OFFICIAL REPORT
AITHISG OIFIGEIL

Constitution, Europe, External Affairs and Culture Committee

Thursday 9 March 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 9 March 2023

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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
8th Meeting 2023, Session 6

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Donald Cameron (Highlands and Islands) (Con)

COMMITTEE MEMBERS

*Alasdair Allan (Na h-Eileanan an Iar) (SNP)
*Sarah Boyack (Lothian) (Lab)
*Maurice Golden (North East Scotland) (Con)
*Jenni Minto (Argyll and Bute) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Paul Cackette
Professor Jim Gallagher CB FRSE
Dr Andrew McCormick
Professor Hugh Rawlings
Philip Rycroft

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 9 March 2023

[The Convener opened the meeting at 09:33]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning, and a warm welcome to the eighth meeting in 2023 of the Constitution, Europe, External Affairs and Culture Committee.

Agenda item 1 is a decision on taking business in private. Are members content to take item 3 in private?

Members *indicated agreement.*

Devolution Post-EU

The Convener: Under item 2, we continue our evidence taking as part of our inquiry into how devolution is changing post-European Union and how devolution should evolve to respond to the challenges and opportunities of the new constitutional landscape.

This morning, we will hear from a panel of former senior civil servants. We are joined by Professor Hugh Rawlings, Dr Andrew McCormick, Professor Jim Gallagher CB FRSE, Paul Cackette and Philip Rycroft, who joins us remotely. I warmly welcome you all. I will ask an opening question, after which we will move to questions from committee members.

Following the United Kingdom Internal Market Act 2020, there have been impacts on devolution. How do you think that regulatory divergence can work within the new constitutional landscape? How has devolution been impacted by the internal market act? I will go to Professor Rawlings first.

Professor Hugh Rawlings: Diolch, cadeirydd—thank you, convener. It is a pleasure to be here on my first visit to the Parliament.

The United Kingdom Internal Market Act 2020 had a profound impact because, as I can remind the committee, a couple of years before the United Kingdom Internal Market Bill was introduced, a commitment was made on the part of the four Administrations to enter into common frameworks, which were designed explicitly to manage the possibility of regulatory divergence and to provide machinery for discussion of prospective divergence mechanisms to deal with possible disputes and so forth. That was designed or envisaged to be a mechanism for joint regulation or joint management of the internal market by the four Administrations working together in a collaborative way.

The internal market act cut straight across that. In its original form, as the United Kingdom Internal Market Bill, it did not acknowledge the existence of the common frameworks at all, and it was only as a result of the tabling of amendments in the House of Lords that consideration was given to its impact on the common frameworks. Of course, the internal market bill reflected a different conception of how the internal market should be used. It was agreed on all sides that there needed to be regulation of the internal market, but whereas the common frameworks proceeded on the basis of a collaborative understanding of how the internal market should be managed, the internal market bill represented a directive approach from the centre as to how internal markets should work. The amendments that were made to it in the House of

Lords were an attempt to mitigate the full rigour of that.

Therefore, the question is the extent to which the common frameworks can survive as a mechanism to provide for regulatory divergence. I remind the committee that the Office for the Internal Market, which was set up by the internal market act, has an obligation to produce periodic reports on the impact or the development of the internal market and how common frameworks have impacted on it. The first report is due this month: it has to be published by the end of this month, and it will be laid before the Scottish Parliament, the Senedd and the Westminster Parliament. Only then will we be able to see, through that comprehensive assessment by the Office for the Internal Market, how exactly the flexibility that the common frameworks provided for regulatory divergence has survived the blunderbuss approach, if I might put it in those terms, of the internal market act.

Dr Andrew McCormick: Thank you for the welcome. It is my first time in the Parliament. I appreciate the opportunity to engage with the committee.

There are some quite different and complicated considerations in relation to Northern Ireland. The issues around regulatory divergence surfaced in the very early stages of the process, including in the joint report of the negotiators in December 2017. That was the whole nature of what the May Administration agreed. At that point, the hard question—it remains the hard question—was how to reconcile Northern Ireland's place in the UK internal market with the absence of a land border. As Michel Barnier put it back in April 2018, if the land border is open, everything in Northern Ireland has to be single market compliant.

Obviously, a lot of water has passed under the bridge since then. That has been the focus of internal debate, and I agree with Hugh Rawlings—everything that he said applies, in some respects, in Northern Ireland. Not to take away from all that, there are some very different considerations. In the present day and the context of the Windsor framework, that takes us to a place where the relevance of that is how we would cope with divergence in a different context from divergence between the different component parts of the United Kingdom—how we would cope with the complexities that could arise through new European Union regulations or ways in which the UK might diverge from EU standards. That presents potential challenges.

In a certain sense, there is an unevenness of risk. Let me put it this way: the Government has consistently guaranteed that there is nothing in the way of Northern Ireland produce having access to the UK internal market. Unfettered access—that critical term—has always been clear and committed in an NI to Great Britain context, and the internal market act provisions effect that. What is not possible simply is the inverse. That is where the complexities of the Windsor framework, such as the green lane/red lane idea and all those things, come into play, and where the Stormont brake becomes relevant. If the effect of some change was to make that more complicated, and that is possibly significant, what is the right thing to do? The power is there. In the original protocol, there was a power for the UK Government to deal with new EU legislation through the joint committee. The new provisions and the amendment that is going into the protocol mean that the same check, or a similar check, can be applied, if necessary, to amending regulations.

It is important to consider a possible effect of that. If the effect of not accepting an amended EU regulation is such that the EU needs to take action to protect the integrity of the single market, it becomes a very uneven risk. Norway and Switzerland are in exactly the same position. They continually have to choose dynamic alignment, and they have chosen that. Indeed, they pay for the privilege, because they regard that as being in their economic interests. You could say that the same applies to Northern Ireland. Maybe, under the original protocol, that did apply. However, an important difference is that we are part of the UK, and if the UK chooses to go a separate way or to diverge materially in some way that would affect something significant, there could be a real issue. In that scenario, things become really quite complicated.

That is quite a different set of issues. This part of the internal market act was not the focus for us in the autumn of 2020. There were notwithstanding clauses to be thought about, which involved a whole different set of issues. Everything that Hugh Rawlings said about principles is relevant, but we have all those different and quite complicated factors as well.

09:45

Professor Jim Gallagher CB FRSE: Unhappily, this is not my first time in front of a committee—[*Laughter.*]—but it is always nice to be back. I will not repeat points that my colleagues have made but, broadly speaking, I would adopt what Hugh Rawlings said as a description. I think that the internal market legislation was an error and that it would have been possible to deal with questions of regulatory divergence and that, in practice, it will be possible to deal with such questions, if there is the political will to do so between the respective Governments.

It is important, from a purely Scottish perspective, to remember that the internal market

of the UK matters for Scotland and that regulatory divergence for its own sake is not something to be sought just because you can do it. It is a question of what you are seeking to achieve.

In that context, it interests me that it is possible to run an effective market with well-managed regulatory divergence. We managed it for approximately 300 years; that was the whole point. The economic union nevertheless managed to sustain, for example, a separate Scottish legal system. I imagine that, if members of this Parliament were to put to their colleagues at Westminster the proposition that there should be a separate Scottish legal system, there would be the most awful shout of, "My goodness! You can't possibly do that." Divergence can be managed, but it needs to be managed carefully and properly.

A constant focus on the principles—on standing on one's dignity—is not the way to do that. One has to look at actual, practical issues as they emerge. If the issue is about the content of sausages, let us negotiate about the content of sausages, not about abstract constitutional principles. If we do that collaboratively, in the way in which Hugh Rawlings described, those issues are entirely manageable. The more people stand on high horses, the harder the issues will be to manage.

However, there is one area in which I would stand on my high horse. That is the intervention by the UK Government at the time of the internal market legislation, which was, as the committee will well understand, a breach of the Sewel convention. That was, in my view, an error of constitutional significance. I will not repeat the history of the Sewel convention and its significance, but the consequence of that intervention and a couple of other interventions by recent UK Governments leaves the argument for strengthening the Sewel convention unanswerable. The committee may or may not want to go into that issue, but it is one that needs to be registered in this debate, and I have given you a short note that explains precisely how that should be done. I hope that that will be the policy of an incoming Administration at Westminster.

The Convener: We have done considerable work on that in the committee and in conjunction with our colleagues in the other devolved legislatures who are equally affected by what has happened with the Sewel convention. Thank you for that.

Mr Cackette—am I pronouncing that properly?

Paul Cackette: The emphasis is on the second half, but do not worry.

The Convener: Sorry about that.

Paul Cackette: Like Jim Gallagher, I have appeared before committees of this nature a number of times in the past, and it is good to be back.

My response is to look at the issue from the perspective of intergovernmental relations, which is an interest of mine in this context. I agree with what Hugh Rawlings said about the impact on common frameworks. The committee has received evidence and papers from Michael Keating about the intergovernmental relations system and its purpose. In answer to your question, I will add a little to what Professor Keating said. He said that intergovernmental relations needed a proper structure in order to support joint working and to ensure dispute resolution. I would add complementary policy making to that, because not all policies are jointly agreed and intended to work in the same way throughout the UK. In some ways, the concept of joint policy making had a resonance, particularly when the UK was part of the EU as a member state, and Scottish civil servants—myself included—contributed to a unified UK line.

I draw that distinction because it is important to recognise—this relates to the issue of recognising the respect that different Administrations should have for one another's discretion, and the discretion of Parliaments, to make their own decisions in their own geographical areas and within their own competences—that intergovernmental relations should be developed in such a way that leaves a space for complementary policy making, whereby we recognise that we can make our own policies in our respective geographical areas, but that the benefits of consistency within the UK can be achieved through a level of joint working.

My comment, specifically on the internal market act, is that that is an area that has still not worked as effectively as it could. Systems are in place for ministerial disagreements but, in my view, there is a bit of work to do on civil service co-operation and on scrutiny by respective Parliaments and Assemblies.

The Convener: Indeed—scrutiny has been of concern to the committee as well.

Finally, we will hear from Mr Rycroft.

Philip Rycroft: Good morning. I am sorry not to be with you this morning. I am over in the west of Scotland.

I do not have a huge amount to add. There has been good coverage of the question, much of which I agree with. I have a couple of reflections.

First, management of an internal market is important. Divergence can be expensive for businesses, disrupt supply chains and, ultimately,

reduce choice for consumers. If you want evidence of that, just look at what is happening vis-à-vis the UK and the wider EU. A small example is that, with the UK setting up its own regime on chemicals, suppliers of chemicals will have to retest their products for the UK market. Some suppliers from the continent will say, "That is simply not worth our while. We will no longer supply that market". Divergence matters in relation to the flow of business and, ultimately, prosperity. The question is how to manage an internal market and, in that context, whether the 2020 act was necessary to manage the UK internal market.

I agree with what has been said. We had a mechanism, through the common frameworks, to deal with domains where there were cross-border issues and where divergent regimes might have caused problems either side of borders. I have yet to see any evidence that suggests that the common frameworks would not have been adequate to deal with those issues. In that context, the 2020 act was a step too far.

If you allow me, I will address a slightly broader issue. Why did the UK Government feel that it was necessary to go down that track? I will give a reflection on the process that we are going through following Brexit. Brexit was, ultimately, about returning sovereignty to the UK from Brussels—the rehoming of that sovereignty. If that is what you have been driving at and is the motivating purpose of your Administration, getting that sovereignty back does not put you in a frame of mind to want to share that sovereignty within the United Kingdom. We can see that tension in UK Government policy. Some people say, "This is our opportunity to reassert the sovereignty of the UK Parliament and assert the concept of a unitary state", whereas others say, "No. We still need to manage devolution in the way that we have got used to. We need good intergovernmental relations and so on." That tension is still evident in the UK Government's approach to these issues. The assertive side of that argument was, ultimately, responsible for the 2020 act.

The Convener: We move to questions from other committee members.

Donald Cameron (Highlands and Islands) (Con): It is good to see all the witnesses. I am glad to hear such enthusiasm about appearing in front of Scottish parliamentary committees—you obviously have not been given a hard enough time by MSPs. [*Laughter*.]

I have a couple of questions. I am interested in the final point that Philip Rycroft made. I acknowledge what was said, but it is easy to downplay the commercial and economic reasons for the 2020 act. Do you have any view or observation on the economic reasoning behind the act? It should not be ignored, notwithstanding the compelling points that you made.

The Convener: Mr Rycroft might be having problems with his microphone.

Philip Rycroft: No, I am here.

The Convener: Excellent.

Philip Rycroft: I am very happy to respond. As I said at the start of my remarks, we must understand the commercial reality of how internal markets function and how business can flow through an internal market with a minimum of hinderance in order to deliver goods and products across it and, ultimately, prosperity for everybody in it. Achieving that clearly requires management and a deep understanding of the needs of business.

Therefore, when looking at possible divergence, part of the equation has to involve considering what divergence would mean for the effective delivery of business on both sides of the border. One solution would be for one Government to say that it will legislate in order to require producers to do a certain thing—to label their products in a particular way, to deal with the chain of waste in a particular way or whatever it might be. If there are different rules on each side of the border, that clearly adds costs to business. If a separate labelling line needs to be run to supply a small market, there comes a point at which it is simply not worth doing that, because the cost of putting an extra label on a jar of jam or whatever it might be is too great for the size of the market that is being supplied. Of course, one solution to that is to get agreement that everybody changes. That is, ultimately, what the EU single market was about: reducing 28 sets of laws to one set of laws, which allowed businesses to function.

Clearly, the same applies within a UK context. When Governments are thinking about changes, whether for public health reasons, environmental reasons or whatever the reasons might be, the impact on the cost of doing business must be considered. There will be occasions when Governments decide, under devolved powers and rightly so, that the benefits of a change outweigh the costs. However, in many other circumstances, the answer, if there is a public good to be derived from the legislation, is to do things in common. How do we do that successfully? We negotiate, as happens through the common frameworks. Until a couple of years ago, we experienced that, in the single market context, through negotiations in the EU. We know how to do it. The best way forward is through negotiation and collaboration to deliver, ultimately, the public good.

Professor Gallagher: I absolutely agree with Philip Rycroft's analysis. It is very important to distinguish between the need to sustain a market

for the benefit of people who get the services and products, and the question of who has the authority to make the rules. His description was absolutely correct. The danger is that one confuses the two and thinks that, given that we are talking about a UK market, only a UK Government can make the decisions.

Philip Rycroft mentioned the magic S-word, and I shall repeat it. This goes back to the question and obsession with the idea of sovereignty. Sovereignty is a concept that should be put in the bin. It is not a useful way of allocating powers and responsibilities across multilevel government. It is a confusion of the correct assertion that there is a UK single market—or domestic market, as I would rather call it—which requires to be preserved, and the notion that sovereign power must therefore reside at a particular level. We need to disentangle those two things; we should separate the politics from the economics.

10:00

Donald Cameron: I am very glad that you made that point, because it emphasises the fact that we sometimes look at such matters just in terms of the UK and Scotland, but there are issues between Wales and Scotland, Northern Ireland and Scotland, and Wales and Northern Ireland. Often, that analysis gets lost in this discussion.

I will move to a different issue. You have already touched on the Sewel convention. Our inquiry is about the effects of Brexit on devolution. We are all aware of some very high-profile cases in which the Scottish Parliament has not given consent to post-Brexit UK legislation. Have the political tensions and pressures, which we are all aware of, that existed before, during and after Brexit led to these problems, or have we been incubating such issues since 1999? I ask that in the knowledge that you all have a very strong track record in working in the civil service throughout devolution, so I would be grateful for your views.

Paul Cackette: The point about the incubation of the problem is absolutely right. One of my reflections is that Brexit has, in many ways, changed how we look at all these issues but, compared with the early days of devolution, we are also in a very different environment, both politically and with regard to the culture that is exhibited by civil servants and politicians. As the Scottish Parliament was being established, there was very much a drive to help it to bed in and to make it work. That was very much the culture. I remember the days of Donald Dewar and Tony Blair, who were very keen to ensure that the Parliament was a success. Of course, the political synergy between the Administrations in Edinburgh and London helped in that respect. What is different now is that devolution has bedded in, and the desire to make it work and to look at things in that way has very much changed.

The wider angle to this, beyond Brexit, relates to the increasing complexity of Administrations throughout the UK. We have not only the three devolved Administrations but the London Administration, the areas of England that have a metropolitan mayor and the areas that do not. Latterly, I was a director with various Covid responsibilities, so I was closely involved with the development of such work when different responses were necessary. Andy Burnham, for example, was a prominent speaker on the interests of greater Manchester. That, too, has added to the complexity in how we face these issues. Yes, Brexit has had an impact, but we should also note that the Scottish Parliament and assemblies elsewhere have matured, bedded in and changed as time has gone by.

When looking at wider issues relating to the future of devolution, it is important to recognise the various solutions that have been adopted. The solution that has been adopted most frequently in trying to address concerns relating to the right balance in devolution has been increasing powers; over time, more powers have been given. A question in my mind, particularly in a post-Brexit environment, is whether that is the right model, or whether we need to think differently on such issues and consider, for example, shared competence, although the 2020 act might not be the best example of successful shared competence.

I was interested in the report that Professor McEwen prepared for the Devolution (Further Powers) Committee back in 2015. In it, she noted that the UK sits quite far down the list compared with many other states in relation to the extent to which regional assemblies and Parliaments have shared competences with national Parliaments. There might well be scope to think about having a system of genuine shared competence as a way forward.

Professor Gallagher: Donald Cameron's question is really interesting and important. Inevitably, because I am still a civil servant, I will tell you that it is a bit of one and a bit of the other. It is quite an important issue that takes us into the nature of the UK's constitution and the extent to which it is written down in black-letter law. The UK's constitution has traditionally relied very substantially on conventions, expectations and norms, which can be unkindly called the good-chap theory of government. It has had to face up to the enormous eruption of Brexit, which was anything but normal, as we noted in the Sewel context. The UK's constitution has been stretched to and, in my view, beyond breaking point by that. As a result, we will have to crystallise in law more

things than we have found it necessary to crystallise in law in the past.

When we reach the stage at which the Supreme Court twice overturns the actions of a UK Government in its relationship with Parliament, something has clearly gone wrong in our constitutional set-up. Similarly, when we reach the stage at which the Sewel convention is, in my view, unnecessarily breached in the context of Brexit, perhaps it is no surprise, but it shows that something needs to be done. More of our constitutional arrangements need to be crystallised in law, and more explicit explanation needs to be given of the relative balance of power and the management of relationships among the different levels of government.

For a century or more, the UK has seen itself as a unitary state, even while it has acted as a quasi-federal state in respect of Scotland, Wales and Northern Ireland. There needs to be a shift. More of our rules need to be put into forms in which the courts can adjudicate on them if necessary. Good fences make good neighbours.

Dr McCormick: The devolution settlement in Northern Ireland was far from comfortable, settled or resolved before Brexit came along, but Brexit has changed things fundamentally. Some obvious points from a Northern Ireland point of view are as follows: first of all, the Good Friday agreement was not just a devolution settlement but a constitutional settlement. It was an international agreement with Ireland. It settled for the first time the constitutional status of Northern Ireland on a basis that could be supported across the island, and it was part of a resolution and an accommodation between traditions that overturned something that can be traced back to the 1918 general election.

I can give you lots of history if you want, but the agreement now has a different status, with the relationships among Northern Ireland, Ireland as a continuing EU member state and the rest of the UK thrown into unique tensions that have not been resolved. That is why we do not have devolution up and running; it links to promises that were made—or which were alleged to have been made—when ministers last came back, in January 2020, following the “New Decade, New Approach” agreement.

What we have now, however, and what was in the Northern Ireland Protocol Bill—indeed, I found this quite astounding—is a reference to the Act of Union (Ireland) 1800, which, although it contains a provision on trade, was actually part of the process of unifying the United Kingdom. The Good Friday agreement was about resolving the tensions between the 1800 act, the home rule campaign and the Government of Ireland Act 1920. All of that very complicated and unresolved history was resolved constitutionally, and with overwhelming support, in 1998.

Brexit disturbed that balance, because it was an assertion of constitutional sovereignty by the UK as a unit. In contrast, the Good Friday agreement said that the constitutional future of Northern Ireland was a matter for the people of Northern Ireland. Indeed, that is clear on the very first page of the Good Friday agreement, which also commits the UK Government to behaving with rigorous impartiality between the two main traditions in Northern Ireland. As a result, we now have very different contexts and circumstances that have been very disturbing to the settlement.

The important and positive thing that might be emerging from the rapprochement between the UK and the EU—this might be a different point, but it is relevant, because it affects how these things work—is the chance to return to the fundamentals of the settlement, which are power sharing, north-south relations, equality and consent. Those fundamentals stand, and Northern Ireland’s relationship with regard to trade and goods has to be unique, which will affect the balance of relationships with the other parts of the UK.

I am sorry—it is a complicated issue.

Professor Rawlings: As Jim Gallagher has said, this is a fundamental question. It seems to me that Brexit is the cause and the context of your inquiry. One of the things that we have learned from Brexit—I freely confess that I had not appreciated this before the referendum, even though I had been involved in devolution since 1999—was the extent to which we assumed, without thinking any further, that EU membership provided a framework within which devolution could work. That external mechanism for holding devolution together has now been withdrawn.

We are also realising that devolution depends, at a fundamental level, on understandings of trust between Governments. There was a reference earlier to shared governance; that became a theme for the Welsh Government fairly soon after the Brexit referendum—it was certainly a theme when I was there, and I think that it has continued to be. Indeed, we published as early as 2018 a document—I am going to wave it for the camera—called “Reforming our Union: Shared Governance in the UK”, of which there has since been a second version. Certainly, the view that the Welsh Government took at that time—and which, of course, was consistent with the idea of the common frameworks—was that we had to reinforce the collaborative possibilities of devolution to compensate, in a way, for the fact that the external framework of the EU had been withdrawn.

The problem, of course, is that Brexit has dissolved many of the bonds of trust between the Administrations. Indeed, that is the context of this inquiry. Where do we go if we have limited trust and limited commitment to shared governance as a matter of political reality? Perhaps the question is this: how far can that be mandated? That will mean replacing understandings and conventions—what might be called the "good chap" theory of government—with a measure of juridification, by which I mean the replacement of political norms by legal norms. Conceptually, from a small jurisdiction standpoint, a rules-based system would be preferable to a system based on discretion, as discretion tends to be exercised by the largest and most powerful party in the system.

From that point of view, a rules-based system with greater juridification of the constitution—that is, the replacement of political norms by legal norms—would certainly be beneficial to some of the smaller jurisdictions in the UK. Of course, it would come at a cost, and it would bring up questions about the extent to which you would want the courts to be involved in regulating relations between Governments.

10:15

Philip Rycroft: On your original question whether something had been incubating before 2016 or lurking in the system that would have emerged whether or not we had Brexit, all that I can say is that it did not feel like that at the time. I was running the UK governance group at the Cabinet Office in 2015 and 2016, and I had the same responsibility throughout the last three years of the coalition Government, too. It is worth remembering that what we were doing before the EU referendum—my team also partly designed the bill that allowed the EU referendum to happen, but that is slightly by the by—was completing what would become the Scotland Act 2016. As we know, that act delegated further fiscal and welfare powers to the Scottish Parliament and put the Sewel convention in statute, even though it was not justiciable.

At that time, we were in the midst of a review of intergovernmental relations, which came out of learnings from the Scottish referendum campaign and how that had impacted on Whitehall and relations between the UK Government and the devolved Governments. A lot was going on to try to firm up and extend the devolution settlements, and there was a sense that there was a job to be done to complete what had been set off in 1999, particularly in relation to fiscal and welfare powers for Scotland. That was very much the tenor of the Government that I was working for at the time—the Cameron Government of 2015. There was no hint at all, amongst the ministers for whom I worked, of the more assertive and muscular unionism—if I can characterise it in that way—that has emerged since then.

That was the departure point for the handling of or dealing with Brexit. That washed out into the early Brexit period as an endeavour to manage the Brexit process in a way that sustained an optimal level of collaboration across the four Governments of the UK. We set up something called the joint ministerial committee subgroup to look at European negotiations. It had quite an expansive remit, and it was a very deliberate attempt to ensure, at least, that the relationships between the Governments could be effectively managed through what was going to be an enormously difficult passage. It simply did not work out as intended, and things fractured and frayed more and more as time went on.

My perspective is that you have to see Brexit as a break point in all sorts of ways, including with regard to the management of relationships between the four Governments of the United Kingdom. I agree with what has been said: this has been so significant that there is no going back to the status quo ante. Instead, it will require a reconfiguration and reconceptualisation of how those relations are managed.

Alasdair Allan (Na h-Eileanan an Iar) (SNP): I turn to the Retained EU Law (Revocation and Reform) Bill, if that is not too drastic a gear change. I am interested to hear opinions, perhaps starting with Mr Rycroft, but from others too, about how that bill will impact on Government time. The committee has discussed how it will affect us as a legislature and some of the issues of principle—if that does not sound like I am on a high horse. What planning is being done to cope with the enormous task that seems to be envisaged in that legislation over the next few months?

Philip Rycroft: Clearly, I am no longer in the house, so I cannot give you a direct answer on what is happening in Whitehall. From what I know about the challenge of managing the transition post-Brexit with regard to the UK statute book, I can say that it seems that the Retained EU Law (Revocation and Reform) Bill is seeking to do the impossible. I cannot see how the UK Government has the time and space to work through this great body of law, in good order, to allow sensible decision making on what should and should not apply.

Ultimately, you can abstract this from the ideological question whether there should be a residue of EU law on the UK statute book. So much of the law governs how businesses function—how the law works in 101 fairly humdrum areas, some of which are more important than others. It impacts on myriad businesses, organisations, individuals, consumers,

employers and all the rest of it. The way to make good regulation and good legislation is to do so through a process of engagement and consultation and by understanding the interests of different parties. There is simply not the time and space to do that with the bill.

Frankly, words almost fail me in respect of the bill. It is seeking to do the impossible. Among its impacts is the impact on devolved competencies in Scotland, Wales and Northern Ireland. Untangling all of that in the time available, again, seems to be asking too much. The UK Government has embarked on an extraordinary piece of legislation, and one in which I see very little benefit.

Alasdair Allan: Thank you. That was pretty comprehensive. Do others wish to come in?

Professor Rawlings: It is, as Philip Rycroft said, an extraordinary piece of legislation. He said that he is lost for words. Well, I am well retired from the civil service now, so I can speak frankly. This is an exercise in performative government. It is a perfectly reasonable policy aim to review EU-derived law as policies come up for re-examination and reconsideration and you look at the extent to which you need to maintain rules that, in their origin, came from membership of the EU. However, what we are faced with here is, in theory, the completion of all that work by the end of 2023. I do not think that we need to be mealy-mouthed about why it has to be done by the end of 2023. There is going to be a general election in 2024, and the existing UK Government will want to be able to say, "We have got Brexit done, and we have dealt with all this legislation." It is a wholly unworkable timetable.

The Whitehall department that is probably the most impacted on is the Department for Environment, Food and Rural Affairs. The bill is at committee stage in the House of Lords, and it has been interesting to read some of the debates. In the House of Lords last week, the Minister of State in the Department for Environment, Food and Rural Affairs appeared to say that DEFRA's default position is that the existing regulations should stay and that he expected that to be the outcome of the reviews. DEFRA has well over 1,000 regulations to examine. He said that there would be a process, apparently, to review them all and that the bulk would be retained. That does not seem to be the most sensible way of conducting government. The problem with it is that the position in the bill—the default position—is that the regulations fall away, so they have to be saved if they are going to be saved.

To directly answer your question, like Philip, I am no longer involved in the Government, and I do not know what planning work has been done. I understand that Huw Irranca-Davies MS was one of your witnesses last week. I imagine that Huw was pretty clear about the horrors that are faced by the Senedd in dealing with the legislation.

There is scope in clause 2 to extend the deadline from 2023 for certain categories of regulation or, indeed, individual regulations to give the Government more time to review them. The date chosen for the possible extension is 23 June 2026. In the House of Lords, the minister was asked what consultation was had with the devolved Administrations and devolved legislatures when that provision was drafted. He was asked whether he was aware that there will be elections in May 2026 and that the Senedd and the Scottish Parliament will rise at the end of March 2026 and therefore cannot possibly undertake work up to 23 June 2026. He was asked why that date was chosen. The minister said—in an admission that this is performative government—that it just happens to be 10 years from the date of the referendum. By implication, he was saying that the Government did not give a moment's thought to the devolved institutions, their elections and how they might do the work.

I am sorry if I have overstepped the mark, but I feel strongly about this. It is appalling legislation. Given both what I have said and the powers that the bill confers on ministers to change the law in respect of a category of regulation that the Government is incapable of defining—it simply does not know how far this goes—it makes a mockery of taking back control and asserting parliamentary sovereignty. It is about ministerial lawmaking on an extraordinary scale, and it is, constitutionally, wholly and utterly inappropriate.

Dr McCormick: I will be very brief, because, again, I am retired and am not on top of the issues in detail. From the point of view of principle, what my former colleagues in the Northern Ireland civil service need to focus on is the implications of how evolving EU law will affect Northern Ireland under the Windsor framework and how that works out. That will be a new and very demanding task, because Whitehall did all of that while we were a member state, and Whitehall will be not only not interested but probably under instruction not to be interested because that was the old way and this is the new way. That is where the implications for Northern Ireland will lie and where difficult issues will lie.

10:30

Alongside that, there is also the need to understand the implications of existing law, what "retained EU law" means now and which laws remain under the protocol/Windsor framework and which are separate, in relation to the economy, and then seeing what the impact will be if the bill goes through. Those are three enormous tasks

combined. For me, the most important one for our people would be the future rather than anything to do with the bill. I have to say that I agree with everything that Philip and Hugh have said about the nonsensical nature of the process.

Professor Gallagher: I will not let off steam, but I agree with my colleagues. However, the question is: what is to be done about it? It seems quite likely that the bill will be pursued by the present Administration in London. There are three possibilities, it seems to me.

The first is that it is time for members of the House of Lords to earn their corn. The House of Lords can delay legislation. The last time that they got so excited about delaying legislation was in relation to fox hunting. This matters a bit more, so two years would be fine, thank you. Even one year would help. That is the first possibility.

The second possibility—this is the much more political one—is that the Opposition should set out its position on what it will do if it becomes the Government and the bill has passed. That position might well be that retrospective legislation should be prepared to give certainty about what will happen under one electoral outcome.

The third possibility, which relates to this institution and, indeed, to the Senedd in Wales, is that two can play at that game. What we have seen is a piece of legislation that disapplies all sorts of laws. Well, you could have one that reapplies them holus-bolus.

It is time for a bit of imagination, because this is a piece of nonsense.

Paul Cackette: I, too, am no longer privy to recent thinking in dealing with these issues. However, I will make two points, thinking back to my time as director of legal services in the Scottish Government at the pre-transition period, when a significant amount of work required to be done and legislation was put before the Parliament to bring the Scottish devolved statute book into alignment as much as was necessary at that point.

A protocol was agreed between the Scottish Government and the Parliament in terms of changed committee procedures and processes for addressing the issues. I would not really commend that system as being a particularly desirable way to scrutinise these matters. I am reluctant to speak on behalf of parliamentarians who can speak for themselves, but it did not seem to me that the time that was available and the processes that were initiated then gave enough opportunities for proper scrutiny. It felt, from a governmental point of view, looking in at parliamentary scrutiny, as if parliamentarians were really faced with little choice as to what to do because of the pressure of time, and it did not look to me as if that was a very effective way of scrutinising matters.

From the governmental point of view—and specifically, as I said, from the legal directorate's point of view—that created intense pressure in that period and led to a dilemma for me in having to manage limited resources. We got some extra resource at the time, but to ask inexperienced lawyers who did not know the government legal service to go in, with no background experience, to draft legislation of that nature was effectively an impossible task. The dilemma for me was whether I should say to ministers who were trying to advance their programme for government and legislation that they could not have it delivered because I had to reassign staff to do other work relating to a policy that the elected Administration did not support and was not in favour of. I sympathise with my successors in office if they have to face similar difficulties.

That was the acuteness of the dilemma. What do you do with your experienced staff who have the skills to do such things? Even if you use all efforts, it is a problem. We brought in people from private firms to deal with some of the business of government, but they did not have the experience in legislation, so that certainly put acute pressure on the legal team at the time. I guess that that is under anxious and careful scrutiny by those with responsibility for such matters right now.

Sarah Boyack (Lothian) (Lab): It has been really insightful to hear the collective experience and different perspectives that you have all given us this morning. It is very welcome.

I want to go back to the opening comments about the impact of Brexit on devolution and what needs to be fixed. I am thinking through those issues. Jim Gallagher, your paper contains a really interesting phrase: "constitutional carelessness". William Wragg, a committee convener, said last week, "It's politics". This morning, Philip Rycroft said that it is the way that we have got used to working.

How do we move from here, where we feel that it is not working, to a system that will work? I am keen to hear your perspectives on what would be your priority. The evidence that we have had has included changing how the Governments work together; deciding whether the Governments should have to work together; dispute resolution and what that would look like; the possibility of entrenching Sewel; and interparliamentary work. What would be your priorities? How do you incentivise respect to make devolution work? You have been on the inside, in the civil service. If the question is too difficult, you do not have to answer, but I am thinking about how, practically, we can move on from here. What solutions should the committee be looking at to generate a bit of progress?

I am not sure who I want to come in first. Who looks most nervous about it? I am trying to be constructive and get solutions. Andrew McCormick, would you like to kick off?

Dr McCormick: Yes. This is really important, because we will not get devolution back without restoring some kind of effective working relationships and rebuilding trust. I have used the word "carelessness" when commenting on how the Brexit settlement for Northern Ireland was developed. What happened in October 2019 and through to 2020 did not have serious regard for the impact of the decisions that were being taken by the Johnson Administration for Northern Ireland's constitutional position. That is very evident. How do you deal with that?

I keep going back to paragraph 1(v) of the Good Friday agreement, which involves commitment by the parties to work together, acknowledging their differences and the totally divergent world views of Irish republicanism and unionism but committing to make the institutions work. To put it naively, it requires a commitment to work together, acknowledging that, yes, we have massive political differences, but we need to make the institutions work.

The Good Friday agreement solved a constitutional problem and worked out how to run a place and make decisions. It was not about making better decisions or having slick and smooth government but about legitimacy and confidence. That is still the issue in the Northern Ireland context. From all that I am hearing this morning, it sounds as though issues of legitimacy and confidence apply in your context, too. There are different possible constitutional solutions to that, but saying, "If we have something that people have voted for and is fixed, let there be a commitment to make it work and engage together" means that honesty is required. We do not have a Government, because there were serious issues of dishonesty around the explanation of what was agreed in 2019. That is at the heart of why we have a problem. Dealing with that, facing up to those issues, getting into a rebuilding of trust, recognising different points of view and saying that we should move forward is idealistic, but, without some such motivation, how do we go forward?

Professor Rawlings: In the Northern Ireland case, a requirement that the various parties must commit to working together might have an important part to play in the restoration of devolution. At a more general level, however, and with all respect to Jim Gallagher, I have considerable doubts about mandating a duty of proper collaboration as a matter of law. Is there an alternative way? My view on that has changed 180°. When we were doing intergovernmental relations in the early years, it was clear that there was a problem, but my view was that the political culture around the operation of intergovernmental relations had to be improved. Once that had been done, if you wanted to reinforce or buttress it with some form of legislation, you could do so, but the key thing to do was to change the culture.

Over the years, however, I came to the view that the culture was not going to change. Philip Rycroft referred to this in an earlier answer, but there was profound ambivalence on the part of the UK Government as to the extent to which the other Administrations had a legitimate part to play in the governance of the UK. Without that shared understanding of what the roles of the various Administrations could be, productive intergovernmental relations were not likely. Indeed, those relations seemed to depend on the goodwill, or absence of it, of individual players in the UK Government. I think that it is a matter of record that, when Damian Green and then Sir David Lidington came into the relevant jobs in Whitehall, there was a significant improvement in the nature of the relationships between the UK Government and the devolved Administrations, just because of the approach that they took and their attitudes to it. Then, of course, in what became the political shambles of last summer, the whole IGR system went into deep freeze because the UK Government of the day simply refused to engage at all. You will all remember when Prime Minister Truss refused to talk to the Administrations, and, of course, throughout his three years, Mr Johnson refused to chair a meeting of the joint ministerial committee, which had previously been a central part of the intergovernmental relations arrangements.

That has led me to think that, at least at some level, you need a legal framework that requires the establishment of machinery for intergovernmental relations. That does not have to be a detailed framework, but placing an obligation on the four Administrations to participate in regular intergovernmental meetings may be a useful starting point. One hopes that, if the meetings were to become business as usual in the conduct of the Government, the political culture of collaboration might develop from that. That is why I say that I am starting to think that you may need law first and then the culture will follow rather than thinking that you should change the culture and then maybe do law. I am now in the place of thinking that you may need to legislate for a system of intergovernmental relations.

10:45

I will finish on this point. Devolution implies the possibility of divergence. If you are going to have divergence, you need to have a reconciliation of different standpoints. That requires effective

intergovernmental relations, which cannot depend on the goodwill or otherwise of the relevant actors at a given time. They have to recognise that this is part of the job that they have to do and that it is business as usual to work with the other Administrations.

Donald Cameron: You have very clear views on the personalities and politicians involved, good and bad. To what extent is culture an issue with civil servants, especially those in Whitehall, and in relations between civil servants in Whitehall and the devolved Administrations?

Professor Rawlings: It was an issue, and Philip Rycroft will be able to talk a lot about attitudes in Whitehall because it was part of his job to improve them. My job title was director of constitutional affairs and intergovernmental relations. We saw intergovernmental relations as being central to the conduct of constitutional affairs. That is where the Welsh Government was. At the expense of being slightly controversial, on intergovernmental relations within the UK, the Welsh Government was the only Administration that was wholeheartedly in favour of the Administrations working effectively. For perfectly understandable reasons, in Northern Ireland, there was a divergence of views in the Executive on what the relations should be within the UK. For the Scottish Government, its long-term constitutional aspirations meant that good intergovernmental relations were, perhaps, less of a priority than they were for those of a different view. As Philip Rycroft has said, there was profound ambivalence in the UK Government about what the legitimate role of the devolved Administrations should be in the governance of the United Kingdom.

Those differing political attitudes were bound to feed into civil service relationships, and although too much of the commentary about IGR has tended to focus on the political actors and there has not been enough recognition of the day-to-day business exchange between civil servants, which, for a long time, worked perfectly well under the counter, as it were, my impression is that the impact of the developments of recent years has made those relationships rather more difficult professionally than they used to be.

Paul Cackette: I agree with much of what has been said. I recognise that the issues and the challenges are formidably difficult to address, both from the civil service point of view and with enhanced scrutiny by the Parliaments. The amount of effort and endeavour that would have to go into having an effective system is pretty enormous. Civil servants can, of course, act only within the authority that ministers give them, but I think that, in the Scottish Government and, I suspect, Whitehall, there are different parameters and pressures that create difficulties with regard to establishing effective intergovernmental relations. They can probably all be summed up effectively by the concept of bandwidth. I have already mentioned the challenges that I see for Whitehall civil servants in coping with different devolution settlements. Even for Scottish civil servants, there is pressure, be it legislative or otherwise, to put legislation through. The focus is always on this place—rightly so—and on stakeholder engagement. We are delivering Scottish devolution, so wider implications and the extent to which there is an ability to look beyond and think about the implications elsewhere, or even to think about how implementation will work—certain issues can arise in a bill as to make that effective once the bill leaves here—can be extremely challenging.

Philip Rycroft will know more. Again, my experience is now slightly elderly, but I have to say that my experience of dealing with Whitehall civil servants is mixed in many ways, but there were circumstances in which they were extraordinarily sensitive and respectful of the different devolution settlements and understanding of the pressures and circumstances that we are under. It can be difficult for them to understand fully the nuances of the different settlements. I had better not think about giving you examples, but, sometimes, the hostility that I saw between UK Government departments was way in excess of any antipathy that I felt directed towards me in my dealings with them.

People need to recognise that Whitehall is a beast. It is a large set of different organisations, all working together in a way that the Scottish, Welsh and, previously, Northern Ireland Administrations do not have to deal with. My personal experience has been positive, although, as I say, I cannot speak for more recent times. I was certainly a believer that Scotland, Wales and Northern Ireland actually did better out of dealings with the UK Government than the English regions did—Philip Rycroft can tell me whether he agrees that that is still the case. There was more of a recognition of the separate nature of the Administrations, and sometimes we actually did better than places in England did.

There are challenges, undoubtedly. Going back to Sarah Boyack's first question, which was about recognising the difficulties that there are and what can be done about them, I again point to Professor McEwen's evidence that the number of times that the dispute resolution processes, through ministerial interventions, have been triggered is relatively few. Indeed, in my time, there were fewer still. The only real engagement was JMC(E)—the joint ministerial committee on Europe—because of EU membership.

The referral to dispute resolution does not seem to provide an incentive for civil servants to work more closely together. It leads me to the question of whether parliamentary scrutiny—the prospect, if they do not co-operate, of having to come and answer to parliamentarians to explain why things have gone wrong or have not worked as well as they ought to have done—may, as much as anything, provide a cultural incentive to get it right in the first place. It may be that parliamentary committees do not end up having to ask a huge number of questions—it depends on the circumstances—but the fact that you could be called to committee in a much more structured and developed way to explain why you have allowed certain things to happen and why intergovernmental co-operation has not worked may end up providing an incentive. It seems to me that there really is no incentive just now to make this work. The question is whether those backdrop potentials to do so could encourage better behaviours, because trust and culture are very hard to develop.

I will make a last point on trust. The trust thing is very difficult for civil servants. There is an institutional inertia, and there are legitimate reasons why information cannot be shared. As a lawyer, I had that issue with regard to knowing what legal advice I could share, not least for fear of breaching legal professional privilege in those discussions. Civil servants need clear guidance on what they can share, but the reason why the transparency and trust issue is so important is that it does not relate only to discussion between civil servants. If there is not a controlled measure of scrutiny, by a Parliament, say, of information within Government, the risk is that you get a less controlled examination. I give the example of the Covid WhatsApp leaks of the past week. In a good sense in some ways and in a less good sense in other ways, that is not a controlled way for information to get out to the public. It is all the more important that the Parliament think about ways in which, in a more controlled environment, proper scrutiny takes place, because the alternative is a less controlled environment where those matters can be dealt with and looked at in ways that may create their own challenges, if I may put it like that.

The Convener: I am conscious of time, so it would be really helpful if we could try to be a bit more concise.

Sarah Boyack: In your paper, you have given practical examples of how to do that parliamentary scrutiny. It is very much worth us looking at that.

Paul Cackette: Thank you.

Professor Gallagher: I will be brief, or, at least, concise. First, I think that it is now necessary for us to make some very substantial statutory changes to constitutionalise the relationships that have not gone well. Hugh Rawlings and I are not absolutely on the same page, but I agree that intergovernmental relations need to be statutory. They need to be an obligation. They should be within the framework of an obligation of co-operation, as they were in the EU in the obligation of sincere co-operation, which is aspirational but nevertheless important. Secondly, the intergovernmental structures should be supported by a secretariat that has a degree of agency of its own, independent of the Governments, that can set agendas and call meetings and, in extremis, do something about unresolved issues. Thirdly, all that ought to be properly overseen by Parliament: a reformed second chamber of the Westminster Parliament whose job that would be. That bundle of changes, alongside some others, would address the structural questions that we have to address.

Hugh Rawlings was right, however, to talk about the cultural questions that need to be addressed. Changing culture is very difficult. As Paul Cackette hinted, it is all about incentives. Leaving aside the politics, which are pretty poisonous at times, and the personalities, of which I will say nothing, one of the structural reasons why IGR outwith the devolved Administrations have been difficult is that 85 per cent of the UK does not participate in them. England is very centralised, and Whitehall seeks to be the micromanager of 85 per cent of the country, and, funnily enough, it finds it difficult to be hands-off with the remaining 15 per cent. A change in the governance of England is an essential precondition for effective IGR for the rest of the UK. That is why I have been working on proposals for precisely that.

That is the structural and the cultural. I will very quickly say a word or two about the civil service. I am old enough—as, indeed, are Philip Rycroft and, I think, Hugh Rawlings—to remember the transition from the pre-devolution civil service to the post-devolution civil service. There was much talk at the time of the civil service as part of the glue that would help the machinery to stick together and make it work. That was true; it was the case.

11:00

To a substantial degree, the bits of IGR that have worked have been part of the inheritance of cross-departmental, cross-governmental working alongside civil servants. The JMC(E), which Paul Cackette mentioned, is a very good example of that. However, people and personalities change, and we have failed, managerially, to do what we always used to do: have substantial interchange between the London Administrations and Cardiff/Edinburgh—historically, it was different in

relation to Belfast. Certainly, in Edinburgh, people from the Scottish Office and the Scottish Administration expected to spend some time in Whitehall learning the ropes—it did not go so much in the opposite direction—and we need to reinstate a dose of that. That is a managerial thing that we could do. The problem is fixable, but it requires something constitutional, a change in England and managerial effort to make it all work.

Sarah Boyack: Thanks very much. That is good because those are things that we can look at.

Philip Rycroft mentioned one or two of those things, as well as regions in England. Do you have any reflections on how we fix where we have got to after Brexit?

Philip Rycroft: I agree with a lot that has been said. You used the word "incentivise" in the original question, which is absolutely right. I will speak now from a Whitehall perspective. If we are honest, devolved matters are not high up the list of priorities for most Whitehall departments. There was a reality to devolve and forget. It was, "Well, that is devolved. We do not need to worry about that". There was an ingrained habit, therefore, of not doing the learning, and not putting in the necessary effort to understand politics in Scotland, Wales and Northern Ireland or how to build good, constructive, proactive relationships across the UK. There is a long history of that going back to pre-devolution. It is an inheritance that, as somebody mentioned, I worked hard to try to address, with a little but not total success.

That is buttressed by political incentives. For most English MPs, the state of the union will not be top of the list of things that they have to deal with in their constituency surgeries. There is not an upwelling of political voice in Westminster, which then runs through to Whitehall, saying, "This ought to be higher up the list of priorities. This ought to be a bigger concern for the Government of the day". I faced that reality when I was advising ministers. What did I say to the ministers whom I worked for to improve their incentives to get this right? My argument was, "Ultimately you, as ministers, are interested in the future and sustainability of the union. In order to achieve that, you have to approach these issues from a position of respect for the devolved Governments, the people of Scotland, Wales and Northern Ireland and their interests in the UK." From there, you take an approach of reasonableness into the concept of intergovernmental relations and all the rest of it.

Ultimately, it comes down to political choice about what substance is put into the form. I agree that we need to change the form. The recent reform of intergovernmental relations takes us in the right direction, and we could go further on that, but, unless the spirit of respect, reasonableness and collaboration infuses those institutions, they will not function. Ultimately, it comes down to political choice. My argument to the ministers whom I worked for was, "If you wish to sustain the union, you have to show respect because that is the way to ensure that people in Scotland, Wales and Northern Ireland see value in the union for the future." Clearly, there has been a change in that view and the political holding of the UK Government since I left, but what we were seeking to do through the Scotland Act 2016, the Wales Act 2017 and so on remains valid and true, if people are interested in sustaining the union for the future.

Maurice Golden (North East Scotland) (Con): We have touched on some of this, but I want your thoughts on the requirement or otherwise for the role of the civil service to be revised in light of devolution in the post-EU environment. The context is that committees and parliamentarians face capacity issues, yet we have a duplication of effort. For example, I met a UK Government minister about my dog theft bill. The minister said that the department had done extensive work, and he suggested sending me a briefing on the issue. Most people would think that that was a reasonable course of action. However, UK civil servants said that that would not be appropriate and that they would send it to the Scottish Government, which would pass it on to me. More than a year later, I still do not have the briefing.

In the context of all this, is there a way in which we can avoid duplication of effort and utilise the experience and expertise, even to a limited extent, of the civil service, via committees, perhaps with redacted or withheld content? I want your thoughts on how we can work smarter.

Paul Cackette: The benefits of smarter working are undoubtedly clear. I wonder whether Jim Gallagher's point addresses that. We should look to have a broader experience of civil servants in different Administrations. That is something that the Brown commission looked at in seeking to ensure that people who come into the civil service bring different skills and that there are opportunities for civil servants to work in private firms and the like to get broader perspectives. The drawback is a practical one: how do you operate a civil service in that way if members of a particular department are seconded for a sufficiently long period to make it worth while?

You had an unfortunate experience, Mr Golden, and I hope that it is not typical. The Scottish civil service has moved over time as more operational functions have come to the Scottish Government, in areas such as social security, and a larger proportion of Scottish civil service time is spent in operational delivery. With limited resources, that has probably meant that there has been a

shrinking of the time that can be spent on dealing with policy development. It is quite challenging.

The best that I can say is that we should ensure that there is better recruitment from a wider range of experience. A lot of the work has been done, but we must continue to recruit from as diverse a range of society as possible. Obviously, Scottish Government civil servants are representative of Scotland, and so they should be representative of all parts of a diverse Scotland. Work has been done on that, and there is a strong commitment to it. That would help. The cultures of civil servants are not entirely typical or representative of society as a whole, and maybe a broader intake would encourage a bottom-up approach to better decision making and engagement.

Maurice Golden: Thanks, Paul. That is very helpful.

Would any of the other panel members like to comment?

Professor Gallagher: Very quickly. It is a long time—more than a decade—since I was a civil servant at St Andrew's house. However, your question reminded me of a time longer ago, when the Scottish Constitutional Convention, which led to the creation of the Parliament, was running. There was some ambiguity in people's minds about the difference between Parliament and Government. It was a rude shock to many enthusiasts when they found that the civil service worked just for ministers. We have to accept that that is the constitutional position: civil servants do not work for the Parliament.

However—there are two elements to this "however"—my recollection of the early years, as Sarah Boyack will remember as well, is that there was a greater degree of coming and going than, perhaps, your story illustrates. That was partly because it will have been mandated and permitted by the ministers and partly, maybe, because the civil service itself felt a little more self-confident than it does now. The key thing for officials is to understand their boundaries with the ministers—what their ministers permit them to do—and, therefore, to have the capacity and confidence to be able to engage, probably informally, with parliamentarians, but inside the boundaries of their accountability to ministers.

Mark Ruskell (Mid Scotland and Fife) (Green): This has been a very insightful and candid session. I want to go back to retained EU law for a moment. Philip Rycroft talked about the bill seeking to do the impossible, but we are where we are, I guess.

Professor Gallagher talked about the options and the imagination that needs to be applied by Administrations and the House of Lords on the way forward. I would like to hear your brief reflections on what might have been a better way forward on revising and making decisions about retained EU law. In the current bill, there has been what is, in effect, a carve-out of financial services. There are issues around the cliff edge and, perhaps, the phased examination of retained EU law. What would have been a better and more credible way forward? May I start with Philip Rycroft, please?

Philip Rycroft: Sure. In a way, the answer can be found in your question. We built that into the original European Union (Withdrawal) Act 2018. That construction—EU law, as it then stood, making it on to the UK statute book—was because we recognised that it was not possible to revise all the law within the timetable that we were looking at for exit from the EU. The concept, which has been alluded to, was that, ultimately, the UK devolved Parliaments could seek to change the law, but that should be a process that would happen over time and be done with due diligence, due process and due consultation. Frankly, that was the process that civil servants in Whitehall anticipated would kick in.

Let us take a concrete example—the habitats directive. There has been a lot of criticism that the habitats directive overprotects some species that are common in the UK but are rare in the EU. It was perfectly legitimate for Parliaments to look at that and to consider whether that law needed to be adjusted to better fit with nature conservation in the UK. Members can see that that sort of issue is quite controversial with some people. It gets picked up on by people with many different interests, including experts. It is the sort of process that, in the normal course of things, would take two or three years, with a consultation, development of a proposition then a process would be gone through. That is good law making that makes good regulation, and that is what we envisaged would happen.

The fact that the process is being so accelerated is not about good regulation, better regulation or good law making, as we have said; it is being driven by other imperatives. We should have confidence that we know how to make good laws, and those are the processes that we should follow.

Professor Rawlings: In a way, you identified the answer when you put the question. There is the "carve-out of financial services". Why did that carve-out take place? It was because there was a review going on of financial services regulations. It seems to me that, historically, there has been a category of retained EU law that falls into a number of different boxes, and as each box comes up for review, the retained EU law is looked at alongside the purely domestic law, then the reform is done. It does not seem to me that there is a

category of retained EU law that requires review and reform all at once.

11:15

Mark Ruskell: Does that suggest that there is no cliff-edge date? You spoke earlier about the somewhat dubious nature of the significance of particular cliff-edge dates. Is it sensible to have one?

Professor Rawlings: I honestly do not think that it is sensible. The question for ministers in any Administration is this: which areas of law do you wish to review or reform? Ministers set those tasks for civil servants, saying that they want to legislate on them within the terms of their current Parliament or mandate. The civil servants will then review the law, from wherever it derives, that relates to that matter, but ultimately it is a matter for ministers to decide the priorities that they give to the areas of law in which they think that reform is appropriate.

Paul Cackette: My view is that a cliff-edge date is not necessary. There is almost a fallacy that, if something has come originally from EU law, that means that, once we are no longer in the EU, it no longer has relevance. Its relevance changes because single-market enforcement does not work in the same way, but if you look at areas of law such as procurement, competition and state aid, although they are derived originally from EU law, they are areas of law that still have relevance in the post-EU environment.

For example, there are good policy reasons for having rules for procurement, such as reasons of sector competitiveness and transparency. We would have those laws even if we had never been in the EU. The idea that law being derived from the EU means that it necessarily needs to be reviewed is a false assumption. The laws should be reflected on, considered and amended as our circumstances change, but I do not see why the cliff edge is the way in which that has to be gone about. It is all part of our normal process of development and keeping the law up to speed and pace with societal needs.

Professor Gallagher: Imagine if this Parliament concluded that any legislation on a devolved matter that had been passed by Westminster was automatically to be repealed and had to be replaced by legislation here. What would people say to you? That is a crazy idea.

Jenni Minto (Argyll and Bute) (SNP): Yesterday, as you will all know, was international women's day. I said in the chamber:

"looking back and learning are essential to moving forward."—[*Official Report*, 8 March 2023; c 45]

You have given us a lot of evidence about your experience in the civil service, and it has been absolutely fascinating. I was struck by the phrase "assertive and muscular unionism". I apologise because I did not write down who said it, but I am interested to hear your thoughts on whether there is anything in the way in which the Windsor framework came about that can be learned from, in moving forward post devolution. Moreover, is there anything that we can learn from Norway or Switzerland about how things are constructed, as a way in which to improve relationships across Parliaments and Governments in the United Kingdom?

Paul Cackette: Your observation about international women's day yesterday is not reflected in the fact that you have four men in front of you this morning.

Echoing what was said earlier, I stress the importance of discussion and negotiation. It is remarkable what can be achieved. It is interesting to look at the innovative ways in which problems are solved: I am thinking of Sarah Boyack with her planning background, and of charrettes in the local planning sense.

One of the ways in which problems can be solved is by asking people who have different perspectives to imagine that they are pursuing the opposite point. For example, if you have somebody who supports cycling lanes, how would they solve the shortage of houses? How do you solve each other's problems? Only through such dialogue and discussion is that possible. It can certainly be done if safe environments are found to allow those discussions to take place. Again, recent progress on a number of fronts might open doors in other areas that were either closed or ajar, and allow matters to be progressed.

Professor Gallagher: One of the lessons of the Windsor framework—it is a strange name—is that you fix things when you focus on the practical rather than on the conflicting principles that are involved. Lots of institutions have conflicting principles and objectives. You can either hit each other over the head with your principles or you can sit down and work through, in practice, what they might mean for sausage meat or whatever the policy issue of the day is.

The lesson from Mr Sunak's work—he deserves some credit for this—is that he sat down and worked through the detail on red lanes, green lanes, trusted traders and all that stuff. Of course, there is still a tension, because you are trying to do things at the same time that are contradictory between two regulatory regimes, but a practical way has been found that will probably work, with good will.

I am not sure that Norway is a helpful example, but Switzerland is, given its relationship with the EU. One of the striking things when you go to Brussels—you should go to Brussels—is that the largest state delegation there is the Swiss delegation, because they have to negotiate every wretched thing; they, too, have to focus on the detail. The Swiss have been stuck with a contradictory-principles problem in that the Swiss state wanted to join but the Swiss people would not let it, so that has been worked through in a practical way. It drives the EU mad, as it happens; it is very difficult for Brussels. Nevertheless, it works in a practical sort of a way.

On the relationships here inside the UK, the more time we spend grandstanding on issues of principle, the less successful we will be. Instead, we should sit down and work through issues day by day, whether they are in relation to single markets, common frameworks or the whole range of other increasingly shared competences among the Governments—social security is an obvious example—to which Paul Cackette referred. We will be more successful if we work together and co-operate. That is the lesson from all the external exemplars.

The Convener: I would like you to be really concise, Dr McCormick.

Dr McCormick: I was about to say that I echo most of what Jim Gallagher said. I just want to offer a slight qualification. The EU drives the Swiss mad as well, because their view of sovereignty also matters.

Yes—practicalities matter, but I always think of George Orwell's review of "Mein Kampf": people also respond to flags. John Hume famously said in Northern Ireland that

"You can't eat a flag."

That is a part of our history and our peace process, but there are visceral and very deeply held issues of sovereignty and identity that need to be taken into account. That is a part of our journey. It is far from easy, but working those things through is, again, achievable only through mutual respect, trust and building of relationships. It is much better when the focus is on the practicalities, but we have to recognise the significance of identity, as well.

The Convener: I want to ask a final question about the issues around intergovernmental relations. Something that happened recently but which had not happened previously in 20 years of devolution was use of a section 35 order by the UK Government.

I was saying something about the impact on the UK Equality Act 2010, which includes Northern Ireland. In his address to the House of Commons, Alister Jack said that it was about regulation across borders, but we have an open border between Northern Ireland and Ireland, and one of the principles of the market access that it has is free movement of workers. People could move who have a certificate that was gained in Ireland or, indeed, in Spain, once that legislation has been introduced. Keeping away from the subject matter of what has happened, do you have a reflection to offer on what the fact that a section 35 order has now been used means for devolution?

Paul Cackette: I briefly referred to that in my written submission. The reason why I did that—I will very carefully try to stay away from politics and my views on the policy—is that, when the UK Government published its statement of reasons, which was some 13 pages long, as to why the process has not worked, the question that came to my mind was about intergovernmental relations. In due course, questions might end up being asked about why intergovernmental relations did not address at least some of the problems. Now is not the time to address the detail of those problems, but it seems likely that at least some of them could have been resolved, had fully functioning or better-functioning intergovernmental arrangements been place. Maybe that is one of the lessons that will be drawn.

One of the reasons why that is important relates to the difficulties that we have been addressing about reconciling the future in the Brexit context. You can see why difficulties could be irreconcilable because of the distinctly different political views of the Administrations.

Think of policy on gender recognition, which is an extraordinarily sensitive and important topic. There should not be the extent of differences that exist at fundamental level. That goes back to Jim Gallagher's question about the detail. Brexit and gender recognition contrast with each other. You can understand why Brexit was so difficult, but it is less obvious why we have found ourselves in a position where some, if not all, of the problems that are addressed in the UK Government's note could not have been addressed through proper intergovernmental relations.

I had better say no more than that, because it is such a sensitive and difficult topic.

Professor Gallagher: I am not going to say anything about gender recognition, because I do not know enough about it, but it was quite interesting that we all had to go scurrying to the statute book saying, "Section 35? What's that?" It is a provision that was probably inserted in the draft legislation quite late in its development. When one reads it, one can see why it is there. It is easy to say that it is a terrible thing, but one can see why it is there. It is there because devolved legislative power is writ very wide. The test of

devolved competence is wide, because it involves anything that does not "relate to" a reserved matter. "Relate to" means something like, "is really about", "is mostly about" or, "is largely about". That means that there is a real possibility that devolved legislation would have a material effect on law in relation to reserved matters but still not be reserved, so some kind of safety net was inevitable.

Whether section 35 is quite the right safety net is a reasonable question to ask. Is it perhaps odd that a minister does it, and that that is all there is to it? The reason why it was drafted and justified in those terms, however, is the reason that Paul Cackette gave. The ability to wave that stick would have been an opportunity to try to resolve the issues in an IGR discussion.

I was working in the justice department in St Andrew's house in 2004 when we did legislation on gender recognition the first time round. We thought very carefully about the cross-border problems and concluded that, for everyone's sake, it would be better not to have them. Whether we got the substance of the legislation right is a different question, but the idea that there is a risk that one's gender recognition suddenly stops working when a train crosses the border is unacceptable. We cannot have that. I will say once again that a cross-border solution that works for everyone is the right way to do things. Talk to each other.

The Convener: We are right up against the clock. I am sorry, Dr Allan. As you know, in a Thursday morning committee, we are up against the plenary session. The meeting of Parliament will kick off in a very small number of minutes.

I thank you all for your submissions and your contributions. I am sure that the committee has found them fascinating. Your candour and the information that we have gleaned from this session will help us in our deliberations. Thank you very much.

Meeting closed at 11:30.

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