

## Scottish Affairs Committee

### Oral evidence: [The relationship between the UK and Scottish Governments](#), HC 1586

Tuesday 20 November 2018

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Members present: Pete Wishart (Chair); Deidre Brock; David Duguid; Hugh Gaffney; Kirstene Hair; Christine Jardine; Ged Killen; John Lamont; Danielle Rowley; Tommy Sheppard, Ross Thomson.

Questions 1 - 48

#### Witnesses

[I](#): Akash Paun, Institute for Government, Professor Nicola McEwen, University of Edinburgh, Professor Jim Gallagher, University of Glasgow, and Michael Clancy, Law Society of Scotland.

Written evidence from witnesses:

– [Professor Jim Gallagher](#)

## Examination of witnesses

Witnesses: Akash Paun, Professor Nicola McEwen, Professor Jim Gallagher and Michael Clancy.

Q1 **Chair:** Welcome to this first hearing of our inquiry into the relationship between the UK and Scottish Governments. Thank you very much for joining us this morning. We couldn't have a more august panel to get us started today, and we are very much looking forward to hearing your views. For us and for the record, please say who you are, who you represent and anything by way of a short introductory statement. As is traditional, we will go from left to right. Mr Paun?

**Akash Paun:** Good morning and thank you very much for the invitation to contribute to your work in this area. I think it is a positive sign to see not only this Committee but so many Committees, both here at Westminster and at the devolved level, taking seriously these questions about the future of devolution and intergovernmental relations and the particular complications of Brexit. It seems that there is an emerging consensus that something needs to be done to strengthen these systems. I don't think there is yet a consensus on precisely what that something is, but maybe that will come with time.

**Michael Clancy:** Good morning, Mr Chairman. Good morning, members. My name is Michael Clancy. I am director of law reform at the Law Society of Scotland. The Law Society is the regulatory and representative body for Scotland's solicitors and we have taken a keen interest in the whole Brexit issue from the start to the present day. I am delighted to be here and am ready to answer your questions.

**Professor McEwen:** Thank you very much for the invitation to come and talk to you. Like the other witnesses, and like many others who have spoken already on this topic, I think there is a problem with intergovernmental relations as it stands. The system is not fit for purpose, particularly in the context of Brexit. However, I also think that it is not completely broken and that there are things that can be done to make it more effective, more accountable and more fit for the challenges ahead.

**Professor Gallagher:** I am Jim Gallagher from Glasgow University and Nuffield College, Oxford. I have two additional thoughts. I agree with much of what my colleagues have said. The first is that intergovernmental relations need to be looked at over time. We have had two decades of them and they have changed a lot. They have become much more competitive Government to Government on any topic, and that is fine; that is part of democracy. Governments do compete with each other. We started out 20 years ago by thinking, "No, they will just be nice to each other all the time." I don't think we should be too distressed by that.



The second is that Brexit is such an eruption into this and the particular Brexit process that we are having is so idiosyncratic, to put it charitably, that no system of intergovernmental relations was going to cope well with it, and this one is not. I think the best thing we can all do is let that process end how it is going to end—and we can talk a little bit about that if you like—and then review the intergovernmental system. I agree with the others that there are some things that can be done to put it on a sounder basis, but that also means understanding what our own expectations of it are. To put it very simply, intergovernmental relations are not the same as intergovernmental agreements; they are allowed to disagree.

**Q2 Chair:** Thank you for reminding us of that very sage point. Professor McEwen said that they are not entirely broken. To kick things off, can you give your general views of the current state and condition of intergovernmental relations? As you answer, perhaps you can go through what the mechanisms are now and, in your view, how effectively we are dealing with this.

**Michael Clancy:** The current structure is set out in the memorandum of understanding of 2013, and there you will find reference to the Joint Ministerial Committee and its various Sub-Committees, some of which are more active than others. In particular, the ones that are most active and have been considered to be most successful are the Joint Ministerial Committee on European Union matters, as opposed to European withdrawal. There is one on domestic matters, one on foreign affairs, one that is the plenary where the Prime Minister, First Ministers and the Deputy First Minister of Northern Ireland appear. The one that we hear about most regularly is the JMC for European withdrawal negotiations, and that is the part of these components that has caused most anxiety. It has flushed out the greatest disagreement between the various Governments.

**Akash Paun:** Mr Clancy has given an overview of the main intergovernmental fora. Just to complete the picture, there is also the more recent creation of something they have called the ministerial forum on European negotiations, which I think is perceived to be a secondary tier of the intergovernmental mechanism that reports to the Joint Ministerial Committee.

My impression of the overall state of intergovernmental relations and how these bodies are working is that things seem to have improved in recent months. If you look back at the entire period since 2016, you will see that there have been some notable down points and breakdowns in the intergovernmental relationship. For instance, there were no meetings of the JMC(EN) at all between February and October 2017 and that was the period that the article 50 notification letter was sent, which had not been agreed with the devolved Governments. That was the period when the withdrawal Bill was introduced, which had likewise not been subject to much intergovernmental consultation at all. That was a period when



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things were at quite a down point, and of course the withdrawal Bill ended up being enacted without consent from the Scottish Parliament, which was a failure of the attempts to find compromise.

In recent months there have been pretty regular meetings of the European negotiation Committee and the ministerial forum. They are meeting about every month and, from the recent reports the British Government have made to this Parliament and other accounts, progress is being made towards reaching agreement on some of the main common frameworks that are expected to be needed. I do perceive that while there is still a high level of political disagreement about some quite significant matters, at a working level Departments and officials are getting on with a lot of the practical business of trying to think through how intergovernmental relations will need to work post Brexit.

**Q3 Chair:** Professor Gallagher, what are your views on the current condition of intergovernmental relations?

**Professor Gallagher:** To expand the period and the scope of the discussion a little, my colleagues have described some of the multilateral parts of intergovernmental relations. That is the Joint Ministerial Committee and its various Sub-Committees. To those multilaterals you must also add the Finance Minister's quadrilateral, which has been pottering along quite successfully since just after 2000. But one must also add the fact that quite a lot of intergovernmental relations are actually bilateral. Some of those are formal. You have, for example, the bilateral Joint Exchequer Committee that looks at taxation with Scotland and there is also a bilateral one in respect of Wales, so there are two different Committees there. Much of the substance of relations between Edinburgh and London is actually bilateral.

If one looks over a slightly longer period, one sees that they have been surprisingly robust and successful. The very fact that the two Governments were able at the time to negotiate what became known as the Edinburgh agreement, permitting the legislative competence for the Scottish independence referendum, is something of a triumph of intergovernmental relations, so the story is not all bad. Brexit arrived in the middle of this, but I agree with Akash that the interesting thing is that they are still talking, and talking rather more than they have been. I am not saying they are agreeing about everything, but the JMC (EN) is meeting with surprising regularity. Official work on these potential frameworks—of which I have not seen the detail and not many of us have—is continuing and legislation is being drafted, wisely or not and with different structures in it, to try to put into effect what might happen if the withdrawal agreement proposed by Mrs May is approved. Things are not as bad as you might think.

**Q4 Chair:** Most of these arrangements seem to be informal and based on goodwill. Is part of the difficulty, the problem that we have with intergovernmental relations, that there are no formal processes in place that can deal with these?



**Professor McEwen:** The JMCs and the JECs are formal processes. To add to what to my colleagues have said to you, I think it is important to draw a distinction between the regularity of meetings and the dynamics within them. Intergovernmental relations have absolutely become more utilised formally, excepting what Jim said about the informal mechanisms that have always been there, but there has been an awful lot more use of the Joint Ministerial Committee. The Joint Exchequer Committees were set up when they had a job to do with the implementation of new tax powers. Similarly, the ministerial forum on welfare had a job to do.

Intergovernmental relations in the UK are very ad hoc. They are used when there is the perceived need to use them. That can be a weakness but it can also be a strength, in that there is flexibility and an ability to adapt as and when needed. I think the problem now, in the context of Brexit, is that although they are meeting a lot, some of the dynamics within those meetings are revealing the limitations of the current system. Given the expectation that there will be a need to co-operate and co-ordinate on an ongoing basis within the context of Brexit, there is more of a pressing need to address the weaknesses.

**Michael Clancy:** I want to follow on from what Jim Gallagher was saying about the way in which officials are working. About six or seven days ago David Lidington tabled the report on the European Union (Withdrawal) Act and common frameworks. I think that points up the extent to which there is a lot of contact going on and how the officials are working towards a better understanding of intergovernmental relations in the country, with a view to having a report in early 2019. It is worthwhile pointing out that there is all of this official work going on irrespective of what the ministerial or political activities are.

Q5 **Chair:** I have been in this House for nearly all of the devolution period and there was never much of a discussion about intergovernmental relations when the same party was in government here, in Holyrood and in Wales. Was the initial memorandum of understanding and the way that the Scotland Act was drafted designed to accommodate different and divergent views in different Parliaments? Has Brexit been a huge disrupter in intergovernmental relations and do you think we have to redesign to be able to cope with the features that we now have when it comes to devolution?

**Professor McEwen:** Was it designed to cope with different parties? Maybe. Maybe not. I think it coped reasonably well with different parties in that they did not compete quite as much as might have been expected. The forums were used more in the context of party differences in government. The key thing is that they were not designed to make decisions. In the context of Brexit I think there is an expectation that when decisions are made about common frameworks or whatever else they will require co-decision between the UK Government and the devolved Governments. The system of devolution, as introduced, was very much one that tried to isolate the devolved competences from



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reserved matters, even though there was some variation between the cases there.

Post Brexit that is more difficult to maintain. Areas that are reserved, such as trade, will have a bearing upon devolved competences, and the devolved Governments are keen to have mechanisms to ensure that they are not just consulted on those matters but have a meaningful role to play.

**Akash Paun:** I share Nicola's analysis. The way I would also put it is that the original devolution settlement, particularly for Scotland, as Nicola was referring to, was predicated on the idea of a binary division almost between what is reserved and what is devolved. For the reasons mentioned, Brexit has complicated that, but the settlement began to become more complex even before that with the devolution of tax and welfare powers in the 2012 and 2016 Scotland Acts. In those areas where previously there had not been much necessity for the British Government, the Treasury, DWP and HMRC to engage very much with the Scottish Government, there was suddenly a need for joint working in those areas. That is why in that period we saw the creation of those new bilateral bodies such as the Joint Exchequer Committee and the equivalent for welfare. Brexit has absolutely turbocharged that.

Q6 **Chair:** I want to get back to the initial days of devolution. Even the list of reserved powers is under question and being looked at and there is a dispute about the very foundation of the Scotland Act it was built on. Were we too reliant on these informal arrangements and goodwill? Mr Gallagher, I want your views about the journey that we have made with this and whether we are in a situation or condition where we can tackle the challenges that we are currently confronted with.

**Professor Gallagher:** I think that is a perfectly fair question, Chairman. If you go back to 1999—like you, I have been around this scene for a very long time—everybody involved in this process had no precedent to fall back on. We did not know what intergovernmental relations were like because we had not had them. The only precedents we had were anything but benign neglect of Stormont from 1923 until 1972, and that was not a good one, or relations with local government, which was not appropriate either as a model. In a sense, the Government fell back on what they knew. They fell back on what were very like intra rather than intergovernmental relations. When the Joint Ministerial Committees were set up, they had very much—and still to some degree do—the look and feel of Cabinet Committees. I rather think that some of the politicians involved at that time thought of the JMCs as just a continuation of the Committees they were in with their colleagues, and of course they were not.

We must remember that there was a bit of political divergence in that the first two Scottish Administrations had Liberal Democrat Ministers as well. Formally, of course, the system could cope with political divergence. In practice, it had nothing to do. I was responsible for the JMCs in the



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Cabinet Office at the turn of the century and, frankly, filling an agenda was very difficult because, as Akash and Nicola have said, there were very good fences between the devolved and reserved, so there was not much overlap. We had a kind of dual federalism, to use the jargon; people got on with their own business.

That changed in 2007 because of political decongruence, if you like. I was back in the centre of Government then and we said, "The one thing we have to do is make these JMCs work because we now do have a political argument to have," and we coped with that, certainly in the first SNP Administration. We had some ding-dongs and we had some agreements. I will just give you an example, because it is all on the public record. There was an argument about the environmental regulation of the North sea and who had the power over it. We negotiated a deal in the margins of the JMC and agreed it there and then. It was possible and they did work.

Going to the end of your question, the JMCs still bear the marks of their birth. There is still a kind of path dependence in them, most notably in the complete separation of talking about money and talking about everything else, which is distinctly odd. No other country would do that and it is because the Treasury likes to keep control of all the money, so in a sense it still thinks of this as an interdepartmental relationship. It is very strange that the Scottish Government's main element is called the departmental expenditure limit. We do not have an integrated set of Government-to-Government relations. There are a number of reasons for that. One of them is that the UK Government still do not have an integrated view of their territorial constitution and their relationship with Edinburgh. For example, the agricultural Ministers meet separately and quite effectively. They are not part of the formal process.

**Q7 Chair:** I am interested in Mr Clancy's view of the historicity of all of this, from when it was set up, and whether that leaves us in a condition to deal with some of the situations and challenges we have face.

**Michael Clancy:** If my memory is correct, Mr Chairman, there was a White Paper that was sent out before the referendum telling people what the devolved-reserved split was. Those who voted in the referendum on the creation of the Scottish Parliament knew roughly what the division was going to be. But as far as I can recollect—and I was not as close to events as Jim Gallagher was because I was working for the Law Society and preparing briefs on our views about the Scotland Bill, as it then was—intergovernmental relations were not part of the concept that we dealt with. We were looking at the legislation itself and at the provisions of the Bill in terms of the competence of the Scottish Parliament, the restraints on competence, the role of what was then the Judicial Committee of the Privy Council on devolution issues, and the lists of reserved matters in schedule 5 and protected matters in schedule 4.

It was not really an issue that arose in the round at that time and it has crept up on us. Having said that, since it has crept up on us those who



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have had to deal with these matters and the memorandum of understanding and the various concordats that flow from that, together with side points such as devolution guidance note 10 concerning the Sewel convention, have become much more acquainted with the substratum of devolution law and practice, which has gained in importance.

**Q8** **Christine Jardine:** We have been talking a lot about the JMC, but how effective do you believe it has been, separate from the other mechanisms, in managing intergovernmental relations, notwithstanding what you have been saying? How effective is it and do you think it is open to political manipulation?

**Professor Gallagher:** Well, it is a very political process.

**Christine Jardine:** Yes, but what I mean is: how genuinely is the JMC used by both the UK Government and the Scottish Government for what it was initially intended?

**Professor Gallagher:** I don't really know how to answer that question. It is there to provide a place where the Governments can talk, agree or disagree, carry issues forward, raise grievances and so on. In that sense it is fulfilling its function. They come, they talk, they argue, they issue bad-tempered press releases afterwards—all that kind of thing—and there is nothing wrong with that. There is a temptation to say intergovernmental relations should be about either officials or Ministers working awfully hard to produce good outcomes for people, and of course they should, but they are also a very political process. They are a place where devolved Governments in particular get the opportunity to make their political points.

As I think I said in a piece of evidence I have given to the Committee, which you probably will not have as yet, there is nothing wrong with political competition. It may be that the implication of your question is that political competition is somehow a misuse of the JMC process. I don't think it is. I think the telling thing about it is that the devolved Administrations have, certainly for the last decade, been reasonably adept at using the JMC to put the UK Government on the back foot. They realise that they are in competition and the UK Government kind of plod along not spotting that they are. I think that is changing and we are about to see competition on both sides. As Akash was saying earlier, we now have more overlapping powers and Governments are going to compete not just on inward investment, which is a concordat that we worried about in 1999, but on income tax rates, welfare powers, provision of public services and what is free and not free and so on.

There is nothing wrong with that competition. I think that what some of the opposition parties in Edinburgh are a bit concerned about, and feel a bit unhappy about, is that the Scottish Government are very good at that competition and the UK Government are not. Well, that is politics.



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**Q9 Christine Jardine:** I should admit that I was involved with the JMC during the run-up to the referendum agreement about having a referendum, so I appreciate some of what you are saying. Do you think that it has been effective in dispute resolution?

**Professor McEwen:** No.

**Chair:** You can tell us why.

**Professor McEwen:** Following on from what Jim was saying, I was going to talk about the purpose of the JMC as intended. It was never intended to be outcome-orientated; it was about discussion of areas of overlapping interest or competence, with the exception of the issue of dispute resolution, which is part of its original remit. Much later there was the adoption of the protocol on the avoidance and resolution of disputes. That is quite a formal protocol of a series of steps and there is nothing wrong with the steps that are designed to de-escalate tensions, starting at official level and working their way up. The problem is at the final stage when the UK Government are essentially the accused and the judge and jury and that has been problematic. It has certainly given rise to a feeling of dissatisfaction with the process on the part of all of the devolved Administrations. It is an area that has to be re-examined now, particularly in the context of altering the remit of the JMC to be something that is a bit more outcome-orientated, perhaps with a decision-making function as well.

**Akash Paun:** To go back to the question about the effectiveness of the JMCs, the JMC in its plenary form, with the Prime Minister and the First Ministers, served a symbolic purpose more than anything else. It is quite important that that body does meet, and that it meets more regularly and is taken seriously, because it sends out the signal that this is a Union of four nations, with usually four Governments, who can come together and have that summit-level meeting, but it is not the place where business is transacted normally.

Some of the functional, sectoral JMC Sub-Committees were not effective and did not serve any particular purpose and ceased meeting. Way back in the early days there was a JMC on health, a JMC on poverty, things like that that fell away very quickly. But as we have discussed, the JMC on the European Union and the separate JMC on European negotiations do have a purpose. That is not to say that the Governments always come to an agreement, but there is a value in having those discussions. The JMC(EN), for example, in October 2017 was the forum where agreement was reached on the principles that would govern the development of common frameworks. That was a very specific, tangible output from the JMC process that shows the positive outputs that it can produce.

**Q10 Christine Jardine:** One thing that occurs to me is that the way you described the JMC is a perception that is not shared by all political parties and beliefs. You described it as a meeting of four Governments of four nations. In effect it is not because there is no English Government as



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such. It is a meeting of the UK Government and the three devolved nations, which I think is a very different perception from the meeting of four equal partners. In effect, it is not. It is a meeting of the UK Government and its three devolved institutions. Do you think that is an important distinction?

**Akash Paun:** I think it is a very important distinction. It is a difficult one to resolve, of course. England is 85% of the UK and the UK Government have a mixture of UK, English, and English and Welsh functions.

**Christine Jardine:** And Scottish ones.

**Akash Paun:** Sure, but sometimes it is acting for the whole of the UK, sometimes for Great Britain and so on. It is a very complex picture and I think the Government could be a lot clearer about when they are acting for the UK as a whole and when they are engaging with the devolved nations wearing their English hat. For a lot of the common frameworks it will be important to recognise this ideally in a more official way. If there are discussions about the details of an agricultural or fisheries framework, for those purposes DEFRA is acting as an English Department. It is the Department for the English agricultural sector. I think it would be helpful to recognise that more clearly in the official business.

Q11 **Chair:** I think that is a really important point. I am interested in Mr Clancy's view on this. Surely when the devolved Administrations sit across the table from the UK Government they do not know who they are negotiating with. Is it the UK as a whole; is it Great Britain; is it England and Wales; is it English Departments? Is there a sense that the way the UK presents itself in these is problematic for the devolved Administrations and how they understand what is being discussed and debated in what terms?

**Michael Clancy:** I think that most commentators would adhere to the view that Christine Jardine has expressed, which is that the three devolved Administrations sit with the United Kingdom. But remember that not long ago there was a paroxysm of interest over English votes for English laws. Indeed, I think you chaired the session at which Sir William McKay and I vied for our knowledge of the Standing Orders of the House—and guess who won. But the whole point is that if you delve into English votes for English laws, that deals with those matters that would be under devolution. In matters where it is a Department dealing with law that relates to England only, you could envisage a structure that would have the devolved Administrations and some representative way for the English MPs who would have voted upon English votes for English laws to sit alongside those in discussion with the United Kingdom. That perhaps would take us over that hurdle.

I don't propose that that is a solution that is either easy or quick to achieve, and of course it depends on the political make-up of the House of Commons for its success and endorsement. But clearly there is a recognition that something has to be given in hearing the views of



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English MPs about the laws that apply only to England alongside the devolved Administrations.

- Q12 **David Duguid:** I have just been scribbling down from my own memory, so excuse me if I have got some of these dates wrong. Going back to the very start, 1999, we had eight years of a Labour UK Government and a Labour-Lib Dem coalition in Scotland. I think it was mentioned earlier that things worked out reasonably well in that period. From 2007 onwards we had three years of Labour in the UK and the SNP in Scotland, and things started to get a bit more complicated. Then there were five years of a Conservative-Lib Dem coalition in Westminster and the SNP in Scotland. Then there were two years of a Conservative Government here with the SNP in Scotland, and during that time the Scottish representation here in Westminster was almost entirely SNP. Now you have a different situation again.

What I am wondering is whether the JMC process can be reconciled with those quite dramatic changes in the political dynamics. I respect the SNP's position on wanting to be independent from the UK, but can the JMC process be reconciled with that position, or can a mechanism be envisaged that will work regardless of the combination? For example, say the next time there is an election and you have a Conservative Westminster Government and a Conservative Scottish Government, it will work just as well, but can a process be imagined that will work in any combination?

**Professor Gallagher:** Yes. The Governments have to work together and they have to compete and they have to co-operate. They have to cope with the fact that there will be different political complexions. Sometimes there will be congruence and in a sense that is a problem because you then stop using the formal machine and it is a bit rusty when you need it. That is what happened in 2007, but the oil was put on and the machine staggered along. I think the remarkable thing, just reflecting on the evidence I have heard, is that, given the disruption of Brexit, the intergovernmental process is working to a degree. You might think it would have collapsed completely but it has not. So yes, it can.

- Q13 **David Duguid:** Does anyone else want to comment on that?

**Professor McEwen:** In the early period of party congruence that you mentioned, you said that it was working very well, except it was not really working at all in that there was not a perceived need for it to work in that formal sense. I agree with Jim; I think it is probably problematic in that if there is a period of party congruence in the future it might be wise to continue the formal machinery as it is. It is difficult to isolate the effect of party competition between Governments and the effect of a less benevolent fiscal environment because the two things coincided. One of the other reasons why the Governments got along swimmingly in the first eight years is because the budget kept increasing quite significantly and there were not the same money issues. Money is often at the heart of



intense intergovernmental discussions. It is difficult to isolate those two things that happened at about the same time.

Q14 **David Duguid:** Of course we have had a couple of referendums in the latter period as well.

**Professor McEwen:** Particularly the independence referendum, as I understand it, did affect relations of trust between the Scottish and UK Governments, and maybe more of a fear of sharing information. I think the willingness to share information at an early stage of the process has been part of the difficulties in more recent times and that has contributed to the frustrations.

Q15 **David Duguid:** On the JMC process itself, do you think that the model can form the basis of future relations, perhaps with some tweaks, or does a whole new mechanism need to be developed?

**Professor McEwen:** I don't think the mechanism needs to be changed, but I think its purpose and the way it operates need to be changed. I don't think it really matters whether you call it a JMC or a council of Ministers, as the Welsh Government have proposed; it is what it does and how it does it that is key. There are some quite significant changes, not just tweaks, that need to be made.

**Akash Paun:** I would agree. I think the JMC does not need to be completely replaced by something completely new but there are various ways in which it could be strengthened. It needs to be made more transparent and accountable to the various legislatures across the UK. It probably needs an enhanced independent secretariat to support its workings. As Nicola was implying, there needs to be a move towards giving it a clearer decision-making function when it comes to the establishment and ongoing management of common frameworks in particular.

Q16 **Ged Killen:** I want to return to Christine Jardine's point about it being devolved nations and the UK Government represented on the JMC. Are we trying to apply mechanisms that were set up solely with devolution in mind to a problem that is increasingly becoming of a federal nature? Would it be beneficial for us to have, for example, representatives from the regions of England on the JMC committee—whether that is mayors or some other—rather than having UK Government Ministers there putting their England hats on, as was discussed earlier?

**Akash Paun:** I think that is difficult. The powers and the functions of even the most powerful mayors in England—say, London or Greater Manchester—are so very different from the devolved institutions that the same kinds of issues do not arise. It might be that we are now in the early stages of a process towards a proper federalisation of England, but we are a long way away from that now. It is hard to fit even the strongest bits of English city regional or regional government into the framework for managing relations with Scotland, Wales and Northern Ireland. That is my instinctive reaction on that.



**Q17 Ged Killen:** Is there a view from the panel on whether that federalisation is a desirable way to progress on how these structures work?

**Akash Paun:** I think full federalisation of England is quite hard to imagine in the short term. There has never been an accepted and established set of regional boundaries within England. Labour tried to create regional Assemblies across the whole of England and that did not work because the regions they were talking about—with some exceptions perhaps—did not align with anything that people actually identified with. For the most part, people do not feel affiliated with the north-west or the south-east. People's affiliations within England are much more local, around cities and counties, and it makes it very difficult to have a fully federal structure with anything like equivalent powers devolved within England to those devolved elsewhere in the UK.

I think for a long time we are going to have to make work a very asymmetrical devolution settlement, particularly between England and the other nations, but of course there are still quite significant differences between Scotland, Wales and Northern Ireland too.

**Q18 Christine Jardine:** I would like to go back to the point Professor McEwen made, which fits in quite neatly with the question. It is about the concern that the JMC may be regarded, rightly or wrongly, as a talking shop in some quarters. Is there a way that you think it could have a more substantive purpose or how would it have that more substantive purpose that you mentioned a minute ago?

**Professor McEwen:** I will go back to something else you mentioned first and then build on it about the point of the JMC being for the UK Government to meet with the devolved Administrations. I don't think that is a view shared within the devolved Administrations, or at least not all of them. The Scottish Government have talked a lot about requiring parity of esteem within the context of the JMC and other intergovernmental forums. Welsh Government Ministers have complained of being brought in to meet with the UK Government rather than being treated and respected for their status as members of a democratically elected Government. I think that points to one of the fundamental difficulties: there are different perceptions of what this body is and what it is for between all of the Governments.

The first thing we ought to do is look at the principles and re-examine the principles underpinning intergovernmental systems. Building on that, there is a case for introducing a decision-making function, particularly around common frameworks, which is pressing, particularly in areas that may have an impact on both reserved and devolved matters simultaneously, such as trade or international agreements or governing the internal market. These are things that are emerging now within the context of Brexit that were not there before.

There is a case for having formats of the Joint Ministerial Committee to look at these issues on an ongoing basis, and not just to the point of



establishing whether or not there ought to be common frameworks and what form they should take but in governing them, reviewing them, discussing implementation of trade agreements, looking at how these meet and affect devolved and reserved competences simultaneously. There is an awful lot more that will be on the agenda of all of the Governments and there is a need to build that into a revised JMC structure.

**Professor Gallagher:** Could I disagree with that? We are all agreeing rather too much here. I think that Nicola is absolutely right to say that there is going to be a lot more intergovernmental meat, a lot more stuff to discuss and a lot more issues where there will be an active need for co-operation and agreement if the things are to work, but that is not the same as saying that the Joint Ministerial Committee is a decision-making body. The Governments may agree to do this or that, but it is not and cannot be an authoritative decision-making body, because each of the Governments have their own democratic mandate. It is going to be awkward because those mandates may conflict, but I do not see scope for disputes to be resolved authoritatively. There is nothing wrong with talking shops. Politics is a process of talking. We are in a Parliament and I think it would be an error to say that we can set up an intergovernmental machinery that can force one or other of the Administrations to do something that they do not want to do.

Q19 **David Duguid:** On this idea that there is nothing wrong with a talking shop, I have not that long ago come from the corporate world, where I couldn't bear to hear that, but having been in this job for a year, I think I know what you are saying. But I do have this issue: if you have a get-together of Ministers, officials or committee members and there is not some kind of outcome at the end of it, even if that is just a recommendation or a report that says, "This is what we think or what we have agreed or disagreed," I wonder what the point of it all is. If you then go beyond just being a talking shop and some kind of executable decision or action comes out of these discussions, would that necessarily lead to one party or the other of the devolved Assemblies having a veto over certain aspects of government? If that was the case, can you have multiple parties all having similar vetoes on similar devolved issues? Is that something that could work?

**Michael Clancy:** First and foremost we are in danger of straying quite far away from what the JMC was intended to be, which was, as Nicola has said, something that adhered to certain principles of communication and co-operation and exchange of information. It was not meant to be a decision-making body. If we are going to re-engineer it, repurpose it into such a thing, taking Jim's point about the democratic mandate of the parties around the table, it is quite difficult to square that with decision making, but there certainly has to be some kind of insulation against the political fluidity of which you spoke earlier, Mr Duguid. One could propose that the JMC is put on some kind of statutory footing, that it is given a defined structure and that its Sub-Committees are reformed in such a



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way as to be clearer and better understood by those in the field, and that the dispute resolution arrangements are more structured.

The worrying thing would be if we got to the point where everything had to have an absolute resolution because then it could just break down in tears all the time, and we do not want the relationships between the UK Government and the devolved Administrations to break down in tears. The key thing in intergovernmental relationships is the word "relationships." PACAC spoke of building trust in those relationships, and I think that making relationships work is what we should be about and facilitating working relationships. That takes us some way away from having a decision at the end of every meeting.

Having said that, it is a misnomer to call the communiques that are issued by the JMCs communiques, because effectively they just tell who was there and that somebody spoke and someone replied. I am afraid to say that that is not good for accountability and transparency. The additional thing that we might want to see is more accountability and more transparency. The model that one might use is the protocol between the Scottish Government and the Scottish Parliament about reporting structures and telling the legislature what has been done in the country's name.

**Q20 Danielle Rowley:** Just on that point, Mr Clancy, you said you think it might be beneficial for the JMC to be put on a statutory footing. Do other witnesses agree that that would help towards transparency and if it was, for example, minuted? Would you agree with that?

**Professor McEwen:** I think it depends on what is in the statute. To a point, but be careful to avoid reaching the conclusion that that will resolve the challenges, because I do not think that by itself it will do that. But you could, for example, have in the statute a requirement to report to Parliament. That would be a positive thing that could boost transparency. You might have an expectation of meetings within a year or whatever. What I would be careful of is putting too much in the statute because then you lose the strength of the flexibility to respond to needs as they arise. I do not have a very strong view on a statute but if it helps with the transparency point, which I absolutely agree needs to be addressed, then yes, by all means.

**Akash Paun:** I agree. I am convinced that there would be benefits in a limited statutory underpinning, but without a huge amount of detail about the particular forums and membership and regularity of meetings. Something along the lines of specifying that, "There shall be a body called the Joint Ministerial Committee, with the Prime Minister and First Ministers, which should be expected to meet at least annually," or something like that would be fine and would be helpful. Then perhaps one might have a requirement that the JMC not only reports to Parliament on its meetings, but publishes and then keeps under regular review the memorandum of understanding. You could give the MOU itself a statutory



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underpinning, but you would not write the entirety of the MOU into legislation—that would be going too far.

- Q21 **Hugh Gaffney:** What happens where the Joint Exchequer Committee and the joint ministerial working group are being regarded as positive examples of effective co-operation compared with the JMC?

**Professor Gallagher:** The Joint Exchequer Committee has a job to do. There are taxes to be collected and there are relationships in the tax collection. Those bits of the intergovernmental machinery that have a well-defined task tend to be successful. As I understand it, the ministerial forum is effectively a supporting body for all junior Ministers for the JMC(EN). I don't know whether the jury has concluded it is successful or not.

**Professor McEwen:** Did you mean on welfare?

**Hugh Gaffney:** The welfare one has been quoted as working well.

- Q22 **Chair:** It seems that the Joint Exchequer Committee is put forward as an example of effective working compared with some others. Is that view not shared by Professor McEwen?

**Professor McEwen:** No. I agree with Jim that it has a job to do. The ministerial group on welfare—I can't remember its formal title—similarly had a job to do and that was about facilitating the transfer of new powers. What I am less clear on is what its continued role will be. Akash and I were talking before we came in and neither of us could find any references to the Joint Exchequer Committee for the last couple of years, so I don't know if it has continued meeting.

- Q23 **Chair:** Surely there is an ongoing discussion of the fiscal framework and so on.

**Professor McEwen:** It has met but it has not reported, which points to the issue of lack of transparency in all of this as well. It is whether it will continue as an ongoing forum to facilitate the interdependence that comes with tax. If it does, that is a positive thing, but I think its focus is narrower. I also suspect that, from the Scottish Government's perspective, it is viewed more positively because it is bilateral and there is more of that parity of esteem that they have been seeking.

- Q24 **Hugh Gaffney:** If Committees are meeting more is that a better relationship, or if they are meeting every six months is that no good?

**Professor Gallagher:** If they are just meeting for the sake of it, it is pretty hopeless, but Committees that have a task to do keep doing it. A good example, which Michael Clancy mentioned, has been the JMC on Europe for several decades, which has had to reach agreement as best it can on the UK's position in individual European negotiations on fish or agriculture or whatever it might be. That has been an effective forum. The devolved Administrations have not always got what they wanted but



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they have had a hearing and that is a good example of a Committee that is well oiled—it is not rusty at all—and has a job to do.

**Michael Clancy:** The joint ministerial working group on welfare is also one where we can point to some success. That created a memorandum of understanding as recently as 2016 because of the ongoing devolution of welfare and social security matters to Scotland under the Scotland Act 2016. Where there is a purpose, these mechanisms seem to work. Where there is no purpose—one could point to the Crown Estate joint committee, which seemed to flourish for a moment, like some kind of bright star in the firmament and then go, but that is because it was superseded by the Scottish Crown Estate legislation that the Smith commission recommended and is going to have its stage 3 debate tomorrow in the Scottish Parliament.

Q25 **Ross Thomson:** Have relations at an official level between the two Governments been affected by some of the deteriorating political relationships that we have seen at ministerial level?

**Professor McEwen:** I think Whitehall is a very big and diverse body. The nature of the relationship will vary between Whitehall Departments and the devolved Governments. My sense is that the Cabinet Office has done quite a lot of work to have a more strategic approach to intergovernmental relations at official level and the officials have been working very well together on issues such as common frameworks and preparations for Brexit. But it will vary and because of Brexit and the challenges that will bring, there will be some Whitehall Departments that are entering into the intergovernmental space that have not previously engaged that much with devolution issues, whereas Departments such as DEFRA will be used to doing that on an ongoing basis. It is quite variable.

Q26 **Ross Thomson:** Do you think in instances where you do have that good working relationship at official level that can compensate for when there is a breakdown at the political level?

**Akash Paun:** A political disagreement can only be resolved at the political level, but of course civil servants can and do prepare the ground for the political agreement. They can do the analysis that identifies and isolates the specific point of disagreement and maps where there is agreement around the sides of that and can, therefore, provide for a more focused negotiation at the political level where there is a dispute. The civil servants can come forward with options and proposals for compromises, but in the end if you have Ministers pulling in different directions it can only be resolved at that level.

Q27 **Ross Thomson:** The relationship between the UK Government and the Welsh Government sometimes seems to be a bit more effective than the relationship between the Scottish Government and the UK Government. Do you think there are differences? Are there any lessons that can be learnt? An example would be what happened with the withdrawal Bill when the Welsh agreed and we still have unresolved issues in Scotland.



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Do you think that is something that could be looked at?

**Professor McEwen:** I think a lot of the concerns that the Scottish Government have over intergovernmental relations are shared by the Welsh Government. We see that in the witness testimony of Welsh Government Ministers to various Committees in this House and in the National Assembly for Wales. There is a difference that I think is quite important to note. The Welsh Government have been very proactive in trying to strengthen and formalise the system of intergovernmental relations in the UK. It is a much more difficult space for the Scottish Government. It goes back to what we were saying originally where devolution was all about self-government, doing things autonomously. Intergovernmental relations are about shared space and doing things co-operatively and together. If your goal is to maximise self-government and political autonomy, it makes it a more difficult space.

**Michael Clancy:** Recently we have had quite a lot of discussions with Scottish Government officials and officials in, say, MOJ, BEIS, DIT and the Office of the Secretary of State for Scotland—I have to remember that it is not the Scotland Office anymore. It is clear that officials are working quite well and working effectively to produce solutions that then have to be operated by the politicians. If one were to point to the original memorandum of understanding, the dispute resolution procedure starts off with references to officials and senior officials and then gets to the political. There is an effort always within the context of the dispute resolute mechanism for the officials to reach a resolution before it gets to a political discussion. I think that that is the point at which things step off into another realm.

Q28 **Ross Thomson:** On that effective relationship at official level, it will be no surprise that I know people who work in the Scottish Government—I am sure most people do—and also in the UK Government. I consistently hear from them that they have sometimes a bit of unease and concern about a level of politicisation. There has been comment in the press where different commentators have spoken about what they have seen as a politicisation of the civil service in Scotland. Is that something that concerns you at all?

**Akash Paun:** The role of the civil service is to deliver the policies of the Government of the day. There has been an SNP Government for 11 years, so the civil service has been focused on delivering an SNP agenda. My impression, from my interactions with civil servants in Scotland and Whitehall and Cardiff, is that the core civil service values of impartiality and so on run very deep. I don't have particular concerns about actual politicisation.

Q29 **Ross Thomson:** Some of the reports that we have seen have been about the role of Ministers, and sometimes special advisers, particularly when it comes to things like FOI requests. You may have seen some of the commentary there has been about the level of that deeper crossover from the political realm into the civil service side.



**Michael Clancy:** In my experience I have not seen any politicisation of the civil service.

Q30 **Ross Thomson:** I do know people who work in it who are even considering their own positions because they feel that uncomfortable, but that is interesting to know.

**Professor Gallagher:** Individuals must make their own judgment—*[Interruption.]*

**Ross Thomson:** You may laugh, but this is an issue, Mr Sheppard.

**Tommy Sheppard:** This is your opinion.

**Chair:** I think that we will leave that one alone now, thank you—*[Interruption.]* I think we have heard from the witnesses, Ross.

Q31 **Ged Killen:** Professor Gallagher touched on this earlier, so I am not sure whether he wants to say any more. How well have current IGR structures managed to deal with the challenges posed by Brexit?

**Professor Gallagher:** The others will have perhaps a slightly different perspective from me on this. Brexit was always going to be an almost impossible challenge for any Government and for intergovernmental relations. Deconstructing a political and economic union that is many decades long and touches on every part of our national life would require the most careful disentangling and even the most orderly of Brexits would have stretched the system. A Brexit where five months before the drop-dead date we still cannot say with certainty what the outcome is will stretch an already stretched system beyond breaking point. The astonishing thing is the extent to which—and I give great credit to the officials here—they are still working away on this, but this process has been one of the least well-ordered pieces of public policy that I have ever seen and that has been reflected in its effect on intergovernmental relations.

**Professor McEwen:** On the organisational point, I think there has been an unprecedented intensification of intergovernmental relations within the context of Brexit since the 2016 referendum. That has put an enormous strain on the officials who are tasked with preparing meetings and the organisational capacity within all of the Governments, which has contributed to some of the frustrations of the experience. Sharing papers and agendas and things in advance is the sort of organisational issue that can become a political issue as well.

In the expectation that intergovernmental relations will be utilised more in the future than they have been prior to the referendum, I think there is a strong case for an independent secretariat to not replace the role that officials within each Government currently play but to administer, to take the organisational burden away from officials who have many other things to do, and to potentially help with the transparency issue as well. We have a report that makes a recommendation along these lines. I will not go into any more detail but that is just one potential reform that



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could facilitate and support all of the Governments in some of the challenges ahead.

More politically, some of the forums that were created to facilitate Brexit negotiations, particularly the Joint Ministerial Committee on European negotiations, raised expectations among the devolved Governments within the remit. The remit included a commitment to seek to agree a UK approach to Brexit and that did not happen, so it raised the expectations and then led to frustrations by not meeting those expectations. Brexit has probably blurred the boundary between what are UK matters and what are UK Government matters and there is not a shared understanding among all of the Governments as to how you disentangle those.

**Michael Clancy:** I think that this is a dynamic process and there has been a lot of learning over the period from the very early days. One of the major issues was the lack of consultation on the European Union (Withdrawal) Bill. While we had the White Paper on legislating for Brexit, it was a White Paper and it went so far. In the Law Society we called for disclosure of draft clauses in advance so that there could be a critical appreciation of that in this crucially important piece of legislation. Funnily enough, when I was doing a little bit of prep for this meeting—yes, I will confess to having done that—I googled “consultation on European Union (Withdrawal) Bill”, and what came up was the Isle of Man’s European Union (Withdrawal) Bill. You may have seen this—I recognise a fellow anorak, although you may deny it. If one jurisdiction in the British Isles could consult on its Bill, other jurisdictions could consult on the Bill. We would say again that if we get to the point of an EU withdrawal agreement Bill in the next few weeks, the earlier that people see it, the better, because this is going to be a crucial piece of legislation for the future.

Q32 **Ged Killen:** Do you think Brexit shows the limits of what can be achieved by a formal IGR mechanism? We have already discussed that at an official level there is a good relationship and that working is going on, but in some cases—and Brexit is probably a good example of this—there is a political incentive for the two Governments not to agree. Is there any mechanism that can cope with that or does it all fall down when it gets to that stage?

**Professor Gallagher:** Can I answer that by being slightly provocative? Brexit was always going to be very difficult. Michael referred correctly to the breakdown over the withdrawal Bill itself, and it is interesting that the Welsh Government managed to reach an agreement on that and the UK Government did not. The UK Government mishandled that, in my view. They did not really take the devolution settlements into account as they drafted their Bill, but they rowed back from it and eventually got to a half-acceptable place that the Welsh Government were able to accept but the Scottish Government weren’t, or didn’t in the event, and that was for entirely political reasons. There is nothing wrong with politics in this but that is the kind of reason that it was.



That illustrates that you cannot design out political conflict by creating systems and don't imagine that you can and don't say the systems don't work if the political conflict somehow overwhelms them.

**Q33 Tommy Sheppard:** Good morning. I have been listening for the last 75 minutes intently and I must say that I am slightly struck by the cautiousness of a lot of the responses I am hearing, bordering on conservatism with a small "c". I am getting the impression that things are not that bad. They need to be tweaked and could be improved, but keep calm. I want to invite you to comment on the proposition that after 20 years this is an appropriate time for a fundamental review and modernisation of the devolution settlement at a political level.

Let me just explain why I am asking the question. Back at the end of the last century, when the devolution settlement was established, things were either reserved or devolved. You could argue about what was on which pile but it was relatively black and white. In the intervening period, and particularly in the last five years, things have become an awful lot more complex. First, in response to a growing appetite for self-government, there was a further raft of devolution in the Smith reforms, which has created new things that are hybrid responsibilities, that are part devolved or part reserved.

Professor Gallagher, you said that this encourages competition between Governments, which is not unwelcome but it can also create dysfunction because it can lead to two agencies trying to pursue policies that contradict each other. For example, if you give the Scottish Government authority over some social security benefits but not others, you may get a situation where the award of something to a claimant by one Government affects their eligibility for a claim from a different Government. Then we get into issues of taxation and the fact that the effect of tax policies in one tax can do something in another tax that you do not control. There are those hybrid areas that are not covered in the 1998 Act.

Brexit then gives us a completely new set of circumstances, which are the devolved powers but operated with a UK constraint that was not there before as the UK Government take upon themselves effectively the role of the European Union in making sure that there is compliance with how devolved powers operate. All of this surely means that it is time for a new devolution settlement and a new MOU and the whole IGR apparatus, does it not?

**Professor Gallagher:** Much of what you say is absolutely right. The devolution settlement of 1999 operated on the principle that good fences make good neighbours, and there was very little overlap. There are almost no concurrent ministerial powers in the 1998 Act, whereas interestingly, of course, there are concurrent legislative powers, but that is a different tale. Let's just stick with the ministerial powers.

One response to your general question is, "Welcome to the federal world." This happens everywhere. Governments have overlapping



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responsibilities. We have been unusual in this dual federalism, to use the jargon, this kind of separation. We are certainly going to change. You are right to talk about the 2016 Act in particular as creating overlapping space in which Governments will compete to get credit for doing the best thing for the voters. Again, there is nothing wrong with that. There is certainly nothing internationally exceptional about it.

The post-Brexit world, assuming we get to a post-Brexit world, will involve greater devolved power and more overlap. There will be some constraints. There will have to be some constraints and I think everybody acknowledges that the process of getting to them will be a bit messy. There will be a need, therefore, for greater co-ordination, or at least argument about how these overlapping powers operate. In my view, the UK Government will operate in a different way in this world as well. This is not merely about how the devolved Administrations operate; the UK Government will be more inclined to compete over matters such as whatever replaces the structural funds. Assuming we leave, there was to be something called the UK shared prosperity fund, which is bringing back regional policy from the 1970s—no bad thing.

I am not so sure whether all of that adds up to the need for another Calman or Smith commission. I think the time to do that is after we have operated in this world for a while and we see what works and what does not work.

**Michael Clancy:** I think that it all depends on what you mean by review. If one looks at Smith or Calman, the Smith commission was under extraordinary pressure within a very short period of time to come up with proposals for change. The Calman commission was at slightly greater leisure but the fundamental basis of the structure came from the constitutional convention, which sat for a considerable period of time before coming up with proposals for devolution. It all depends what is meant by review. If we get into the position where it is a group of smart people in a room who are able to take evidence from a group of likeminded stakeholders, the review might not be as radical as some people want. It might be tinged by that very conservatism that we have spoken of.

**Professor McEwen:** I think that reviews of devolved powers come when there is political demand for them to come. The Calman commission was not created from some sort of rational decision to re-examine the devolution powers; it was created by the election of an SNP Government. Similarly, the Smith commission emerged from the process of the referendum. If the politics dictate that there be a review and a division and potentially a strengthening of devolved powers—

Q34 **Chair:** Can I just put this? I have been here through all these commissions and there was always a sense that devolution was going to be extended and expanded through all these commissions and all the various Scotland Acts that we have had since 1999. There is now a



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perception, which probably is not shared across this Committee, that devolution is in some way being reversed and that powers that should normally go to the Scottish Parliament are coming to Westminster. Is that a view that has any currency among any of you on the panel here? Mr Paun, I know you have not answered this question.

**Akash Paun:** Of course, the passage of the withdrawal Act without consent from Holyrood gave rise to legitimate concerns about the approach to devolution and to protecting the devolution settlement that the current Government might take. Overall, I think that if you look at the final enacted form of the withdrawal Act and the terms of the intergovernmental agreement with the Welsh Government, it is the case that Brexit, depending on its final terms, seems likely to lead to an increase in the powers of the devolved Governments. There are 153 areas of overlap. They have narrowed it down to maybe 24 where legislative frameworks may be required, and even then, unless there is going to be an actual permanent reservation of powers, the legislative competence in the end will still rest with the Scottish Parliament.

**Chair:** We will come back to that. I know that other panel members may be keen to come in, but I want to move on to the Supreme Court and a couple of questions from Kirstene Hair.

Q35 **Kirstene Hair:** Professor Gallagher touched on this earlier and I think that the answer to this question is probably in his written evidence to the Committee. Could the other three panel members share their views on why the Welsh Labour devolved Administration did not progress their similar continuity Bill, as it has been called? They are clearly not friends of a Conservative UK Government, but they did not require a continuity Bill similar to what the Scottish Government raced through the Scottish Parliament. Why do you believe that might have been the case?

**Akash Paun:** In the end, of course, the Government compromised sufficiently on the terms of the withdrawal Bill on what was originally clause 11 and is now section 12, such that the Welsh Government were happy to accept that compromise, which may lead to some temporary freezing of devolved powers under section 12 orders. That has not happened yet but will overall and ultimately lead to an increase in the powers of the Welsh Assembly, just as it will for the Scottish Parliament. Certainly, it was a concession for the Welsh Government to accept the Bill in its final form, but I think that they recognised that there had been a process of compromise and that went far enough for them.

**Michael Clancy:** I would agree with that analysis. It was certainly the case that the legislation as it was proposed, in the clauses that ultimately became section 12, was floated in the House of Lords and in debate at Committee stage and then withdrawn by the Government after debate. There was discussion between the UK Government and the Welsh Government about the provisions in those clauses. When the Bill returned at Report stage, that clause was incorporated into the Bill and the ones that had caused significant concern to the Scottish Government and the



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Welsh Government were withdrawn. I think that it is all about that process of agreement and compromise and the Scottish Government just did not agree with the terms of what is now section 12.

**Q36 Kirstene Hair:** Going into the detail of that, why do you believe the Scottish Government did not agree with it but the Welsh Government came to a compromise? Why do you think there is the difference in views, in your opinion?

**Michael Clancy:** I think that is a question you would have to address to both the Welsh Government and the Scottish Government rather than to me, because I was not privy to the discussions as to why the Welsh Government would accept it.

**Professor McEwen:** There is a bigger political issue here and the direction of travel for both Governments is different, but I would agree with my colleagues except that I am not sure that the Welsh Government would describe themselves as happy to have accepted the compromise. It is recognising the shift that took place within the process of the legislation, but I think that they invested quite a lot in the intergovernmental agreement that came with the reform to the legislation.

Again, you would have to put this directly to them, but I think, certainly having listened to Carwyn Jones's lecture at the Institute for Government recently, that the Welsh Government are as equally concerned as the Scottish Government are about the fate of the Sewel convention going forward. It is not the Sewel convention, but the consent decision clauses within that withdrawal legislation are certainly a shift from the Sewel convention's understanding of consent. It talks about a consent decision being potentially a decision to withhold consent, but that in itself would still be taken by the UK Government to be a consent decision.

There are concerns that are shared across the devolved Administrations about the fate of the Sewel convention, and perhaps we will await the ruling of the Supreme Court on the Scottish Bill.

**Professor Gallagher:** Can I add two very quick things to that? The answer to the question is politics, and that is perfectly straightforward. The interesting thing about clause 12 is that it got more or less to an acceptable place as far as the Welsh Government were concerned. I rather suspect that the power in it will never be used. I do not think there are going to be any temporary reservations for a variety of reasons. The thing that we will be left with, however, depending on where the Supreme Court judges the matter, is a potential conflict of laws in which two pieces of legislation purport in slightly different terms to preserve EU law after Brexit, assuming that Brexit goes ahead. That will be a bit messy for ordinary people trying to figure out what actual law applies to them. The constitutional crisis may fizzle out but the consequences may run on.



**Q37 John Lamont:** Apologies for being late. This is a session about intergovernmental communications and relationships and we are trying to improve them. We have touched on this just now. When you have this political difference between different Governments within the United Kingdom, and for whatever reason one part of it decides it wants to cause disruption and play party politics with this, we end up in a debate about reform and change. That is not because there necessarily is any need for reform and change but because there is a political argument going on about other things and it gets caught up in that wider debate. Are we having a discussion about something that needs to be reformed, or are we being sucked into this discussion because of a party political fight that has happened between two parts of the United Kingdom, between Scotland and the UK Government, for purely party political reasons?

**Professor McEwen:** If that were the case, we would be hearing calls for reform from only the Scottish Government, but that is not the case. You can go back to 2002, I think it was, when the Lords Constitution Committee first raised the issues of the system of intergovernmental relations in the UK being insufficiently robust to deal with some of the challenges of party competition. I think that there is a lot more to it than that and probably Brexit and the challenges of Brexit more than the challenges of party competition are what, for me, are making the need to re-examine the system a bit more urgent.

**Q38 John Lamont:** I accept that we do need to change the system, but I am concerned that part of the discussion is becoming about further devolution and those who are arguing for an even more powerful Scottish Parliament as opposed to trying to improve intergovernmental relations.

**Professor Gallagher:** It is a legitimate aspiration to argue for. There might not be a good outcome, but it is not an illegitimate proposition to make.

**Akash Paun:** It is also worth highlighting that when it came to the passage of the withdrawal Act it was not just about the two Governments. There was a cross-party majority—other than, of course, the Scottish Conservatives—in the Scottish Parliament not to give consent to the Bill. That suggests to me that there is a wider consensus in Scotland in support of the position taken by the Scottish Government.

**Q39 Kirstene Hair:** I want to move on to common frameworks. The Scottish Government accept that there is a requirement for common frameworks, as do many businesses and organisations across the UK, from the Food and Drink Federation to the FSB and the NFU. Professor Gallagher, you have said that the common frameworks are in everyone's economic interests. With that in mind, and the fact that we have 111 powers that are going from Brussels directly to the devolved Administration in Scotland, would you agree that, in fact, there are a huge number of more powers that are being pushed out to the devolved Administrations and there are no powers being taken away from these Administrations by any other Government?



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**Michael Clancy:** I think that it is not 111 powers that are going directly to Scotland. If one looks at the list, it is 107, although the number varies depending on who you talk to. We are down to 24 that may need legislation. There is a significant amount of agreement; I think that 87 are agreed between the Scottish Government and the UK Government about what nature of consistency there needs to be across the UK. It is the 24 that are problematic. These are very technical, complex areas of law; they are not at all simple. The question is: what is the range between complete harmonisation and differentiation and where do you fall within that range, or unanimity and some form of qualified majority voting? It is not an easy question to answer about the 24 powers. We know that some of these will fall out as time goes on and the negotiations between the Governments go on, but at the moment we have to wait and see.

**Akash Paun:** Yes, we do not know what is going to happen yet with those 24 areas. It is true that the withdrawal Act creates a mechanism to re-reserve only temporarily the powers in that list, although it is only for a maximum of seven years in any case unless some other primary legislation were to make a more permanent change.

My understanding, based on the report that was referred to before—David Lidington’s update on the common frameworks work—is that they are trying very hard to avoid having to use those powers to freeze the devolved powers. Jim just said that he thinks they may not ever need to be used. To give a specific example, the Government have said that on agricultural support the UK and Welsh Governments at least have agreed that they do not think legislation is going to be needed in that area after all to establish a framework and that it might be possible to do that just through an intergovernmental agreement. That is the preferred model where possible. It may be that in some of these areas we do yet see Westminster taking back some of the powers, but that has not happened yet.

Q40 **Kirstene Hair:** Taking back which specific powers?

**Akash Paun:** In the list of 24 areas, which are in agriculture, animal health, environmental quality and some other things like services and public procurement, the Government, whenever this agreement with the Welsh Government was reached, specified that they anticipated having to use the powers under the withdrawal Act to freeze devolved competence in those areas for a maximum of seven years while further work was done on the nature of a common framework for the period after Brexit.

Q41 **Kirstene Hair:** Do you believe that to be an advantage or a disadvantage to the wider UK? As I mentioned at the beginning of my question, a number of organisations and businesses have suggested that these common frameworks were very important for the integrity of the UK single market. Are you suggesting that it is a disadvantage for these powers to potentially be frozen if that were to come into play in order to have a framework that allowed the whole of the UK to operate smoothly?



**Akash Paun:** I think that the principles that were agreed through the JMC process for when you would need common frameworks—including, as you say, preserving the functioning of the internal market, enabling the UK to strike trade deals and implement international obligations—were good ones and they were agreed between all the Administrations. Now the detailed work is ongoing about what the right way is to ensure that those principles are adhered to. In some of these areas it might be that you need a legislative framework to prevent divergence between the nations, or it might be that the Governments can simply agree to work together and the common framework can work through a non-legislative—

**Chair:** I am conscious of time and I know that Members have to be elsewhere at different places. I know Mr Sheppard has a question on this that maybe Mr Clancy could answer.

Q42 **Tommy Sheppard:** Would you agree that it might be useful to draw a distinction between having Executive responsibility for an area of public policy and having the political power to do something about it? For example, a situation where the Scottish Government have responsibility for farm subsidy but are unable to provide subsidies to the Scottish farmers to the level they might wish because it would breach a cap set by the UK means that they have responsibility but not power.

My second question is with regard to common frameworks. Do you see a problem in UK Government Departments seeking to be both the arbiter of any disagreements within a common framework and the advocate for the interests of England?

**Michael Clancy:** Could I just reflect on the second question? I do not know if I will answer it precisely, but I think that we have to bear in mind that the withdrawal agreement means that if it is agreed there will be a period when European Union law will continue to apply within the UK, even though we shall have left the European Union, up until 31 December 2020. That should give sufficient time for any of these common frameworks decisions and the nature of common frameworks to be properly worked out and decided.

The danger is that if we do not have a withdrawal agreement in place by 29 March 2019, which is only 129 days away—that sounds rather sooner than five months—those common frameworks have to be struck and ready to go at the end of March. If we leave without a withdrawal agreement, we will not have that shield of the European Union law that continues a common, consistent approach in these areas.

**Professor McEwen:** We would have it within retained EU law.

**Michael Clancy:** Within retained EU law but it is frozen at that point, 29 March 2019.

**Professor Gallagher:** I think that it is quite important to understand why it is that EU law has the position it has in the devolution settlement.



It is there because it is a very wide-ranging, extremely deep set of international obligations that the UK has made. In 1999, when devolution was being constructed, the policy objective was to ensure that devolved Administrations and Parliaments did not make it impossible for the UK to meet its international obligations in relation to the EU and in relation to the ECHR. Therefore, they were built into the basement of the devolution settlement and constrained the competence of the Parliament and Ministers.

The underlying principle is not that it is EU law, or indeed the ECHR; it is that the devolution settlements cannot make it impossible for the UK to meet its international obligations. There are other powers in the devolution settlements in respect of other obligations. If we leave the EU, as Michael says, there will be, one hopes, a transitional period during which EU law will continue to apply. In my view, although I have not seen the withdrawal agreement Bill drafting on this, it should continue to apply to the devolved Administrations in the same way that EU law currently applies. That is to say, to constrain their powers, although there may be another way of drafting that, and I rather suspect that the Government will take a different one, unwisely in my view.

The UK will in the long run continue to have certain international obligations. The most likely is to the EU, and those will still have to constrain devolved powers in one way or another, because otherwise we will not be able to trade with the EU under whatever long-term trade agreement we have. Simply looking at this through the lens of who is grabbing power from whom is naive and unhelpful.

**Professor McEwen:** To build on that a little bit, having read the 585 pages of last week's draft agreement, I think it is interesting that within the context of the backstop, which may or may not be the final version and may or may not be utilised, there are legally binding commitments, which the UK Government would be entering into, that would affect devolved competence. In environment or in state aid—I know state aid is a disputed area of competence—there is, for example, an agreement to maintain standards that are equivalent to EU standards, although I forget the exact wording. There is a commitment to set up executive authorities or authorities that could monitor and hold to account the Governments within the UK. These are matters that affect devolved competence.

Q43 **Chair:** I am trying to rush things through because we have only a few minutes left, but I am quite interested in this point. It was a point that Mr Sheppard made earlier. We designed this in 1999 and when we talk about the Sewel convention these are not normal times when it applies to how the Sewel convention has been applied and the original Scotland Act was not designed to take into account something like leaving the European Union. Therefore, if it is not fit for purpose and the memorandum of understanding is no longer relevant because we have Brexit, surely, as Mr Sheppard suggested, we have to redesign and reinvent all of this because it has quite clearly broken down?



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**Professor McEwen:** There is a review going on just now. All of the Governments are engaged in a review of the memorandum of understanding and of the system of intergovernmental relations. I do not know what that review will come up with, but I would hope—

Q44 **Chair:** In your view we are getting into a radical redesign and we are looking at some of the difficulties that we have now about leaving the European Union?

**Professor McEwen:** I think that it needs a significant redesign, so more than just tweaking, but maybe not necessarily a radical overhaul. That is separate from the broader issue that you were raising on whether or not that also necessitates a revised devolution settlement. I see that as a separate issue—it is a legitimate debate to have, absolutely—but I do not think that the two necessarily go in tandem.

Q45 **Chair:** Would you be naturally opposed to something like the Smith commission or the Calman commission to take into account post-Brexit UK intergovernmental relations?

**Professor McEwen:** I would hope for something rather less elitist and that was a bit more inclusive of a wider range of voices than either of those.

**Michael Clancy:** What we have spoken about is that this is not a whole-of-Government project. This is a whole-of-governance project and that should encompass not only the UK and devolved Administrations, but the Parliaments, civic society, academia and others, so that there is a big tent where people can give a lot more thought, take out some of the politically charged discussion and rhetoric and can make a contribution that creates an improved product for the rest of us.

It is a variable picture that we are seeing. What is developing is a variable picture because while under the Agriculture Bill Scottish provisions are limited to those relating to the WTO arrangements, and under the Fisheries Bill, which has its Second Reading tomorrow, there are provisions where regulations can be made only with the consent of Scottish Ministers. One might say that that might be a gold standard to reach for in the next set of legislation down the track, but it just shows those of us who look at these things closely that there is not one size that fits all here.

Q46 **Danielle Rowley:** To try to sum up, what would a successful outcome of the Cabinet Office's review look like? Professor Gallagher, perhaps you could tell us what, if you were still head of devolution at the Cabinet Office, you would like to see included in that review.

**Professor Gallagher:** I am really glad that I am not head of devolution at the Cabinet Office at the moment. My view is that a successful outcome first has to await the resolution of the Brexit question, because that is so existential for all of this. Just the other day the Prime Minister was saying, "It is my deal, no deal or no Brexit." That is a pretty wide



range of possibilities and the world will be radically different under each of them.

Let us assume that the no-deal option is off the table and let us just concentrate for the moment on the Prime Minister's deal. It involves a long series of implementation chunks, a transition period, an extended transition period, potentially a backstop, potentially a Canadian arrangement, potentially a Norwegian arrangement, and potentially—though I think that it is highly unlikely—a Chequers arrangement. The implications for IGR of each of those are going to be somewhat different.

Therefore, we have to design a system of IGR that will function in the world where we eventually end up. I agree with the others that it is time to make this a statutory proposition. Ged Killen used the word federal or quasi federal, and all federal countries have something about relationships between the different levels of government built into their constitutional arrangements. We need to do the same.

My personal view is that it is probably time to change the name because there is too much past dependence in this. We are still behaving in some of the ways we behaved at the first JMC I went to in 1999, and that is probably not a good thing. The arrangements need to be more integrated. We talk about this JMC and that JMC but there are a whole series of other inter-ministerial groups. That needs to be brought together and, in my personal view, the UK Government need to reorganise themselves to bring their relations together—I have thought this for a very long time—rather than have them piecemeal.

There probably does need to be some space for England in this. It is not being at the JMC but there is an interesting model in the British-Irish Council in which people of different legal status get around the table and talk about matters of common interest. Perhaps we should create some kind of opportunity for the metro mayors and whoever their successors are to speak for England in a different way.

This is quite a long-term project. It is not Tommy Sheppard's complete reconstruction of the devolution settlement, but it would be a substantial change in the IGR arrangements. We are talking about 2024 or 2025, in my view.

Q47 **Chair:** Can there be shorter responses than Professor Gallagher's, just to finish things off?

**Professor McEwen:** Jim disagreed with me earlier, so let me return the compliment. I partially disagree with your timescale because I do not think this is something that you fix and then that is it, just like the UK-EU relationship is unlikely to be one that you fix and then that is it. Everything will be subject to review and development as we go. Therefore, there are certain things that can be done now and there are other things that will await the outcome of the broader discussion.



One of the priorities, I would hope, would be around greater transparency and accountability to each of the Parliaments, and that is not something that has to await the outcome of the Brexit negotiations. There are a variety of other things that can be done, but I am thinking more of an interim approach and a commitment to review the mechanisms as we go, because we do not know what the future holds.

**Michael Clancy:** I would like to see that when the intergovernmental relations review reports next year we can come back to this Committee and have a further discussion about how it will proceed.

**Chair:** I am sure that this Committee is very much looking forward to that, too.

**Akash Paun:** I would like to see a statement of the principles of the intergovernmental relationship, and certainly things like transparency and accountability should be in there. There is going to be a need for additional JMC-type bodies, whether we call them that or not, possibly on international trade, probably linked to some of the main areas where we will need common frameworks, such as the environment, food and rural affairs, for instance. Bringing the ministerial intergovernmental body on finance into the JMC framework would be helpful. As I have already said, I agree that it is probably the right time to think about statutory underpinning for some of this.

Q48 **Danielle Rowley:** Finally, with this inquiry we want to look at other countries and at how they manage their intergovernmental relations. Where do you suggest we should look?

**Professor McEwen:** We have done that for you in certain ways if you want to look at the report that we have just produced. Every country is unique but it is then too easy to say that, therefore, it is not helpful to look elsewhere. I think that it is.

The Canadian example is interesting for you because it combines intergovernmental relations, which are fairly informal in some respects, with parliamentary sovereignty, which is often invoked as a barrier to intergovernmental working here. When you get to outputs and decisions, they are not binding decisions, legally at least, but they are often politically binding and then the various Governments can take them back to their own parliamentary setting. That is one example that stems at least partially from a Westminster tradition.

There are other European examples as well, but possibly the non-European examples might be most useful going forward because in a sense we are looking for something to replace that framework that is provided at the EU level and mechanisms for governing an internal market within the UK context. We are very happy to share some of that with you.

**Michael Clancy:** The Scottish Parliament's information centre, which is its research body, commissioned studies in Canada, Germany,



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Switzerland and Norway. One of the seminal aspects is that three of those were properly federal jurisdictions. When one gets to federal jurisdictions, there is a written constitution, understandings that are slightly more structured than, say, the Sewel convention and things like that. We have to be prepared to think out of our box just a bit.

Given the way in which our constitutional arrangements stand at the moment—and I think that Jim Gallagher's point is extremely important in this—waiting to see where we land in terms of withdrawal from the European Union is going to be critical. Where we land then will determine a lot of the structure of our law and our relationship with other countries, particularly in Europe but also what Akash was saying about the issue of trade and how that plays out. Trade arrangements with third countries may have a direct impact on the way in which the devolved arrangements have to work.

**Chair:** We are still awaiting the UK Supreme Court's decision on the continuity Bill, but apparently while we have been here there has been a decision that has refused the UK Government permission to appeal the article 50 situation. That news has just broken and I know that will be of great interest to all of you here, particularly to you, Mr Clancy. It is breaking news as we are sitting in this Committee.

Thank you ever so much. It has been a fascinating first session and we are grateful as always for your contribution. If there is anything that you feel you could usefully contribute as we continue this inquiry, please submit it to the Committee. Thank you very much.