

Scottish Affairs Committee

Oral evidence: Scotland's Place in Europe, HC 595

Wednesday 7 September 2016

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[Watch the meeting](#)

Members present: Pete Wishart (Chair); Deidre Brock; Mr Christopher Chope; Margaret Ferrier; Mr Stephen Hepburn; Chris Law; Ian Murray; John Stevenson.

Questions 1-63

Witnesses

I: Professor Sionaidh Douglas-Scott, Professor of European and Human Rights Law, University of Oxford, Professor Nicola McEwen, Professor of Territorial Politics, University of Edinburgh, and Dr Jo Murkens, Associate Professor in Law, London School of Economics.

II: Professor Michael Keating, Professor of Politics, University of Aberdeen and Dr Tobias Lock, Lecturer in EU Law, Edinburgh Law School.

Written evidence from witnesses:

Relevant documents

[Written evidence from Dr Jo Murkens \(SPE0009\)](#)

[Written evidence from Professor Michael Keating \(SPE0005\)](#)

[Written evidence from Dr Tobias Lock \(SPE0008\)](#)

Examination of witnesses

Professor Sionaidh Douglas-Scott, Professor Nicola McEwen and Dr Jo Murkens.

Q1 **Chair:** Could we welcome you all to the Scottish Affairs Committee? This is our first evidence session in our inquiry into Scotland's relationship with the European Union. For the record, can you please say who you are and which organisation or interest you represent? We will start with you, Dr Murkens.

Dr Murkens: Good afternoon. My name is Jo Murkens. I am from the Law Department at the London School of Economics.

Professor Douglas-Scott: My name is Sionaidh Douglas-Scott. I am a Professor of Law at Queen Mary University of London and I am also a special adviser to the Scottish Parliament European and External Affairs Committee, but I am here in a personal capacity this afternoon.

Professor McEwen: Nicola McEwen. I am a Professor of Territorial Politics at the University of Edinburgh and Associate Director of the Centre on Constitutional Change.

Q2 **Chair:** That was quick and efficient. My first question: could you please finish this sentence, "Brexit means—"?

Dr Murkens: Brexit means a massive constitutional headache for the United Kingdom.

Professor Douglas-Scott: I think that was very nicely put. I would not want to disagree with it for fear I might say something I would regret saying later on, so I will agree with my colleague.

Chair: I thought Brexit meant Brexit, so I am told.

Professor McEwen: Brexit means whatever negotiations turn out to conclude, so we do not know at the moment.

Q3 **Chair:** We have you three along just to help us with some of the process issues leading up to the triggering of Article 50. I do not know if you want to talk just a little bit about where you see we are just now, what issues we have started to look at and what type of progress has been made. I do not know if you managed to catch Prime Minister's Questions today, where there were all sorts of questions about access and membership of the single market. Again, there was a response from the Prime Minister that suggested that this was going to be part of the negotiations. Where on earth are we? Are we closer to knowing what Brexit means in any capacity and how are we getting on as we move towards Article 50?

Professor McEwen: I do not think we are closer. Clearly there are differences of opinion at every level. Perhaps the Prime Minister's first challenge will be to negotiate the differences within her own party, to come to some sort of agreement within her own Cabinet, within the Government, to come to an agreement there. Then there are the differences in the country, which I assume is a primary part of this



HOUSE OF COMMONS

Committee's concern, of how to reach what has been described as a common UK approach. I am not altogether sure what that means, but one of the things I noticed in the Secretary of State's statement in the debate on Monday was that he talked about a common UK approach, which was not just about the devolved Governments agreeing with the UK Government, but also about stakeholders throughout the country. I think one of the things that would be useful to clarify is what is the status of the devolved Governments in the process of coming to, or trying to reach, a common UK approach.

Professor Douglas-Scott: I think it is very difficult at this stage to determine exactly what is going on, in spite of some statements that have been made. It seems to me that one thing is clear, that 48% of the electorate voted to remain in the EU, maybe with a renegotiated settlement, so we know that those 48% were content with free movement. It is very difficult to say what the other 52% voted for, except that they voted to leave the EU, but I do not think that means that they voted to leave the single market. There was a paucity of information as to what leaving the EU might mean. That is what is being discussed right now, and politically I think we wait to hear exactly what that means. But in terms of what we can be clear about, there is very, very little. We can advise about certain legal implications of that and I am sure that the Committee will be asking us about that later on, but politically I think the position is somewhat uncertain.

Dr Murkens: My own view is that so far we have heard a lot about the implications of Brexit from an economic perspective, from the impact on trade and for businesses and in relation to the single market. My goal is to rejig or change the narrative somewhat to talk about the constitutional implications for Brexit. As Sionaidh said, 48% of people voted to remain, 52% to leave, but the United Kingdom as a whole was also split 2:2, Scotland and Northern Ireland voted to remain; England and Wales voted to leave. I think that is what I meant by a constitutional headache for the United Kingdom, because somehow someone at some point in time needs to address that split. On Monday, when David Davis spoke, he did not even address Scotland or Northern Ireland as an afterthought, they did not feature, and I think at some point we do need to think about the constitutional implications of Brexit.

Q4 **Chair:** We most certainly will be considering that and asking you very detailed questions. At this stage, I think we are just trying to see where we are in terms of the process.

The other thing that seems to be apparent, and it certainly has been mentioned in several of the responses about this, is that the Government look likely to use prerogative powers when it comes to deciding this and not take this to Parliament. Are there any particular constitutional issues that you have identified with this approach? Are there any difficulties or problems that you see down the line with going down this particular route or what are the difficulties of this? Is this a practical way to deal with this?



HOUSE OF COMMONS

Professor Douglas-Scott: I think there clearly are difficulties, because there is a difference of opinion between what our Prime Minister is currently saying, that Article 50 can be triggered by use of the prerogative, and by others who disagree and by lawsuits that are being brought on that basis. The alternatives vary in sort. Some suggest that Parliament must be consulted, Parliament must vote or even that parliamentary legislation is needed. These matters are going to be litigated first in October. I think there is a reasonable argument that a parliamentary vote would be needed to trigger Article 50 because of the implications of triggering Article 50 for the European Communities Act, which gives rise to rights for people throughout the UK.

Q5 **Chair:** Is this the 1972 European Communities Act?

Professor Douglas-Scott: The 1972 European Communities Act. I think that once Article 50 is triggered, there is quite a good argument that the European Communities Act becomes a dead letter, which is the basis of the argument, or one of the arguments being made, because it would be very difficult to revoke the process. It would lead to Britain withdrawing.

But I think there are also broader arguments of constitutional practice—and of course much of the UK Constitution is politics, policy and practice rather than strict law—which relate to a growing preference for the involvement of Parliament rather than the use of Executive power and prerogative. I think those arguments are particularly strong in this case, where withdrawal from the European Union and repeal of the European Communities Act would be such an immense revolution, not just constitutionally for this country, it would touch every area of our life. I think in that case there is a real argument that Parliament should be involved, otherwise what happens is that Parliament is involved at a much later stage, when the withdrawal agreement is a done deal and Parliament can only confirm it or reject it. If it rejects it, it seems that we would be out in any case, because the two-year period would have expired. So I think the gravity of the situation merits extremely serious thought about the rationality of using the prerogative in this case.

Q6 **Ian Murray:** Can I just unpack that a little bit? It is clear that from your experience and expertise you are suggesting that Parliament should have some kind of involvement as early in the process as possible to legitimise it, but what would happen if Article 50 was rejected by Parliament? What constitutional crisis would that then inflict on this place? Yes, we are in a constitutional quagmire at the moment and Dr Murkens has said that in his response, "Brexit means a constitutional nightmare", but where would we be if Article 50 was not initiated?

Professor Douglas-Scott: If the result of the referendum vote were put aside and not acted upon by the Government or Parliament, I think that that would be perfectly legal. It is an advisory referendum. Parliament could if it so chose, the Government could if it so chose, have inserted clauses to make the referendum binding or to make consequences inevitable, as was the case with the electoral reform referendum in 2011. It chose not to do so. So legally I think that would be possible. Politically



HOUSE OF COMMONS

it is another matter. On the other hand, we have a 52:48 split here, so we have a very divided country. There is going to be a degree of constitutional dissent whichever way we go, but the view taken seems to be that it would be politically unacceptable not to act on the referendum vote in some way. Legally I do not think it is—

Q7 Chair: Thank you for that. I know we have different traditions when it comes to the idea of sovereignty. To claim a right to sovereignty seems to be a principle that underpins our approach to national and civic life, but we are always told that parliamentary sovereignty is the key principle that underpins the political approach to life here. Assuming there is something at odds with that idea, something so dramatic as leaving this huge partnership arrangement without Parliament having a say, do you have any—

Professor McEwen: I guess the legal issue will be debated and decided in that particular court case that Sionaidh referred to, but Parliament would have to be involved at some stage in the process. If it was not at the point of consenting to triggering Article 50, it would have to be involved at the point of agreeing a treaty for a new relationship with the EU or for repealing the European Communities Act or for agreeing and legislating reforms to the Scotland Act. There would have to be parliamentary involvement at some point in the process. Politically I agree that it is wisest to do that earlier rather than later.

In response to your question, I assume that the first step would be to—it would depend on the reasons for the rejection. If it was to do with the negotiating position, if that was revealed at the point of triggering Article 50, then I assume it would lead to a reexamination of what needed to be tweaked in order to win that parliamentary vote. But if that is the case, it is better to find out at the start of the process than at the end of the process, because I think it would be a much bigger constitutional crisis if a deal was negotiated with the European Council and then subsequently rejected by Parliament. That would be interesting territory.

Chair: Dr Murkens, you are looking keen to get in there.

Dr Murkens: I would like to make three very brief points in response to the questions that you posed just now. First of all, I would say that what is at odds with the principle of parliamentary sovereignty is holding the referendum in the first place. That is a constitutional oddity, but what is done is done. We now have to live with the referendum result and not ignore it—I would not recommend that—but interpret it correctly, interpret it in light of the national interest. Of course that first of all means that we have to work out what the national interest is. It could be economic, it could be about maintaining the integrity of the United Kingdom; that is not for me to decide.

The second thing I would say in answer to your question whether prerogative or Parliament is necessarily to trigger Article 50, let me give you an analogy with the deployment of troops. As a matter of constitutional theory, the Prime Minister could deploy troops to another



HOUSE OF COMMONS

country using prerogative powers, but we saw in 2003 that the Prime Minister, Tony Blair at the time, consulted Parliament. So you might say that that has established a new convention, that when it comes to issues of the constitutional gravity that Sionaidh has alluded to Parliament will now be consulted as a matter of political practice rather than as a matter of strict constitutional law. I would agree with that. I think there is a very clear case for parliamentary involvement, not necessarily by constitutional rights but by convention.

Finally, you asked about the political crisis that would ensue if Article 50 was not triggered. This is often raised in relation to the people of Sunderland, because they overwhelmingly voted to leave and you could not possibly ignore their vote. To that I would say: what about the people of Sutherland? They overwhelmingly voted to stay, and in the same way that you cannot ignore the vote in Sunderland, you also cannot ignore the vote in Sutherland. I think whatever happens there will be a political crisis, it is just what type of crisis do you want.

Q8 Mr Chope: When we went into the European Union, there was a treaty agreement that was then implemented by the European Communities Act. When we are coming out of the European Union, surely you would expect that process to be in the opposite direction, in other words first Article 50 is exercised and then you would have the repeal of the 1972 European Communities Act. Don't you think that that would be the logical thing to do?

Professor Douglas-Scott: I do not think the two situations are completely comparable because if Parliament had refused to legislate to enable the ratification of our accession to the EEC, we would have stayed with the status quo. We are in a different situation now. We are members of the European Union and our law is imbued with many rights and other provisions that come from that. As a result of leaving the European Union, this is going to have a huge impact on British citizens and other EU citizens living here. We would be in a situation where the Executive would be able to deprive those people of rights without any effective parliamentary control. Parliament could, in the end, reject the withdrawal agreement, but what would happen then? We would simply have to leave in any case if the two years had expired.

Q9 Mr Chope: But can I interrupt? The previous Prime Minister promised during the referendum campaign that he would honour the outcome of the referendum. He made it specifically clear that if he continued to be Prime Minister—and at that stage he said he would—whatever happened, he would trigger Article 50. Nobody complained about that. Extend that argument: we had the opportunity in the general election. The SNP campaigned on the basis that if there was going to be a referendum they would want to amend the Referendum Bill so that there had to be a majority in each jurisdiction within the United Kingdom for the referendum to be carried. That was put in our Parliament by SNP representatives. It was rejected by our sovereign Parliament. Aren't you now trying to unwind all that in a rather undemocratic fashion and isn't this exemplified by your exaggeration when you started, almost your first



HOUSE OF COMMONS

remarks, as saying that 48% of the electorate in the United Kingdom voted to remain and 52% of the electorate voted to leave? The position is surely that the percentage in Scotland was about 43% of the electorate, because fewer people in Scotland chose to participate. So in Scotland, it was 43% of the people voted to remain in the European Union as against 62%, which is being suggested.

Professor Douglas-Scott: That was a lot of points that you put to me. The only figures I am aware of are the figures of those who voted in the referendum, and I believe in Scotland it was a 62:38 divide.

Mr Chope: Yes, of those who voted, not the electorate.

Professor Douglas-Scott: In the whole of the UK, and I was referring to those who voted overall, it was 52:48. I do not think I am being undemocratic. The Prime Minister, when he said he would honour the result of the referendum, did not refer to honouring it in any particular way and I do not think that it would be democratic or constitutional if we were to have a state of affairs where the Brexit vote were implemented in a way that is unconstitutional. That is why I think that the extent to which Parliament is involved matters at this stage.

Q10 **John Stevenson:** Professor McEwen, just about Article 50 and parliamentary involvement, aren't we getting a little bit of a red herring here to a certain extent, because can you envisage a situation where the present Parliament would not vote for Article 50 to be invoked?

Professor McEwen: I suppose it depends on the way in which it was presented and the work that goes into the process before you get to that point of triggering. Presumably there will be a lot of work behind the scenes to try to ensure that there would be a sufficient degree of consensus to allow a Government with a very small majority to ensure that at the point that it puts that to the vote, it will secure its majority. So I do not envisage them going to that stage of the process if it looks like it would not be carried.

Q11 **John Stevenson:** But you would envisage that if Parliament, for whatever reason, did not invoke Article 50, like the holding of a general election, would you not say that?

Professor McEwen: Possibly, possibly.

John Stevenson: Any comment?

Dr Murkens: I do have a comment to that. The answer to your question hinges on how we conceive of our MPs, whether we think that they are delegates or representatives. If they are delegates, then their role is to give effect to the decision made by the people, let us call it that, in the referendum. That also means that the MPs would not be accountable, because it is not a decision that they themselves have made, it is merely one to which they are giving effect. If we conceive of our MPs, however, as representatives, then their role is to exercise political judgment and to weigh up different interests: what is in the national interests, what is in the interests of their constituents, what is in the parties' interests. Then



HOUSE OF COMMONS

they reach a decision for which they are accountable, because that is the one that they, on the basis ultimately of their conscience, have reached. As far as I understand it, Parliament is currently split 450 to 150, give or take a few, in favour of—

- Q12 **John Stevenson:** I think that is a ridiculous comment, because I voted remain and I would not go against the decision of the people of this country and I suspect that the overwhelming majority of MPs would do likewise. I think that is an utterly ridiculous comment to make about what we, as MPs, would do, because we have to accept the democratic will of the country, as we do at general elections, so I think that is very unlikely to be—

Dr Murkens: Fine, but it still remains for every MP to make that decision for him or herself. As I understand it, this is how it is reported, that there is an overwhelming majority in Parliament currently for remain. I am not saying that anything—

- Q13 **John Stevenson:** I have to challenge that again, because I do not think there necessarily is, because I think people change their opinion. Funnily enough, even Members of Parliament occasionally change their views on certain things, but I suspect you would not find that as being the case. I think we have exhausted that point.

You have different interpretations, to a certain extent, of the views of the vote in Scotland. Professor Douglas-Scott, you had said that it does not really matter what happened in each individual local authority in Scotland, it was a UK-wide decision and that has to be accepted. Is that the case?

Professor Douglas-Scott: No. I do not remember saying that, no.

John Stevenson: Sorry, it was Professor McEwen. You said that legally it does not matter that every local authority in Scotland voted to remain in the EU because this was a UK-wide poll.

Professor McEwen: I do not think I said that, but I am quite happy to respond to the comment.

John Stevenson: I have it quoted here.

Professor McEwen: In a sense, yes. In terms of the mandate, it was a UK-wide electorate, so yes, there is no veto, in a sense.

John Stevenson: There is no veto, yes.

Professor McEwen: So there is no veto, I absolutely accept that.

- Q14 **John Stevenson:** But, Dr Murkens, you seemed to take a different tack to that in your analysis.

Dr Murkens: I am happy for Nicola to finish her explanation, because that will take a minute or two to set out. I am happy to do that now, but I—



HOUSE OF COMMONS

Chair: Can we find out who is responding to Mr Stevenson's question? Professor McEwen, please finish your—

Q15 **John Stevenson:** You have answered my question, to a certain extent. You said there was no position of a veto. Your analysis seems to be slightly different.

Dr Murkens: My analysis is slightly different, which I am happy to explain. It is not that complicated to explain but there is also a tension here, because we keep hearing from senior politicians that there has to be a common UK approach, that there has to be national consensus that involves the devolved Administrations as well as stakeholders. Then we also hear that Scotland does not have a veto. Clearly both positions cannot be correct. The role of Scotland is not just to say yes to any deal hammered out by Westminster, so if there is a common UK approach, which I hope that there will be, then of course if Northern Ireland or Scotland—or Wales, for that matter—say, "We are not happy with the deal" then that is an effective veto. It is not a veto recognised in constitutional law, but as a matter of political practice—

Q16 **John Stevenson:** That is an interesting separation there. So as a matter of law you say that there is no veto?

Dr Murkens: Yes, because we do not live in a federal—

Q17 **John Stevenson:** That is fine, but what you are suggesting is that there could be political veto of some description.

Dr Murkens: Yes.

Professor McEwen: There is not necessarily a contradiction here. It is just that you are asking the political scientist to talk about the law and the lawyer is talking about the politics, but I think politically there are—

Q18 **John Stevenson:** They are two different things.

Professor McEwen: Of course they are, but politically there are clearly issues. There is no formal sense of a veto, but politically there are issues for all sides in this. Thinking here specifically of the UK Government and the Scottish Government, there are points in the process where there may well be a role for not just this Parliament but the Scottish Parliament to give or withhold consent for the changes that result from this process that impinge upon the devolution settlement.

Q19 **John Stevenson:** I see the point you are trying to make, but just to clarify, you would say legally there is no veto?

Professor McEwen: I am not a lawyer, but my interpretation is that legally there is no veto.

Q20 **Chair:** I know that we have both Deidre Brock and Ian Murray keen to come in, but we had that statement on Monday and I detected a change of tone about the involvement of the devolved parliaments when it came to taking this forward. Initially it was all, "Rush up to Scotland and make sure Scotland is going to be properly involved". I do not know if it was



HOUSE OF COMMONS

consulted or whatever, but there seemed to be more of a sense on Monday that Scotland would effectively have to accept what was going to be delivered by the UK Government. I do not know if that is a tone that you have detected in the course of the past few weeks, but I have a series of comments here from the Secretary of State for leaving the European Union. What strikes me, is that it was a much more belligerent tone in terms of its approach to the devolved Parliaments and Assemblies. Is this something you have noted yourselves?

Professor McEwen: Yes. I looked at his statement and there two particular paragraphs in there. One that seemed to include the devolved Governments alongside industry, trade unions and so on as general people with whom the UK Government should engage, and then there was another one that talked specifically about engaging with the devolved Governments. I think later, in response to a question, he mentioned the Joint Ministerial Committee as a forum in which those discussions might take place.

Chair: That is right. I think we all looked at that.

Professor McEwen: I suppose that is slightly concerning in that the Joint Ministerial Committee is a much maligned forum for meaningful engagement between the different Governments of the UK, particularly from the perspective of all of the devolved Governments. They have all had issues with it and there have been a number of inquiries in this Chamber, in the Lords, in the Scottish Parliament and various commissions around the country that have all found the Joint Ministerial Committee wanting for providing that sort of role. If it was to be a forum like the JMC that we have had, then I think it may not prove to be meaningful engagement, but it depends. We will have to wait and see what the details of that are.

But one other thing to bear in mind as well is that there is not common cause between the devolved Governments on many issues in this process. In addition to multilateral forums for negotiation, I think at some point there will have to be some sort of bilateral relationship or a discussion between the Scottish Government and the UK Government if there is to be some sort of agreed solution for Scotland in that process.

Q21 **Deidre Brock:** Do you agree with the opinion of Sir David Edward that the Scottish Parliament would have to be asked to agree to a legislative consent motion for Article 50? If I recall, Sewel motions are a matter of courtesy rather than an obligation under statute in any case, but do you think that the system is embedded solidly enough that it would be considered necessary in any case? Could you perhaps elaborate what cases there are where the UK Government have legislated on a devolved matter without seeking a Sewel motion?

Professor Douglas-Scott: I think this does raise issues of LCMs and of course the Sewel convention in Scotland takes two different forms, I think, one of which was put on to a statutory basis with the Scotland Act 2016. The need for legislative consent would be invoked either where



HOUSE OF COMMONS

Westminster seeks to legislate on a matter that has been devolved to Scotland—we could imagine that arising in the case of Brexit, where there would have to be a change to policies that had been transferred to the EU, such as agriculture or fisheries—or the Sewel convention can arise in the case of a change to the devolved competencies of the Scottish Ministers and Scottish Parliament, and likewise in Northern Ireland and Wales. That situation was not put into statute in the Scotland Act 2016, but there is still a convention to that extent. Courtesy is an interesting word to use in that context, because it is in the parlance a constitutional convention and constitutional conventions are said to be binding but they are not legally binding, so we have very interesting questions of what arises from that. I think it is more than a courtesy.

In legal terms, Westminster could choose to ignore any need for legislative consent. It would then be in an interesting constitutional political situation. There are examples where this has happened in the context of Wales. Westminster legislated in spite of a refusal of legislative consent and Wales issued its own legislation, which was upheld in the Supreme Court. One could expand on a lot of these issues, I think. It would not be a case of blocking Brexit, but it could cause some constitutional problems or even a crisis.

Q22 Ian Murray: I do not want to labour this point. I think we are heading down a rabbit hole that is unnecessary, because I think this Parliament or this Government are going to instigate Article 50 and the question has to be what process will they do to instigate that Article 50 rather than whether we should or not.

This is the Scottish Affairs Select Committee so if you would allow me a little bit of reminiscing. If Scotland had voted to leave the UK in September 2014, we could quite happily have exactly the same discussion about whether or not we repealed the Act of Union 1707 or we just scrapped the Scotland Act 1998 or some process. You would not honestly expect this place to vote against that vote, even if it was 52 to 48 or 51 to 49. I am wondering whether or not we are over-complicating this in terms of where we need to get to, rather than the fact that the Government will initiate Article 50. I am not sensing that you are saying that this process can be stopped, whether it be through an LCM, just because parts of the country disagree. London voted, for example, to stay in the EU, so maybe the question has to be what is the process for instigating Article 50 rather than how we stop this process from happening at all.

Dr Murkens: I think there is another question and that is what are the consequences of triggering Article 50? I think you are basically faced with a choice of how to answer the constitutional question. You can view the devolution experience over the past years as something that affects only Scotland, Wales and Northern Ireland but that essentially has left Westminster untouched. In that case, we can proceed with triggering Article 50 from Westminster, taking a very Westminster-centric perspective on the United Kingdom as a whole.



HOUSE OF COMMONS

Alternatively you can argue—and this would be my argument—that devolution has radically changed the UK Constitution. The UK Constitution today is not the same as it was 25 years ago or 100 years ago when all these doctrines about parliamentary sovereignty were written down for the first time. I think it is becoming increasingly difficult, if not impossible, to talk about parliamentary sovereignty in a late 19th century way when Scotland, Wales and Northern Ireland are largely self-governed. Devolution has only gone in one direction, especially in Wales, which has maybe increased its powers more than others, but of course the Scotland Act 2016 entrenches the Scottish Parliament and Scottish Government and that is a very rare example of constitutional entrenchment.

Q23 Ian Murray: Can I just press you on that a little bit? I agree that the English question is the big question, the constitutional question that has not yet been resolved properly in terms of devolution, but if I could agree with Mr Chope, the rules of the game were set out in the legislation for the referendum already. The rules of the game did not say that London would have a veto or Sunderland would be able to push this through or Sutherland would not. So, yes, all these constitutional questions have to be answered and I think the consequence of the EU referendum is that there is a greater need now to answer these constitutional questions, but the framework for Article 50 has been set in the European Union Referendum Act of 2015.

Dr Murkens: That is where I disagree, because I think that there is still room for Parliament to reflect on the referendum, to reflect on what is in the long-term interests of the United Kingdom, and especially maybe Scotland and Northern Ireland—I think those two are the focal points—and then to reach a reflective decision. I think we are still in the immediate aftermath. The first question was, “Where are we now compared to two months ago?” I do not think we have moved an inch in the last two months. We are still looking for answers, and whenever a senior politician speaks on Brexit, we are not given any detail. I think the focal point is mainly on the European question. As I say, I think the United Kingdom needs to get its own house in order first before it can really think about withdrawing from the EU.

If I can put it bluntly, the EU is what has been keeping the United Kingdom together, and by taking the EU out of the picture, we have this 2:2 split. That is not just a matter of politics. EU law is written into the devolution, into the Scotland Act and into the Northern Ireland Act, and by virtue of being written into the devolution legislation, it has constitutional status, so this is not just a matter of politics. Brexit does raise serious constitutional questions.

Q24 Deidre Brock: Further to the impact on Europe itself, I know there is the possibility to extend Article 50 negotiations beyond the two-year period. Leaving aside for a moment the question of whether the other member states would agree to that, could you tell me what you think the possible benefits and dangers are of that course of action? I appreciate the current Government would obviously want to avoid that scenario in a



political sense, but what else should be considered?

Professor Douglas-Scott: I think we are talking about two agreements, or maybe more, three, four, five, six, but the withdrawal agreement itself is simply about how Britain exits. It will be a relatively restricted tariff of things that have to be decided: budget contributions, what happens to MEPs, acquired rights, what happens to EU agencies in the UK, those sorts of things. But Article 50 also refers to the framework for a future relationship that Britain would have with the EU and presumably there would be a separate treaty for a future trading relationship with the EU or maybe we go on to WTO terms, I do not know.

My understanding is that that framework agreement would be discussed in some way while the withdrawal negotiations were going on. Indeed, it is very hard to see how it could not be, because if we leave after two years or whatever without having anything in place, no transitional arrangement, that would be a very severe situation. I think in terms of extending time, we are looking more at that second, the framework discussions, to get something in motion there to decide what sort of relationship we want. Do we want to have an off the peg sort of Norway style arrangement? Do we want something else? I think that is where there could be a lot of disagreement and problematic discussions.

Professor McEwen: In terms of what are the advantages, the only advantage in extending is if you do not think you have what you want in the existing period, otherwise the longer it takes, the greater is the risk that it will have economic disadvantages if it prolongs uncertainty. In that sense timing matters, but it probably does not matter as much as getting a deal that is appropriate and beneficial in all sorts of ways, so it is taking heed of not just the overall economy but these other issues of relationships within the UK as well.

That process of reaching an agreement is also where there may be an opportunity to have different layers of agreement, so an agreement for the UK, an agreement with the UK and with potentially the Scottish Government. In as much as there is a precedent at all—of course we are in a wholly new situation—there are precedents of the EU reaching treaty agreements with home rule Governments tied to existing member states, so there is possibly scope within that and that might take more time.

Q25 **Chris Law:** It chimes nicely with what I was going to ask you about these treaties and what you mentioned earlier about binary discussions with the devolved Parliaments. I am assuming you will agree that these discussions need to take place. In what context do you think they should take place? You had said that the JMC would not be appropriate, so we needed a wider approach.

Professor McEwen: The Joint Ministerial Committee has its purpose written into the memorandum of understanding. Its purpose is essentially about good communication, discussing where devolved matters and reserved matters might overlap a bit. It has not been viewed terribly positively by any of the Governments, including the UK Government.



HOUSE OF COMMONS

There has not been a Joint Ministerial Committee plenary since December 2014, so in a sense that is symbolic of the importance that has been invested in it. If the Joint Ministerial Committee was going to be used as the Secretary of State indicated for this purpose, it would, I think, have to have a shift in emphasis. If it is about trying to agree a common approach or trying to discuss and negotiate possible special arrangements for the different parts of the UK, then that seems to me to be much more task-oriented than the JMC has been up until now. As a multilateral forum, it is the one that we have for the four member Administrations of the UK, but I think it would need a bit of shift of focus.

Q26 Chris Law: Just to follow up on that, what do you think the consequences would be if common agreement could not be found with the devolved Governments and Parliaments and what constitutional headaches do you think that will end up in? Tough question.

Professor McEwen: Then we are into the political realm, which is your terrain, really. Obviously at that point you would have a high-stakes political scenario where the Prime Minister, the First Minister—presumably it is those two—might have the most difficulty in reaching agreement. At that point, they would have some big political decisions to make. For the First Minister, it would be thinking whether that option of independence that is said to be on the table is appropriate to take the risk to have a second referendum, because losing a second referendum would have consequences for the Scottish Government's bargaining position on all of these issues with the rest of the UK. For the UK Government, if it was faced with that position and to proceed without some sort of concession or special arrangement, which is possible without a common UK approach, you could imagine a scenario where there is a trade-off.

The First Minister has made it very clear that her second-best solution to membership is participation in the European Economic Area. If that turns out to not be the option that the UK Government want to proceed with, then it is difficult to envisage a UK common approach emerging out of that unless it is able to incorporate some kind of special arrangement for Scotland, which would have to be opening up again the current devolution settlement.

Q27 John Stevenson: A second referendum: to confirm, it would have to be agreed to by the Westminster Parliament?

Professor McEwen: We do not know that.

John Stevenson: It would have to be legally binding.

Professor McEwen: In a sense, the discussions over Article 50 are reminiscent of the discussions over precisely that question, a similar point in the pre-independence referendum process. The Scottish Government have never—

Q28 John Stevenson: You are going into politics here. It is just a matter of law.



HOUSE OF COMMONS

Professor McEwen: For sure, for sure. It was never tested as a matter of law, because there was an intergovernmental agreement to secure it. The Scottish Government, as I recall, never conceded that they did not have the legal authority to hold a consultative referendum. What they did concede was that it would be unlikely that they could have held a referendum with the question that they used, but that was never tested.

Q29 **Margaret Ferrier:** I am going to come back to Article 50 and the timing of triggering this, which is probably a bit of a mystery to all of us. When the Prime Minister said that there should be a UK approach and objectives, the First Minister then came in, agreed and said that the Scottish Government had to be involved in the development of the whole of the UK position ahead of Article 50 being triggered and also the mechanism around it as well. Now we also hear that Martin Schulz, the President of the European Parliament, seems just keen for us to get on with it and trigger it.

Going back briefly to what Dr Murkens said earlier, section 29 of the Scotland Act states that the legislation passed by the Scottish Parliament would not be law because it is linked to EU law, so it would not be law if it is not compatible. Where does that leave us in all of it? But going back to the question: what involvement, if any, should the Scottish Government have in terms of when Article 50 is triggered?

Dr Murkens: If I could very briefly answer maybe both your questions, I think that we may reach a point where a common UK approach is no longer possible. If we test that point, we can think about alternative arrangements for Scotland and Northern Ireland, but if we reach breaking point, then we reach just that. Then the overriding question for me would be: what are we trying to do? What is the overriding goal? Is it to withdraw the United Kingdom from the European Union at all cost? If the answer to that is yes, then there will be a debate about Scottish independence and maybe also about Irish reunification. Now, if that is the price we want to pay for Brexit, then that is the price we need to pay.

If the overriding objective is to ensure the long-term survival of the United Kingdom as a state, then we will have to look for a common approach. This is why European law and European human rights law was built into the devolution settlement, especially in Northern Ireland, because that was the platform on which all negotiating parties could meet and agree on. That is absolutely essential to the Good Friday Agreement and it is absolutely just as essential in Scotland. Tinkering with that opens a can of worms, quite frankly, from a unionist perspective. Those are the kind of questions that you may not be able to ignore in the long run.

Professor Douglas-Scott: I agree with everything that Dr Murkens has said, but I would also add that as a matter of strict law, a question you might ask is: is there any obligation for the Scottish Government to be consulted in the context of Brexit negotiations? I think it is very hard to find one. As a matter of courtesy, as a matter of political goodwill, yes, but legally speaking, I see nothing in Article 50 or in the wording of the



HOUSE OF COMMONS

Scotland Act. In terms of the nuanced development of our Constitution, there are many things that one could pick on that could be relevant but not legally binding. That brings us back to the issues that Dr Murkens has raised, very serious political issues about do we want Brexit at any price.

Professor McEwen: I more or less agree. I think it is a matter of mutual political interest and at this stage there is mutual interest. For the First Minister, for the Scottish Government, it is about trying to shape what Brexit means in a way that is conducive to what they perceive to be Scotland's interests; for the Prime Minister it is about trying to ensure that this does not threaten the union. For the time being, the interest is mutual. At some point in the process, if they cannot come to that agreement, then there is certainly no legal obstacle, but I do not think a failure to reach a UK approach would stop the process.

Q30 **Mr Chope:** Forgive me for saying this, but it seems as though your hostility to Brexit is colouring the evidence that you are giving. I put down a couple of questions to the Government just before the recess. I asked the Secretary of State for Scotland what his policy was on trying to negotiate separate relationships or different arrangements in Scotland and he said, "Foreign affairs, including the United Kingdom's membership of the European Union, are reserved under the devolution settlement in the Scotland Act". In answer to a different question, Sir Alan Duncan, the Minister at the Foreign Office, said, "The legal and constitutional responsibility for the UK's relationship with the European Union lies at Westminster". Aren't your remarks designed to try to redesign what are clearly-defined constitutional arrangements that set out the competencies and responsibilities of the United Kingdom Government vis-à-vis the devolved Administrations? You are trying to rewrite that because you think that that is going to fit in with your own political views, isn't it?

Professor McEwen: I will leave the writing of legislation to the legislators, I am afraid, but I am merely commenting on the political reality in the differences that have emerged both before and after the June referendum. It is absolutely right that EU relations and external affairs are reserved matters under the devolution legislation, but it is also the case that the membership of the EU and withdrawal from the EU would have an effect on devolved matters. Under the Sewel convention, which is now written into the Scotland Act, that would normally—and the emphasis is on the word "normally"—suggest that some sort of legislative consent of the Scottish Parliament would be required. Certainly it would spark intergovernmental negotiations with the Scottish Government to secure consent for the things in that process, the consequences of that process that would in turn affect devolved matters. That is just in terms of interpreting the legislation.

If you go beyond the legislation to the political reality, it depends on how the debate unfolds in the country. There is no significant movement in constitutional preferences within Scotland at the moment, but there is a wide debate to be had as the process of Brexit continues and we start to understand a little bit more about what it means. The two Governments are coming at this from very different political angles. In that sense, it



HOUSE OF COMMONS

does not really matter on one level what the legislation says for the time being. If there is claim and counterclaim, then they are playing to a different audience and that can increase pressure on demands for greater self-government and it can threaten the union. I think the Prime Minister is mindful of that.

- Q31 **Ian Murray:** Just a very quick question, because the answers that you have given to the previous questions gave an impression or certainly a need for both Governments to work together. Politically, we know that is not going to happen, because it is not in both their political interests to work together and all march out of Downing Street holding hands saying, "We have a wonderful deal from the European Union and therefore Brexit will go ahead". In an ideal world, that is not going to happen. If it is the case that the Scottish Parliament demands an LCM, and they could just put an LCM through if they so wish—we have tried to do that with the Trade Union Bill and so on, there are mechanisms to do it—and the legislative consent motion is not passed, because it will not be, what then happens? As Mr Chope has said, the Prime Minister said, "Brexit means Brexit". All of this is to be done on courtesy and the need for intergovernmental relations to work. We know they do not work, because it is not in the interests of both Governments to make them work.

Professor McEwen: I am going to let my legal colleagues comment on the legal consequences of that, but just on your assumption there to begin with, I am not sure I agree with that on one level. At least at the moment, until we know what Brexit means, I think the Scottish Government sees it in its interests to co-operate to try to get a soft Brexit, not just for Scotland but for the whole of the UK. That is within their interests if they see independence as the eventual outcome for Scotland sooner or later. Independence becomes much more complicated in the context of a hard Brexit. From the Scottish Government's perspective, Scottish interest is tied in with the broader UK issue. As far as I understand, I think there is co-operation at least at the level of officials. Obviously there are new ministerial appointments and I am not privy to that.

Professor Douglas-Scott: I think the legal situation is slightly more complex and nuanced than the impression that has been given as well when it comes to competencies, particularly devolved competencies, but even with LCMs, for example, the Scottish Parliament could adopt its own legislation rather than waiting for Westminster to act, and then the question could come up in the Scottish courts. There are all sorts of ways in which that particular issue could become legally active as opposed to just being thrown back on politics.

Dr Murkens: I would say very briefly that statutes must not just be legal, which they are by definition, but they must also be legitimate. I would counsel against viewing the United Kingdom purely from the position of Westminster, the position of which you just outlined. But I would take into account social and political attitudes in the regions, which may take a different approach to being legislated for from Westminster. I do not think the United Kingdom is a centralised state, it is not a federal



HOUSE OF COMMONS

state either, but it is somewhere in between and it is leaning now, 20 years after devolution, more on the federalist side than on the central side.

- Q32 **Chair:** I am going to end with one question. I would be very interested and I know it is a little bit of crystal-ball gazing: is it possible that Scotland can secure a bespoke solution to the European Union question about withdrawal? Is there something that could conjure up a good relationship between the UK and Scotland that would satisfy the Scottish Government's concern about Brexit that would also satisfy the UK's desire to leave the European Union, whatever that may mean?

Dr Murkens: Short answer, no.

Professor Douglas-Scott: I think it is very, very hard. It might depend on the relationship that the UK forms which road it goes down, whether it goes for an EEA membership. That might make it easier for Scotland to have some sort of bespoke arrangement of its own, but apart from that, no, I do not think it is possible.

Professor McEwen: Yes, I agree. I think it very much depends on what the UK outcome is. Short of EFTA membership, then you could imagine some sort of agreement around things like Erasmus or smaller programmes like that, but something akin to membership? No, I do not see that.

- Q33 **Chair:** I was not going to ask any more questions, but I will end on this one. There does seem to be a coalescing around this idea of the soft Brexit, where there could be arrangement and agreement and having full membership of the single market. If that was to be an eventuality in Brexit, do we see a situation where there may just be an agreement, an arrangement between the UK and Scottish Government?

Professor McEwen: Yes, yes.

Professor Douglas-Scott: Yes, because Norway, for example, being a member of the EEA, is able to negotiate and add on additional things. Scotland could do that in the context of further devolved competencies, education and things like that as well.

Chair: I am very grateful. You have kicked our inquiry off in a very forthright and interesting way, so we are very grateful for you coming down here this afternoon. As ever, if there is anything further that you observe about our inquiry, any further evidence would be most welcome and will be of the written variety, obviously. Please, anything you have, just send us a line. But thank you very much for your attendance today.

Examination of witnesses

Professor Michael Keating and Dr Tobias Lock.



HOUSE OF COMMONS

Q34 **Chair:** Good afternoon, gentlemen, and thank you very much for coming along to our first evidence session. Obviously you have been hearing some of the questions that we are likely to ask and things that we are likely to explore with you but, first of all, could you just for the record say who you are and what institution you represent? Dr Lock.

Dr Lock: I am Tobias Lock. I am a senior lecturer in EU law at the University of Edinburgh.

Professor Keating: I am Michael Keating. I am a Professor of Politics at the University of Aberdeen; I am Director of the Centre on Constitutional Change. I should say that I am also an adviser to the Scottish Parliament European and External Affairs Committee, but I am speaking on my behalf here. I also chaired the Royal Society of Edinburgh working group that produced a paper that has been sent to you and I am able to answer any questions you might have about that.

Q35 **Chair:** We are grateful for that. Can we kick off just with a question I asked the first panel, and that is to conclude the sentence, "Brexit means—"?

Professor Keating: Brexit means that the UK leaves the European Union, but it begs the question of what relationship it will have with the EU in the future. The most important issue there is about whether we will or will not be within the European single market.

Dr Lock: I agree with that. I think Brexit means that the UK will formally leave the European Union, but the substantive result of all of that is still to be determined.

Q36 **Chair:** I know that you are working with the Scottish Government on these issues and advising the First Minister. The First Minister said that she wants to give—

Professor Keating: I am not advising the First Minister. I am adviser to the Scottish Parliament Committee.

Chair: I am grateful to you for clarifying that and sorry for picking that up wrongly. The First Minister has said that she wants to secure Scotland's continued membership with the European Union and I think that is becoming more and more an issue to do with membership of the single market. Is it going to be possible for Scotland to do this, to secure it, and if it is possible, how is that done?

Professor Keating: It is not possible for Scotland to stay in the United Kingdom and the European Union at the same time. That is quite clear. It may be possible for Scotland to stay within the European market if the UK remains within the European single market or to the degree to which the UK remains within the European single market. It is not possible for Scotland to be within the single market when the rest of the UK is outside the single market. That would create a very hard single market border between Scotland and the rest of the United Kingdom.



HOUSE OF COMMONS

Dr Lock: Scotland, as we have heard before, is part and parcel of the United Kingdom. It will be taken out of the European Union with the United Kingdom. There is at the moment in European Union law no provision that would enable a sub-state entity such as Scotland to remain or be a member of the European Union where the rest of that state is not in the European Union.

One of the things that has been discussed in the media and also on various blogs is whether we could use the Greenland analogy in this regard and do a reverse Greenland—to make it a bit more complex. Greenland, which is part of Denmark, became autonomous, got home rule under Danish law, and then decided they wanted to get out of the European Economic Community as well. This was accepted by the EEC at the time and the way this was done was to designate Greenland as an overseas territory of Denmark for which provision is made in the treaties—the UK, the Netherlands and France have such territories as well—which means that Greenland is still part of Denmark. It is largely outside of the European Union. Greenlanders are outside the single market to the largest degree. They have some trading privileges and they are still EU citizens, but EU citizens cannot, for instance, settle in Greenland. It is a semi-detached relationship but the metropolitan state, the state to which they belong, is still a member state.

If you wanted to do the same with Scotland, what you would need to do is you would have to say the UK formally remains within the European Union but England and Wales become these dependent territories or something of the kind and would leave the European Union that way. Scotland and perhaps Northern Ireland and maybe Gibraltar would become the UK for EU purposes. That would be the construct and, of course, as Michael has said, there would then be two markets within the UK presumably, the English and Welsh market, and then we would have the Scottish market, which would be in the EU single market and the English and Welsh market would be outside it, and you could create trade barriers that way. It would not work in any event, I think, but the only way this could work is if the UK remained in the single market. Then the question would arise: why would Scotland then want to have this special status in the first place?

Q37 **Chair:** Is there any bespoke solution or arrangement that could be put in place that would satisfy the UK's desire—what the UK voted for—to leave the European Union, and Scotland's increasing concern about remaining part or retaining as much as possible of its European arrangements?

Professor Keating: There is a whole spectrum of possibilities. If the UK remained within the single market, that would allow Scotland to remain in the single market for all purposes. If the UK wants to come outside the single market, then the question is what other European policies and institutions could Scotland retain? Not the big single market ones, but there may be some opportunities. For example, competencies that currently are shared between the Scottish Parliament and the European Union would come back to the Scottish Parliament unless Westminster changed the devolution legislation. That is something that is worth



HOUSE OF COMMONS

discussing. Where would those competencies come back to? If they did come back to Scotland, agriculture, environmental policy, elements of higher education that are Europeanised, some of the social policies of the European Union, if all these came back to Scotland, then it would be open to Scotland perhaps to shadow the European policies in those fields to try to remain within those networks, although not fully participating in the political side of Europe.

Q38 Chair: I know that part of the evidence that you have given, Professor Keating, was talking about shadowing European legislation. What exactly does that mean and how is that possible and how would that work?

Professor Keating: Well, for example, Scotland could say, "We are going to maintain European environmental standards". They could say, "We are going to maintain many of the regulatory standards that may be abandoned in the UK" because part of the Brexit prospectus was having more deregulation. Getting rid of some of what was seen as excessive regulations coming back from Brussels, whether it is about health and safety, work standards, environmental standards, would be absolutely critical.

Then on the social dimension there is talk of the European Union relaunching the social pillar or the social dimension. The UK Government are in any case not really interested in that and they are leaving. The Scottish Government were quite keen on pursuing the social dimension. That does not operate through the normal European policymaking process through the Commission and the Council of Ministers. It is something called the open method of co-ordination where Governments agree voluntarily to exchange information, to share standards and proceed in parallel to the same standards. It is not a hierarchical system. It does not work through hard law. It would be open for the Scottish Government perhaps to participate, as it already does to some degree, independently in those kinds of policy areas. That would not affect the big single market issues, but in some quite important policy areas those networks might be kept open. The same thing might apply to universities. The research sectors and local authorities in Scotland have been telling me that they would want to retain membership of some of those networks, even if they are not getting European money. To that degree, Scotland could still participate in European policies even if formally it was outside the European Union.

Dr Lock: I agree with that and one could take this a step further and think about whether maybe the devolution settlement would have to be reconsidered after Brexit. For instance, it is often said that the Scots are more accepting of things like labour regulation, for instance, employment laws. An argument could perhaps be made that Scotland should be allowed to retain labour standards that have been set at the European level and maybe the rest of the UK should be able to cut them back, given the different votes in the referendum. That would, of course, mean changes to the Scotland Act.

Q39 Ian Murray: We talk a lot about the single market and access to that.



HOUSE OF COMMONS

Given that is predicated on the rules of the EU to a greater or lesser degree and free movement of people seems to be this current UK Government's spectrum or prism with which they will look at withdrawal from the EU, are there circumstances where the UK could stay in the single market but have different provisions on free movement in particular, or is it the case that this drive to stay in the single market is a red herring because of the free movement issue? What does that then mean for Scotland? Professor Keating said about a hard border.

Professor Keating: The single market consists of a number of things. Borders consist of a number of things as well. It is about the movement of people, physical movement, mutual rights to work, the movement of capital, labour and goods. All of these are quite separate in principle, although the EU has said you have to take the whole package. This was what David Cameron was told.

There may be some leeway about free movement. David Cameron negotiated some deal about benefits. There may be a certain amount of scope, which other European countries might even support, to limit free movement but without confronting the basic principle. That is at the margin. It will not deal with the kinds of numbers we have been hearing about recently in the debate about migration.

Similarly, there would be some scope for Scotland to have a different regime about access to its labour market. It happens in Canada. The migration requirements in different provinces are somewhat different because labour shortages are different in different provinces. The demographic requirements are different. There might be scope for a rule saying you can come to Scotland but you have to stay and work in Scotland for so many years before you move to other parts of the United Kingdom. That is perfectly feasible. It has not been discussed very much here. There was only one example of that, which was the Fresh Talent Initiative some years ago, where Scotland, in advance of the rest of the UK, got a more liberal regime for allowing graduates to stay on after graduation. That was then uploaded to the UK as a whole and then it was abolished.

There is some scope there. It does not address the big migration flows that have been at the centre of debate, but it would allow Scotland to have its own labour market policies and to select its own work migrants according to its own labour requirements.

Q40 **Deidre Brock:** In regard to that, Switzerland—and there is a referendum mandate calling for this—has been attempting to renegotiate that free movement principle of its deal with the EU and has been repeatedly rebuffed with what appears to me to be a rather blunt instrument, that freedom of movement is part and parcel of access to the single market. Is it your impression that the UK will have a similar sort of hard wall put up against it and that access to the free market will necessarily involve freedom of movement?



HOUSE OF COMMONS

Professor Keating: In the Norwegian agreement, the European Economic Area, there is provision for an emergency brake. It has only been invoked by Liechtenstein, as far as I know, once. The European Economic Area is not quite as rigid, but the principle of free movement is still very important. The Norwegians have never invoked that. In the case of Switzerland, it is a separate agreement because it is not part of the European Economic Area. It does not have an emergency brake provision and the EU did take a very hard line on that, partly because they are becoming rather impatient with Switzerland, which has insisted on negotiating about 120 separate treaties and not updating them. They were unwilling to give Switzerland any more leeway. They had already told them, "We would like to consolidate all these agreements into a single package". The Swiss agreement was heading for trouble anyway even before this migration issue came up.

Q41 **Deidre Brock:** Can I ask what your impression is of how keen other member states are to ensure that continued economic relationship with the UK?

Dr Lock: It is important to bring the other member states' interests into the equation here because we have to distinguish two processes that are presumably going to take place. One is the negotiation of that withdrawal agreement under Article 50, which deals with all the technicalities and legacy issues and so on. There does not have to be but there might have to be a separate agreement on the future relationship between the EU and the UK. That would then determine the conditions of access or, indeed, membership of the UK in the single market. That first withdrawal agreement can be concluded by the European Union and the only thing you need is a qualified majority in the Council, so you do not need every member state to agree. With the other agreement, there will be a massive debate whether all member states will have to agree to that. Every member state can then bring in their own personal wishes that they would like to see fulfilled and, of course, there are member states that have a huge stake in the UK, as countries whose nationals have migrated here. They might want to see this possibility continuing and they might insist that any concessions on, say, financial services, on free movement of goods and all of these things should only be granted if the UK accepts some form of free movement.

Q42 **Chris Law:** I am trying to qualify in my own mind about borders and particularly about hard border or soft border. I am just looking back to what you said in January, Dr Lock, when you said there was a degree of flexibility and ingenuity when it came to difficult domestic political situations. It suggested that Scotland could leave the EU with the rest of the UK but retain EU law, including free movement of persons. Would that mean we would have a situation that could result in a soft border where we could have control over migration and movement with the EU?

Dr Lock: What I meant was we have all these examples like Greenland, Germany after reunification, Cyprus, and if you start digging you will find more. You will see that the EU has been able to accommodate relatively difficult constitutional situations within member states relatively well.



HOUSE OF COMMONS

Their lawyers have been clever enough to find some way to accommodate this. The question would be: could we, for instance, have a situation where Scotland takes part in free movement of people both ways, for Scots or for people having been designated Scots for that purpose, and for people coming into Scotland, and England and Wales would not take part in that? I think that could be a possibility. It is often said this would require a hard border with border checks. I am not convinced by that because the fact that you can enter a country without a visa, which we can do in many countries with our UK passports, does not mean we are allowed to stay there and work there. You would need to ensure that people can work and reside in Scotland but they cannot go to England to do that. I think that is conceivable.

Q43 Chris Law: Just to be clear, there would be no need for a hard border between Scotland and the rest of the UK in this instance?

Dr Lock: I do not think so, and you can draw the Irish analogy, who are in the Common Travel Area so there is no visible border. There are no border checks at the moment and I do not think there are any envisaged for the future. Of course, European Union citizens will still be allowed to live and reside in Ireland, but they will not be allowed to cross the border to Northern Ireland and work there legally. They can work there illegally of course, but that is a risk you are already running with, say, Australians or Canadians coming here. They could take up a job illegally in the UK and, okay, they are violating the law then and we will have to be able to sort that out, but that is a different matter.

Q44 Chair: Is this an example of the flexibility within nation states too, where here was an issue and a difficulty about the border between Northern Ireland and the Republic of Ireland and suddenly a solution was found where there would be no hard border at all? Then during the debate about Scottish independence, for example, several put forward the premise that if Scotland became an independent nation some sort of hard border would be required. Surely all these things could be resolved with goodwill and ensuring that the most practical solution would be the one that comes to the fore.

Professor Keating: The Irish analogy is not quite exact. I am sure there will be some arrangement to keep an open border for travellers and for workers between the two parts of Ireland, but that would be part of a mutual agreement between the United Kingdom and Ireland to allow their citizens to work in each other's countries. That is nothing to do with the European Union. Any European country can sign an agreement with a third country allowing access to its labour market. I do not see where that really leaves Scotland, unless Scotland were to become independent, but Scotland within the United Kingdom could not have that kind of arrangement.

The other problem with a lot of these adopting European policies or adopting European regulations, including free movement, is that they are reciprocal. You could say, yes, European workers can come to Scotland, but we cannot unilaterally say Scottish workers could work in the rest of



HOUSE OF COMMONS

the European Union. That would require other European Union countries to recognise Scotland as a distinct jurisdiction. It would also require us to define who are Scottish citizens, who are the people who have that right, and then it would become extremely difficult.

- Q45 **Mr Chope:** The referendum has presented Scotland with tremendous global opportunities. It is going to take back control over its own fishing grounds, immensely rich. It has in Scotch whisky a product that is subject at the moment to quite a lot of tariff barriers in countries outside the European Union. It has the potential to be able to take over its own agriculture and develop its agricultural industries as well. Why do you think the Scottish Government is paying so little attention to these fantastic opportunities for new trading relationships between the United Kingdom and other countries, which would be to the benefit of Scotland, and also thinking about how they are going to maximise the benefit for Scotland of being able to take back control over their own fisheries under their devolved powers? Why do you think those positives that come out of Brexit are not being promoted more in Scotland?

Professor Keating: The last part of the Royal Society of Edinburgh paper does address that question. They said there are possibilities in Brexit for developing our own policies in things like agriculture and fisheries, assuming the UK Government would allow those to come back to Scotland.

- Q46 **Mr Christopher Chope:** Pausing there, they will come back, won't they, because under the settlement these are not reserved matters for Westminster?

Professor Keating: No, but the money is. Agricultural policy is largely about spending. It is a little bit of regulation; it is nearly all about spending. That money does not automatically come back to Scotland. That would have to be resolved. Either the UK would say, "We will put it through the Barnett formula. What would be the basis for that?" or, "We will keep the money at Westminster" because we will have a UK-wide agricultural policy and if Scotland were to have its own agricultural policy that would raise issues of competition in the UK single market. If Scotland were to give better conditions to its farmers, that might be to the disadvantage of English, Welsh and Northern Irish farmers.

Certainly, your broad point is right that there would be opportunities to do things. In fisheries, actually it is only part of fisheries, the inshore fisheries and not the outer fisheries. There would certainly be opportunities for Scotland to do things. There would also be opportunities for changing the financial settlement around devolution. You would not have harmonisation of VAT. There might be different rules about corporation tax. Indeed, there are possibilities as well as constraints in leaving the European Union and that is something, as I say, if you look at the RSE paper you will see we have a list of those possibilities.

- Q47 **Mr Chope:** My question was: why do you think the Scottish Government is not putting more emphasis on trying to maximise those opportunities?



HOUSE OF COMMONS

Professor Keating: I do not know. You will have to ask them. That is a political question.

Chair: There will be opportunities to do that. We are having the Scottish Government coming to give evidence in the next few weeks.

- Q48 **Mr Chope:** It has been said that Scotland could, in a sense, stay within the European Union, although the United Kingdom is leaving the European Union. I think that Professor Keating has made it clear that he thinks that if Scotland wishes to be independent it will have to be independent and leave the United Kingdom and then make its own arrangements with the European Union. Under EU rules of freedom of movement, which is much sought after in Scotland, that is one way of ensuring that Scotland is able to have the people it needs to do the work it wants to have done. But isn't it possible also to have the sort of arrangements we heard about in a previous session where you could have effectively a points-based system giving special categorisation to the needs of Scotland compared with other parts of the United Kingdom, which is what we have heard that they do in Australia? There is scope for a points-based system outside the European Union, which would enable Scotland to have greater control over the people who come and work in Scotland to satisfy the industrial needs of Scotland. Why do you think that is not being promoted as an idea by the Scottish Government?

Professor Keating: I do not know why it is not being promoted, but certainly, yes, that would be possible. That could be done within the United Kingdom by changing the legislation at Westminster, giving the Scottish Parliament the appropriate powers, absolutely.

- Q49 **Chair:** We have just heard this week, one of the few things that we do know about Brexit, that the Australian points-based system that was promoted by the leave side looks unlikely to be the solution that is going to be put in place for Brexit. We have been doing several immigration-related inquiries in this Committee. We have looked at post-study work schemes and we are currently conducting an inquiry into Scotland's population and demography. Would there be scope, for example—and this is to follow from Mr Chope's point—in the transfer of powers through this Brexit process for Scotland to acquire powers over immigration so we could meet some of our population demographic challenges? Is that something that could be done? We are looking at any benefits and good things that may come from all this. Is that something that could be a possibility?

Professor Keating: Yes, that might be part of a broader consideration of the allocation of labour market powers generally. At present, what we have between Scotland and the UK is the result of a series of political compromises. The way that welfare and labour market powers are split up is not terribly coherent, so there is certainly quite a case for revisiting that issue in a less politicised way than has been done in the past.

A differentiated work permit system for Scotland could be part of that because it is done in other countries. I know the Canadian system quite well and it is quite successful. In certain categories, provincial permits are



HOUSE OF COMMONS

given that are territorially differentiated; in other cases, it is the provinces themselves that are allowed to select the migrants. More could be done there if that is the question. It would probably have more to do with the quality of migrants than the absolute numbers—that is normally the case in other countries—but certainly it would be a policy instrument that the Scottish Government could use to pursue its policy objectives.

Q50 **Mr Chope:** The question is: why hasn't it done so?

Professor Keating: It does not have the competency.

Chair: I think it is a matter of powers and competencies.

Dr Lock: Legally speaking, it is not a problem. We can construct that legislation. One of the difficulties would be that I think you would have to probably introduce some sort of a system of registration then. Yesterday we have heard that we do not know how many EU migrants are currently living in the UK, so there might need to be a more systematic approach to that overall, but that might be coming with tighter immigration controls anyway.

Q51 **Margaret Ferrier:** Just to set the scene, back in 2014 we were told that the only way to secure our continuing membership of the EU was to vote no. That is what we were told back then. Fast forwarding to the EU referendum, the First Minister of Scotland said that if Scotland was taken out of the EU against its will that would constitute a significant and material change in circumstances. This is to Professor Keating. I think you have said that the clearest way of remaining fully in the EU would be for Scotland to become independent. Does this mean that you think that a second independence referendum is the likeliest course of events should the UK and Scotland not agree on how to withdraw from the EU and if the single market was not an option that was on the table?

Professor Keating: I have said that I could understand that option and I can understand the option of Scotland coming out. What I cannot understand is these reverse Greenland ideas, and I endorse everything that Tobias has said about that. The desirability of an independent Scotland is a political matter on which I will not comment. There is a division in Scotland on that and polls have not shifted very much since the last referendum. Europe has not really changed that as far as public opinion is concerned.

Were Scotland to be within the European Union and the rest of the UK outside the European Union, that then would break up the internal UK market. You would lose that. There would be an economic barrier, a barrier to free movement, a barrier to goods and probably services as well, particularly services because free trade in manufactured goods is not much of a problem these days. Free trade in services is much more problematic. There would undoubtedly be a cost to that and the question would be: is it more important to retain access to the European single market or to the UK single market if we cannot have both? Again, that is a political judgment.



HOUSE OF COMMONS

Dr Lock: That would then depend, as another “if”, on what relationship the rest of the UK would have with the EU single market. The important thing is that if you are an EU member state, so if an independent Scotland was in the EU, it would not have the power to negotiate a special relationship with the UK single market. It would have to accept the approach that the EU has with the UK in trading terms. If that is a very close trading arrangement, similar to the Swiss or Norwegian arrangements, then that would not be a big practical problem. If it is, however, a much looser arrangement, then you would have many more trading difficulties within what used to be the United Kingdom across the Scottish border.

- Q52 **Margaret Ferrier:** If Scotland was independent, what would be the process for it to pursue EU membership as an independent nation, not within the UK?

Dr Lock: I think it would depend on whether Scotland became independent before the UK left or after. If Scotland became independent after the UK has left the EU, Scotland would then be an independent country outside of the EU and would have to apply for membership under Article 49, which it could do. It would then have to negotiate that membership, which would probably not take too long given that Scotland largely complies with EU law. There is, of course, the issue of the euro and of Schengen and all those we have heard about in the last referendum debate.

If Scotland left the UK before the UK has left the EU, then the question would be whether at the same time—and it is slapping on another layer of complexity—as the UK is negotiating its exit, Scotland could negotiate or the UK on behalf of Scotland could negotiate a continued Scottish membership. Then the question would be under what conditions.

- Q53 **Margaret Ferrier:** Again, about a possible second referendum on independence, if that happened, we have spoken about section 30. Could Scotland just go ahead without a section 30 order by the UK Government or what would happen in that case? We have heard that the Secretary of State had said that if the people of Scotland ultimately determined that they want to have another referendum, then there will be one, but then we heard from Theresa May that as far as she is concerned we had our vote back in 2014 and that we should abide by that. If we decided to go down the route, do we need permission from the UK Government?

Professor Keating: The answer to that is, as my colleague Nicola McEwen was saying earlier on, we do not know because the Government deliberately decided not to test that. Both Governments deliberately decided they did not want to test that. There was an exemplary process last time. It attracted admiration all over the world, we will have an agreed process, but it was strictly one-off and neither side conceded. It was exemplary because it was a clear question; otherwise the Scottish Government were talking about a convoluted question, which would make it clear that it was only advisory and not binding and all the rest of it, which would undoubtedly have muddled matters.



HOUSE OF COMMONS

This is going to be a political consideration and the UK Government last time decided that the politically sensitive thing to do was to allow a referendum and take their chances in the democratic process, which they did. We do not know what the political circumstances would be next time around, but I would imagine it would be very difficult for a UK Government to resist that if there were strong support in Scotland and if the Scottish Parliament wanted to do it because we could say that a precedent has already been set. Had the UK Government last time been like the Spanish Government saying, "Under no circumstances", but if you have already done it, then maybe that is part of the constitutional understandings. What we never resolved is how many times you can do it.

This is one of these issues that is in abeyance and it has always suited the politicians to leave it in abeyance. I very much suspect that next time they will come to some kind of accommodation again. They do not want to go to the courts because the Scottish Government fear that they would lose in the courts and the UK Government fear that if the court said, as the Canadian Supreme Court did, "Yes, you can have a referendum under certain circumstances" that would become part of the constitution. That is just the way we operate. There is very little constitutional jurisprudence in this country on this settlement. There are all kinds of things that have just never been tested because the politicians prefer to do it that way.

Q54 Chair: Hopefully this will not be necessary and I think that the idea is to try to ensure that we do get some solution that satisfies what Scotland voted for in the European referendum. That is why we are exploring all this just now. That is why this Committee is doing this work. If it becomes apparent that it is going to be hard Brexit and it becomes even more apparent that the UK Government are not prepared to countenance the views of the Scottish Government when it comes to their requirements about Brexit, in your view do you think that an independence referendum, therefore, becomes much more likely as a prospect?

Professor Keating: It is almost impossible to say. Two months ago I would have said yes and now I am not so sure. It goes up and down. I think it will depend on how this plays out within the next year, what Brexit turns out to mean, the judgment of the people of Scotland with regard to this, with regard to the choices, because they are faced with a number of invidious choices that they would probably rather not have. As this eventuates, the Scottish Government will or will not be able to say, "Look, we were simply overridden. Our interests were not taken into account. That gives us the justification for a referendum". That again will be a political judgment but it is far too early to say.

Q55 Chair: I will bring you in, Dr Lock, and maybe you could answer this, too. I put to the previous panel that there seems to be an increasingly belligerent tone that is starting to emerge within the UK Government in its relationship with Scotland and its involvement of Scotland in the Brexit negotiations. I do not know if that is something you notice, but it is certainly something we picked up in the statement on Monday. Where



HOUSE OF COMMONS

there was an initial rush to try to ensure that Scotland was included and taken on board, there does not seem to be that same imperative anymore. Have you identified that and does it concern you that that might be the case?

Dr Lock: I do not know if the tone has become more belligerent, but Scotland has probably been mentioned less on Monday than some might have expected. What reasons there are for this, whether that is an actual sign of a change of direction of the UK Government in this regard or whether it is just that maybe the Secretary of State for exiting the European Union did not want to make statements he did not want to make, I cannot comment. I do not know.

Professor Keating: Can I comment on that? The claim has been made that EU matters are external affairs and therefore reserved; it is foreign policy. I think that is not true. The EU is part of the internal constitution of the United Kingdom. EU law, unlike other foreign treaties, is incorporated into UK law, including into the devolution settlement. It would be, I think, pushing the constitutional conventions beyond the limits for the UK simply to say because it is foreign policy, we have the right to invade devolved competencies and to change the internal constitutional settlement. We do not have a written constitution that says that, but I think that is part of the understandings of the constitution that we have been developing over the last 20 years.

Q56 **Ian Murray:** I want to follow up from the questions from Mrs Ferrier on the hypotheticals about Scotland being independent, which is probably some of the questions we will consistently get in this Committee. If it was the case that, as Mrs Ferrier said, Scotland's best interest to be in the EU is to be independent, and the First Minister has said essentially a red line for the Scottish Government is access to the single market, in that scenario how does Scotland stay part of the UK single market, which is obviously four times more important to the Scottish economy than being part of the EU?

Professor Keating: Well, they do not and that is the point I made earlier on. If it is a hard Brexit and the UK comes out of the European single market, then it makes it much more difficult for Scotland to become independent because you have that hard border with the UK market. Ironically enough, the closer the UK gets to the single market, then the less grievance Scotland maybe has but the easier it is to become independent, because on that point you could have access to both markets.

Q57 **John Stevenson:** Two very quick points; I think you have half answered the question already. International relations/foreign affairs is a reserved matter. Therefore, somebody could argue quite simply that the negotiations are a UK competence. It is for the UK Government to negotiate to reach a settlement with the European Union, end of story, and it is binding on all of us. Is that the situation or are you saying it is not quite as nuanced?



HOUSE OF COMMONS

Professor Keating: No, that is not the situation. This has come up in a number of federal countries where the federal government have from time to time—Germany, Canada—said, “Foreign affairs is our responsibility so we can sign a foreign treaty that includes matters that are the competence of the devolved or the federated units”. The supreme courts and constitutional courts have intervened frequently to say, “No, that does not allow you to do that. You cannot invoke that foreign affairs power to change the internal constitution of the country”.

We do not have a constitution—it is nowhere written down—but it would seem to me that is a reasonable interpretation of the way our constitution has been evolving, that you cannot legitimately use the external affairs power to legislate domestically, especially where it concerns Europe, which is itself not just foreign affairs but part of our domestic law.

- Q58 **John Stevenson:** That is really interesting. There has been a lot of discussion today about our constitution, conventions, laws and so on. Going back to my constitutional law days, which admittedly is quite a few years ago now, the basic premise was that Parliament was sovereign and that no Parliament could bind a future Parliament. I would suggest even politically and legally that is still the position. Would you agree with that, ultimately, when all is said and done?

Professor Keating: No, I would not agree with that interpretation. There are Scottish lawyers, not all of them nationalists, who would never agree with that and never have agreed with that and have said that is a misunderstanding of the union. We even have some jurisprudence, the famous *MacCormick v Lord Advocate*. What I say is since devolution that understanding of the constitution is reinforced.

In the Scotland Act, the civil convention was incorporated in law. Either that was utterly meaningless or it means something, and if it means something it is part of the constitution. The unionist parties agreed to entrench that as strongly as was possible within the British constitution. That was the deal. We will respect this. There is that weasel word “normally”, but again if “normally” means whatever the Westminster Parliament at any time says normally is, you are emptying that of meaning. If these agreements have any meaning at all, it is that the Westminster Parliament can no longer simply say, “We are absolutely sovereign to do everything”.

- Q59 **John Stevenson:** Ultimately, power lies to a certain extent with the judiciary?

Professor Keating: Some of these are justiciable but a lot of them are not because they are conventions and conventions are very difficult to take to courts. It suited the politicians here not to make them justiciable. That is what we have done. We have very little jurisprudence. We have very little to go on. That is why we seem to be avoiding the—

John Stevenson: It has always been the mission of this place to avoid anything relatively difficult.



HOUSE OF COMMONS

Professor Keating: Yes, but our constitution is based upon understandings. At the moment there is no veto legislation, all kinds of things that have become part of the constitutional understanding, and at critical points those are disrupted and then we just do not know what the rules are. Here we have a clash of different principles and, therefore, constitutional lawyers, of which I am not one, can legitimately disagree about how you interpret it.

Q60 **John Stevenson:** Would you take a similar view or would you take a different one?

Dr Lock: You have espoused the classical view, the Dicean view of what parliamentary sovereignty means but, of course, we must conceive of the British constitution as a political constitution first and foremost. I think you can go with the letter of the law and, of course, in that case Westminster can do what it wants because it can change the constitution unilaterally, but it comes at a high political price. I think that is something that needs to be taken into account in this regard. If you define legality or constitutionality as what can be done without the courts interfering, then, of course, you can do an awful lot here. You can also define constitutionality as what can be done without political mayhem breaking loose and then maybe you can do a little less. I think in that sense I agree.

Q61 **Chair:** An interesting debate. You brought in Dicean principles of sovereignty. We are facing the prospect of Parliament not getting a vote in this and it is going to be exercised by prerogative. Have you any views about that as a process in dealing with this?

Professor Keating: I think it is paradoxical that parliamentary sovereignty is informed by a referendum, which is effectively giving up sovereignty. Are the people sovereign or is it Parliament? That question has just been muddled, it seems to me, by the referendum. From what I have heard today, a lot of people are saying the referendum result gives a legitimacy because that is now a convention, therefore Parliament has to follow that. There is no law that says it has to, but that is another of these conventions that would be very difficult simply to overturn.

Chair: It is a fascinating principle.

Q62 **Margaret Ferrier:** I have one last question, which has not come up yet. What involvement would the House of Lords have in all of this? Could they put a spanner in the works on the Brexit negotiations?

Dr Lock: I think we need to distinguish the two sides to all of this. One is the external side, which is the negotiations that will be conducted on behalf of the UK by HM Government, whether after a parliamentary vote or not, and then the implementation of whatever comes out of these negotiations, which will involve probably a repeal of the European Communities Act, changes to the Scotland Act and all of that. In those legislative changes, the House of Lords would play the normal role that it plays. It has to be involved. It can at least delay if the House of Commons chooses to use the Parliament Act route and that is I think the



HOUSE OF COMMONS

normal process. I do not think that the House of Lords has greater powers than the House of Commons when it comes to influencing the process. I do not think so.

Q63 **Chair:** One last question from me. What is the ideal solution for Scotland in all of this? What would be the best outcome in Brexit?

Professor Keating: Scotland itself was divided on this question. There was a remain majority but some people wanted to leave, so it is very difficult to say what the Scottish interest is when Scotland is divided. The Scottish Parliament has a very large remain majority and it would seem to me their shared concern there is about remaining in the single market. There is a division about independence, of course, but there is a broad concern about the single market. That would probably be the priority of a broad swathe of Scottish political opinion, the majority of the Parliament, to focus on the economic questions because the political questions are so divisive.

Dr Lock: I think that is a largely political question that I cannot comment on in any expert manner, I am afraid.

Chair: We tried anyway. Thank you to both of you for coming along. As usual, if there is anything else that you observe through the course of the inquiry, please give us any further submissions in the way of written evidence. Thank you for your attendance today.