OFFICIAL REPORT
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Finance and Constitution Committee

Wednesday 21 June 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 21 June 2017

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FINANCE AND CONSTITUTION COMMITTEE
18th Meeting 2017, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Neil Bibby (West Scotland) (Lab)
*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)
*Ash Denham (Edinburgh Eastern) (SNP)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Patrick Harvie (Glasgow) (Green)
*James Kelly (Glasgow) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Ivan McKee (Glasgow Provan) (SNP)
*Maree Todd (Highlands and Islands) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Derek Mackay (Cabinet Secretary for Finance and the Constitution)
Professor Alan Page (University of Dundee)
Professor Stephen Tierney (University of Edinburgh)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 21 June 2017

[The Convener opened the meeting at 10:03]

Brexit (Legislative Consent)

The Convener (Bruce Crawford): Good morning and welcome to the 18th meeting in 2017 of the Finance and Constitution Committee. As normal, please put mobile phones on silent.

The first item on the agenda is evidence on the applicability of legislative consent in respect of Brexit. We will hear from Professor Alan Page of the University of Dundee and Professor Stephen Tierney of the University of Edinburgh. I warmly welcome our witnesses to the meeting. Members have received very interesting written submissions from you both—I am sure that we have all had a chance to digest them. You have given us considerable food for thought, so we will get straight into the questions.

Adam Tomkins (Glasgow) (Con): Good morning. I want to ask our witnesses about the Sewel convention. To what extent does it apply, if at all, to the making of secondary legislation? Can you provide any legal, political or constitutional authority—others will ask you what those words mean—for what you think the answer to that question might be?

Professor Alan Page (University of Dundee): Thank you for the question and for an unexpected starting point. My short answer is that the Sewel convention does not apply. As you specifically asked for an authority for that proposition, I say that it is a pretty clearly set-out rule, as I said in my written submission. It has been set out unambiguously ever since devolution began. There has been absolutely no mention of it or its application in relation to subordinate legislation.

As I said in my paper, the Scottish Government, in its submission to the Smith commission, argued for the extension of the convention to secondary legislation in devolved areas, which might be taken as an acknowledgement of the fact that it does not apply.

The example that has been of most concern to me is the exercise of concurrent powers and the transposition of European Union obligations. The Scottish Parliament's consent has never been sought in relation to that—worse, the Scottish Parliament remains singularly uninformed or ill-informed about the extent to which that happens.

I regard it as an area in which the convention simply does not apply. That is not to say that it should not, but, at the moment, it does not.

Professor Stephen Tierney (University of Edinburgh): I agree with that. The accepted understanding is that the Sewel convention does not apply to secondary legislation. In the context that we are looking at, that raises considerable issues and a real lacuna with regard to how the powers that will be accorded to the Executive under the great repeal bill play out, and what level of consent will be or could be sought from the devolved legislatures.

Adam Tomkins: I move to the question whether the Sewel convention should apply to secondary legislation. In the 1930s, Jennings said that, when we are trying to understand the scope of a convention—the Sewel convention is a constitutional convention, which is to say that it is a binding rule of constitutional behaviour that is not judicially enforceable—we should look to see what the purpose of the convention is. Whether or not there is a good rule or a good reason for it, what is the purpose of limiting the application of the Sewel convention to primary legislation and not extending it to delegated legislation?

Professor Page: The short answer is that that was the context in which the issue was first thought about, and the question of its application to secondary legislation was never thought about or addressed.

However, as you hint at in your question, if we think about it in terms of underlying principle or purpose—namely, that the consent of all the devolved legislatures should be obtained for changes that bear on their responsibilities—it is unarguable that the convention should apply to such changes, regardless of whether they are made by primary or secondary legislation. That is a gap that, as Stephen Tierney just said, will become not only more apparent, but more pressing in the context of Brexit.

Professor Tierney: I agree that the purpose of Sewel not being applied is—largely—a practical one, because there is much more secondary legislation than primary legislation and it would be extremely difficult in practical terms for consent to be sought every time that a piece of secondary legislation had to be made.

Secondly, secondary legislation tends to be on less important, more technical matters, and it would be taking a sledgehammer to crack a nut to seek formal consent every time that the Executive was required to make secondary legislation on a minor technical matter.

However, the fundamental point is that it is a constitutional issue of principle—and I am delighted to hear Jennings quoted in the

Parliament. Conventions are rules, and those rules are there to regulate behaviour. We have constitutional rules to regulate the Executive and, in so far as the convention operates to regulate the Executive in the context that we are looking at today, we are talking about secondary legislation that will be made in great volume and which will be concerned with matters that are not simply technical. It will be concerned with major substantive issues in the repeal of a vast body of European legislation on areas covering things from workers' rights to environmental issues and so on.

If we look behind the technicality of Sewel not applying to secondary legislation, we see that we are left with the gap of principle that Alan Page has alluded to, whereby there is a possibility that the devolved legislatures might not be involved in making very fundamental decisions about the removal of very important areas of law.

Adam Tomkins: My final question on this—

Professor Page: I would just like to make a supplementary comment on what I said—unless, of course, this is the subject of your question. Granted that there is a gap, how do you fill it? I add to my earlier answer the point that you do not fill it by extending the Sewel convention to secondary legislation. There are other ways of tackling that question; for example, you can use consultation consent requirements.

Adam Tomkins: Other members want to ask about that issue, so I will not jump in.

My final question is this: given that you have identified a gap and given the Supreme Court judgment in the Miller case, is there in your view any way in which that gap could be challenged or filled through judicial action, or has the Miller judgment completely ruled out all aspects of the justiciability of Sewel?

Professor Page: My immediate reaction is that it is dead as far as adjudication is concerned. It is not the way forward.

Adam Tomkins: Do you agree, Professor Tierney?

Professor Tierney: With regard to Sewel, the court clearly said that

"the policing of its scope and ... its operation"

was

"not ... within the constitutional remit of the"

courts. That seems entirely categorical to me. The courts were not prepared to get involved in enforcing Sewel; never mind enforcing it, they were not even prepared to get involved—as, for example, the Canadian courts have done—in defining the terms or the extent of the convention. It seems to me that the courts will not touch it.

Adam Tomkins: Thank you very much.

Maree Todd (Highlands and Islands) (SNP): How would you fill the gap with consultation consent requirements?

Professor Page: We are talking about secondary law-making powers that, in this context, will be conferred on United Kingdom ministers in some cases and on Scottish ministers in others, and in some cases—we are not certain about this, and we will not know until we see the legislation—there might be concurrent powers that could be exercised by either.

My concern lies with the powers exercised by UK ministers either exclusively or concurrently with Scottish ministers in relation to not just devolved but reserved matters. I therefore propose that the gap be filled with requirements to consult Scottish ministers on—or, in some cases, obtain the consent of Scottish ministers to—those powers being exercised in devolved and, in some cases, reserved areas. That would have the singular merit of providing the element of bite that is currently missing from our intergovernmental arrangements, in which so much depends on goodwill obligations that are binding in honour only and which can, either by accident or by design, be forgotten about. If, on the other hand, you are faced with a statutory requirement to consult Scottish ministers or obtain their consent, that is a completely different and much more compelling set of arrangements. That is what I would propose.

Professor Tierney: There seem to me to be either informal or more formal avenues. The informal avenue would be through intergovernmental relations and the ways in which consent or agreement is sought through the channels that already exist. However, absent the application of Sewel, it is possible that the great repeal bill or other legislation could make provision on the need for the formal consent of both Parliaments—or of all the devolved Parliaments and the UK Parliament—with regard to the making of legislation that crossed the boundaries between reserved and devolved matters. The Scotland Act 1998 already provides for that kind of joint consent, and such provisions are the more formal mechanisms that could be used.

The practical difficulty is that we are talking about a vast body—possibly 12,000 pieces—of European legislation that has been transposed into UK law. A balance will have to be reached between arriving at the consent of the devolved territories and getting the job done, because the Brexit job is going to be massive. That is where the balance will lie.

10:15

Maree Todd: If I understand correctly, you both consider that the Sewel convention should apply in this situation, but that it does not. I think that we are also agreed that there is a gap that should be filled by either informal or formal requirements to consult and seek permission from the devolved Parliaments. Is that what you are saying?

Professor Page: Not quite. The gap should not be filled by informal requirements. I am all in favour of informal requirements and people doing the right thing, but I am worried about what will happen when people forget what they have undertaken to do. Therefore, I want formality to be introduced. That takes us back to the deputy convener's question about the role of the courts, as they would have a role in considering whether the statutory requirements had been observed by the Whitehall departments making the legislation. It is important to recall that we are talking about a massively decentralised subordinate law-making process. It is at that level that we want people to be conscious that this is not just a matter for London, and that they need to talk to other people about it.

Maree Todd: You are saying that provisions in the Scotland Act 1998 would cover that.

Professor Page: Yes, there are models.

Maree Todd: Professor Tierney is also saying that the matter needs to be covered in the great repeal bill, too.

Professor Tierney: Well, the great repeal bill will provide the powers for the UK Executive to make delegated powers to repeal a lot of EU law, although there will almost certainly be allusion to the Executives of the devolved legislatures, too. The issue is whether the bill should also make reference to schedule 7 to the Scotland Act 1998 when those delegated powers are used to repeal EU laws that step into devolved areas. The issue is whether the bill, when delegated legislation in relation to powers across reserved and devolved boundaries is made, should set out the mechanisms in the Scotland Act 1998—or some analogy to those powers, such as the joint consent of both legislatures being needed—that will be used to make delegated legislation in areas that step significantly into devolved areas.

Maree Todd: Although I understand your point about volume, you also made the point that the approach would set a precedent because some of the legislation will be significant and not simply technical.

Professor Tierney: Yes. It is almost—

Maree Todd: Does that require an exceptional mechanism? I am sorry, but I am not a lawyer.

Professor Tierney: No, you are right. We joined the EU more than 40 years ago. A vast body of law comes out of Brussels. The only practical way of bringing that law into UK law has been to do so through delegated legislation. That does not mean that that law is not important; it just means that delegated legislation has been a practical way of bringing it in through the European Communities Act 1972.

A swathe of law has been brought in through delegated legislation and will be removed by delegated legislation. On the face of it, from an outside point of view, you might not think that that is terribly significant. However, we know that the substance of that law is often terribly significant. We ought not to be caught up in considering the form of the law, but the fact that delegated powers will be used to remove European legislation should not disguise the fact that we are often talking about incredibly important areas of law that would, in any other context, be given the full parliamentary treatment.

The Convener: I want to get into the detail of schedule 7 to the Scotland Act 1998 a wee bit more. Professor Page references it in the last paragraph of his submission as a possible mechanism to follow. We are on the brink of the Queen's speech and the gap that you mentioned exists. What, practically, would the UK Government require to do to fill the gap, and how long would that take?

Professor Page: It would need to do very little. It would have to say that the exercise of the power will require the consent of the Scottish ministers, for instance. It depends on what parliamentary procedures govern the exercise of the powers. There will be provisions that govern that in the legislation, and you would be seeking to ensure that they extended to Scotland. It would be the work of five minutes for a drafter to amend that.

Professor Tierney: There are different mechanisms. The paper that I submitted is one on which I have been working with Mark Elliott from Cambridge. We have been examining a distinction in terms of designation. When the delegated powers are used, it might be possible for the Government to designate an instrument as simply a technical matter—a piece of secondary legislation that will simply remove the phrase "European Union" from a particular area of law because it will no longer apply. That would either not require the consent of Scotland or could be done by negative procedure and covered fairly quickly.

The other mechanism would be for the Government to make a statement to the effect that a piece of delegated legislation will cover a substantive area of law. If it also designated that substantive area of law as one that stepped into

devolved areas, the procedure used could be type A under schedule 7, which would require the affirmative consent of the devolved legislatures concerned.

The practical problem to which the convener alludes is that such processes can take a long time, as we have seen with section 30 orders. It is a real struggle between what seems a fairly ideal system and what could become a very complicated process when each piece of delegated legislation that would require consent around the UK was made—it could take an extremely long time. I do not have an answer to that conundrum.

The Convener: The process of getting the consent might take a long time but it should not be difficult to enact the process to achieve that.

Professor Tierney: Yes. That should not be difficult under the great repeal bill, but the danger is that, in order to put it in the bill, one would have to think about what one was doing and what implications it would have for the 12,000 pieces of legislation that we are talking about.

Maree Todd: For clarity, could you say "UK Government" and "Scottish Government" so that I do not lose track and know which Government you are talking about?

Professor Tierney: Sorry.

Murdo Fraser (Mid Scotland and Fife) (Con): On a slightly different but related point, in paragraph 8 of your paper, Professor Tierney, you refer to the Supreme Court judgment in the Miller case concluding that there is nothing to prevent the UK Parliament from passing the great repeal bill without consent from the Scottish Parliament. However, in your final sentence you say:

"The existence of the Sewel convention however suggests that while it can do so legally, it is questionable whether or not it can do so constitutionally."

Professor Tierney: Yes.

Murdo Fraser: It is a long time since I sat in constitutional law lectures, so perhaps you could explain in more detail the difference between those two concepts.

Professor Tierney: Certainly. On the one hand, we have law. If you decide to break the law, the courts will enforce it and say that you cannot do that. That happens to the Government all the time in judicial review, for example. We also have political constraints whereby the Government knows that it is unwise to do certain things because it will lose elections. In its judgment, the Supreme Court tended to treat those as the only two factors that exist in our system. It treated them as a binary decision—either you do something that is unlawful or you do something that is politically ill advised—and it called the Sewel convention a political constraint on the activity of the UK Parliament.

However, to a constitutional lawyer, there is a third category in the middle, which is conventions. As Professor Tomkins said, the convention is a rule that controls behaviour but is not enforceable by the courts. It can be quite hard to understand, but there are rules that political actors stick by because they know that they are rules. They are conscious that they are bound by those rules even though the rules will not be enforced by the courts—if they violate those constitutional conventions, the courts will not do anything. Nevertheless, my argument is that they will be acting unconstitutionally. Their action might not be illegal, but it is more than simply politically ill advised. In our system, there is a distinction between constitutionality and legality—it is possible to act unconstitutionally without acting illegally.

Murdo Fraser: Who would determine whether someone was acting unconstitutionally?

Professor Tierney: You—political actors.

Murdo Fraser: In the end, it is a political judgment.

Professor Tierney: It is a political constraint. If a minister does something that is clearly unacceptable and refuses to resign, politicians who oppose what is happening can react by saying, "This is completely unacceptable under the doctrine of ministerial responsibility. You were responsible for that department and you were extremely slack, so you must go." There is a constitutional convention to that effect. They cannot take the minister to court, because the court will not remove the minister, but what has been done was more than simply ill advised. The minister has violated the convention of our constitution that says they must behave responsibly.

It is not an easy line to draw. It is, in a sense, all about impression and the reaction of the political environment. There is a distinction between unconstitutionality and illegality.

Murdo Fraser: Do you have anything to add, Professor Page?

Professor Page: You could say that the Sewel convention is a part of our constitutional arrangements, that it applies in this particular case and that, if the Government chooses to ignore it, it is acting unconstitutionally.

The consequences of that are, as Professor Tierney said, ultimately political. Nevertheless, the argument that someone is acting unconstitutionally is very well grounded. The convention has been there since day 1, in 1999, and it has been

assiduously observed—I am not aware of any circumstances in which it has been ignored. If memory serves me correctly, on the one occasion when it was forgotten about, the legislation was immediately corrected to take account of it. It is in with the constitutional bricks, such as they are, of our constitution.

Murdo Fraser: What would happen if legislative consent was unreasonably withheld by the Scottish Parliament?

The Convener: Or what if it was reasonably withheld?

Murdo Fraser: I think that we understand what would happen if it was reasonably withheld. The point that I am trying to make is that the politics overrides the constitution. If the Scottish Parliament were to decide to make a political point by withholding legislative consent, what would happen?

Professor Page: The Scotland Act 1998 is perfectly clear about what would happen. The UK Parliament could go ahead and legislate, and that would be an end of the matter.

I would not approach the matter in such confrontational terms; I would take a more step-by-step approach. The threat of withholding consent is in the background, but you can say, "This is all very interesting, but we would like to see the following things." That is why, in my submission, I talk about a Brexit legislative programme rather than the great repeal bill. Or rather, I focus, understandably, on the great repeal bill, but say that the bits that are going to be of real interest to the Scottish Parliament will come at a later stage.

In my view, it would be perfectly reasonable for the Scottish Parliament to say, "This is all very interesting, but we need to see the full package before we can come to a properly informed view on the question of consent or on whether it is not relevant. It's our ball and we're taking it home."

The Convener: So it might be unconstitutional for a UK Government not to seek the consent of the Scottish Parliament, but it would not be unconstitutional for the Scottish Parliament, reasonably or unreasonably, to withhold that consent?

Professor Page: Yes.

The Convener: I realise that we are dancing on the head of a pin a bit, but those could become important issues.

Patrick Harvie (Glasgow) (Green): I would like to expand on that point. If the word "consent" is to be meaningful in this context, rather than simply a rubber stamp, it must involve the Scottish Parliament agreeing to something. Surely, if the Scottish Parliament has taken the view that, politically, it objects to a course of action that the UK Government acknowledges requires legislative consent, the UK Government would be acting in that grey, unconstitutional way were it to legislate for something that the Scottish Parliament had not agreed to give consent for. In that situation, the constitutional course of action for the UK Government would be to revise its plans and come forward with something that would gain the consent of the Scottish Parliament.

Professor Page: The question is, what sort of revisions are you looking for?

Patrick Harvie: You are suggesting an alternative menu of options—beyond the Sewel convention—that might be drawn from. Surely, there is a question about whether the UK Parliament or the UK Government has the authority to pick from that menu as it sees fit or whether the Scottish Parliament has, at least, a right to consent or not consent to the choice from that menu.

10:30

Professor Page: What you are looking for is an agreement. It is as simple as that.

Patrick Harvie: An agreement that is willingly entered into.

Professor Page: I do not see an agreement being unachievable around the sort of things that we are talking about, which are basically procedural constraints. It is about acknowledging that the devolved legislature matters and that the exercise of the powers in relation to Scotland is a serious business. You need to know what is being proposed; you need to be consulted; and, in some cases, depending on how serious the proposals are, you may need to consent. However, you are talking about that in relation to not the great repeal bill but all the stuff that will come later down the line, which Stephen Tierney talked about—the details on agriculture, fisheries, the environment and whatever. Those are the areas in which you want to be certain that the voices of the Scottish Government and the Scottish Parliament are being heard, because they matter to Scotland.

Professor Tierney: As Alan Page has said, the Sewel convention has worked very well. We know that a convention exists if it is a repeated pattern of behaviour. Although it is not a law, people abide by it because they feel that they are bound by it.

Patrick Harvie: Until it becomes a problem.

Professor Tierney: Two things can happen to a convention. First, it can simply be found not to exist any longer. If political actors pay no heed to it time after time, we can simply say descriptively that the convention no longer exists.

The second thing that can happen to a convention is that our understanding of its limits can change. The nature of the Sewel convention is that Westminster will not normally legislate with regard to devolved matters without consent, but the word "normally" has never really been filled out. To take Mr Fraser's example, if it was perceived that devolved legislatures were routinely putting in unreasonable objections to legislation, the UK might say, "When we perceive that there are unreasonable objections, we will no longer wait for Sewel consent." We could then say that the Sewel convention had changed in that there would be an exception to "normally" when there were unreasonable objections. However, that would depend on behaviour over periods of time and, as observers, we would say, "The convention now means this."

This is a huge test case for Sewel. We are going to see what the limits are and when it does and does not apply. Technically, it does not apply to delegated legislation, but we are now going to see whether the principles that underpin it apply to that.

The convention is not written down. No one has ever written it into a law—apart from in the Scotland Act 1998, where it is referred to but not given force of law. It is recognised in that act. In practice, we are going to have to wait to see how Brexit will let us fill in what Sewel means.

Liam Kerr (North East Scotland) (Con): Professor Page, paragraph 14 of your written submission says that

"the Scottish Parliament cannot by withholding its consent prevent the Great Repeal Bill or any other Bill in the Brexit legislative programme from becoming law."

You have made that point clearly this morning. However, I am slightly confused, because you say in paragraph 2:

"The question of the Scottish Parliament's consent to the legislative consequences of Brexit has thus only been delayed".

I am unclear about what you mean by its being delayed. To me, that suggests that the question could be asked again and the answer might change.

Professor Page: In paragraph 2, I am referring to the fact that, as I say at the beginning of that paragraph,

"Much of the reaction to the Supreme Court's judgment has been to the effect that section 28(8) of Scotland Act 1998 ... is not worth the paper it is written on."

I have tried to go behind that and say that, actually, there is a lot more to it than that dismissive reaction suggests, and it is still a live issue. It has not been disposed of by the Miller case and it remains to be determined. That is what I mean by "delayed"—it has not been settled. The Miller case did not get rid of the Supreme Court judgment.

I am referring to a remark by the chair of the Scottish Affairs Select Committee in the House of Commons, who said to me in a question that that section of the Scotland Act 1998 is not worth the vellum it is written on. I replied that that is the sort of smart Alec comment that one would associate with a professor—which is why I talked about the paper that it is written on rather than the vellum.

Liam Kerr: I understand. Thanks for the clarity.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): I will do my best to work my way through this question.

Professor Keating was here last week. In his paper, he said that if Westminster was

"to ignore Sewel and legislate in devolved fields, the Scottish Parliament could in turn legislate to nullify such Westminster laws, leading to an endless game of legislation and counterlegislation."

Professor Page: Legislative ping-pong.

Willie Coffey: He said:

"This could be ended only by a specific reservation of the contested competence. According to the larger interpretation of the Sewel Convention, such a reservation, altering the powers of the devolved bodies, would normally require the consent of those legislatures themselves."

Do you agree with that?

Professor Page: I am not sure that I follow what Professor Keating said to you last week. I have not read that paper. If we are talking about reservations, amending schedule 5 to the Scotland Act 1998 and altering the legislative competence of the Scottish Parliament would unambiguously require the consent of the Scottish Parliament under the Sewel convention—unless it was done by an order under the 1998 act, in which case it would require the consent of the Scottish Parliament. So, my answer is yes.

Willie Coffey: Ultimately, if we go down that road of ping-pong and reversal—

Professor Page: I do not see that as a starter at all.

Professor Tierney: The point that I try to make in my paper is that we can get bogged down in talking about the Sewel convention—what it means and the extent of it—when the crucial issue is that, regardless of what one thinks of the merits of Brexit, the process of bringing Brexit about and trying to repeal all of that law will be an absolute headache. The last thing that Scotland and the United Kingdom need is a war of attrition in the middle of that, in which the two legislatures do exactly the sort of thing that you describe. It would be dangerous if we were to take our eye off the

ball by getting bogged down in Sewel and ignoring the fact that the crucial issue is intergovernmental relations and, as I say at the end of my paper, interparliamentary relations, which can provide a joined-up way of thinking about the issues.

When the great repeal bill takes effect, the competences of the Scottish Parliament will not change, as has been suggested. The Scottish Parliament will have competence in those areas that are returning and, under the Scotland Act 2016, there will be shared powers in a whole swathe of new areas. On top of that, there will be European competences. If there was a wish to be obstructive, it would be possible for more than one legislature to pass laws in exactly the same area, to the intense detriment of any kind of single market within the UK. The issue calls for mature political agreement. I do not know how that will be reached, but the nightmare scenario that you describe is a very real one and could happen in the absence of a mature approach to intergovernmental relations.

The Convener: You mentioned the scale of the legislative challenge that we face. Is it likely that there will need to be some sort of sifting process potentially involving all Governments of the UK to prioritise the level of scrutiny that will be required? There must be some mechanism to allow that. Do you have any suggestions on how we can go about that process successfully?

Professor Page: In his paper, Stephen Tierney mentions interparliamentary relations. In this particular context, that would raise or highlight the possibility of joint scrutiny between this Parliament and the Westminster Parliament, and perhaps with the other devolved Parliaments. I understand that there have been joint meetings between the Welsh Assembly and Westminster but that that has never happened between this Parliament and Westminster. I suppose that what I am saying is that the Parliaments need to get their acts together on how best to go about scrutiny and do it most effectively. I would not rule out, and can see considerable merit in, co-operation in that enterprise.

Professor Tierney: The initial step would be to provide for designation of any piece of delegated legislation. Statements are already made about such matters as whether particular legislation affects human rights or involves devolved matters. Any power that is used under the great repeal bill or any piece of delegated legislation that is put forward could be designated as technical or substantive; it could also be designated as reserved or devolved, or as covering the boundary between the two.

The resources at the Executive and parliamentary levels are now so stretched that it makes sense to find mechanisms whereby some of the work could be passed on to Scottish Parliament committees. They could be involved in determining where the devolved component came in. The sifting process of identifying which areas are devolved and which are not could be divided up, and agreement could be sought about which provisions should be repealed and which should continue. It is most likely that many will continue, because a lot of the law that we are talking about will not be removed; it will simply be domesticated. A lot of it is law that we will not necessarily want to remove from the statute books.

Wales and the UK have had to co-operate closely, given the nature of Welsh devolution, which has always been much more closely connected to Westminster than has Scottish devolution. That could provide an interesting precedent. Lessons could be drawn from that on how the Scottish Parliament could start to talk to Westminster committees about dividing up the scrutiny role.

The Convener: Ash, I apologise—I have just realised that I strayed into an area that I know you are interested in. Forgive me.

Ash Denham (Edinburgh Eastern) (SNP): You did, so my question has partly been covered. However, I would like to pick up on what Professor Tierney said.

You asserted that the committees in the Scottish, Welsh and UK Parliaments could work together, and not just as a way of preventing duplication. You also made the point that that will be vital in constraining what you describe in your submission as the “expansion in executive power”. Will you explain what you mean by that?

Professor Tierney: Yes. We are concentrating on the substance of Brexit. We are leaving the European Union, which is a very dramatic process and one that has created huge tensions in the territorial constitution, so it is inevitable that people have taken their eye off the ball with regard to how it can be done. Arguably, it can be done only by handing massive powers to the executive to make law and to change primary legislation by way of delegated legislation—Henry VIII powers, as they are called.

That is a concern for any legislature. It is a concern for Westminster: the House of Lords Constitution Committee, which I advise, is always commenting on the danger of Henry VIII powers, as is the Delegated Powers and Regulatory Reform Committee in the Lords. Committees in the Scottish Parliament are concerned about Henry VIII powers, too. We must be aware that it is not simply the UK Government that is going to get those vast powers; the devolved Executives will inevitably have to embark on that process, too.

There is a job for parliamentarians to do, regardless of their view of Brexit or of the balance of power between Westminster and Holyrood. They must keep their eye on the ball and recognise that one of their first duties as parliamentarians is to call the Executive—wherever it may be—to account and to make sure that whatever powers it has are subject to proper scrutiny.

Ash Denham: Do you have anything to add to that, Professor Page?

Professor Page: No—I agree entirely with what Stephen Tierney has said.

I will go back to what was said about the possibility of co-operation. I am reminded that there is a model—I think that it is called the subsidiarity protocol to the Lisbon treaty—whereby the EU legislates in areas in which member states think they should legislate. Of course, we are now talking about the opposite—that model is contrary to the principle of subsidiarity. There is provision for parliamentary scrutiny. "Parliament", in that context, is understood to be the national Parliament—that is to say, the Westminster Parliament. As I recall, those arrangements include provision for the devolved legislatures to tell the relevant UK Parliament committee when they have a particular issue with a proposal.

We are talking about something that would be analogous to that, whereby the Westminster committee that was scrutinising the exercise of powers would be informed about anxieties or concerns that the devolved legislatures might have about their exercise of powers or their competences. There are models that one could easily build on for that purpose.

10:45

The Convener: I would like to unpick some of the issues around that. My question is linked to Willie Coffey's and Ash Denham's questions. The repatriation of powers from the EU may or may not form part of the great repeal bill. We do not know yet. If the thrust of the white paper that was presented before the election were to be followed through, around the pan-UK frameworks that were to be engaged as part of the great repeal bill, would that engage the Sewel convention? If there is to be some sort of pan-UK arrangement, the powers could not just be left to come back to the Scottish Parliament, because there would be no way of using that pan-UK framework.

Professor Page: That is why I stress the programme rather than the great repeal bill, because I do not see the great repeal bill doing those things. I see it, where the devolved legislatures are concerned, as being about relieving them of the obligation to comply with EU law—in that that will cease to be an obligation at the end of the process—and giving them the powers that we have been talking about. However, when we get into frameworks and so on, what we are talking about are substantive policy areas—for example, agriculture. The great repeal bill white paper put it by saying in paragraph 4.4 that the Government would treat Brexit as a fresh start and would convert the existing EU frameworks into UK frameworks using UK legislation, and then talk after that about how the powers should be distributed.

The focal point of that will be schedule 5 to the Scotland Act 1998 in relation to what issues are reserved and adjustments to those powers. I see that as not being an issue for the great repeal bill because, politically, that would be taking on too much. I see the matter as being the focus of intensive discussions about common frameworks in areas including agriculture, and I see adjustment of the reserved/devolved boundaries taking place in that specific context, rather than being done in the great repeal bill.

The Convener: At some stage, we may require legislation to amend the Scotland Act 1998.

Professor Page: Exactly—and that will require Sewel consent. It is not a one-off question; it is a question that will recur throughout the process.

The Convener: On Willie Coffey's question, Scottish ministers could decide to legislate in an area themselves. I am not saying that they will, but it is possible. In that circumstance, who would adjudicate and who would have primacy?

Professor Page: That question came up a very long time ago and the answer is that that would be whomever legislated last on the matter.

The Convener: So the process could go on for ever.

Professor Page: There is no answer. Short of removing a competence from the Scottish Parliament so that it no longer has power to legislate in that area, in theory the process could go on forever. I genuinely do not see that as a starter, at all.

Professor Tierney: It is important that we do not get too bogged down in Sewel. Alan Page is absolutely right, and he has made in his paper the perceptive point that there could be 10 or 15 bills.

Professor Page: There would be eight bills, according to the press this morning.

Professor Tierney: Different numbers are being suggested. Primary legislation that affects devolved matters will obviously need Sewel consent. The danger of getting too bogged down in Sewel is that if we say, "Sewel applies if it's primary legislation and it doesn't apply if it's

secondary legislation," the UK Government could decide that it will try to do everything through secondary legislation. That would not only create an accountability gap, but would simply antagonise in terms of the territorial dimension. We need to put the technical limits of Sewel to one side and talk about the spirit of Sewel, which is that we have a territorial constitution, and the point of having a territorial constitution is to try to govern the state by consent.

People who look at countries with federal systems talk about "competitive federalism" and "co-operative federalism". There are ways in which arrangements could be managed to create a federal system that is co-operative rather than competitive. The case that Mr Coffey set out is an example of competitive federalism, in which he who laughs last laughs loudest, and people keep antagonising each other. In a situation in which we are trying to extricate ourselves from a massive body of law—a process that is complicated enough—it would be utterly disastrous to get into a situation in which two or four nations were involved in that sort of pathology.

The spirit of Sewel calls for a mature approach among political actors that will enable us to develop mechanisms that will allow us to avoid that situation. It is important that the bills that have been mentioned are developed on the basis of how they will impact on devolution and how the market in those areas will work afterwards. That is fundamentally a task for intergovernmental relations before the legislative process.

I know that I keep coming back to this point, but as a lawyer I think that it is dangerous to get bogged down in the technicalities of who has the power to do something and who does not. We need to see the bigger picture. Legislatures might have the power to legislate over each other's heads but, in political terms, their doing so would be an utter disaster.

The Convener: That touches on the area of intergovernmental relations, in which Liam Kerr was interested.

Liam Kerr: I asked my question earlier, but I was going to ask Professor Tierney about interparliamentary relations.

The Convener: That is right. Are you happy to leave this issue?

Liam Kerr: Yes.

The Convener: Ivan McKee has a question.

Ivan McKee (Glasgow Provan) (SNP): I am taking notes and trying to get my head around what has been said. I am not a lawyer, but I am interested in what has been said about the legal side, the political side and, in the middle of those two sides, the constitutional issue. You are saying that, as long as everyone is nice to each other, it will be fine. Obviously, we understand that. You mention specific issues, and I agree that specific issues can be dealt with as they happen. However, fundamental contention will not arise in a situation in which the UK Government wants to legislate to do something and the Scottish Government wants to legislate to do something else, so a compromise is reached.

As I understand it, the first problem that we will hit concerns who will have the power to legislate, because the devolution settlement is quite clear about what is and is not reserved: the Scottish Government might take the view that the UK Government is encroaching on its territory. In that context, which is more abstract than a situation in which one side wants to change a specific law in agriculture, for example, it is much harder to reach a consensus, because the change will need to be codified and, by virtue of where we are, that will require a change to the Scotland Act 1998, I think, with regard to what is devolved and what is not.

I think that you are saying that, because the courts are not involved in that issue, because of Miller, the backstop for all this is the court of public opinion, which means that this stuff is going to play out in that political sphere, and that that is, ultimately, where disputes will be resolved. Is my understanding correct?

Professor Tierney: I have said that the conventions are not enforced by the court—that is clear. Alan Page might take a different view, but it seems to me that the great repeal bill in itself is not going to change the competence of the Scottish Parliament, which means that the matters that are devolved to the Scottish Parliament will continue to be matters for it. If the UK Government were to use powers under the great repeal bill to make regulations that it was felt were clearly in devolved areas, that could well be challengeable in the courts, because the powers of the Scottish Parliament are defensible in the courts. The question of whether the great repeal bill is sufficiently clear in its intention to give the UK Government power to step into devolved areas could become extremely complicated. It cannot simply and impliedly repeal the powers of the Scottish Parliament.

Professor Page: Ivan McKee mentioned the court of public opinion. It is worth thinking about what that means in the context of agriculture, which was the example that he gave. What that means in practical terms is that the moment the UK leaves the EU, we will need an agricultural policy to replace the common agricultural policy. If I was a farmer, I would certainly want to know what that policy is going to look like. That is the practical question.

In UK terms, I assume that we are talking about a policy that would be either drawn up by Westminster with the agreement of the devolved legislatures, or done separately, and which will secure the common frameworks that have been highlighted in earlier questions, but which will, for the rest, leave the devolved Administrations to go their own way or to tailor that UK-wide policy to their own circumstances.

It is also worth remembering that the devolved Administrations have very little discretion to tailor anything under the common agricultural policy—the decisions are all taken in Brussels. It is about developing a post-EU agricultural policy, as it will be about developing a post-EU fisheries policy or environmental policy. That is where the practical decisions will have to be made.

Ivan McKee: So, the matter will be resolved when everybody sits round the table and tries to figure out what an agricultural policy should look like.

Professor Page: Exactly. The great repeal bill is a sort of prelude.

Ivan McKee: We are clearly a long, long way from that—

Professor Page: No. That will happen very quickly.

Ivan McKee: I will put it another way, in that case: not much progress has been made towards that yet, by which I mean that we do not even know what the UK Government's policy is.

Professor Page: I am surprised by how little progress appears to have been made and how little discussion there has been about what is coming next. All we know is that it will be the subject of intensive discussions.

Ivan McKee: Thank you.

Patrick Harvie: Forgive me, but I get the feeling that I might have skipped a track there. In his last answer, Professor Tierney said that the repeal bill itself will not alter devolved competence, but Professor Page's written submission says that it will. I thought that we had already accepted that repealing the European Communities Act 1972 will affect devolved competence and thereby put the issue of legislative consent on the table, but I note that there was very little disagreement from Professor Page after Professor Tierney's answer.

Professor Page: I do not think that we were in disagreement.

Professor Tierney: The great repeal bill will remove the area of EU law that at the moment circumscribes what this Parliament can do. This Parliament is prevented from legislating in a bunch of areas because of the EU; indeed, the Scotland Act 1998 says that the Scottish Parliament cannot legislate contrary to that.

Suddenly, all that will disappear and the Scottish Parliament will be able to legislate in all those areas. We do not really know what the great repeal bill will say about the Scottish Parliament's role; my sense is that it will not say very much, in which case the competencies that are written out in the Scotland acts will not be removed or officially changed—there will just be a bigger area of law in which the Scottish Parliament can use the powers.

Patrick Harvie: The Parliament might not be directly changed, but indirectly it will be changed profoundly.

Professor Page: Yes.

Professor Tierney: By definition, the Scottish Parliament will no longer be constrained by the restriction on legislating contrary to EU law.

Professor Page: The Scottish Parliament will be given additional powers. However, I go back to my earlier analogy of a play, in which the great repeal bill is act 1; it will change the Scottish Parliament's competence in the way that Professor Tierney has described, but it will be a minimal change. A large series of other changes in discrete policy areas including agriculture, fisheries and so on will be matters for discussion and possibly agreement between the various parties, and will be the subject of subsequent legislation, as part of the programme. It is not a one-off question; it will recur time and again, both in relation to the great repeal bill and the other legislation that will follow.

The Convener: We are going to find out pretty soon what the great repeal bill includes and does not include. Depending on the context of the bill and whether a myriad other pieces of legislation will flow from it, we will probably have to come back and talk with some more certainty about this. There is a bit of speculation going on, simply because we cannot be absolutely sure.

I thank our witnesses for coming along today for what has been a useful scene-setter. It will certainly focus our attention on the Queen's speech this afternoon, and on what it says about the great repeal bill and what might be in it.

10:59

Meeting suspended.

11:30

On resuming—

Subordinate Legislation

Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017 [Draft]

The Convener: Item 2 is to consider a Scottish statutory instrument relating to the Land and Buildings Transaction Tax additional dwelling supplement. Before we come to the motion seeking our approval, at item 3, we will take evidence on the order. We are joined by Derek Mackay, Cabinet Secretary for Finance and the Constitution, and Scottish Government officials John St Clair, from the legal directorate, and Ewan Cameron-Neilson, from the fiscal responsibility division. I welcome our witnesses and invite the cabinet secretary to make an opening statement.

The Cabinet Secretary for Finance and the Constitution (Derek Mackay): Thank you, convener. I aim to keep my opening remarks brief.

An additional dwelling supplement liability arises when a buyer purchases an additional dwelling in Scotland and at the end of the effective date of that transaction, when mortgage funds are cleared and keys are handed over, the buyer owns two or more dwellings and is not replacing their main dwelling. In the context of the additional dwelling supplement legislation, "replacing" means selling the previous main residence and buying a new main residence.

For the purposes of the additional dwelling supplement legislation, the Scottish Government's policy is that a couple—by which I mean a married couple, cohabitants and civil partners—is treated as one economic unit. That is to address the risk of properties being moved between individuals for the purpose of tax avoidance.

It is also the Scottish Government's policy intention that, when the additional dwelling supplement is paid, it can be reclaimed when a main dwelling is being replaced and the sale of the former main dwelling occurs within 18 months of the purchase of what becomes the current main dwelling.

As the additional dwelling supplement has become embedded, it has become clear that, in practice, the legislation has not worked as intended in relation to couples. Demonstrating that the Scottish Government is listening to taxpayers, the order before the committee this morning amends the legislation to address that issue for cases going forward. It does so in two respects. First, the order amends the current legislation to provide relief from additional dwelling second homes tax when couples jointly buy a dwelling-house but the dwelling-house being replaced is owned by only one of them.

The second legislative amendment provides for the scenario when the transaction for disposal of the former main dwelling owned by one of the couple is concluded after the transaction for the joint acquisition of the new main dwelling. In short, the amendment will allow for a repayment of tax paid to the couple if the disposal happens within 18 months of the joint purchase of the new main dwelling.

I am happy to answer any questions that members may have.

Murdo Fraser: Thank you, cabinet secretary. You will know, because we have corresponded, that I have constituents who are affected, and I am sure that other members have similarly brought concerns to you. I warmly welcome the order—thank you for bringing it forward. I know that my constituents will be pleased to see that the unintended consequence of the legislation is being addressed. Have you any sense of how many individuals or family units in Scotland will have been affected by the issue in the period since the additional dwelling supplement was introduced?

Derek Mackay: That is difficult to quantify. In fact, I cannot quantify it, because tax returns on LBTT do not ask for the specific information that answers that question. There is no evidence to suggest that it is a large number of people but, subject to the committee and the Parliament approving the order, Revenue Scotland will work to engage with people to make them aware of it.

On Mr Fraser's point about his constituents, the order does not resolve the matter retrospectively. That will require a further legislative mechanism that I am exploring. If that is successful, it will allow Revenue Scotland to engage with all those who have paid the tax. That should capture anyone who has been affected by the issue.

Murdo Fraser: I was just going to come on to that question of the retrospective remedy. I appreciate that the order will not solve that particular problem. My constituents have already had to pay that money. While you are looking for a legislative vehicle to deal with the retrospective issue, is it possible to issue guidance to Revenue Scotland to advise them on how to address the situation when people are caught in the retrospective trap, pending legislation being brought forward, or can that not be done?

Derek Mackay: Retrospectively? Going forward, Revenue Scotland will apply what Parliament approves. It will continue to apply the strict letter of the law that is currently in place but, if the law is changed, it will apply that and look to

resolve the matter in the light of the new legislation. It is not for me to advise solicitors how to do their job, but I should point out that they can give appropriate and relevant advice when they advise their clients, and I am sure that many have done so.

Murdo Fraser: Do you want to expand on what you mean by that?

Derek Mackay: Not particularly. [*Laughter*.] I do not want to advise people to engage in any form of tax avoidance, but let us just say that different solicitors might have given different advice about how to approach the subject. What we are doing is delivering on the policy intent that I have outlined.

Patrick Harvie: The policy intention of the Government is still to treat couples in one way and to treat in a different way people who have a joint mortgage because, for example, it is the only way they can afford to buy a property to live in as their main residence. Am I right in saying that there is no intention to look at that kind of situation and to address an arrangement that might be becoming more common?

Derek Mackay: This is a very specific mechanism to address what has been identified, rather than a wider point, and it looks at couples as one economic unit for the reason that has been given.

Patrick Harvie: What is the reason for treating only couples as an economic unit and not, for example, two or more friends who have a joint mortgage because that is an affordable way for them to meet their housing needs?

Derek Mackay: That has not been raised with me previously, so I have not given it full consideration. The issue is about couples as economic units, minimising tax avoidance and ensuring a degree of fairness. I am happy to hear more evidence from Mr Harvie but, in the light of the communication that I have received, I want to address that very specific anomaly that has come about from an interpretation of the legislation.

Patrick Harvie: So the Government might be open to looking at that in the future.

Derek Mackay: I do not want to trigger a much wider debate on what I am trying to resolve. I want to be clear and focused on the remedy that I am proposing today in returning to the issue and addressing it retrospectively. The order is very specifically about the issue that has been raised with us by the Law Society of Scotland and a number of MSPs. I am happy to respond swiftly to the correspondence that I have received to resolve the matter. If Mr Harvie wants to raise that issue with me, I will happily engage with it and have a further discussion with him, if that would be helpful.

Liam Kerr: On a point of clarity, the issue is about a policy intention that, for whatever reason, was not actioned correctly, so there is a group of people who have paid tax in good faith but who should not have done so. Presumably, assuming that the order goes through, a considerable amount of resource will need to be devoted to identifying those people and to making sure that they are refunded the tax that they should not have paid. Is that correct?

Derek Mackay: Yes. Revenue Scotland will undertake that work.

Liam Kerr: It will presumably be given a due level of importance to ensure that people who have inadvertently paid are recompensed.

Derek Mackay: That is correct.

The Convener: As there are no other questions, we move to item 3, which is formal consideration of motion S5M-05994 on the order.

Motion moved,

That the Finance and Constitution Committee recommends that the Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017 [draft] be approved.—[*Derek Mackay*]

Motion agreed to.

The Convener: The committee will publish a short report to the Parliament that sets out our decision on the order.

That was the final piece of business on our agenda. The next meeting will be the final meeting of the committee before the summer recess, and we will take evidence from the Minister for UK Negotiations on Scotland's Place in Europe on issues that are related to Brexit.

Meeting closed at 11:39.

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