



Select Committee on the European Union

Corrected oral evidence: Brexit: devolution

Tuesday 28 March 2017

2 pm

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Members present: Lord Boswell of Aynho (The Chairman); Baroness Browning; Baroness Falkner of Margravine; Lord Green of Hurstpierpoint; Lord Jay of Ewelme; Earl of Kinnoull; Baroness Prashar; Lord Selkirk of Douglas; Lord Teverson; Lord Trees; Lord Whitty; Baroness Wilcox; Lord Woolmer of Leeds.

Evidence Session No. 16

Heard in Public

Questions 149 - 156

Witness

[I](#): Lord McConnell of Glenscorrodale.

Examination of witness

Lord McConnell of Glenscorrodale.

Q149 **The Chairman:** You will be more than familiar with the broad structure of these sessions, but a very warm welcome to you, Lord McConnell of Glenscorrodale—a former First Minister of Scotland and, I think, the longest-serving. We are anxious in this Brexit: devolution inquiry to try to sound all shades of opinion in each devolved nation and to know the minds of our colleagues, who have been generous with their time, in the different parts of the inquiry. We are extremely grateful to you for coming this afternoon. You will know the usual rules of engagement. This is a public evidence session. We will webcast it and we will send you a transcript for any factual corrections.

Perhaps I could also say at this point that certainly as we see it—I am sure that you can effect this, because you are here—the intention is to have a continuing relationship with you through this challenging period for the British system and approach to these issues. What you say today is useful and what you may wish to add in the future will be equally useful, so please keep in touch with the Committee.

Having said that, I will kick off with the first question. What is your reaction to the Prime Minister's Lancaster House speech and then the White Paper? We have other White Papers coming out this week and we may return to some of those, but from what you have seen so far of the UK Government's approach to Brexit negotiations, and in particular the political, economic and legal implications for Scotland—and the other devolved nations, if you want to add a comment on them—what is your reaction?

Lord McConnell of Glenscorrodale: First, thank you very much for this opportunity, and my apologies that I was unable to attend the Committee on an earlier date. I was very keen to give evidence and I appreciate this opportunity to do so. I should probably say for the record that unfortunately I am not now the longest-serving First Minister, as I was overtaken by my successor, but I am still the youngest—and that includes Ms Sturgeon. I will retain that until someone who is under 41 takes on the position in the future.

On the first question, I want to make a few general remarks, which I am sure you will come back to in other questions. It seems to me that a critical situation is emerging now as a result of the vote last year, the Government's strategy as it has developed, including in the Lancaster House speech, and subsequently the speech of the First Minister. I worry deeply that the polarisation of the two positions taken by the UK Government and the Scottish Government could lead to real problems further down the line in Scotland, given the implications for the legislative responsibilities of the Scottish Parliament and the implications for the Scottish economy, not just in relation to another independence referendum but more generally in relation to the amount of detail that will have to be covered between now and the great repeal Bill and the other actions that will come out of the Brexit negotiations.

There are a number of fundamental principles here. The Prime Minister laid out a very clear strategy in the Lancaster House speech. I, for one, believed from the moment the vote took place last June that it was logical for the UK then to decide, if it was going to remove the jurisdiction of the European court, to leave the single market and ultimately almost certainly the customs union. So her speech was not much of a surprise and I think it is a logical strategy, given where we are—many of us might not want to be here but given that we are, it is clear. In that speech, she made a positive reference to Scotland, but yet again—this has been the tradition with the last four Prime Ministers—that statement was couched in very defensive terms about the United Kingdom rather than stressing the potential and the possibility that this new situation might provide for the diversity of the modern-day United Kingdom. When the First Minister, in her response, indicated that she wanted to have another independence referendum, that was perhaps predictable, but it meant that there was almost no reference on either side to the great detail that needs to be addressed, not least because of the specific circumstances in Scots law that will be affected by all this.

To summarise this briefly, I think the two Governments need to take a different approach to this. I hope that in the weeks to come they will look at this. First, because of the intransigence of the two positions and the claims and counterclaims that will result from that in every meeting that takes place, there needs to be even more transparency about the process of intergovernmental discussions within the United Kingdom than there is in Whitehall or between the UK and the EU. All the papers that are discussed between the UK Government and the Scottish Government should be published, and there should be open access to them.

Secondly, the discussions should respect the current devolution settlement. That should be a firm position of both Governments before they get started. That would produce, in terms of stability in the allocation of powers, a fairly straightforward process.

Thirdly, where there is a dispute, there should be some form of independent adjudication over the allocation of powers within that settlement. Without needing to refer to the Supreme Court, it should be possible through a judicial appointment perhaps, or something of that sort, to have at least an independent view where there is a dispute over the allocation of powers as a result of the repatriation from Brussels.

Fourthly, there needs to be active co-operation in the post-Brexit world so that if, for example, all the powers on fisheries are devolved to the Scottish Parliament, as would be the case under the current devolution settlement, a co-operative arrangement is set up immediately on a UK basis to enable Scotland, Wales, Northern Ireland and England to discuss a common fisheries policy for the UK. Again, that seems to me entirely logical and straightforward, if it is agreed at an early date.

Fifthly, there needs to be an urgent injection of capacity, in which I would include transfers between the two Governments of civil servants, so that UK civil servants are embedded in the Scottish Government and Scottish

Government civil servants are embedded among those working on Brexit in the UK Government, with additional capacity, certainly on the legal side, in both Governments to deal with aspects relating to Scots law.

Finally, and this probably goes to the nub of your question, everybody has to fully understand that if there are to be special arrangements for Northern Ireland—as there have to be—as a result of these discussions, it is simply not true to say that there will be one solution for the whole of the United Kingdom. Therefore, there needs to be some flexibility in relation to Scotland and perhaps to Wales.

The Chairman: Thank you for that very clear statement. May I come back just once on it to see whether I have read you aright? The first proposition that I derive from what you are saying is that Brexit has perforce opened up issues that were otherwise if not closed then at least not presented in such a stark form. Secondly, in the relatively short and medium term—in the next two years of the Brexit period, say—the negotiations that we now need to undertake at a member state level with the European institutions will not be well served if the parties between the UK Government and the Scottish Government are not at one on the common objective of getting the best deal or if they interpret it in radically different ways. Thirdly, looking forward, if such a collaborative or consensual approach might be achieved, that might have certain longer-term implications for the reversion to peace time, as it were, in the devolution settlement. Is that roughly what you are arguing for? Obviously we will return to some of the details later.

Lord McConnell of Glenscorrodale: That is quite a good summary. This is obviously a difficult situation for the UK Government—at least, it was for the first eight months following the referendum. The Prime Minister has given some clarity on that, whether we all agree with the outcome or not. Her clarity on strategy is now helpful for everybody, inside and outside government. The problem in Scotland is that with the potential for a second independence referendum comes a tendency for both the UK Government and the Scottish Government to respond to every issue and discussion in that context, thinking about this possible independence referendum at some point in the next five or six years. That would be a tragedy, because there are huge issues here. The great repeal Bill, for example, cannot cover all the devolved responsibilities. There will also need to be a great repeal Bill in the Scottish Parliament, and someone has to start working on that quickly.

A debate about additional powers for the Scottish Parliament can wait for another time. The focus now should be on getting the right distribution of powers inside the UK as a result of the repatriation from Brussels. It is not a hard process but it needs a forensic, detailed approach at both ends of the Edinburgh to London railway. It is possible to do this if there is good will. I worry that the good will is already not there, and if that is the case transparency is required. If the public and media can see what is being discussed, and if what is proposed is on the table in writing from

the two sides, it is much harder to exaggerate each other's position and cause further fractures in what little good will may still exist.

The Chairman: That is really helpful. Before I leave this, I will come back on one point. We will want to ask further about the great repeal Bill later on, but you have mentioned it specifically and already made a general statement about the need for cross-posting and collaboration at the official level, as well as at the government level. You are probably well placed to answer this from your previous contacts. Is it your impression that the structures are not in place, and are currently not being put in place, for discussing who does what and with a full understanding of why they are doing it, and who needs to pass on and deal with other bits of the tapestry?

Lord McConnell of Glenscorrodale: I made the same point to the Constitution Committee when it had a detailed look at the way devolution was operating in the UK some two or three years ago. There has been a very damaging decline in the interchange between the Civil Service that is within the responsibilities of the Scottish Government and the Civil Service that operates across the UK and is within the responsibilities of the UK Government. Before devolution, senior civil servants in Scottish departments, and certainly those working with Ministers, used to spend some time in the big departments in Whitehall as well as in the old Scotland Office.

I was always very keen that we continued that process of Scottish civil servants spending time in the Treasury or perhaps the Foreign Office and in particular the Cabinet Office, but also vice versa. It happened to a certain extent from Edinburgh to London, but I am not sure that it happened much in the other direction. We would all have a better understanding of the challenges and the decisions made in each jurisdiction if there was more of an interchange between the civil servants. There is an opportunity here to rectify that quickly by embedding the civil servants of both Governments in each other's departments and therefore ensuring that they are at least behind Chinese walls. There would be an understanding and a bit of discussion that the politicians could fall back on.

Q150 **Lord Trees:** Good afternoon, Lord McConnell. Your introduction has led into the next series of questions, which attempt to probe in more detail the extent to which a bespoke arrangement can be provided for the devolved nations.

The Prime Minister has said on a number of occasions that she would like to reach a Brexit agreement that works for the whole of the UK. So, first, has she so far delivered on that undertaking? Then a little more specifically, is it possible to respect that referendum result while taking account of the divergent views of the nations, particularly, if I might be frank, if one Government have two agendas? Is it also possible—I think you have hinted at this with reference to Northern Ireland—to have differentiated relationships in other parts of the UK, in addition to Northern Ireland, or is a single arrangement the only solution?

Lord McConnell of Glenscorrodale: In the same way as we can look across the European Union through the decades and find examples of flexibility in its joining criteria or the implementation of specific legislation, or even sometimes in the treaties, to accommodate different points of view, to me the modern, 21st-century UK is, even more than it was before, a shared sovereignty operation. In that situation, you have to take account of the fact that there are significant powers that are properly devolved, but devolved on the understanding that they will not be interfered with in Scotland and Wales, or in Northern Ireland when the Executive there are operating. But we also have the background of the situation in Northern Ireland. Nobody is suggesting that there will not be some flexibility in Northern Ireland going across the border with the Republic. If there can be some flexibility for Northern Ireland, it is not outwith the brainpower of the British Government to find accommodations in some sense with some of the aspirations that there are in Scotland.

That is not to say that you can be a member of the UK single market and a member of the EU single market if those single markets become two distinct and different operations. The idea that Scotland could stay in the single market while still being part of the UK is not at all legally possible, never mind realistic in any other way. But on other issues it should be possible to give some indication to the fact that in Scotland there was a clear political expression, not just in the public vote but across the five main political parties in Scotland, that we had a closer relationship with Europe, and with some of the ideals of the European Union, than was perhaps the case elsewhere in the UK. The British Government would be very wise to find ways of accommodating that, not in a defensive, negative or fearful sense but in a positive sense that celebrates the diversity of the shared sovereignty of the UK. It is possible to do it. It just needs effort and good will.

The Chairman: Have you any particular areas in mind that would be obvious candidates for a differentiated settlement?

Lord McConnell of Glenscorrodale: I will give two examples, one that already exists and one that could exist. There is already in Scotland a slightly different set of criteria for some of the immigration categories for work visas and so on.

The Chairman: Which partly reflects the demographics.

Lord McConnell of Glenscorrodale: Which partly reflects the different demographics and economic challenges in Scotland, and so on. I believed strongly when I was First Minister that in Scotland we needed more cultural diversity. We needed more of an injection of new talent and people from elsewhere in the world if Scotland was to become more entrepreneurial and economically successful. That was reflected in our agreements at that time with the Home Office, particularly when David Blunkett was the Home Secretary. It is possible to find ways in which that desire is accommodated within the UK immigration system once all the powers are properly repatriated to the UK.

The other area I would mention, though, is trade agreements, which is a whole new area for the UK Government to deal with. There are specific industries in Scotland, such as the whisky industry, where it would not be outwith the brainpower of everyone involved to find ways in which the Scottish Government might be engaged in some of the international trade discussions that particularly affect them. So there are ways of working collaboratively and for the UK Government to signal to Scotland that they want to work collaboratively if the will is there to do so.

The key issue is psychological, in my view. Every time Prime Ministers and other senior figures in the UK Government have talked about Scotland in the last 15 years, they have been reacting defensively to a situation that they have seen emerging and felt was potentially getting out of control. They need instead to embrace the diversity of the UK and find positive solutions rather than trying to be defensive and trying to find some "one nation" that no longer exists.

The Chairman: That is very helpful as a general statement of your position, and obviously colleagues will want to explore some of the details in a minute. May I sound you out on one question? You have referred a number of times to Northern Ireland, and as you will know this Committee has taken a close interest in the island of Ireland. You have not mentioned Wales in terms, the third devolved nation, although that in no sense derogates your answers. Do you have a perspective on that? Do you see Wales and Scotland as having different approaches? We will talk about the respective Governments' respective White Papers on Brexit shortly. Are you in touch with Welsh opinion on this as well, or do you look at it in a somewhat detached way?

Lord McConnell of Glenscorrodale: There are very good reasons why we have three different devolved settlements in the UK.

The Chairman: Because there are three different sets of problems

Lord McConnell of Glenscorrodale: Yes. In Northern Ireland, specific historical circumstances have led to a particular form of treatment that is designed to build peace as well as, hopefully, prosperity. In Scotland, for me, ever since I cast my very first vote way back in the 1979 referendum, the issue of devolution in Scotland has been a point of principle about the fact that we have a separate Scottish legal system, which should be controlled by a democratic parliamentary institution. That was always my view, and to me it is the core of Scottish devolution. Everything else is an agreement that makes that work as well as it can, but the core of it is that the legal system is separate, and therefore special arrangements are made for Scotland. That situation does not arise in Wales. Again, there are other reasons for having the Welsh Assembly. Given that we did this, I do not see why we cannot be as creative and recognise those historical backgrounds and present-day realities when we look at how Brexit is implemented within the UK.

Lord Selkirk of Douglas: What is your assessment of the Scottish Government's paper on Scotland's place in Europe? Do you agree with a

good deal of the paper and take issue with other parts of it? How realistic are the proposals that the paper sets out? As a follow-up question, should the UK do more to take account of the Scottish Government's perspective on Brexit?

Lord McConnell of Glenscorrodale: This is not the first time I have been a bit disappointed with the detail of a paper from the Scottish Government on Scotland and the UK's relationship with the EU. A paper was published by the Scottish Government at the time when Prime Minister Cameron was looking at potential reforms to the EU, even before the last independence referendum, that was meant to be a contribution to the debate about reforms in the EU but was relatively empty of any substance. I do not think that document has really stood the test of time. Apart from the point that is made in the Scottish White Paper about the single market, which is obviously a substantive point but one that I do not think works in practice—if you are in the UK single market you cannot also be in the EU single market; these two things are separate and under separate jurisdictions—there is not a lot of substance. For example, it does not lay out the implications for Scottish criminal and civil law. Those implications have been raised by hardly anyone, but there are big issues about cross-border adoptions, wills, contracts and so on in civil law that will need to be addressed as part of this, and they will be peculiar to Scotland and not consistent across the whole UK legal system.

I was therefore disappointed by the Scottish Government's paper. They need to do better and come up with more detail, not only on what they want but on what they will do, and not on what they want to do with powers but on what they will do to implement the repatriation of those powers and create the capacities and the systems that will make them work in practice. Both the Scottish and UK Governments have been failing in one other aspect so far: recognising that in the same way as there will need to be co-operative arrangements between the UK and the EU in certain areas in future, in some of the powers that are repatriated—fisheries are an obvious example, but there will be others—co-operative arrangements will need to be agreed between the governments of the UK internally to make these repatriated powers work in practice and in a way that is sensible and helpful. Both Governments need to do better, and they can do.

Q151 **Earl of Kinnoull:** I will take you on to something that you touched on in your introductory remarks. What did you feel the implications were for the Brexit negotiations of Nicola Sturgeon's announcement that she would seek to hold a second referendum, and hold it before negotiations were complete?

Lord McConnell of Glenscorrodale: The prospect of a second divisive referendum in Scotland does not cheer my heart. Apart from for a few people who enjoyed the debate, who tended to be activists taking part in creative discussions among themselves, I do not think that the last referendum was a wholly enjoyable experience for people across Scotland; I certainly came across many people who found the whole experience really quite difficult. So any move towards another

referendum needs to be treated cautiously, not just because of division but because of the very real need to get the timing right. I recognise that the timing is a political issue. The nationalists, perhaps understandably, would like to have that referendum quickly while the UK Government are otherwise detained. The UK Government, quite clearly, seems to want to push any second referendum as far back as possible. I suspect that the ultimate outcome will be a compromise between the two.

My biggest worry about this is that Ministers in both Governments, and maybe some civil servants, will spend most of the rest of this year preparing arguments about this issue instead of preparing the necessary legislation—executive orders and all the other things that will be required—in order to make Brexit work for Scotland in a practical sense. I am seriously concerned that this debate about the referendum, however predictable it might be, will be a huge distraction from the urgent business, because there is a time limit on this now, of sorting out the legislation, the capacity, the arrangements that will be required for Scotland to be governed properly, regardless of the constitutional position following the final day of Brexit in two years' time.

The Earl of Kinnoull: I have one brief follow-up question on that. Scotland is trying for a differentiated deal. I wonder whether you feel that the situation with the proposed second referendum was helpful, or a hindrance to someone who was trying to look for a differentiated deal.

Lord McConnell of Glenscorrodale: Again, everybody is choosing their words very carefully. On some occasions at least, the Scottish Government have talked about access to the single market rather than necessarily full membership. "Access to the single market" is the language that the Prime Minister is now using, so I am not sure whether the two sides are quite as far apart on the detail as the impression that they want to give us implies. That is why the transparency is so important. I would like to have on the record not so much what both sides' spin doctors say after a meeting between the Prime Minister and the First Minister, or between Mr Davis and Mr Russell, or anybody else for that matter; I would be interested to see what is on the table, what has been proposed and agreed, and what has been put off until the next meeting. In that way, you would focus the attention of both Governments on the detail.

I have some big disagreements with the Prime Minister and Mr Davis, but this continued move towards more and more detail coming out about what the British Government are trying to do is helpful. It is helpful for accountability and discussion, as well as for their negotiating positions. The point I am trying to make is that the same should be true inside the UK as it is between the UK and the EU.

Q152 **Lord Whitty:** You have already covered some things about the allocation of competences after we have a great repeal Bill, and after we have domesticated, repatriated or nationalised the regulatory powers. Could you be a bit more explicit about which powers should come to Scotland, whether Brexit changes the current balance of competences at all, and

whether other powers should therefore follow simply as a result of Brexit?

One issue that you have not commented on is that competences also imply money. For example, would you regard the common agricultural policy money and structural funds money, which has to come directly from Brussels, as something that comes directly to Scotland? Is there any role for the Westminster Government in that? Is there any shared competence? Could you outline a little more how you see that reallocation of competences, which, as you say, would have to be approved by a Scottish great repeal Bill as well as the one here?

Lord McConnell of Glenscorrodale: First, discussions on money will be helped by my proposal about transparency. Again, what we want here is not spin on both sides but substance. If figures are being looked at, they should be transparent so that both sides in the debate can be held accountable.

One thing about the money is that it is important to look at the complete bundle, not just one individual responsibility. If we spend time focusing on agricultural, fishing and higher education grants or on the regional development funds, or whatever they are currently called, certain parts of the UK will benefit more in those areas than others. But if you take European funding as a whole, I suspect that the discrepancies are not quite as huge.

If, as I understand it, Scotland currently receives more than what we would call a Barnett consequential in agriculture, I suspect that it receives less in European regional development-type funding, given that some of the money goes to the north of England, Wales and Northern Ireland. I suspect that Scotland gets more in higher education research grants per head of population but probably slightly less in some other aspects of European funding. That might be the case in relation to general government spend on the EU.

It would be very helpful to see that in the round and to have a full and complete picture, rather than simply focus on an individual area. The outcome might be perceived to be fairer in every part of the UK if that happened. In any case, transparency would help to make the case for it being fair. However, this cannot be done just on Barnett consequentials. If the promise that has been made—that funding will be preserved—is kept by the Chancellor, there needs to be some flexibility with the Barnett formula to achieve that.

On the powers more generally—I say this almost as a plea, because I already see a debate opening up in the speeches being made about the powers of the Scottish Parliament—there is a very tight timetable and a lot of work to be done. It is only about a year from our agreement on the last set of new powers for the Scottish Parliament, many of which have not been used yet and some of which have not even been triggered yet. It seems to me that the best thing to do over the next two years is to repatriate those powers from the European Union, within the bounds of

the current devolution settlement in Scotland, Wales and Northern Ireland.

Those settlements were designed to have absolute clarity. There was a reason for the reserved powers system, which provided more clarity than a list of devolved powers. It said that if a power is not reserved it is automatically devolved. That clear principle was agreed back in 1997 and has worked in practice ever since. I think you could count on one hand the number of cases since where there has been a dispute between Edinburgh and London about who has the power to do something: that is, a legal dispute as opposed to a political dispute. That system works, and it will be obvious which EU powers are reserved when they are repatriated to the UK. Everything else should then be devolved. There are obvious examples in all that: on one side in fishing, agriculture and so on, and on the other in international trade.

There then needs to be a positive approach by both Governments to describe how they will use those new and additional powers in a co-operative way. If the UK Government were to say, "We want the Scottish Government, the Welsh Government and the Northern Ireland Executive to work with us co-operatively on things like a common fisheries policy for the UK", but also, "We will work co-operatively with them so that where we have the power, as in trade, we will engage the Scottish Government in our discussions", for example on whisky, in the same way as UKRep in Brussels would always have involved Scotland House—our office in Brussels—in those discussions at the European Union level, it would ensure that Scottish interests were represented in those discussions. Both sides can be positive if they can find ways of making co-operation work within that kind of settlement.

Lord Whitty: In the new situation, taking agriculture as an example, because of the principle that if it is not reserved it is devolved, agriculture has hitherto been a Scottish Government responsibility. But that has of course been overridden by Europe requiring the whole of the United Kingdom to observe certain regulations and conditions for expenditure. When that goes, there will be a discussion as to whether, even in that area, some reserve powers should be reinvented. Do you see that as a real issue or something that we just have to negotiate our way through, when clearly the regulatory power could undermine the single market within the United Kingdom in certain respects?

Lord McConnell of Glenscorrodale: I go back to the point I made in my opening statement about precisely those kinds of issues. There will be those who say that the reserve power—that is, the single market of the UK, or trade—overrides the precedent of devolving agriculture, fisheries or whatever. On the other side, there will be those who will say that the fact that agriculture, fisheries or whatever is currently devolved means that anything that is in any way associated with that should automatically be devolved.

I think there will be space not just for political posing but for genuine disagreement or dispute on the interpretation of that settlement. In that

situation, there needs to be an alternative route to the legal dispute that might then lead to constant challenges in the Supreme Court. That is why I suggest the appointment of, for example, a senior judge who has served in the Supreme Court from Scotland or wherever, or maybe three. If people wanted to be sure about this, there are Scottish judges who have served at European level. You could easily have three judges, one of whom had spent all their time in the Scottish legal system and at the Court of Session in Edinburgh, one of whom had served on the Supreme Court and one of whom had served in the European court. Those three judges could have the job of adjudicating, or at least recommending an adjudication, in a dispute about the interpretation of the definition of reserve in relation to some of the issues that affect the market and trade issues and specific policy responsibilities. I think getting that agreed now would save an awful lot of grief further down the road.

Baroness Falkner of Margravine: To pick up that point about the adjudication mechanism at the European level as well as here, which is very interesting, how would you see the English, Welsh and Irish interests being represented?

Lord McConnell of Glenscorrodale: The interesting thing about devolution in Scotland, Wales and Northern Ireland is that each of the three devolved settlements is very specific for that jurisdiction. If the same issues were likely to arise in Wales and in Northern Ireland, there is no reason why you could not also have an adjudication—

The Chairman: Separately?

Lord McConnell of Glenscorrodale: Yes, a separate adjudication. The three devolved settlements are very much agreements between the people of those three smaller nations in the UK and the UK as a whole, as represented by the UK Government and the UK Parliament. Those three individual settlements have a very distinct element in each of them that needs to be reflected in any of the mechanisms as well as the final decisions in this process.

Lord Whitty: You partly covered this question in your earlier answer to the Chairman. Do you think that in its present state the Scottish administrative structure has the capacity to take on these areas? Interestingly, you started talking about the interrelationship between members of the Scottish Civil Service and Whitehall. I have to tell you that when we asked the question of various people in Edinburgh, they all said that no member of the Scottish Administration has been seconded into any of the Brexit departments, which struck us as peculiar. You are making a much more general point. Would you like to comment not only on the general issue of capacity but on the question of interchange that you were beginning to develop earlier?

Lord McConnell of Glenscorrodale: Hopefully I can comment much more briefly on this than I have on the other issues. I think there will be the same issues of capacity, although maybe not exactly on the full scale, in relation to new responsibilities in the Scottish Government as there will

be in the UK Government in relation to trade and so on. Yes, of course there will be a need for additional new capacity and skills. Those skills may exist in British civil servants who are currently working in Brussels, but certainly the Scottish Government need to think about that and quickly. The issue of interchange is really important, but it has broken down, partly as a result of the breakdown in relations between the two levels of government in the last 10 years. I believe that embedding civil servants on each side would be really helpful, even if it was behind Chinese walls. That would be really good to do.

The other issue is capacity here. I do not believe that the current scale of the Advocate-General's office will be able to deal with the number of issues affecting the Scottish legal system that will arise during the Brexit negotiations over the next two years. We have an almost entirely separate civil and criminal law in Scotland, and you cannot deal with that with a few civil servants and a department with one Minister. That will also have to be built into this in London as well as Edinburgh.

Q153 Baroness Browning: On the great repeal Bill, how do you see the devolved legislatures playing their role in this? Will they need to legislate in parallel, or would it be sufficient for them to indicate their assent with something like a legislative consent Motion? What happens if no consent is forthcoming on certain matters, or indeed on the whole Bill?

Lord McConnell of Glenscorrodale: When I looked at your list of possible questions that I might be asked today, this is the one that I had to give most thought to. Having had the tortuous experience of discussing these legislative consent Motions on a regular basis in my years as a Minister, I can say that they were always difficult decisions and it is always a balancing act between the right thing to do and what you can actually achieve politically in the Scottish Parliament. There is a real possibility, particularly if the Scottish Parliament has asked for a second independence referendum but the UK Government have said no or "Not yet", and given the deadlines that we are all trying to work towards, that the Scottish Parliament, with its current make-up, might then use the legislative consent Motion process, or even a great repeal Bill in the Scottish Parliament, as a challenge to the UK Government. It would be understandable if they did that. If they had the opportunity to do so, I can see why they would want to.

I come back to my original statement: if there is no clarity and transparency in the negotiations exposing both sides—the UK Government and the Scottish Government—to full accountability in the positions they are adopting, and if there is not some process of adjudication on some of the issues regarding powers that might then arise, I think we will find ourselves in 12 to 18 months' time facing the prospect of the Scottish and UK Parliaments disagreeing in the Supreme Court and the whole timetable being derailed. I come back to the issue that we need to resolve how we are going to resolve differences now so that at the end of the day, if there is a great repeal Bill in Scotland—perhaps coupled with some legislative consent Motions; there might need

to be both—that has been agreed publicly and transparently so that no one on either side can then go back on the deal.

Baroness Browning: Apart from the proposed referendum on independence, are there any other hotspots that you have identified that might be key sticking points?

Lord McConnell of Glenscorrodale: I am concerned about the impact that all this has on the distinctive criminal and civil law in Scotland. Based on the experience of the last 18 years, I am not convinced that, with everything they are facing, the UK Government will be alert to all the implications for the Scottish criminal and civil law that they need to take on board. Therefore it would be very easy to see towards the end of this process the possibility of a number of issues arising that simply have not been thought through properly.

That takes us back to the issue of capacity that was raised a minute ago. This is not a normal political process in which you can just put it off for six months. There is a deadline, and these new laws will have to be passed. So scaling up the capacity right now needs attention at both ends of the M1. Having an adjudication mechanism and transparency in the process needs to be dealt with now, because if these issues arise in 12 months' time it might be too late to resolve them properly.

I was sitting in the Scottish Parliament as Finance Minister—I was not First Minister at the time—in August 1999. We always talk about the first Act that was passed by the Scottish Parliament and which I put to Parliament to set up the financial rules and regulations—the Public Finance and Accountability Act—but actually the first Act was a piece of emergency legislation that arose because a legal technicality had led to the release of a prisoner who, if I remember rightly, was deemed to be dangerous, and we had to act very quickly in order to fill that gap in the legislation. I worry that if the Scottish legal provisions are not properly accounted for in these discussions and there is a mix-up in the final month or so before the passing of the great repeal Bill, there could be mistakes with quite serious consequences. We need to get our act together on this.

The Chairman: Do you get the impression that there is any significant body of opinion, in London or in Edinburgh or both, that is buying into your ideas on transparency and dispute resolution?

Lord McConnell of Glenscorrodale: Not yet, but I am an optimist.

The Chairman: That was a short answer, and I got the point.

Q154 **Lord Jay of Ewelme:** First, could you sum up what you have said so far about whether the UK Government are doing enough to take into account and reflect the different interests of the devolved Administrations? Secondly, do you think that the Joint Ministerial Committee, about which we have heard quite a bit, is the vehicle for doing that? The implication that we have heard until now is that London seems to speak rather highly

of the Joint Ministerial Committee but when we asked people in Edinburgh, Cardiff or Belfast they seemed to be rather dismissive of it. I wondered where you stood on that.

Lord McConnell of Glenscorrodale: I was never a fan of those committees, I have to say. I am probably the most sceptical person ever involved with them. The only one that I have found to be particularly useful was an internal UK Government JMC, which was the one on Europe that was chaired by the Europe Minister, including during your time as head of the Diplomatic Service. That is because, in my view, that JMC had a function. It was partly for exchanging information and partly about agreeing and understanding the UK Government's line on certain issues, looking ahead to the debate on the constitution of that time, and so on. If people are honest about the other JMCs that involve the devolved Administrations, they will say that they are seen either as a chore or as a political opportunity, and neither of those two psychologies fits the bill on this particular business.

There needs to be a JMC on European negotiations because there needs to be some mechanism for them to pull together, but I do not think it is at all sufficient for the depth of discussion that needs to take place here. I do not know enough about the procedures to know if their members are presented with papers from each side and go through the details slot by slot, but there need to be direct civil-servant-to-civil-servant and Minister-to-Minister negotiations for each of the three devolved nations in the UK. The papers and agreements from those discussions could then be ratified by a JMC on European negotiations that then went up through the process in Whitehall or wherever, but that bilateral agreement is critical for getting right into the detail of this as opposed to the general process and strategy, which is really what we have been talking about so far.

Lord Jay of Ewelme: So the JMC on European negotiations would be ratifying what had been sorted out bilaterally with the three different Administrations separately?

Lord McConnell of Glenscorrodale: Yes. It would be a way of recording agreements that were then processed through the system.

The Chairman: The idea of cross-posting, to which you referred earlier, could be relevant to this in that there would be representatives of the Scottish Government in the Cabinet Office who could walk down the corridor and say, "We need to sort this out". There would be informal working-level contact before anything went through for conclusion or ratification by the JMC.

Lord McConnell of Glenscorrodale: Yes.

Q155 **Baroness Prashar:** I want to talk about the interparliamentary dialogue mechanisms between Westminster and the devolved legislatures. Are the existing arrangements adequate, or do you think something more is needed to meet the challenges of Brexit?

Lord McConnell of Glenscorrodale: The first thing I would say about this is that I am not certain what arrangements are currently in place, so my comments may not be as full in this respect as I would like them to be. I am also not sure how involved the Speaker and various committee chairs in the Westminster Parliament are with the Government in talking about how they will process this. I presume that discussions are taking place about how to create the parliamentary time and so on, but I do not know for certain.

Baroness Prashar: What would you like to see?

Lord McConnell of Glenscorrodale: Ideally, I would like to see early discussions between the Speaker and the Presiding Officer in Scotland, and I presume that would be the case in Wales and Northern Ireland. Even with the current situation in Northern Ireland, these discussions should be happening. I would like to see, at least in preparation, a system in the Scottish Parliament that would mirror the system that is being developed to deal with the great repeal Bill here in the UK Parliament. There are all sorts of issues here. There are issues in the Scottish Parliament about the parliamentary timetable. It meets in different months of the year, for example, so if there were a parallel Bill, at what point of the year would it be discussed? Would it get out of sync at some point, and would that cause any difficulty?

I think the Scottish Parliament will need to change its committee structure. It does not have the Select Committee/Bill Committee divide that exists in the UK Parliament. It has combined committees, which I have been critical of in the past, so it will have to find a way of creating the legislative discussions in the committees that will deal with any Bill that comes along. A lot of preparation will be required, and the best place to start on that would be perhaps some kind of joint working group set up by the Presiding Officer and the Speaker—again, engaging with each of the three Administrations, Parliaments and Assemblies and starting right now, not leaving it to once the Government have come up with plans and proposals further down the road.

The Chairman: At least potentially and somewhat in the future, could we even look at things jointly as a London-based Select Committee with a devolved legislature that had a particular interest in the area?

Lord McConnell of Glenscorrodale: I have absolutely no objection to that in principle. The situation is complicated by the decision that was made by Ministers in the Scotland Office in 1998, almost before the Scottish Parliament was created, that there would be this hybrid system of committee, which means that we do not have the exploratory, investigative Select Committee style that might work.

But I see no reason why you could not create, as we have created in these two Houses, hybrid Committees that share the membership of both Houses. It would be an interesting experiment to do that for the UK. Let me give an example. To go back to Lord Whitty's questions, if we were looking at a common agricultural policy or a common fisheries policy for

the UK, where each devolved nation had its own responsibilities and the UK Government had their responsibility—for England and perhaps for some overview—would there be a case for a joint parliamentary committee on what that policy might look like in practice, rather than the four Parliaments doing their own thing while the four Governments tried to work together? That would be quite an interesting idea, but perhaps two years down the road rather than right now.

Q156 Lord Green of Hurstpierpoint: Looking in the other direction, across the Channel, how far do you think that the EU, collectively and individually at member state level, understands the subtleties and importance of some of the issues that affect the devolved Administrations? You said earlier—we would all agree, of course—that there are distinctive situations in three of them. Perhaps we should leave Northern Ireland aside for the purpose of this question and focus primarily on Scotland. This is not really about Brussels and the machinery there. How far do you think the member states more generally, which will be important in the process—and certainly at its end—understand the aspirations and particular issues that are of concern to the Scottish people and the Scottish Government?

Lord McConnell of Glenscorrodale: I think that the level of understanding is different in different member states of the European Union. There is acute understanding in Spain, and there is quite a good understanding in Germany, not least because its second Chamber is based on representation from its Länder, as is the case in Austria. There is a degree of understanding in Belgium, perhaps more at the devolved level than necessarily at the central government level, and in one or two other places. It is perhaps less so with a different regional system as in France, for example, and maybe in one or two of the eastern European countries.

I was involved in a very interesting group when I was First Minister, which was called the Conference of European Regions with Legislative Power. We were established as part of the debate on the EU constitution to see whether there could be a role for regions that were not administrative but legislative regions, in the countries that had those systems. We formed a group and met for four or five years, but following the Lisbon treaty it really drifted away as an institution. I had the privilege of being its president in 2004. The group involved Catalonia, Bavaria and some of the other German Länder, as well as Salzburg in Austria, Wallonia and Flanders in Belgium, and so on.

These issues exist elsewhere in Europe and there is therefore an understanding in the EU Council that they have to be addressed, but it is not always a positive understanding. Sometimes it is an even more defensive reaction than the UK Government take. In Germany, they would be more open to having a decent discussion about this, and in Spain they would be closed to it, for understandable reasons.

However, Michel Barnier has an understanding of this. I would not want to be derogatory to anybody else but to this day I found that my

exchanges with Michel Barnier, when he was an EU Commissioner, were the best negotiations that I had with any Commissioner. He was on top of his brief and understood Europe and its complexities. He always negotiated hard but was always working out in his head where the final solution would come. He managed to negotiate, with agreement, western Europe having a reduced level of European regional development funds in order to accommodate the new countries of eastern Europe coming in. He is probably one of the few people to reduce the EU budget in western Europe. This is a very skilled operator who understands the complexity of Europe, and I feel confident that he understands Scotland, because in my previous experience with him I certainly found that to be the case. He is a very good interlocutor.

Baroness Falkner of Margravine: I want to take you a little further in that conversation. You mentioned Germany in particular. I agree broadly that because of its own federal structure it is much more open to this. Have the current Scottish Administration done a calculation of who may be where in terms of their trying to be part of the European architecture beyond Brexit? Do you think Germany will be onside there? I know that Spain, for example, would not, and you have been clear about that.

Lord McConnell of Glenscorrodale: My view on this is that you cannot completely avoid the rules. If there were an independent Scotland or if it voted to be independent, the rules are that you do not just become a successor state. That, to me, is pretty clear, but you also cannot avoid the political reality. If Scotland were an independent country and wanted to be a member of the European Union, I think the European Union would find a way of dealing with that pretty quickly. There are rules and there is political reality. Both would come into play, but a decade from now we would look back and say, "That was sorted".

The issue here is: is it desirable? To me, too much of the last independence referendum was about what people might be stopped from doing. I hope that if there is to be a second independence referendum at some point in the next decade it is based on what is desirable rather than what somebody is ruling on at that time.

Lord Selkirk of Douglas: I would like to follow up on a point that the Lord Chairman made from the Chair about how a Joint Committee could operate. My understanding was that in principle you would not disagree. Would I be correct in saying that the Joint Ministerial Committee has not been a success, mainly from political considerations because the SNP wanted independence and therefore wanted to short-circuit that committee? But now that it has lost its overall majority, if it loses its majority altogether could there be scope for a Joint Committee acting in much the same way that a joint Select Committee of both Houses does in this Parliament, for example as on the Deregulation Bill?

Lord McConnell of Glenscorrodale: As part of this discussion over the next two years, it might be interesting to have a mechanism for those who are carrying the burden of parliamentary scrutiny. There may be two or three Chairs of the main Committees in the House of Commons that

are dealing with Brexit preparations and the legislation. If there are a couple of Chairs in the Scottish Parliament doing that too, it might be interesting for them to have a regular mechanism where they talk to each other and liaise. The issue of Joint Select Committees, whether informally or formally, is perhaps beyond this process, but I would not count it out in the longer term.

The Chairman: Thank you for that. If no colleague has any further questions, I think we have all found that incredibly helpful. Have you anything else you would like to add?

Lord McConnell of Glenscorrodale: I am very happy, thank you very much.

The Chairman: Then we thank you formally on behalf of the Committee and remind you that we will send you a transcript. We would very much like to keep in touch with you, formally or informally as you feel convenient, in what will be a fast-moving and challenging situation for us all. At that point, I conclude the public evidence session and thank our witness, to whom we are very grateful.