debate and it is in those two parties' interests to maintain this issue, presented in this way, as a binary choice.

Professor Jim Gallagher: James's political analysis is absolutely spot on. Before I come to your second question, the evidence tells us that the Scottish electorate is divided into three chunks. One is the core nationalist vote, which I characterise as folk who would sell their granny for independence, which constitutes something like 30%. There is the core unionist vote, which the Conservative Party have very carefully harvested by being the anti-independence party. Then there are the poor people in the middle who constitute about 40% of the electorate, who do not regard the constitution as the most important issue but are worried about things like hospitals, schools, jobs and so on. For them, this issue is in fact a distraction. If you insist on it being a binary issue, they will choose one way or the other because you ask them to. They did so in the last referendum and they do so in opinion polls. This is a deeply unsatisfactory situation.

To come to your more technical question about statutory underpinning, of course Mark Drakeford is right to say that political problems require political solutions. No set of institutional arrangements will force politicians to redo that which they have agreed. That is okay, except when one looks back on the history of intergovernmental relations. Let me tell you an anecdote to illustrate this.

In 1999, I worked for Mr Blair in the No. 10 policy unit dealing with devolution, and I had to persuade him that we must have one of these joint ministerial committees. He asked, "What would I talk about?" I left that unit, and the joint ministerial committee, as I recollect, did not meet again until I re-joined that unit working for Mr Brown in 2007. That suggests to me that the institutions need something underneath them to make sure they happen. That does not guarantee that there will be agreement. It does not guarantee that there will even be constructive discussion, but at least a meeting would be a good thing.

So there needs to be statutory underpinning saying that these things must exist. I would link it with a statutory obligation of co-operation. It cannot do any harm.

- Q213 **Lord Dunlop:** Thank you for that. Before we leave intergovernmental co-operation, Professor Gallagher, I think in your paper you write about the possibility of widening the membership of whatever takes place at the JMC to include English regions. Could you say a bit more about that? Obviously there is the asymmetry of powers, there being a lot of potential players in England, so how do you prevent that body becoming quite unwieldy?

Professor Jim Gallagher: Taking a step back, first of all, why would one wish to include regional figures from England in this debate, whoever they might be? There are two reasons why. The first relates to England, which is a very important reason. England, in my view, requires decentralised power to rebuild trust in its institutions of government.

The central state in the UK, Parliament and the Executive is the least trusted of any central state in Europe. That trust has been declining for the last 10 years or more, since 2007. If you look, for example, at Eurobarometer studies of trust, most of the institutions of the British state are as trusted as institutions elsewhere in Europe—the legal system, the police, the judiciary and so forth—but not central government and not Parliament. That is because, in my view, they are very distant from the people. If you ask people in England, they trust local government, those who have some form of regional government such a metro mayor trust that, but by and large they do not trust government at the centre.

England needs decentralisation. Once it has decentralisation in whatever form, which is bound to be asymmetric, at least to start with, the central state needs to be able to engage with them just as it needs to be able to engage with the devolved. The regions of the north of England, the great cities of the north of England, have many of the same interests and issues with the centre as Scotland, Wales and, in its own different way, Northern Ireland do. Therefore, an institution that brings those folks together seems to me to be quite important.

In fact, I think there should be two such institutions. There should be a set of executive institutions, of which the JMC should form a part, which you might choose to call a council of the nations and regions, in which it will be in the interests of the devolved Administrations to make common cause with the Mayor of Manchester, the Mayor of Newcastle and others and thus gain leverage over the central government. That is why it is in everybody's interest to have this.

The second institution that should be created, in my view, is a legislative one. That legislative one you may choose to call, if you wish, the senate of the nations and the regions—that is to say, a second Chamber of Parliament that would replace, for good or ill, your Lordships' House with a body whose job it was to do the things that the House of Lords does, but also to represent the territorial nature of the United Kingdom's politics and, rather as this committee does, focus on and safeguard the constitutional division of power—the distribution of sovereignty, if you like—across both the geography and the institutions of the United Kingdom.

Professor James Mitchell: Could I add one point? Jim may disagree with this, but there is another reason why I would go along with all that Jim said, with respect to broadening out membership. I have a fear that any institutions, new or old, that involve the devolved Administrations and UK Government could simply involve, as so often, grandstanding and theatre in the meetings, the lead-up to them and the follow-through from

them. If you broaden it out, it is much more likely, I would imagine—I might be wrong—that you will focus on the substance, whatever that policy substance or problem is. That adds to a shift that I would like to see away from simply constitution mongering and on to public policy analysis.

Q214 **Baroness Doocey:** Do you think explicit recognition of England's place within the union would create any risks to the future of the UK?

Professor Jim Gallagher: This takes us to the West Lothian question, and my view on the West Lothian problem is that it is not a very big problem and does not need a very big answer. It is not a very big problem, because England almost always gets the Governments it voted for, because it is 85% of the United Kingdom. Therefore the risk to England of being outvoted in the United Kingdom Parliament is rather small, whereas the risk to Wales or Scotland, or indeed to Northern Ireland, of being outvoted in the United Kingdom Parliament is quite big. That is a justification for a separate devolved legislature to give the opportunity to reflect what may be a different balance of political view in the historic nations of the United Kingdom.

Nevertheless, at least in theory the West Lothian question is a problem and in theory it should have an answer. The answer it should have is in the procedures of the House of Commons, where there should be an opportunity for English Members to vote upon, and if need be to stop, the process or proceeding of legislation that applies only to England. One might add in Members for England and Wales for that subset of legislation that applies only to England and Wales. I am rather puzzled by the decision of the United Kingdom Government, I think one Friday afternoon, to abolish that procedure.

The key thing, however—and to answer your question about whether this in any way threatens the stability of the union—is that Westminster is England's Parliament and there is not another Parliament that is England's Parliament. As long ago as 1974, the royal commission on the constitution recognised that an English Parliament per se would undermine of the union. That is the reality. Not only that, but the United Kingdom Government are England's Government, and nothing that is done to recognise England in the procedures of the House of Commons should call into question that we are one Government in there and not two.

It might be sensible, it might be practical, for example, to run an English Cabinet Committee. Baroness Taylor will remember we used to have things called the H Committee, which did mostly English business, whereas E Committees tended to do UK business. It might be sensible for the Prime Minister of the day to chair that committee as the Prime Minister for England. All those kinds of things could be done. The key is that if you wish to maintain the United Kingdom, you must maintain the United Kingdom Government.

Professor James Mitchell: I am not sure I can add to that, to be honest.

Q215 **Baroness Doocey:** It has been said that until we solve the English question we are not going to be able to resolve everything that is a larger question. Do you believe it will be absolutely necessary to decentralise and to put power down to the lowest possible denominator? Do you see not doing so or doing so as a threat to the future of the UK?

Professor James Mitchell: We should certainly be doing that just for good governance. That is essential, regardless of the constitution, if we want to ensure that we are truly dealing with these problems. We have become far too centralised, both in Scotland and indeed in England. That desperately needs attention.

The form that it should take is an open question, but we have seen a gradual drift, although here in Scotland it has been going at one hell of a pace recently, but we do desperately need to address this. I am not sure that would affect the constitution in the way we have been talking about one way or the other. I just think it is necessary. What I do think is that we spend far too little time talking about the local dimension.

The Chair: You are talking about the principle of subsidiarity.

Professor James Mitchell: Absolutely. Too often, central government, particularly here, but it is true in England as well, basically tells local government what it can do and the money it can raise, but the resources it has been able to raise have been declining, and even within those budgets there is very limited scope to do what local government wishes to do as compared with the past. It has been a gradual process. For me, one of the biggest disappointments with devolution is that we have seen the centralisation of power.

Professor Jim Gallagher: If I could add to that on the constitutional side, it is always tempting to offer ideas that are consistent with the evidence but which the evidence does not quite yet back up. I do think that reform and decentralisation inside England are constitutionally important, as well as getting a decent public policy delivered. They are so, because the danger of centralisation is that we get what we have just had.

Let me explain what I mean. What we have just had over the last five years is a revolt of the English regions and a revolt of the north against London, but it was not focused on London but on Brussels. The problems that people were complaining about—the lack of voice, the economic difficulties, being left out and left behind—are of course problems made in London and not in Brussels, but they created a level of discontent and resentment in many parts of the north of England, which, in my view, was harnessed by those who wished to leave the European Union and used to create a majority for a project that is not the answer to the problems that were being raised.

If we do not fix this problem it will produce similar effects for the United Kingdom, because it has not been fixed by Brexit and it will not be fixed by Brexit. In my view, it will probably be worsened by Brexit, but, be that as it may, those feelings of being left behind have not been listened to in the main. I understand and welcome that the present Administration in London want to try “levelling up”—that is to say, reducing economic inequality.

But unless they do that in a way that is linked to the provision of local voice, a feeling that people are being listened to and are being heeded and respected by the centre, which in the long run is linked to local economic development anyway—there is worldwide evidence—these resentments will remain. They will turn into, and I think in some ways they already have, feelings of mutual resentment between different parts of the United Kingdom, not just between England and Scotland but between one region of England and another, between the north of England and the south, between the peripheral regions of England and the centre. That can only produce further constitutional upheaval.

Professor James Mitchell: Can I add something I ought to have said? Jim gave me time to think about something you said. I think one thing to be careful about with devolving locally is to make sure that we devolve power and do not just dump problems on local authorities. There need to be the resources and the capabilities. Too often we are saying, “Okay, over to you now”, and they are not capable of dealing with what is devolved.

We also have to make sure that we get the balance right in decentralising, and—this picks up on Jim’s earlier point—that those localities have a voice at the centre. Some of the debates in Scotland on devolution in the past have focused exclusively on self-government, on Parliament, and have ignored making sure that Scotland has had that voice at the centre.

I suggest that for localities and regions in England it is vitally important that it is not just about devolving, because that is often the devolution of penury rather than power. We have to get the balance right and ensure that the local, regional and substate national voice is louder and clearer at the centre. That takes you back to Jim’s point on the need for reform at the centre.

Q216 Lord Howell of Guildford: Much wisdom. I have learned a lot. I want to go right back to Professor Gallagher’s first challenge, which is to ask the right question. You said the right question was: what is the right governance for the United Kingdom? The trouble is that, to answer that, a whole lot of other questions pass. What are the right issues? In this digital age it is which assessment of what is right in sharing government and power at different levels is correct and who is to decide it.

Lord Dunlop touched on this. Did I hear a touch of our old friend subsidiarity raising its head, the old European trick? I think they had 20 years of it and succeeded in applying it notably to the treatment of

animals in zoos. I think that is about as far as they got with subsidiarity. It did not work, on the whole. All the problems are in the process. How much will be devolved? Is it everything or is everything except defence, foreign policy, ceremonials, the monarchy and things like that, or is there a vast range of overlapping issues that are changing all the time, which will require constant supervision, constant selection and constant political battles? How is this supposed to work? That is my first question.

My second observation, while I have the floor, is really more a conundrum than a question. I was an MP for 30 years before they pushed me elsewhere, namely to the Lords. I wonder how today's MPs, who have quite a different job to mine, would feel about your rather dismissive feelings about Parliament being out of touch. It is one of the biggest parliaments in the world—the Lords of course is even bigger—partially overmanned and overwomaned. It is a huge organisation. These people have 1,000 emails today and they are the whole time pestered by their constituents every hour 24/7. They are in touch as never before, far more in touch than the national newspapers and the journalists opining in their columns. I wonder how they would feel about your rather dismissive view that they are out of touch. I would have thought that we have a more in-touch Parliament than ever before.

The conundrum is that despite all that it looks out of touch, and there is the problem, touched on rightly by Professor Mitchell, that it is no use being in touch and dealing with every problem in every street about every paving stone and in every hospital and health department if you do not have the power to do anything about it. That is where the gap is, so how does one relate the power to the content? I think "out of touch" has become the slogan of the age and it is a slightly hollow one. It needs a little more filling in. Those are my two comments to reflect the context back.

Professor Jim Gallagher: One of your questions answers the other, and here is why. First of all, you did not hear me use the words "in or out of touch". What I quoted was social science data, which said that the central state of the UK, Government with Parliament, is the least trusted central state in Europe. It is less trusted than the Greeks', less trusted than the Italians', not just less trusted than the Germans' or the French but less trusted, I have a horrible feeling, than any other EU state, not that we are an EU state anymore. That is Eurobarometer data, if the clerks want to bring it to your attention.

Nobody talks about being in touch or out of touch. What you see, however, is illustrated precisely by the point you make about members of the central legislature getting thousands of emails a day about the drains. They should not be doing that; someone else should be doing that. That is what we have local government for, and that is what we should have more powerful regional government for.

As for subsidiarity, of course the principle of subsidiarity, if I may say so, is not originally an EU principle at all but a Vatican principle devised as an argument about the balance between the state and the family so as to

persuade essentially Italian politics to realise that there are places where the state need not go. It was then taken over by some of the founders of the European Union who were steeped in Catholic Social teaching as an institutional guide for the distribution of power between the central institutions of the EU and states of the EU. It is a slightly different context. Of course, it was very much taken on by the UK Government in Mrs Thatcher's era as a way of saying to the EU, "There are things that you should not be doing". That is the subsidiarity story.

The interesting thing for us in considering the distribution of power and responsibility to different levels of a multilevel government in the UK is what should stay at the centre, which is the essence of your question. There are three sets of things that should stay at the centre. One is the things you mentioned, issues relating to the relationship between the state of the United Kingdom and the rest of the world, such as defence and foreign affairs. Only the centre can do those. That is the political union of the United Kingdom.

The second thing that could stay in the centre and must stay in the centre is the set of institutions, powers and relationships that determine the economic union of the United Kingdom: the Bank of England, the functions of Treasury, the institutions that support the common currency, the institutions that support a single domestic market, which is what has led, in principle correctly but in practice ineptly, to the UK's internal market Act, which I know this committee has looked at.

The third thing that should remain in the centre is the institutions of what we can call the social union. That is the pooling and sharing of resources across the territories of the United Kingdom to ensure that common standards of public service are available for all the citizens of the UK, so it is not the case that your old age pension is smaller in Liverpool than in London because Liverpool has low taxable capacity and London has high, and not the case that proper free healthcare is available to the citizens of London because they can afford it but not to the citizens in Glasgow because Glasgow cannot.

Those are the three key aspects of the union. Those are the things that determine the allocation of power to the different levels of government, and those are the principles that define how subsidiarity operates inside the United Kingdom. One of your questions neatly answered the other.

Lord Howell of Guildford: I wish I was confident as you are about that.

Professor James Mitchell: I am going to avoid that kind of issue. I want to make one point, which is that we need to look not only at what is retained and what is devolved, but I want to suggest that we may have neglected that which is shared. It seems to me that this is the area that we need to spend more time on. I suspect that there is a fair degree of consensus, certainly among the 40%—well, 70% if you put the two together—on much of that. Where I think we have a real problem is with interdependence.

The problem for me is that much of the debate here in Scotland has been based on an assumption that we have a dual system of retained and devolved and we ignore the interdependencies. If you look at it not from a legal point—and I apologise to Lord Howell—but from a public policy point of view, that is that area that I am most concerned with, because these are where the very tricky issues arise. These are the problem issues, these are the wicked problems, and they are where we have interdependencies.

These require certainly institutions, it requires negotiation, it requires good governance. What we get is not a governing mindset reflected in negotiation, give and take, compromise, constructive engagement, but a campaigning mindset that encourages adversarial theatrical politics. That is why I think we should be focusing on that, and that is certainly not a criticism of Jim Gallagher, because he has written on this very subject in a very interesting way.

Q217 Baroness Drake: Professor Mitchell, I want to go back to the point you made earlier about this very issue, because of views on sovereignty “of this nature”—I think that was your phrase. It is not in the political interests of parties to participate in constructive collaboration, because it contradicts the very sovereignty argument. That is a point I have heard before. It is in their interests to show that collaboration does not produce good outcomes for Scotland.

If that is a real tension in the political system, would that not apply to whatever structures we put in place, and would that not—being devil’s advocate—encourage as a consequence possibly recentralisation of power to re-establish a generic relationship between the UK Government and the Scottish electorate? How does one break it down? One could do the analysis that you are dealing with, as in life generally: what are the behavioural responses, and if one of the key parties is driven wholly by our responses, what does this mean for the sovereign argument? How do we break through the structural solutions?

Professor James Mitchell: The point I was trying to make was that structural solutions on their own will not work. It needs to be more than that. Recentralisation? Trying that at the moment. The perception in Scotland, among a group of people at least, is that that is what happening, and this is feeding adversarial politics, this binary approach. It is quite interesting, because on the one hand we have these very adversarial politics going on, but on the other hand there is the other aspect, the mundane everyday co-operation. I would like to see a bit more of that made public, I would like more transparency, because we tend—and our media obviously encourages this—to focus on the battles because it is more exciting. We have a kind of gladiatorial approach to this, but we could help ourselves if we spent more time focusing on the other. I suggest that recentralisation would have the opposite effect from what you might suggest.

Baroness Drake: Yes, I hear you, but what I am saying is that you can see a kind of negative series of consequences, where one party is not

listening to another in the spirit of co-operation and we have structures that are not delivering. How do you break that?

Professor James Mitchell: I do not have the answer, to be honest. One thing we certainly need to do is scrutinise it. We need to make it more transparent. We need to challenge when one or other party, the Government or whoever, is behaving in this blame game way. They are both at it and I think we need to show this up.

The other thing is that we need more attention focused on the positives. This is where I think Jim's proposal of intergovernmental relations institutions bringing in others could contribute to a more constructive form of engagement focused more on everyday public policy. In other words, get health, the economy and such like uppermost rather than the institutions. If we focus only on the institutions, we will have a problem. I will not pretend that I have an easy answer to this, but I think it gets to the nub of the problem.

Professor Jim Gallagher: I agree with what James said, and I will add one thought. The obligation on the United Kingdom Government is to be the grown-up in the room. It is the Government of the union. This is the Government whose job it is to look after the whole UK, and they need to man up—am I allowed to say that nowadays?—and not simply play the partisan side that suits them in a party political sense. A way of putting it is that the Prime Minister of the United Kingdom is the Prime Minister of the union, not just of unionists.

The Chair: But as Professor Mitchell was saying earlier, it is suiting both sides to play this for all it is worth at the moment. Shall we move on to the internal market issues?

Q218 **Baroness Drake:** We have heard various observations about the impact of Brexit on devolution and in particular the internal market Act and the shared prosperity fund replacing the EU funds and the implications in response to that support. I have two questions. To what extent has the internal market Act led to the recentralisation of power in the UK, in your view? What does that mean for the prospect of greater collaboration between Scotland and the UK Administrations on the allocation of post-Brexit funding?

Professor Jim Gallagher: I think there are two different propositions here. The internal market legislation and the shared prosperity fund are different in nature and kind. I am afraid I gave up in despair some time ago on the detail of the internal market legislation, but the principle of maintaining a single UK domestic market is obviously right. It is one of the advantages of the UK economically. The Scottish economy is deeply tied into the UK economy and has been for 300 years, and maintaining that is in the interests of people in Scotland, and indeed in the rest of the UK. A recent study by the London School of Economics, analysing Scottish trade with the rest of the UK, estimated that trade between Scotland and England was approximately six times higher because of the nature of the very deep domestic market than it would have been simply

on the basis of what was called gravity-weighted trade theory. The internal market, or the domestic market—I prefer to use that phrase—really, really matters.

It is, however, an error to think that the UK internal market is a creation like the EU single market. The EU single market had to be created by regulation, removing barriers that were already there. There are almost no trade barriers in the UK and it does not need legislation to take them away.

The Chair: That was our starting point when we looked at that field originally.

Professor Jim Gallagher: Precisely. Therefore, the best action that the Government could have taken was do nothing. It was an inept Act that should be taken off the statute book, and no harm could be done thereby. It gave the opportunity for immense theatricals, to use James's phrase, between the UK and the devolveds. The Government cavalierly overrode the Sewel process of consent to put it in, and they did themselves no good in the process and achieved no benefit for the UK in doing so. Crikey, what a mess—focusing on the right thing, but doing the wrong one.

The shared prosperity fund, however, is rather different. It is a responsibility of the United Kingdom Government to promote economic development in the different parts of the UK's geography. Before 1972, we had regional economic development policies and they worked quite well. The economic geography of the UK changed substantially through government action over a long period.

To give you the simplest example of that, in 1963 Scotland was one of the poorest regions of the UK. From 1963 until 2008, per capita economic growth in Scotland exceeded the UK average almost every year by a small amount, and as a result Scotland became the third or fourth richest region of the UK during that period. Much of that was driven by UK Government regional economic development policies. Regional economic development matters and it is a central government priority, going back to the stories of levelling up that we are currently hearing.

It is right and proper for the United Kingdom Government to have a shared prosperity fund—call it what you like—and to decide on the geographical allocation of that fund. Going back to our story about the co-operation between the levels of government, it is also incumbent on them to implement those economic development policies in co-operation with national, local and regional governments in every part of the UK. This time, the Government got half of it right; they got the first half of it right and the second half of it wrong.

Professor James Mitchell: I was going to emphasise the last part. I did not know Jim was going to say it, but I guessed he might. I would emphasise that the co-operation, the consultation, is vital. I have not managed to see details, but I understand that a fund has been available

from UK central government to fund a fancy roundabout in Falkirk, and there has been the huge reaction that this should have been decided by the Scottish Government. It might be as well, they might get involved in the decision, but what about local government? Falkirk Council has been arguing for this for a long time. Frankly, the real problem the Scottish Government may face is that local government will start going over the heads of the Scottish Government and go to the Treasury. I would support them in that, because they feel, rightly in my mind, that they have not been resourced properly, but it does not create a healthy situation.

My key point is that we need to have the willingness to engage where there is that co-operation, that shared point, which I suppose has been the big theme. If I have been trying to hammer home one thing today, it is that.

- Q219 **Baroness Drake:** Without introducing more dysfunctionality in the Government of the UK, what do you think the Government should do to correct the implementation bits of what they did as opposed to the intellectual framework of what they did?

Professor Jim Gallagher: The most obvious example, and it is perhaps rather heretical these days, is to ask yourself what the EU did in this context with the structural funds. I had a responsibility myself for the administration of the structural funds in Scotland for some time. It was a national, local, and in those days EU, partnership through implementing bodies that included, by analogy, central government, the regional or Scottish Government and the local authorities. That is how the EU implemented the structural funds, and there is no reason at all why the shared prosperity fund could not be managed in the same way, with everybody around the same table, not standing on their dignity but sitting down together and trying to make it work.

- Q220 **Lord Hope of Craighead:** I want to come back on the internal market Act. You said that it was not needed, but do you think that it went too far?

Professor Jim Gallagher: Yes. I think it was completely unnecessary, because it was addressing itself to theoretical risks. The theoretical risk was that legislation by one of the devolved Administrations would be used to get in the way of free trade inside the UK. That was the theoretical risk.

Lord Hope of Craighead: Create a barrier, in other words.

Professor Jim Gallagher: Yes, create a non-tariff barrier to trade. Of course, the difficulty with that is that it is in the nature of different jurisdictions with different capacities to devolve, but in principle they could create barriers to trade. Let us just imagine—going to your Lordship's own background—that we had started out on devolution without having a separate Scottish legal system, rather like the Welsh, and we proposed a radical solution that there should be a separate Scottish legal system with a Court of Session and a High Court. People

would have said, "We can't have that. That is a barrier to trade". Of course it might have been, but it is possible to live with such things and make them not barriers to trade. That is why this spectre is a paper tiger, to use another analogy.

Lord Hope of Craighead: The problem that I have in mind is the need to allow just a little room for diversity among the various parts of the UK in designing regulations and so on, taking account of the fact that climate and various other factors might differ from one part of the UK to the other. The trouble with the internal market Act is that it does not allow for that at all. That seems to be contrary to the way this country should live. What is your view, Professor Mitchell?

Professor James Mitchell: I just stopped getting into the thick of it and I am at the stage now where I want to go back to it, because I found it very difficult to follow in detail. I think the fundamental point is that we must do nothing that would disrupt free movement—again, we go back to the EU and free movement—so balance is practically possible. There will be occasions—this is not just the Act, this is a general point—when policies in one part of the state will have an effect elsewhere. We saw that with the with personal care, and we saw that with tuition fees in the early days, but that is why we need institutional structures plus the culture of mutual respect to deal with these effects. I would have thought that that could be applied equally to the issues that follow from Brexit, but I may be wrong on that.

Professor Jim Gallagher: There is one issue that, to be fair to the UK Government, requires management, and that is the replacement of the state aid rules. The state aid rules, as you know, are designed to stop competitive bidding for mobile capital, essentially. What constitutes state aid is a very wide range of possible interventions, and it would be a bad thing for the UK as a whole if we were to have that kind of competitive bidding inside the UK. In fact, it would be worse for the devolved areas than for the centre, because in the end one of them has bigger pockets. If the UK Government want to put a battery factory in Newcastle or Sunderland or wherever it might be, they are capable of doing so. We need a degree of level playing field on that, and to the extent that the internal market Act enables that I suppose there is something worth having in it. I do not understand the detail of it, so I cannot say whether it does.

- Q221 **Lord Hope of Craighead:** I want to move on to the Sewel convention, and I think Professor Gallagher said that it had effectively been overruled. There are some things that we know about that have happened already that I do not think we can reverse. One is the Supreme Court's decision that Section 2, I think, of the 2016 Act is non-justiciable. The second is amending that provision. I tried, with an amendment, to get the word "normally" taken out, and I could not get anywhere with the Government on that. From that, I would adduce that any attempt at legislation to cure the problem will not work and that the judicial route will not work either, so we are searching for something else, something

within the procedures in Parliament, that we can seek to develop and which would improve the situation. Do either of you have any ideas to offer?

Professor James Mitchell: What we need here is a new convention of the constitution but the problem with conventions of the constitution is that they are so slippery they can be ignored. That is where we are at present. If it cannot be done legally, it may be abused, essentially. If you have a principle and there is no way in which it can be policed, it has the potential to be abused. That is where we are. That is why I think that anything to strengthen that convention has to be welcomed. I am just not sure how it can be done within the current arrangement.

Lord Hope of Craighead: There seems to be no discipline at all.

Professor James Mitchell: No, indeed.

Lord Hope of Craighead: That is why it seems effectively to be ignored, because no procedures were put in place at all. Could anything be done within Parliament to devise a procedure that would work and would enable the nations to have a proper voice to be considered when decisions are taken?

Professor James Mitchell: I would not be expert enough about parliamentary procedures to answer that. All I would say is that anything that could be done to strengthen and ensure practice would obviously be welcome. Apologies, but I cannot answer that.

Professor Jim Gallagher: I have a menu of possible answers. I do not think that simply parliamentary process will do the job, although one can imagine a number of procedural steps that could be taken. Let me go, if I may, to what you might call a series of nuclear answers and let us see which of them could be done in the short run. The key problem here, of course, is this notion of sovereignty and the idea that Parliament could do what it likes, which is what people tend to think sovereignty means. James quoted the doctrine earlier: indivisible, unaccountable and unlimited, which interestingly goes back to Bodin in the Middle Ages, a period where they were living in this kind of world, a piece of propaganda from the 16th century.

Professor James Mitchell: It goes well back. It is theocratic. It is the idea from theology, the one and indivisible, and James I wrote about this.

Professor Jim Gallagher: The divine right of kings is not an appropriate basis or source for the UK's modern 21st century constitution. However, let us imagine the kind of things that one might do. First of all, it is a disappointment that the 2016 legislation, which was intended to say to the courts, "This exists", was ignored by the courts. I think, with all respect to people in the Supreme Court, for whom I have great personal respect, that that was wrong. That was an error by the Supreme Court, so we will have to legislate again to make them pay attention.

In what ways could we legislate to make this a bit more justiciable? Here is one: we could borrow from the ECHR process in the 1998 legislation and make it a requirement on a UK Minister introducing a Bill in Parliament to certify that the consent of the devolved Administrations, to the extent that it was relevant, had been obtained, just as Ministers are currently obliged to certify that a Bill is consistent with the European Convention on Human Rights. That is one piece of process. It might in principle be possible, to go back to your detailed question, to consider a piece of process in Parliament for that without statutory backing in the first instance. That might be a way of introducing the idea, but it would need, in my view, legislation to make that possible.

A second route in would be to borrow from the devolution legislation and to give the law officers in the devolved Administrations the capacity to challenge in court legislation that had been introduced by Ministers without such consent or contrary to such consent, and either to invite the court—in extremis, if you like—to strike down the legislation or at least to make a declaration of incompatibility if we feel the obligation to be consistent with the principle of parliamentary sovereignty.

A third option, again a statutory option, would be to change the 2016 legislation not merely to say that there was such a convention but to say that legislation that did not have that consent would not be law. Parliament would then have to repeal that first piece of legislation in order to make the other one, and that would be consistent with parliamentary sovereignty. There is a menu of options in which one might give Sewel some teeth, but the underlying principle does need some teeth. Yes, it does.

Professor James Mitchell: It is often said that war is what happens when diplomacy fails. I think the courts and law happen when politics fail in constitutional matters and we have to think of other ways. This in no way detracts—we need to do this because our politics are failing—but we should also try to make sure that we get the institutions and the culture to prevent things getting to that level. It is a failure when they reach that level, but sadly we are unable to address these things.

The Chair: Yes, that is the key problem. Taking your solutions, when you consider what the Government did on the Fixed-term Parliaments Act in 2019, and they start moving Motions in the Commons notwithstanding, you have an overriding facility that they have the nuclear option to use.

We do not detect a great deal of sympathy on the part of Government Ministers to change legislation, so one of the things that I have been thinking about, although it would not make the dynamic difference that you are talking about wanting, is whether there are aspects of our parliamentary procedures—only in the Lords, because that is our only remit—where we could insert at least something that highlighted the lack of a consent Motion and would therefore add leverage to people who were putting subsequent amendments and shift that balance of power and influence just a little. It might have a practical implication, even if it did not cope with Sewel.

Professor Jim Gallagher: I think that is entirely possible. The House of Lords has essentially one power in relation to this, and that is the power of delay. You are all very experienced Members of the House and you know the game of ping pong. We have just been through a bit of ping pong with a piece of legislation. An obvious occasion for ping pong would be the absence of devolved consent, and your Lordships' House could first of all, for example, have at the beginning of any piece of legislation that has been to the Commons—it is a bit more awkward when it starts with you—

The Chair: Yes, I agree with you, but as we tend to start with the less controversial, it is probably less of problem.

Professor Jim Gallagher: So you begin your consideration of a Commons Bill with the procedural process in which you actively check that the devolved legislators have given their consent. One of the things that we are not very good at is interparliamentary relations.

The Chair: No, we have been talking about that.

Professor Jim Gallagher: Some formal link between the institutions of the Lords and the institutions of the devolved legislatures in which confirmation of the consent is sought—perhaps a briefing on the issue, perhaps a debate in a committee set up especially for the purpose in the Lords before a Bill proceeds to the Floor of the House, perhaps a formal report on the issue from that committee to the Lords before Second Reading or the Committee stage—is entirely possible.

The Chair: At a later stage, yes. Maybe also a report from the relevant committee in the Scottish or Welsh Parliament. There are things that could be done. You could have a legislative standards approach so that everything coming forward had to tick the boxes in the same way as the old Cabinet Committee and the Leg Committee.

Lord Hope of Craighead: One of the problems is that so much is invisible at the moment and we simply do not know what is going on. Anything that could be done to bring it more out into the open I suppose would be a step forward.

Professor Jim Gallagher: One of the practical issues with UK legislation—I do not know how much this still happens—is that for many years the Sewel process worked very well, mainly because the UK Government shared their tough legislation privately with the devolved Administrations. They may still do, I do not know, but certainly I have seen much of that in the past.

The Chair: That would make a big difference.

Q222 **Lord Howell of Guildford:** My questions, which we have been round and round, are not really on the menu, and some fascinating things have been added. I suppose it all comes down to: are we searching spaces?

It is a very worrying situation that Professor Mitchell began with. Will this

be mended by actual constitutional changes, justiciable issues that will have to be fought out over differences about who should have what power? Is that the world we are going to move into, and what sort of constitutional tweaks should we be thinking about? Is it just going to be done by the respect that we were talking about over at Parliament this morning, or even by the Westminster habit of devolve and forget, which has been the tendency, the trend, I think?

Is it just by an additional dose of Westminster politeness, which is obviously lacking and has been lacking in a lot of areas while London civil servants have busily focused on other issues? Or can we have this mechanism that we have just been talking about, a mechanism for seeking consent when knotty issues come up and, if there is no consent, putting it back in the works and starting again? I think that is a sort of summary question. Are these constitutional issues that this Constitution Committee should be gnawing or picking at, or can it all be done just by being what one of our members, Lord Hennessy, who is not here, would say simply is by being better performers, as good chaps?

The Chair: Those were the days.

Professor Jim Gallagher: The good chap principle of governance, my goodness. This of course takes you straight into the question of conventions. I think the broad answer to your question is that it needs a bit of both. The interesting thing about this debate is that we are having it about Wales as well as about Scotland. It is very interesting to see how much of the dissatisfaction with the UK Government and with the arrangements is shared between Cardiff and London.

That tells you that it is not just that people wish the UK not to exist or do not wish the devolution settlements to look good. You have heard evidence from Mark Drakeford, who does not wish Wales to leave the United Kingdom. He wants Wales to work well inside the United Kingdom. It is not merely that we have a separatist Administration in Edinburgh who underlie these problems. Of course, that exaggerates them; of course, to use James's language, it makes them more theatrical. But that is not the problem.

The fact that they are persistent in time and persistent across geographies suggests that there is something wrong in the machinery. We have a list of things where the machinery could be improved, and some of them we have touched on today. There will, at some point, have to be some kind of resolution - or at least going off the boil - of the Scottish question—if the machinery is to operate in a more mature manner. I think time will tell how that will come about. I suspect it will not be another referendum. In fact, I suspect it will be a shift in Scottish opinion. Who knows what will happen, but we do need to make some changes to the constitutional arrangements, which are not working right just now.

Professor James Mitchell: Absolutely. The one other thing I would mention, and Peter Hennessy also talks about it, is the hidden wiring of

the constitution. Sometimes that hidden wiring works very well, and I think we could do with exposing that wiring and making it more transparent, because where we have good co-operation it works. It does not get the attention it deserves, so it might help to balance our understanding of what is going on.

My final point, which I keep repeating and will keep on repeating, is about the issues, the problems, that we face today. I mentioned wicked problems, and we are now talking about super-wicked problems, the problems that need immediate attention as time is running out: climate change, responses to Covid, levelling up. None of these can be achieved by one-level government. It desperately needs co-operation. That does not mean to say they all have to agree, but we need to find ways of doing this and we need to emphasise this, otherwise it is pretty unpleasant out there.

It is not just theatrical. It has real implications, and that is what worries me. The constitution is vitally important, and we need to reform it. I am very much of the view that Jim's set of issues and proposals must be taken seriously, but within that we need to keep those super-wicked problems in mind. If we do that, we will find a resolution, surely.

Q223 The Chair: That is assuming there is willingness. Going back to your hidden wiring and, Professor Gallagher, going back to your time in government, we have not mentioned the Civil Service and how that has changed in terms of relationships, placements and people understanding devolution. People say that politicians say devolve and forget, but some people say also that the Civil Service devolved and forgot. Can you say where you think Civil Service issues come into this?

Professor Jim Gallagher: First, one of the things that was reserved in the Scotland Act and is also reserved in respect of Wales—but not, as it happens, to Northern Ireland—is the Civil Service of the Crown. It is interesting to think about what that means. It means two things. It means the same pay and grading for the senior staff, so that the senior people in St Andrew's House have the same kinds of job titles and the same pay rates as their colleagues in Whitehall, apart from the London weighting. I do not think that matters very much. It means also, however, that the same constitutional relationship between officials and Ministers in one place and the other ought, in principle, to mean and to facilitate sideways conversations between the officials of the different Administrations.

My impression, and I have been outside government for more than 10 years now, is that the capacity for that has declined over time, because there is less familiarity in the careers structures of senior people with the other institutions and less exchange of staff between St Andrew's House at the moment and Whitehall than there was in my own career. I spent much of my career in London but was based essentially in what was the Scottish Office and then the Scottish Government. I think there is much less of that now, which potentially is a problem. I think, however, that what civil servants are good at—and I have no reason to suppose they

are any worse at it now—is finding co-operative solutions to help their Ministers to solve problems, but their Ministers have to want to co-operate in order to do that.

There has, however, been a great deal of turnover in senior Whitehall staff. There has been a huge churn in central government and a substantial shrinkage under the Administration before last, the coalition Administration, and it did not do Whitehall any favours. My impression is that capacity is smaller than it was, and capacity to deal with these issues is smaller than it was. It has always been a struggle to get devolution and intergovernmental issues focused on at the same time. Consistent and persistent habits of re-organisation do not help. There are so many versions of the central arrangements since 1999 and none of them has worked very well. I am probably to blame for some of that, because I tried to make it work and did not succeed and I do not think my successors have done all that much better. I am quite gloomy about whether the Civil Service is part of the solution, I am afraid.

Q224 The Chair: We should not be ending on a gloomy note. What is your one recommendation to us as to what we should absolutely not miss out on saying in the report?

Professor Jim Gallagher: You go first.

Professor James Mitchell: I suppose the one thing in my mind is the emphasis on shared mindset. Do not fall into the dual kind of mindset, the silo mindset that we have seen so often, the winner takes all mindset. Starting with a shared mindset is how you would go about it if you were looking at a problem of public policy. I listen to these discussions and I hear echoes of other discussions that I have had, for example in dealing with some of the big public policy problems, and how much we look at issues in isolation—whether we look at these from a justice, health, or whatever point of view—and it never solves the problem. We need to come together to do that. I think that functionally applies territorially as well.

I am a bit more optimistic because I am an outsider, but I have studied the Civil Service and the Scottish Office. That is where I started off my research career. I think one of the great strengths and why Scotland had a good voice, a loud voice, in the system is that we had senior officials who had spent much time in London. That did not mean that they abandoned their commitment to the Scottish Office. It meant that they returned, they knew more and they had the contacts. The more contact, the more communication the better.

Q225 Lord Hope of Craighead: I have a very particular question for Professor Mitchell. In your very interesting paper looking back five years on is a paragraph about the independence referendum, in which you say, “The idea that an independence referendum could finally resolve all matters with regard to Scotland’s constitutional status is fanciful”. You go on to say, “Relations would have to continue to be negotiated”. I wondered what you meant by that, because the SNP’s view is that the referendum

is the thing and that answer is the end of it. Can you elaborate?

Professor James Mitchell: Well, they are wrong.

The Chair: Has Brexit taught us anything?

Professor James Mitchell: Thank you, that is exactly what I was going to say. There is no finality to this. I often tell a story of one of my kids who just missed the vote in 2014, and he said, "Do you know, I'm not going to vote. It's not fair". He said, "You two are getting a vote, but I am going to be stuck with the decision you are making". I said to him, "You know what, even if Scotland votes for independence, we will have to have to negotiate your relationship. It is an ongoing thing". Some of these institutions are talking about it, and one of the things I would say to the SNP is, "If you muck it up now and you get independence, you're going to need those institutions". It is about relationships.

Again, that is why I find that the constitutional legalist approach is important—I am frightened to say this to such an eminent lawyer—but there is public policy approach that demands that co-operation and acknowledgment of relationships and the complexity. Relationships are constantly changing because the context changes. As Lord Howell rightly pointed out, we have social media and technology, which affects things. It is an ongoing, constant negotiation.

Professor Jim Gallagher: On referendums and finality, the Brexit referendum tells you that the referendum does not bring finality. In the end, what we are talking about here—the separation of Scotland from the United Kingdom, which would be independence—does not involve towing the land mass of Scotland and tying it on to mainland Europe. We will remain a single island. If there are any lessons from the Brexit shambles in Northern Ireland, it is that managing relationships in a single island is very difficult.

An extraordinary thing about Brexit is that it increased support for Scottish independence and made the achievement of Scottish independence much more difficult at the same time. It takes you to the point that there is no such thing as independence; there is only a variety of structures and relationships, a choice of relationships that one would have.

In a sense, the question of where sovereignty resides is meaningless. The real question is where decisions are made, where power resides and where choices are made inside whatever institutional constitutional framework one has. That is as true if there is no independence as it would be if there were independence. Goodness knows how it would work under independence. I cannot imagine what kind of confederation would have to be constructed to deal with the reality of it all.

If we do not end up with independence, which is probably the more likely outcome, the question to be asking is what the right bundle of relationships is, which is why your question about the governance of the United Kingdom is the right question. Inside the governance of the United

Kingdom, the main problem is not the allocation of power but the management of relationships, which is what all these institutional questions—Lord Dunlop’s questions about intergovernmental relations, the arguments I have been making about the distribution of power across England, which will create the need for a new set of relationships, and the allocation of power inside the central institutions of the UK state—are all about.

If there was one thought that I would leave you with, which is probably not one that you can develop fully in your report because it is probably beyond its scope, is: what is the purpose of the second Chamber of Parliament? I would argue that the purpose of the second chamber of Parliament ought to be to supervise the constitutional distribution of power across the institutions of the United Kingdom. Now this committee has begun to do that. Is it 15 years since the Constitution Committee existed? I forget the numbers, but a generation ago no one would have thought of a constitution committee, because no one thought that somebody needs to be overlooking the UK’s constitution. My view is that in the long run the role of the second Chamber of the UK Parliament should be to oversee powers and responsibilities within the UK constitution and to speak up and perhaps act in cases where constitutional powers had been misused or where the distribution of authority has not been reflected properly in action.

Let me give you two examples of that recently and compare how they have been dealt with. One was the Supreme Court’s reaction in the Prorogation case that we mentioned earlier, where the Government clearly went over the boundary of its constitutional prerogative. The other was the Sewel convention, where the Government clearly went over the boundaries of their constitutional prerogative but the courts did not answer—unfortunately, in my view.

One of the purposes of having a second chamber in many jurisdictions is to deal with those kinds of issues, to raise them and—to use Lord Hope’s words—to police them. God help me, I have been thinking about Lords reform since 1999 when the Blair Government were trying to do it—it went well then—and we all focused on the wrong question. We all focused on who should be in the Lords. The right question is what it is for, and that I think leads you down the route of the propositions in the paper that I put to you in evidence. That is the thought that I would leave you with.

The Chair: After nearly two hours, we had better not go down that route at the moment, otherwise we would be here for several days, I would think—

Professor Jim Gallagher: Yes, absolutely.

The Chair: —however interesting and enjoyable as it is to talk to you about those things, and very tempting. Can I just say thank you to you both? We have found this very interesting. It has reaffirmed some of our thoughts and perhaps given us a few extra things to think about. It is a big task that we have taken on, but we are trying and we do welcome

your contribution, so thank you both very much indeed.