



HOUSE OF LORDS

Revised transcript of evidence taken before
The Select Committee on the Constitution
Inquiry on

THE UNION AND DEVOLUTION

Evidence Session No. 10 Heard in Public Questions 141 - 148

FRIDAY 11 DECEMBER 2015

11.50 am

Witness: Sir John Elvidge

Members present

Lord Lang of Monkton (Chairman)
 Lord Cullen of Whitekirk
 Lord Hunt of Wirral
 Lord Judge
 Lord MacGregor of Pulham Market
 Lord Morgan

Examination of Witness

Sir John Elvidge, former Permanent Secretary to the Scottish Government

Q141 The Chairman: For me, this is a sentimental journey, because I keep meeting people whom I knew when I was in the Scottish Office. We had Ken Thomson earlier, who was my Private Secretary. Sir John, welcome very much to the meeting. You know what we are on about: the union and devolution; the relationship between the nation state and the nations, if I can put it like that, and how we can stabilise and strengthen the relationship in various ways. We are very grateful to you for coming along, because one of the areas that we are interested in is the Civil Service, and we have always thought of it as being a United Kingdom Civil Service. We appreciate that in Scotland civil servants have to be loyal to their immediate masters, but there is nevertheless an overriding—as I see it, personally—duty to the United Kingdom. Therefore, when existential issues are at issue, it may be that their duties lie in a slightly more UK national direction. How important do you think it is that different Governments across Great Britain are served by a single Home Civil Service and to what extent is that Civil Service genuinely a unified service?

Sir John Elvidge: Can I take the second question first? It is easier, in a sense.

The Chairman: You may dilate as you wish.

Sir John Elvidge: There is no meaningful sense in which the UK Civil Service is not unified. Its leadership is still managed in a very coherent way. Personally, I regret the fact that we no longer have a National School of Government, which was one of the devices used to create a sense of collectivity at all levels of the Civil Service, but especially at leadership level. The UK Civil Service is bound by some clear shared arrangements of various kinds but, more importantly, it is still very clearly bound by a shared ethos as to the purpose of a Civil Service in our democracy.

It is, I suppose, implicit in what I have said, to some degree, that I think having a unified Civil Service has proved an important piece of glue in our very unusual constitutional settlement, in

that it provides a channel which contributes ease of communication and a shared professional grounding. One cannot stop disagreements existing, but it helps if everybody is working from a shared understanding of what is being disagreed about. One of the functions a unified Civil Service provides is that it makes it more likely that that work of trying to establish an objective common ground, within which political disagreement can be played out, is a useful contribution.

If I look at some other countries I spend time in—take Germany, perhaps, as an example—I see less communication between the federal level and the Länder level, at civil service level, than I have observed here.

The Chairman: If I can dwell on recent history as an example of how the concern has arisen recently, I think Peter Housden was your immediate successor.

Sir John Elvidge: He was, yes.

The Chairman: He had to handle an incoming SNP Government, first in coalition and then in absolute power, and to fight a referendum. A number of things happened in and around that referendum that, to put it bluntly, horrified those of us who regard the Civil Service as one unified organisation. I am not asking you to retrospectively criticise your successor, but do you think, looking back at it, that that sustained or undermined the unified nature of the Civil Service?

Sir John Elvidge: The unified Civil Service withstood the strains of that experience pretty successfully. As an observer, and naturally as an empathiser, of the circumstances that Peter had to deal with, the thought that struck me was that nothing in our prior understanding of how the Civil Service is intended to operate, and nothing in what passes for a rule book, in the Civil Service Code, contained any obvious preparation for a challenge of that kind. It is not as if there was anywhere one could go and say, “This is what the Civil Service should do in these circumstances”.

The Chairman: Do you think the code should be revised to build in something that would refer to the threat of existential change, such as a referendum of the kind that we had last year?

Sir John Elvidge: In various ways, it might be helpful if there were more explicit recognition of the existence of devolution in the code and in various other places. One cannot ever prepare for every eventuality, but giving people more in the way of milestones that they might use as reference points would be helpful.

Lord Hunt of Wirral: I suppose, Sir John, that this is a confessional, as the Civil Service Minister who introduced the code. I saw the introduction of the code as underpinning the

basic principles of independence, integrity and impartiality. Therefore, it never crossed my mind that I needed to deal with the sort of conflicts that you are now talking about. Should not the impartial nature of what a civil servant does fit neatly into these situations, without having to adjust it because of the conflicting pressures?

Sir John Elvidge: The principle of impartiality is an essential and valuable reference point. I do not think it answers all the practical questions that people had to face in the circumstances. Civil servants are faced with a very clear statement that their loyalty to the Crown—and it is useful to remember that there is a unifying concept behind our different political Administrations—is for all practical purposes expressed through their loyalty to the sovereign's Ministers of the day. On the one hand, civil servants are given a very strong message about not interpreting the interests of the Crown for themselves, and, on the other hand, there is an equally clear statement about impartiality. As is often the case, neither of those things is ambiguous in itself, but, when you encounter a situation which requires both of them to be weighed together, there is a space, which civil servants have to navigate.

The Chairman: A devolved Parliament is devolved by the United Kingdom Parliament. I do not think you are equating the status of the Ministers of those respective Parliaments.

Sir John Elvidge: But it is not the Parliaments. The Civil Service Code is explicit that it is Ministers, and the First Minister is Her Majesty's Minister, just as the Prime Minister is. I am not sure it is obvious that there is a hierarchy of Ministers through which the civil servant can perceive their loyalty to the Crown.

The Chairman: We are getting into metaphysical territory.

Q142 Lord MacGregor of Pulham Market: Mr Thomson said in answer to this question that of course civil servants are used to dealing with different political masters, as the Governments change after an election and so on. I take that point, but I wonder whether, in the increasingly devolved situation that we now look to be facing, to what extent officials working in the Scottish and Welsh Administrations should serve the UK as a whole, rather than the devolved Administrations, which will themselves be taking on much more responsibility.

Sir John Elvidge: As a matter of practicality, most of what most civil servants do will very clearly be in the service of the devolved Administration. There is an observable territory where civil servants think of themselves as serving both the devolved Administration and the UK and where there is no discernible conflict of intent between the two political leaderships. The rub comes only where there is an unmistakeable difference of political intent between the two leaderships, and that takes us back. It is easy, and indeed right, to say that wherever

possible civil servants should be seeking to serve the interests of both, but, where there is a conflict, we come to some practical issues of trust between Ministers and civil servants.

One of my perceptions is that civil servants cannot effectively do their job if they do not have the trust of the Ministers they work for. If civil servants were to behave in ways that broke that trust, then there would be a considerable price to pay. That invites the question: “Are there circumstances in which that price would be worth paying?”. But close on its heels comes the question, “What is the legitimacy of civil servants themselves answering that question?”.

Lord MacGregor of Pulham Market: I take all your points about the ministerial, the code, the ethics, the training, and all that. But, if I can use a practical example that may be arising in relation to the fiscal framework, that is clearly going to be a rather crucial element where there are going to be a lot of difficult decisions and controversy, as I would guess is happening at the moment. A civil servant with a strong Treasury background, going to the Scottish Office, has to serve that political master. If there are profound arguments coming from, let us say, the Treasury, about certain parts of the fiscal framework—which he knows is fundamental—he will have to argue against those on behalf of the Scottish Government.

Sir John Elvidge: Yes. Scottish Ministers are entitled to the services of someone who will put their argument, are they not? One might say, in the context of a fiscal framework, that the point of having an agreement is to try to reach a situation in which it is not an endless political fight, but actually a system that is capable of being interpreted. But the concept that civil servants have to advance the arguments that the Ministers they serve at that time wish to see advanced is not a new one. In my second job in my Civil Service career, I worked for someone whose job, while I was working for him, was to undo all the work he had done in the previous three years, for a different Government.

Lord MacGregor of Pulham Market: I completely understand that. But now we are dealing with two different Governments and, in Scotland’s case, a Government that has got much more power, so there is a difference there. To what extent are exchanges still taking place within the Civil Service from the UK Government and the Scottish Government?

Sir John Elvidge: It is not the strong tide that it was early in devolution. There was a strong flow from Whitehall to Scotland in the early years of devolution, and a bit of flow the other way. It has settled down, as one might expect. There is not, in my view, a sense of barriers. It is probably invidious to personalise this, but I cannot quite resist the fact that we have a case of an individual who was, in the not too distant past, the First Minister’s Principal Private Secretary, and is now the director of the Scotland Office, responsible for advancing the UK

Government's view of how the relationship between the two Governments should work. The fact that that can happen is an indicator of a system in good health around exchanges.

The Chairman: Is that not an example of a much more diminished situation? In the past, Scottish Office Ministers went to London every week; their private office team went with them. Senior officials from the Scottish Office came south to deal with their counterparts in other departments. The Ministers sat on endless committees of a United Kingdom nature, so there was huge exposure there. They all recognised and understood that Scotland had to fight its battles with the Treasury; it had to seek allies in other departments to achieve some results, and so on. All that is disappearing now, and more and more Scottish government is handled in an isolated way within Edinburgh. How do you see us countering that? You mentioned possibly tightening up the Civil Service Code. Are there any other ways that you think it could be done?

Sir John Elvidge: The Scottish Government work quite hard at making sure that officials get that understanding of how the UK Government function in a different way. You are absolutely right that it is no longer absorbed by osmosis from frequent visits. There needs to be a more deliberate attempt to make sure that at least senior civil servants understand the functioning of the UK Government, and that is done in a structured way. It is a fact that, on a whole range of topics, civil servants here in Scotland are in regular contact with colleagues in the south. There is still quite a lot of jumping on trains and planes.

The Chairman: But the animus is slightly different now. It is confrontational.

Q143 Lord Judge: Sir John, I have understood you to say that, largely, it is possible for a senior civil servant in Scotland to serve both the master in Scotland and the master in London, but you also accept that he or she cannot always do that. What I am worried about is whether each individual senior civil servant will choose which to prioritise. Is there a system by which they are told which they must prioritise, or is it left to the relationship between the civil servant and the individual Minister?

Sir John Elvidge: It is certainly more collective than that. It is not a series of random individual decisions.

Lord Judge: But it does not sound as though it is totally structured either.

Sir John Elvidge: It is structured within the limits that it can be structured. I can speak only for my own time there.

Lord Judge: Of course.

Sir John Elvidge: We spent a considerable amount of time discussing these issues with a reasonably large group of the leadership of the Civil Service, so that, as far as we could, there

was a shared understanding and shared practice around these things. By and large, that understanding followed some of the lines we have touched on: an ethos of mutual professional respect with the colleagues one was dealing with; an ethos of attempting to recognise the interests of both Governments and to avoid unnecessary confrontation, but at the heart of it was the recognition that there is no legitimate basis for civil servants to decide that Ministers are acting wrongly, except in limited circumstances where they are clearly acting unlawfully—and it is helpful that the Scottish Government, in that sense, are a statutory creation and therefore bound by the law more explicitly than a sovereign Government are—and in the well-worn territory of financial propriety, where we have longstanding processes. But, outside those definable territories, there was a shared understanding that it is not within the constitutional legitimacy of civil servants to say to Ministers, “I cannot pursue that policy on your behalf”.

Lord Judge: Have I understood this correctly: “Notwithstanding that the United Kingdom Government say this, I am going to follow what you wish me to do”.

Sir John Elvidge: Yes. That would be my understanding of the Scottish Civil Service Code.

Lord Hunt of Wirral: Is there a separate one?

Sir John Elvidge: Yes, there is a separate one.

Lord Hunt of Wirral: I see.

Sir John Elvidge: They are virtually identical in text, but they are separate.

Lord Hunt of Wirral: When I was Conservative Secretary of State for Wales, I had to accept that the overwhelming majority of Wales was run by the Labour Party. There were occasions on which my civil servants slightly rapped my knuckles and said, “Our Civil Service Code says we cannot possibly promote the agenda of a political party”. Yet I am getting the impression now that you think you can use public funds to promote the agenda of the Scottish National Party in Scotland. Can you help me through this jungle?

Sir John Elvidge: I would like to be unequivocal that I am not saying that. The challenge comes—and your experience is relevant—when one tries to decide where the authority and interests of Government end and the interests of the party that happens to form the Government begin. That is not an easy judgment to make. I have to say, since I am a long way away from your conversations with civil servants in Wales, I am surprised that they found much occasion to advance that argument, because it seems to me that it is quite difficult to find the territory that is not the legitimate business of the duly elected Government of the day and is clearly only the business of the party.

Q144 Lord Morgan: Can I just ask about asymmetry, a word hitherto unknown to me, about which we hear a great deal? As you very well know, there is a considerable degree of asymmetry between the nations of the United Kingdom, in terms of their powers and perhaps in terms of what the Governments do. Wales and Scotland, for example, are very different. Does this create particular problems, do you think, for the governmental structure of the United Kingdom?

Sir John Elvidge: It presents a challenge for civil servants in the UK Government, who have to hold in their minds a professional understanding of quite a complex set of arrangements. I do not suppose I would be the only person who said to you that the understanding of the structure of the devolution settlement and its asymmetrical nature is not as thorough or widespread in the UK Civil Service as it might be. For fairly obvious reasons, it tends to be nearer the front of the minds of civil servants in the devolved Administrations, but I think it is a challenge.

It is not a challenge that causes fundamental difficulty to anybody. Of course, it causes friction, which has to be resolved, when people do not understand it. It is probably less of a problem in Scotland than it is elsewhere because, when you are at the top of that hierarchy of asymmetry, it is unlikely that any powers that the Scottish Government have are not understood. It is more a problem for those elsewhere in the UK, getting people to understand that Wales is not Scotland, for example.

Lord Morgan: Thank you. A sombre answer.

Q145 Lord Hunt of Wirral: Is there merit in a statute or charter of the union, setting out principles underlying the UK's territorial constitution?

Sir John Elvidge: That is an interesting question. I am by personal preference an enthusiast for the UK's habit of flexing and adapting before it attempts to put things in stone too rapidly. Taking an international view of constitutional arrangements, we are less than 20 years in. This is a young system. One day it would probably be helpful to try to get greater clarity about the motivating principles, the guiding principles, of the set of arrangements we have come up with. But, while they are all busy moving about, I probably would not try to codify it just now. People in other countries would be horrified by this approach, would they not? In other nations, the idea that you go into the territory and see where you get to would seem very messy to them. I freely confess that it is not a definitive answer of what is right; it is just an affection for the way we do things.

Lord Hunt of Wirral: "Yes, but not yet".

Sir John Elvidge: Yes.

Lord Judge: The other point, surely, is that, if you decide on it now, or in 2019 or 2025, you produce a constitution that is reflective of the conditions as they stand, which might not be a constitution that is appropriate for 10 years or 20 years later.

Sir John Elvidge: Indeed. I was, at one stage of my life, a historian, and I am an admirer of our constitution's ability to adapt itself over centuries to the changing circumstances of the nation that it needs to serve.

Q146 The Chairman: There will be many shared elements resulting from the legislation now before Parliament, bringing forward a whole range of policies that will be devolved, but there will still be a need for wider consultation and better intergovernmental relations. As you may know, this Committee has produced a report on that, which is still awaiting a reply from the Government. Do you see that as a possible vehicle for improving the understanding within the Civil Service between Scotland and the rest of the United Kingdom?

Sir John Elvidge: Yes, I do. As a broad judgment, I would say we have not built quite enough of a robust framework to support the integration and co-operation that everyone wants to see. My affection for the ad hoc does not take me to the point of thinking that a little more structure around this would not be a helpful thing.

The Chairman: Does the Treasury have any presence in Scotland, as an office or as individuals, or is all that work done from London?

Sir John Elvidge: They come, occasionally.

The Chairman: How occasionally, in what numbers and at what seniority?

Sir John Elvidge: Very occasionally and very senior. By and large, we see only very senior Treasury officials.

The Chairman: We cannot anticipate the fiscal framework and what it is going to lead to, but it is going to lead to a lot of—say I, immediately trying to anticipate—communication between the Scottish Government and the Treasury. Might it be sensible for the Treasury to establish a permanent office in Scotland?

Sir John Elvidge: Maybe. There are two ways to approach that. That would be one. The approach to the Scotland Office, as I understand it, is that it should flex its capabilities to reflect what the UK Government need from a presence in Scotland. Just as the Scottish Government are having to learn to do some things that they have never done before, it may be that the other way of approaching this would be to extend the capacity of the Scotland Office into the areas of expertise of the Treasury.

The Chairman: A lot of its work would be public relations rather than substance. It would need a big budget, would it not?

Sir John Elvidge: There might be plenty of substance in the early years of the fiscal framework.

Lord MacGregor of Pulham Market: Those civil servants would be responsible to the Scottish Government, presumably.

Sir John Elvidge: No, not in the Scotland Office. They would be responsible to the UK Government.

Lord MacGregor of Pulham Market: The Treasury ones, I mean.

Sir John Elvidge: Yes, the Treasury ones.

The Chairman: They would be regarded as a foreign embassy.

Sir John Elvidge: That is harsh.

The Chairman: A little harsh, perhaps, yes.

Q147 Lord Cullen of Whitekirk: Could I ask you about public understanding in Scotland of the respective roles of the UK and Scottish Governments? On the one hand, the Scotland Bill makes life a bit more complicated, and, on the other hand, it is said that it will bring a greater sense of realism as to who is responsible for doing what. Do you have any views as to what can be done to promote greater public understanding of the respective roles in the future that faces us?

Sir John Elvidge: To be constructive, this is an area where shared endeavour between the UK and the Scottish Governments, to try to express in simple and accessible terms what the relationship now is, would be helpful. To inject a note of pessimism, it is not a post-devolution phenomenon that citizens do not understand the internal arrangements of central government. I remember, and Lord Lang may remember, that, back in the days of the Scottish Office, we discovered that less than one-third of the population of Scotland knew that the Scottish Office existed. They knew that there was an Agriculture and Fisheries Department, and they knew that there was an Education Department. They did not really know that there was this other thing that was actually the umbrella.

We have to be realistic about how much understanding of these issues citizens will absorb without quite a lot of effort to convey information to them. Also, many of the things that interest us and that we talk about are quite difficult to render in terms that are easily understood by someone whose level of interest in the topic should not be overstated. Yes, it is worth doing. I do believe it would be best done as a joint effort. I do not think we should get carried away by optimism about how much progress one can make.

Lord Morgan: I am just wondering whether things have got worse. One has a feeling, as an outsider, that to ask about where responsibilities lie is perhaps to question where

responsibilities lie, and to that extent might even be quite dangerous, or thought to be dangerous.

Sir John Elvidge: No, I do not think so. Everyone in the political and government structure has an interest in there being clarity of understanding about these things. Irrespective of which side of the constitutional debate one is on, there are arguably advantages to be obtained by better understanding of where we have got to. If one believes in democracy, it is quite dangerous for people to carry significant misapprehensions about the consequences of their voting behaviour as citizens.

Lord MacGregor of Pulham Market: I may be wrong about this, but it seems to me very likely that, as we move to stronger devolution, and all the powers in the Scotland Act and so on—because the pressure is still for that to continue—two separate civil services will develop between the rest of the UK and Scotland, sharing the same values, the same ethics, the same training and work practices, but serving two different Governments.

Sir John Elvidge: Yes, that is fair. There are differences of ethos without disturbing the commonality of ethics, and it has always slightly been so. The Civil Service in Scotland has always felt slightly different in terms of its working ethos from the Civil Service in London. The question is: is that damaging and does it threaten the things that need to be common? I would say that the evidence is that it has not necessarily been damaging so far. Could it become damaging? Yes, of course. It is a perfectly realistic risk to pose.

I cannot quite remember Tam Dalyell's words about devolution, but I do not think we are on a motorway with no exits. I do not think it is in any sense an inevitable consequence of the arrangements that we have. There is another way of looking at this. Lord O'Donnell said, when he was Head of the Civil Service, that the UK was a remarkably lucky country in having established a permanent basis for the comparative study of public policy, in a broadly homogenous economic and social context. The positive view of this is that you can see the opportunities for the Civil Service to be engaged in shared professional learning from the differences, rather than being pulled apart.

Q148 Lord Hunt of Wirral: I know that a week is a long time in politics, but we now have several months before the elections in Scotland. Looking ahead, if a very pro-union Government were to be elected next year in Scotland, what effect would that have on the impartiality and independence of the Scottish Civil Service?

Sir John Elvidge: I am not sure it would have any. In so far as one worries about the strains, then by definition the strains would be diminished. If one took a microscope to the working relationships, one probably would not see a difference.

The Chairman: Sir John, we have just about run out of time. You have been extraordinarily helpful and forthcoming, and fascinating to listen to. Thank you very much indeed. Is there anything you think you should have said or we should have asked you?

Sir John Elvidge: No, I think you have asked all the difficult questions.

The Chairman: A very sensible civil servant's answer. Thank you very much.