

Public Administration and Constitutional Affairs Committee

Oral evidence: Devolution and Exiting the EU, HC 484

Monday 30 April 2018, Edinburgh

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Members present: Mr Bernard Jenkin (Chair); Mr Marcus Fysh; Kelvin Hopkins; Dr Rupa Huq; Mr David Jones, David Morris.

Questions 491 - 606

Witnesses

I: Professor Michael Keating Professor of Politics, Aberdeen University, Director of Centre on Constitutional Change.

II: Adam Tomkins MSP, Scottish Conservatives, Richard Leonard MSP, Leader of Scottish Labour, Willie Rennie MSP, Leader of Scottish Liberal Democrats, and Patrick Harvie MSP, Co-convenor of the Scottish Green Party.

III: Mike Russell MSP, Minister for UK Negotiations of Scotland's Place in Europe, and Ken Thomson, Director General for Constitution and External Affairs.

Examination of Witness

Witness: Professor Michael Keating.

Q491 **Chair:** May I welcome our first witness to this session in Edinburgh of the Public Administration and Constitutional Affairs Committee of the House of Commons from Westminster? We are looking at the relationships within the United Kingdom between the four Parliaments, if they are all sitting, and the four Governments, if they are all constituted, and in particular at the EU (Withdrawal) Bill and the issues arising from the UK leaving the European Union. Could you introduce yourself for the record, please?

Professor Keating: My name is Michael Keating. I am a Professor of Politics at the University of Aberdeen and the Director of the Centre on Constitutional Change.

Chair: We had hoped that another witness, Professor Aileen McHarg,



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would be sitting with you. Unfortunately she has been detained by a family matter, so we will have to ask you the questions we would have put to her, and we will try to make it clear what we are asking.

To start with, Professor McHarg argued that while the UK is formally a unitary state, there have always been aspects of diversity within the UK constitution and she uses a phrase, "Unity and diversity in the Constitution." It is slightly unfair to ask you what she meant, but perhaps you have a view on that.

Professor Keating: Yes, I do. I am a political scientist and Aileen McHarg is a lawyer, but I think we probably have a similar view on this. There is an ambiguity in the UK constitution that goes way back—at least to the Treaty of Union between England and Scotland forming the United Kingdom—as to whether this is a unitary state, in which the principle of parliamentary sovereignty is the be all and end all of the constitution, or whether it is a union in which sovereignty is shared, in which there are historic understandings among the nations as to the nature of the constitution itself. That has even been raised in a famous case in the Court of Session here back in 1953, *MacCormick v. Lord Advocate*, but it was something that did not have any resonance in politics until devolution, when the multinational nature of the United Kingdom was given an institutional expression and referendums were held in Scotland, Wales and Northern Ireland to back up plans for devolution. They passed, and therefore there is a view that that has changed our understanding of the constitution, that it is a union of diversity, that there is a division of power and that we must rethink what we mean by Westminster sovereignty. That is one way of thinking about the constitution.

The other way of thinking about the constitution, which is in the devolution Acts, is that Westminster is still supreme. There is a difference of opinion. Because most of our constitution does not hinge upon black letter law—it hinges upon conventions—the question there is what conventions do we have? Because there are those very different views over the constitution, there has been a practice in the last 20 years to try not to confront that issue, where possible. The Sewel convention is a way of doing that—a way of saying, "Let's respect the devolved powers as far as possible; let's not take things to the Supreme Court." The UK Government have never gone to the Supreme Court over a Scottish Act; it has done so once or twice in Wales.

We let those conventions develop and grow, and if there are different understandings of the constitution in different parts of the United Kingdom, we can live with those and just get around them politically. Brexit makes that more difficult because Brexit is a shock to the constitution and certain things have to be written down that were not written down in the past. That is how we have come to the situation we are in this week, where there is still a dispute between the Scottish and UK Governments about this question of where ultimate authority lies or should lie.



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Q492 **Chair:** That was a tremendous answer. I do not feel I need to ask anything else. Unless anybody else wants to ask a supplementary on that, I think we will move straight on.

I ought to just bring in the question of Northern Ireland, because that presents particular challenges. Perhaps it is of minor interest to most people, but whereas in the island of Great Britain we have a single civil service, for historical reasons Ireland has a separate civil service. Of course the history of Ireland and of Northern Ireland presents particular challenges of diversity, so how can they be accommodated within the UK constitution outside the EU in the same way as you have described for the rest of the United Kingdom?

Professor Keating: The same problem arises there because we have a peace agreement in Northern Ireland and a power-sharing form of Government that rests upon quite of a bit of suspension of disbelief. Different sides buy into it for different reasons, so that nationalists have accepted the border in Northern Ireland and the unionists have accepted an Irish dimension. They may interpret that rather differently, but they both put aside their long-term aims in favour of an agreement because they realised that neither side has won that particular argument.

The Good Friday agreement and the European single market are two separate things, but they have complemented each other in many ways, because with the European single market it has been possible to give some substance to the Good Friday agreement, notably by opening up the border. The border exists, the border is recognised, the border has not gone away, but it has been transformed and opened up. Then it has allowed all-island institutions to develop without challenging the notion of British sovereignty—an all-island electricity market, all-island agricultural markets, and development of close economic links between the north and the south.

They have been complementary and that has given rise to two interpretations of what happens after Brexit. The UK Government have tended to take a rather narrow view that whatever it does, it must preserve the Good Friday agreement as written, whereas the Irish Government have taken a more extensive interpretation to say the Brexit agreement must preserve everything that has developed in the 20 years since the Good Friday agreement, so the implications are disputed.

Q493 **Chair:** I think everybody agrees that we do not want any infrastructure at the border in Northern Ireland. Given that the former President of the World Customs Organization, the head of HMRC and the head of the Irish Revenue, Niall Cody, have all said a frictionless border without infrastructure is possible, what do you make of the insistence of the new Republican Government in the Republic of Ireland—which has a different policy from Enda Kenny’s Government—and the European Union insisting that there has to be infrastructure at the border if we have regulatory divergence from the rest of the EU?



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Professor Keating: I do not think the issue is the physical border. The issue is the existence of a border, whether it is physical or not. If you use technology to avoid a physical wall at the border, if you still have regulatory divergence, it is a border that obstructs trade, it creates complications for the single agricultural market, the single energy market and it will require ways to manage that border. The fact that they are controlled electronically or on the ground is a secondary issue. Those are different ways of managing the border, but they are not ways of eliminating the border.

Q494 **Chair:** All the transactions of goods across the border have to be registered electronically anyway through the European Intrastat system, so that any transaction across a border between a member state within the European Union has to be recorded on the system and logged. There are different rates of VAT that have to be dealt with and there is obviously an excise duty border. Livestock movements already have to be checked across the border; you cannot move livestock across the Northern Ireland border without being subject to checks. This is not a Rubicon we are crossing here, it is a—

Professor Keating: This is why I say that the physical border is not the issue, because that can be dealt with.

Q495 **Chair:** I think the physical border is the issue.

Professor Keating: But if you have different regulatory systems, different standards for animal health or agricultural products and so on, then that becomes an obstacle even if you get rid of the physical border.

Q496 **Chair:** We already have different regulatory standards for animal health, for example. We have higher regulatory standards than the Republic of Ireland. If we can resolve this without physical infrastructure at the border, surely that would be sufficient.

Professor Keating: Yes. You have mutual recognition in most regulatory systems and therefore—

Q497 **Chair:** Mutual recognition being different from regulatory alignment?

Professor Keating: There has been a lot of exegesis of words—regulatory alignment, no regulatory divergence and so on—but the broad principle is mutual recognition and compatibility. That is the problem there. There is also a political issue in that, whether it is the customs union or the single market—which is mainly about regulation—there is a fear that you will not preserve the current position, which is that Northern Ireland has an open border both to the Republic and to the United Kingdom. Whatever solution you have—people have talked about a border in the Irish Sea—that does not resolve the problem; that is still a border.

For the nationalist community, having a border of any sort or a stronger border—a deeper border, I should say—is a political red line and for the



unionist community, having a border with GB is a red line. I can understand where they are both coming from because it is important almost psychologically for the agreement to work that you can have these open borders and that you can have the free movement of people across both of those borders.

Q498 Dr Rupa Huq: To some extent you have answered my question, I think, but this binary model of devolved latitude and centralised supremacy of Westminster—unity and diversity, whatever we call it—can this twin-track strategy continue after departure?

Professor Keating: You are referring to the division of competencies within the two levels?

Dr Rupa Huq: Yes.

Professor Keating: Yes. The feature of devolution in Scotland and Northern Ireland and now in Wales is a pretty clear division of powers between the two levels because of the reserved model—that everything is devolved if it is not explicitly reserved. That has a number of advantages. One is it is pretty clear where any given competence lies. There have been very few disputes—in Scotland almost none between the UK and the Scottish Government, and one or two in Wales in the transition. It also allows the devolved Governments broad capacity to make policies. They do not have to keep going back to the statute book and seeing whether they have the power to do one thing or another. They can mix and match policies in various ways and it allows greater transparency and accountability because we pretty much know where powers lie.

That has worked pretty well compared with other systems, but inevitably there are areas of overlap, there are commonalities, and there have been arrangements put in place to deal with those in the devolution settlement. After Brexit, those common areas may increase. Similarly, with the recent devolution of some welfare powers, there is more overlap. Some of my colleagues in political science will tell you, “That is fine. That is the way the world is. Let’s not go for these watertight divisions of powers.” But there are problems there, and I think the model we have in Scotland is a good one because it does make for clarity.

The more you move from separated or devolved and reserved powers towards shared powers, the more problems you get about deciding who can do what; there are problems with transparency, knowing who is accountable for what. These intergovernmental arrangements that are used for managing joint affairs tend to be precisely that—intergovernmental—and Parliaments tend to be excluded. Where it is possible, Governments across Europe have been trying to get away from that, trying to get some more clarity as to where responsibility lies, bearing in mind that there can never be complete clarity. There is always going to be some overlap and we need mechanisms for dealing with that.

Q499 Dr Rupa Huq: How can the shared powers and frameworks fit within the



reserved powers model?

Professor Keating: The term “frameworks” has just come into the debate as a result of Brexit. We never talked about frameworks before and we do not have framework laws within the UK devolution settlement. A framework law is a law where both levels have responsibility for a given policy field. The higher layer sets the parameters within that; the devolved or the federated units can make policy.

Q500 **Chair:** Is this the same as what in EU law we call shared competence?

Professor Keating: The EU law is based upon that.

Chair: Shared competence?

Professor Keating: Yes. The EU operates on that principle. We do not operate on that principle, but if we are going to download EU frameworks into the United Kingdom constitution, then we have to work out what that means. There has been very little thought given to that in the debate in the last few months because it is a new principle. How would frameworks operate, how constraining would they be, how can we avoid the problems that have arisen in other countries? In Germany they got rid of framework laws; they are problematic in Spain and in Italy. How can we make sure that the system is going to work properly? If we are going to take over the European frameworks, are we going to operate them the way the EU does or are we going to operate them in a different way?

EU frameworks are negotiated: they are suggested by the Commission, adopted by the Council of the European Union—that is the Council of Ministers with 28 member states—with qualified majority voting. We do not have anything like that. They subject to the principle of proportionality and subsidiarity; you can go to the courts, Governments can go to the courts, Parliaments can go to the courts if they think that has been violated. Then there is a legal mechanism to enforce those frameworks. We do not have anything like that in the United Kingdom constitution, so if we are moving towards that framework instrument, it behoves us to think about just what we mean and how would it operate.

Q501 **Marcus Fysh:** Other than having those discussions that you just mentioned, what should we be doing to think about what is required or what else should we be doing to do what is required to create and regulate the UK internal market, while respecting the devolution settlements?

Professor Keating: You mentioned the phrase “UK internal market” and that is something that is worth thinking about. It only features in the Northern Ireland Act; it does not feature in the Scotland and Wales Acts, but it is implicit that we sort of understand what that means. But once you get into detail about the UK single market it becomes quite contentious. What about public procurement? What about state aid? Again, it is worth thinking about what that means, what has to be uniform across the UK and what instruments you need not just to deal



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with the present day problems, but to anticipate other things that might come up.

One example of that from the European context is the minimum pricing of alcohol in Scotland that was introduced as a public health measure. Its opponents say, "No, that is a single market measure. It violates the European single market" and it took several years to resolve. It went all the way up the court system and back down again here before it was resolved. A general principle like that will have multiple interpretations. We need to think, "What does that principle mean and how can we put in place mechanisms to deal with it?"

The single market is the one that has been addressed, but there are other things about welfare. What about health and welfare rights and so on? How much commonality do we need there? That is a debate we never had at the time of devolution because it did not seem to be important, partly because Europe dealt with those kinds of things, but if Europe is no longer dealing with those things then it is again worth thinking about what that might mean. Ultimately a lot of this is a matter of political judgment. There is no scientific answer to what that means. It depends on your political predilections, in many ways.

Q502 Marcus Fysh: What would be your comment on the extent to which the uniqueness of Northern Ireland's position within that means?

Professor Keating: Northern Ireland is obviously within the European single market. After Brexit, everybody in Northern Ireland wants to keep access to the UK market; they do not want obstacles there. But there is also an all-island single market, which is quite important. It is very important in agriculture, it is important in energy and it has some importance in some other sectors as well. How can you keep Northern Ireland with full access to both of those single markets? Because they are important economically, but they are also extremely important politically. This notion of an all-island market is a very important reference point for the nationalist community and to being able to say to them, "You do not need to separate. You do not need to get rid of the border because you still have access to the all-island market and can participate in many ways in the social, cultural and political life on an all-island basis."

Q503 Mr David Jones: Professor Keating, as you know, the Government have now made proposals to amend the EU (Withdrawal) Bill so that the presumption will be that repatriated powers will reside at a devolved level and that Westminster will only have a role in terms of making temporary regulations to protect the UK internal market or to carry out international obligations. That has already been accepted by the Welsh Administration. How significant a change is this to the Bill?

Professor Keating: It is a significant change because initially clause 11 says that all retained EU law will go back to Westminster until such time as the UK Government will release the powers. They then shifted and said, "We can release some powers immediately," then they said, "There



will be a limited list of powers,” and then they said, “We will release all powers. All powers will go back to the devolveds, except the ones we specify,” reversing that assumption of reservation of powers. That was a very significant move. On their side, the devolved Governments said, “We will accept frameworks. We have no problem with frameworks. It just depends on how they are negotiated.” Then the UK Government said that this reservation of powers, which will be done by statutory order, will have a sunset clause and it will be subject effectively to the Sewel convention, which statutory instruments normally aren’t. These were considerable moves, I think, which are very important.

That got us back to the status quo ante, because that got us back to the position before—the assumption of reservation, consent for change of that, the Sewel provision for changing that. But it did not resolve a problem that was there even in the old system, which is what happens when legislative consent is not given. That problem has been avoided hitherto; Governments got around it. Both Governments have respected the division of competence, but with Brexit it is very difficult to do.

The Sewel convention was reinforced following the Scottish independence referendum in the Scotland Act of 2016, and in the Wales Act of 2017. It was written down, but as the Supreme Court were minded, as in the Miller case, it still was not legally binding. That raises the interesting question of how binding it is. What is a convention? I have argued before that a convention is not a binding law, but it is not just a political agreement either. Conventions are the basis for our constitution, the unwritten constitution we have in this country, and most levels have—for obvious and very good reasons—tried to avoid facing that question because it does not have an answer, “Let’s just work around it”.

Now it is posed and the latest amendment that the UK Government has tabled says the Sewel convention will apply, in so many words. They restate it, but then they say, “If legislative consent is given or legislative consent is withheld or there is no answer to the request for legislative consent, the outcome will be exactly the same.” They have chosen to highlight this anomaly. We have a convention, but it is not enforceable.

Q504 **Mr David Jones:** But nevertheless that has been accepted by the Welsh Assembly.

Professor Keating: The Welsh Government have accepted it and the Scottish Government have not. There is a difference there. But as I say, that has always been there in the devolution settlement. It has just been highlighted by the Brexit debate and the need to do something about these competencies.

Q505 **Mr David Jones:** Does it matter that it has been highlighted, given that everybody knew it was there all the time?

Professor Keating: Yes, because—here I am not speaking as a lawyer, because I am not a lawyer—but politically this was a compromise.



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Politically it was saying, "Yes, we will respect your competencies, but we will have a fall-back where we will be able to legislate anyway and we will try not to talk about it." But once you write it down in such an explicit way then—

Mr David Jones: People start talking about it.

Professor Keating: —you could say, "We are just drawing attention to that anomaly and we are not resolving it."

Q506 **Mr David Jones:** Yes. To what extent do you think that the latest proposals respect the constitutional balance under the devolution settlements, which I guess is what we have just been talking about?

Professor Keating: Yes, they do. The UK Government have moved and they have accepted the principle of reservation. They have accepted that the Sewel convention should apply and even extended it to statutory instruments. On the other hand you could say that the Sewel convention post-Scotland Act 2016 and the Wales Act 2017 has failed its first test because those two Acts were supposed to resolve the question by saying, "This is the situation" but in a very ambivalent way. Just when it really matters, you could say it failed the test because the UK Government says ultimately it does not make any difference.

Q507 **Mr David Jones:** As you rightly say, it is set out on the face of both the Scotland and the Wales Acts, so it was expressly ambivalent.

Professor Keating: We knew that in law so the Supreme Court did not tell us anything new. What is the difference between the black letter law and a constitutional convention? That is the big question, because most of our constitution is based upon conventions. Following the Scottish referendum, the Smith Commission and the two Acts I referred to, there was an understanding emerging in practice that the UK Government would not intervene just because it wanted to and that was being respected. Brexit now has put a burden on that convention it is just not capable of bearing and it had not had time to bed in before Brexit came along. That is why we got ourselves into this position. The fudge that was in there does not work for Brexit and so we have these two interpretations of the constitution clashing.

I cannot speak for either Government, but it seems to me that it is implicit in there, when I was talking about the nature of the status that you indicated or whatever, they have two visions of the constitution, but they were always able to work around them. Here we now have an instance of it becoming very explicit. I do not know what is going to happen on Wednesday—maybe there will be a compromise—but I am just trying to explain where the two sides seem to be coming from and where these two visions of the constitution do clash.

Q508 **Mr David Jones:** To what extent does the acceptance by the Welsh Government of this proposal put pressure on the Scottish Government to fall in line?



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Professor Keating: I do not know. That is a political question. Obviously the Scottish Government are more exposed than they were in the past and the fact that the Welsh Government are not a nationalist pro-independence Government made a difference to that. I do not make any comments about whether the Scottish Government are right in maintaining their opposition. This is an issue about the nature of the constitution and whether we are to see this as some kind of deeply entrenched federal arrangement or not. The understanding in Scotland following the referendum was that the devolution settlement would be more strongly entrenched in some way or other. We are not there yet. We do not have the kind of understandings that we need to make this system work, because this may come up again. It is not just over the EU (Withdrawal) Bill. These clauses will have a sunset clause up to seven years—two plus five—but we may still need frameworks after that, so this may come up again and again.

The other concern I have with the way that the two sides have gone about talking about the division of competencies is that instead of talking about general principles, like the internal market we are discussing now, and saying, "How can we have some general principles for operating across the UK?" they have gone into individual very detailed competencies. That might be too wide a list or it might be too narrow a list, because we do not know what is going to come up in the future, particularly with regard to international trade deals. Whatever happens, there has to be some longer-term mechanism for dealing with this problem.

Q509 **Chair:** Can I just ask a supplementary? In his February speech, basically about clause 11, David Lidington said, "Nor would this proposed arrangement prevent the devolved Governments from doing anything that is already within their competence." How much do you give your assent to that assertion?

Professor Keating: At that stage we did not know what the frameworks were going to look like. We did not know what they were going to contain. Certainly within the EU frameworks, the Scottish Government has very large room for discretion; within agriculture all the discretion that the UK Government has as a member state is devolved down to Scotland. There is a very distinct capacity for making policy there. It depends on what the frameworks would mean. I think it is becoming clearer now what they would mean and I do not think the UK Government are engaged in any kind of power grab. I do not see why they would want to do that.

I think there has just been a neglect all the way through the process of the nature of the devolution settlements and the way it works. I am thinking about the longer term, how policy will be made in the longer term, what issues will come up in the future. I am just worried that if we get a short-term settlement to get the EU (Withdrawal) Bill through, we will not have the mechanisms in place for the next time this comes up,



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which it may come up in relation to foreign trade deals. It may come up in relation to reinterpretation of the single market.

Q510 **Chair:** You are hoping eventually that the Scottish Government will accept this compromise or perhaps a bit more of a compromise, but will they accept a compromise?

Professor Keating: I do not know. That is a matter of political judgment. What I do know is that, however this list of powers is resolved, it is not going to provide a long-term solution to this problem.

Q511 **Kelvin Hopkins:** I wonder if you could briefly explain what the Scottish withdrawal from the European Union (Legal Continuity) (Scotland) Bill is and what it would do.

Professor Keating: I was hoping that my colleague, Aileen, would be here to explain the legalities of it, but I will try to do my best. They would incorporate directly into Scottish law all those repatriated European competencies that lie with the competence of the Scottish Parliament and in that way pre-empt the EU (Withdrawal) Bill in whatever form it takes by saying the powers immediately come back to Scotland. That is going to the Supreme Court and I have no idea what the Supreme Court will say.

That clearly is a political gesture, because we know the UK Government can get its way anyway, whatever the (Legal Continuity) (Scotland) Bill says. Westminster can countermand that if it wants to, the Sewel convention notwithstanding. There is a political battle about that, but it also says one or two other interesting things as well, which may survive even if the EU (Withdrawal) Bill were withdrawn. One is that it incorporates the Charter of Fundamental Rights from the European Union into the law of Scotland so that those repatriated competencies would be subject to the charter. There is also a debate about this in the House of Lords as well, whether that should be done for the UK as a whole. Secondly, it would allow Scotland or give Scottish Ministers the powers unilaterally to align with European regulations in areas that are devolved so that Scotland would remain closer to European regulations and European rules, so keeping its effective capacity to work within European policy systems within devolved fields.

Those other two things it seems to me are quite interesting and worth thinking about because they do not challenge the Union or challenge Westminster's supremacy. They open up the possibility of the devolved territories may be having a slightly different relationship with the European regulations than the rest of the United Kingdom does.

Q512 **Kelvin Hopkins:** You do not think the United Kingdom Government would be hostile to it, necessarily? It strikes me as being a bit of a belt and braces Bill, that if the EU (Withdrawal) Bill belt does not cover all bases, your Bill would fill in the gap, so to speak.



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Professor Keating: It would mean that Scottish Ministers have the power effectively to adopt European regulation. The Scottish Parliament could do that anyway by primary legislation, but it provides a mechanism for Scottish Ministers to be able to keep up with European regulations as they change. That is just a matter of public policy. Pre-empting the EU (Withdrawal) Bill seems to me essentially a political issue, because ultimately we know that Westminster can get its way if it wants to. Even if the Supreme Court allows this Bill, Westminster could say, "No, we are not going to permit it."

Q513 **Kelvin Hopkins:** You could take in parallel legislation to the EU legislation itself, but obviously it would not be governed by the European Court of Justice or anything of that kind. It would just be imitating what the EU has done and adopting similar laws, which the UK is going to do anyway in many cases, I think.

Professor Keating: We do not know. We do not know how far the UK is going to maintain alignment with European regulations on whatever basis in order to give access to the market, but indeed, yes, that would allow the Scottish Government to go further than the UK in that regulatory alignment. Also the European Court of Justice would not of course have control over these things, but it could even incorporate decisions of the European Court of Justice, which a lot of the single market comes from, the way it is interpreted by the court.

Q514 **Kelvin Hopkins:** Going back to one of your previous comments, it has always struck me that Scotland is, in philosophical terms, to the left of the rest of the UK—certainly England—if you look at free university tuition, free long-term care, public ownership of water and so on. You specifically referred to public procurement and state aids, which would be outside what the EU would allow, but something that might be very popular in Scotland and certainly I would support that personally. Do you not think that it would provide opportunities for Scotland to pursue its much more social democratic, even socialist, agenda?

Professor Keating: That is possible. The free personal care does not come into this at all because it has nothing to do with European regulations. The fee regime obliges Scotland to allow European students to come to Scotland and study without paying fees and that obligation would go after Brexit.

State aids and public procurement is the kind of thing that might come into UK single market regulations, but whatever conception we have of a UK single market would probably have some common regime about state aids, otherwise you are in for a competition, a race to the bottom in subsidies across the United Kingdom, and nobody would want that because it would just be destructive for everybody.

What Scottish parliamentarians—because it is not just the Government—might have in mind would be environmental regulation. If it were the case that the European standards were higher than UK standards, the



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Scottish Government could go for that higher level: regulations in animal health; labour market regulation is not devolved, but there is a case for argument. Those are the things that people are talking about. Maybe that would be devolved in the future. It is a relatively small area. It does not cover the main issues of economic or welfare policy, but it is just a way in which Scotland could stay a bit closer to the EU than the rest of the United Kingdom.

Q515 Marcus Fysh: I wanted to ask what would happen if the UK Parliament were unable to pass the EU (Withdrawal) Bill. Would this Continuity Bill be able to be implemented?

Professor Keating: Yes, I assume so. If the UK Government were unable to pass the EU (Withdrawal) Bill—do you mean if it were voted down?

Q516 Marcus Fysh: If it were voted down, if it was not possible to get it through the House of Lords, if they point-blank refused to approve it and we had to use the Parliament Act and it took two years.

Professor Keating: Yes, I think you would have a constitutional crisis there and the Scottish issue would be a sideshow. I do not think that is going to happen. There is no evidence that the House of Lords would be attempting to do that, but just imagine that the EU (Withdrawal) Bill were to disappear; then I suppose the Continuity Bill would be there, but whether the Supreme Court will accept it because the Presiding Officer of the Scottish Parliament says it is not competent and the Lord Advocate said it is competent. There is an argument among lawyers as to whether it is competent. I cannot answer that question because I am not a lawyer.

Chair: We will find an answer from someone else. We are going to have to skip along a little bit more quickly if we are going to keep to time. Can I ask colleagues and our witness, please, to give short and crisp answers?

Q517 Mr David Jones: What mechanisms exist in the Scotland Act to ensure that all parts of the UK comply with international obligations entered into by the British Government?

Professor Keating: There is a clause. I will not give you the precise wording—I do not remember it—but I will give you the gist. It can instruct Scottish Ministers to give effect to international obligations. It does not instruct the Scottish Parliament; it instructs Scottish Ministers. Whether that would override the Act of the Scottish Parliament, you would have to ask a lawyer. There has been a question as to whether that is the right kind of power to have because it has not been used, as far as I know, and certainly it was intended as some kind of backstop in some kind of emergency, some problem of non-compliance, which there has not been.

As more and more regulation ceases to be European law and becomes international treaty law, including our future relationship with the EU and



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then trade deals with third parties, the number of cases where that arises is going to be much greater. I think at least looking at that and seeing whether that power is adequate, whether it is something that could be incorporated in a general set of principles—I was talking about frameworks before as a principle—we would understand something like that would probably be more satisfactory than what was intended just as a fall-back power.

The other side of that, if there is a requirement that devolved legislatures, as well as Governments, give effect to international trade agreements or other international obligations—it could be in the environment or anything—then those devolved institutions should have an input into the making of those treaties or some kind of way in which they can express their concerns about what is in those treaties.

Q518 Mr David Jones: To accommodate this, do you think that there is going to be a need for new primary legislation amending the devolution settlement?

Professor Keating: I do not know. Again, that is a legal question and it just seems to me that that power was intended for a different purpose; it was intended as an emergency override. If we are going to have a regular penetration of devolved law by international treaty instead of European law, there is probably a better way of doing it on a regular basis, again, putting in place conventions whereby the devolveds were at least consulted on how this might affect their devolved competencies. I am not talking about a veto, but some way they could be consulted.

Q519 Dr Rupa Huq: We have heard several recommendations, even when we went to Cardiff on a similar visit, that intergovernmental relations need to be placed on a statutory footing now. What might such legislation look like and what mechanisms would need to be put in place to formalise these?

Professor Keating: I would not start with institutions and committees and mechanisms like that, because if you set up institutions without giving them something to do, they atrophy. This is what happened to joint ministerial committees: they just stopped meeting because there was nothing to talk about. I would start with general principles, going back to this notion of what the single market is, going back to this idea about what are the implications of international agreements—start at that point. You might have to address the status of the Sewel convention. In other devolved or federal systems there is a fall-back mechanism as to what to do when there is deadlock and in no case does it say the central Parliament will just resolve the matter—I have not found a single case where that happens. There is always some mechanism for constitutional amendment involving the devolved or federated units, usually involving qualified majorities, the Second Chamber—some way in which when there is deadlock, the centre cannot unilaterally get its way.



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Once you have established that principle, everything else follows, because it provides an incentive to co-operate. You know what the rules are; you know what the fall-back is. You do not want a constitutional crisis. The devolved level is not simply saying, "We would like you to take our position into account, but we realise you do not have an obligation to." If you have that mechanism, then I think you can build on that. You can identify ways in which to avoid that kind of conflict.

Then I would work around policy fields. The problem with the joint ministerial committees is that they only worked where there was a policy field that was relevant, so they worked in relation to the European Union, because before the meetings of the European Council or the Council of the European Union you need to have common positions. They worked to some degree in agriculture because there is a lot of common interest there. In Spain, they do this with what they call sectoral conferences: they look at the big policy fields and organise meetings around that. They also have a mechanism for voting there. I am not saying we should reproduce this, but it is interesting that there is voting. The central Government has the same number of votes as the autonomous communities put together, so neither side can overrule the other side without getting some support there.

Some kind of underpinning would be extremely useful because there would not be the possibility of unilateral imposition. Then some serious thoughts about where these issues might arise. Most issues we can forget about. Where are these going to be important, what are the important fields and then put in mechanisms to deal with those.

Q520 **Dr Rupa Huq:** In Cardiff, they had not got their meeting. I think David Lidington was due to meet them. They felt a bit forgotten and we have not had the equivalent session here yet.

Professor Keating: There were complaints about the Joint Ministerial Committee on European Negotiations from both Scotland and Wales.

Q521 **Chair:** I think you described "set out a set of general principles." What would those set of principles look like? Is there anything like that in existence at the moment?

Professor Keating: No, there is not. This is where we get back to frameworks and what should be in frameworks. My suggestion is that frameworks should not have a detailed list of competencies to argue about, but broad principles and some way to interpret those.

Q522 **Chair:** About how to conduct intergovernmental relations?

Professor Keating: Yes, or what a single market looks like, what kind of things we think might be important, broadly defined, so we do not have to keep on printing the list out.

Q523 **Chair:** In terms of the basic set of principles for intergovernmental relations, you have in your mind's eye what that would look like?



Professor Keating: Yes. It would require a recognition in Westminster that there are circumstances where it will not get its own way.

Chair: Very challenging for us.

Professor Keating: That is a challenge to Westminster sovereignty, where we started off, but that is what a devolved constitution, a federal constitution looks like. That is the critical one. If you have that, I think you might reduce the number of conflicts because there would be an incentive to agree.

Q524 **Kelvin Hopkins:** My question follows on from what Rupa and the Chair have been saying about intergovernmental relations. If they are formalised, what role should there be for parliamentary scrutiny rather than the Executive? For example, should there be an inter-parliamentary council with a scrutiny role or should that role fall to the individual Parliaments and Assemblies? One of the significant points here is that most members of the European Union have different electoral systems from us, which tends to give more power to legislatures than to Executives. I think that is probably true of Scotland and Wales as well, but England, because it is first past the post, strongly gives very great power to the Executive. What role for Parliament?

Professor Keating: Of course the question of England, by the way, is one that we have not come to. I think it is a really big one, which has to be resolved—who speaks for England. But as far as the Parliaments are concerned, yes, this is a weakness in the present system. In all countries where you have a lot of intergovernmental relations, Parliaments tend to be marginalised, agreements are made in closed forums, they are not subject to scrutiny and there is a problem of accountability. That does need to be addressed. I know all the legislatures around the United Kingdom have been concerned with that.

There has been some experimentation around this in relation to the European Union and how European policymaking works because the same criticism is made: how do we control our Governments who go to the Council of the European Union and negotiate on our behalf? Denmark is one example where Ministers have to come to the Parliament before and after meetings; they have to explain what their negotiating remit is and they have to explain afterwards what they have done. As I keep on telling Members of the Scottish Parliament, “You do not need the UK Parliament’s permission to do that. You can just do that yourself. You can summon Ministers here and tell us what they are doing when they go to London and negotiate.” It requires a willingness on the part of the Parliaments to exert themselves.

On the inter-parliamentary dimension, again I think it would be extremely useful to have more contact among the Parliaments. There is a common shared interest in scrutiny of Executives that transcends any partisan political divisions. There have been moves in that direction, but the problem with these things is that people always say, “We do not have



time,” or, “We are too busy doing other things,” but again they could if they were prepared to invest time in that and get much better co-ordination, joint meetings, joint inquiries in common problems. Without changing the devolution settlement, without changing the law, there is a lot more could be done.

Kelvin Hopkins: Three members of our team today are members of the European Scrutiny Committee at Westminster as well, and there is some tension between the EU Scrutiny Committee and Government and Ministers. Getting Ministers to come to talk to us is sometimes quite difficult. It is just a comment.

Q525 **Marcus Fysh:** You referred earlier, Professor Keating, to what a federal system looks like; that is what it looks like. What would be the constitutional implications of making intergovernmental and inter-parliamentary relations more of a permanent feature of the constitutional settlement? You mentioned the England question. Obviously that would have to be addressed.

Professor Keating: Yes. Can I come to England then? I think that is one of the biggest issues within this—who speaks for England. Is it the UK Government or is there a separate voice for England? The difficulty fitting England into the constitution is that within England itself there is no consensus about how that should be done. English votes for English laws—is that the answer? An English Parliament? There is not a lot of support for that. English regions? That was tried. City regions is being tried at the moment, but it does not resolve this particular problem. We just have to work around that, but it does mean that whatever system we have is going to be asymmetrical in a very serious way—a way that does not exist in any other country—where 85% of the population belongs in one unit.

There have been suggestions in relation to intergovernmental machinery and whatever comes out of Brexit in these new frameworks that there should be a separation between England and the UK and that Ministers attending this should be English Ministers or UK Ministers. Having debated it in the past in the Joint Ministerial Committee for Europe, one Minister was given responsibility speaking for England and another was presiding on behalf of the UK. I think that is the way we will probably be moving, but as long as there is no consensus within England about how this is going to be handled, then it is very difficult to do anything. People here talk about a federal UK, but if the English do not want that, then we have no right. We cannot impose on the English something that they do not want. We have just to work around it.

Q526 **Marcus Fysh:** I am also on the International Trade Committee of the House of Commons. One inquiry that we are intending to undertake is the way that we achieve buy-in of the different parts of the political economy for potentially thinking about new international treaty obligations. I was just wondering whether you thought that giving the constitutional discussions practical tasks such as that might be a context in which to



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experiment with such new ways of talking to each other.

Professor Keating: Yes. It is absolutely vital that joint committees be given a job to do; otherwise people just do not turn up. Yes, it might be useful to start off with some key issues and say, "Let's work on that," and then see how the practice develops from that.

Q527 **Marcus Fysh:** Are there any other spheres of public life other than international trade where you think that would be important?

Professor Keating: Everything that might be covered by UK frameworks that would be to do with a single market and things like competition law, notably. People talk about state aids, but that is just a subsidiary category of a much bigger thing called competition law, which is downloaded from Europe. Environmental policy is another one. Common resources, cross-border issues, infrastructure—these are the kinds of things where it might be useful to work on concrete tasks. A lot of the stuff that is done in Ireland across the border is about very specific things—hospitals, roads, bridges—where there is a clear task and a clear common interest.

Q528 **Chair:** Professor Keating, it has been a fantastic session. How we would have fitted you into the hour that we allocated if Aileen McHarg had been here as well, I do not know, but we have been hanging on your every word. It has been a fantastic session.

Just one last question: what else should we do or can be done to build up more trust and mutual respect between Westminster and Holyrood?

Professor Keating: I think trust comes from institutions; it comes from knowing what the rules are and it comes from practice. Following devolution, we did not have the crises that people thought we would have. We even got through the Scottish independence referendum and were able to put together a system after that, get agreement on a new Bill and get agreement on the Sewel convention, until Brexit came along, which could produce a shock to the system. Even with various combinations of different political conventions, a lot of common work did go on. I do not subscribe to the notion that there was any crisis in devolution.

I think the arrangements were generally working, but they could have been improved. Trust stems from knowing that the other side has to co-operate with you and you have to co-operate with them. That is a hard-headed view of what trust is. It is not people being nice to each other, it is people knowing there are games here, there are rules and we have to play by those rules. Where there is that uncertainty and where one side ultimately holds all the cards, it is very difficult to get that trust relationship.

Q529 **Chair:** Surely trust is an act of faith, is it not? It is not about knowing the other side is obliged to do something.



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Professor Keating: I am supposed to be the airy-fairy academic and you are the hard-headed politicians, but I think it is about power as well. That really does matter.

Chair: Thank you very much. It has been extremely good. We are going to take a 20-minute suspension now to catch our breath before our next panel.

Sitting suspended.

On resuming—

Examination of Witnesses

Witnesses: Adam Tomkins MSP, Richard Leonard MSP, Willie Rennie MSP, and Patrick Harvie MSP.

Q530 **Chair:** This is the continuation of our session on inter-institutional relations within the United Kingdom and we are very pleased to welcome four Scottish parliamentarians—four Members of the Scottish Parliament. Could I ask each of you to identify yourselves for the record, please?

Willie Rennie: My name is Willie Rennie. I am Leader of the Scottish Liberal Democrats.

Richard Leonard: I am Richard Leonard. I am Leader of the Scottish Labour Party.

Adam Tomkins: I am Adam Tomkins. I am the Constitutional Affairs Spokesman for the Scottish Conservatives.

Patrick Harvie: I am Patrick Harvie. I am co-convenor of the Scottish Green Party. We do not do leaders.

Chair: I understand that. Thank you very much indeed. We will need to crack on at a fairly speedy pace. If somebody has given the answer that you would have given, you can just say, "I agree." We do not need to linger.

I will start, if I may, with the EU (Withdrawal) Bill and the new amendment that the Government has tabled in the House of Lords, which changes the presumption so that powers now rest with the devolved level, and Westminster will only be involved in making temporary regulations to protect UK common interests or international obligations while common positions and frameworks are being agreed. In each of your views, how does this change the substance and effect of the original clause 11?

Adam Tomkins: It turns it on its head, Chair. As you will know, the Scottish Parliament's Finance and Constitution Committee, on which I and Patrick Harvie sit, was unanimous in its report a few months ago that the



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original clause 11 was incompatible with our devolution settlement. It was incompatible with our devolution settlement because it turned the fundamental of that settlement on its head.

It is one of the founding principles of devolution in Scotland, and has been since 1999—and now also in Wales—is that everything is devolved apart from that which is expressly reserved under the schedules to the Scotland Act 1998. The effect of the original clause 11 was unfortunately to turn that around. The amendments published by the Government last week reverse that and in my view—this is only my view—the amendments are fully compatible with the recommendations and conclusions that the Finance and Constitution Committee came to in its interim report a few months ago.

Patrick Harvie: I disagree with Adam Tomkins on much of that. Yes, the Finance and Constitution Committee was unanimous on the original EU (Withdrawal) Bill and said section 11 was incompatible with devolution. I think the amendments that have been published remain incompatible with the devolution settlement, in particular the introduction of restrictions on actions that the Scottish Parliament or the Scottish Ministers can take unless the questions of consent have been dealt with. To define “legislative consent” as the Scottish Parliament saying yes, the Scottish Parliament saying no and the Scottish Parliament saying, “Neither” is in no way a meaningful definition of consent. Whether in legislation or any other walk of life, consent has to be freely given without coercion, it has to be capable of being withdrawn at any time and fundamentally it has to be respected. Section 30(a) in the new amendments very clearly shows no fundamental respect for that legislative consent process.

Let’s remember that it is only a very brief time since the last Scotland Act, which purported to put into practice the recommendation of the Smith Commission—of which Adam Tomkins and I again were both members—that the Sewel convention, that legislative consent convention, should be put on a statutory basis. It was put on a statutory basis for five minutes and then a coach and horses was driven through it, and I am afraid that remains the case.

Chair: Maybe Richard Leonard or Willie Rennie would like to respond to that.

Willie Rennie: In my view there has been some significant movement, but we still have not reached the essential issue, which is how do you resolve a dispute? Westminster having the final say is not a dispute resolution procedure. You need to have some kind of mechanism where the devolved institutions and the United Kingdom Government are able to agree without Westminster having the final clout. There needs to be a much better way of doing that. We still have not tackled that fundamental problem yet. Whether they are fundamentally devolved for a



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time period or they were reserved for a time period, it does not matter. We still need to solve it.

Q531 **Chair:** Who should have the final say?

Willie Rennie: There needs to be a co-decision-making procedure on issues of common interest and common power, which I think this is. We need to create a level playing field across the United Kingdom for the EU (Withdrawal) Bill. Giving Westminster the final say is not sufficient. There needs to be some kind of mechanism around perhaps qualified majority voting of sorts—

Q532 **Chair:** Would that be like the Sewel convention, but instead of saying “normally,” saying “never”?

Willie Rennie: Yes, you could go down the route of something like that. What you cannot have—

Q533 **Chair:** The point is that the Sewel convention does not say “never.” It says “normally”.

Willie Rennie: Yes, exactly so, because it is just a convention and it always has been a convention. The issue is whether you are moving from a veto to overwhelming power and that is where we still have a problem. That is why you need to have a dispute resolution procedure.

Richard Leonard: Up until now, the devolution settlement founded around the 1998 Act has worked well. It is only now that the Supreme Court has been called upon to adjudicate over a piece of legislation the Scottish Parliament has passed.

Underlying a lot of this is a complete breakdown of trust. I have to say that the responsibility for that breakdown of trust lies with the way the UK Government approached the EU (Withdrawal) Bill with regard to the devolution settlement. Adam Tomkins was right, there were Members of the Conservative Party in the Scottish Parliament who also understood that there had been a failure, whether in Whitehall or Westminster, to grasp the fact of devolution. There has been some remedial action taken to address that and I agree that there has been a degree of movement that has provided for people to now think about reaching settlement, but I also take the point that Patrick Harvie makes that the definition of consent is still problematic. There are still knots in the Bill as it stands that need to be untied.

Adam Tomkins: Can I come back on one point about Sewel, just to explain why I think the amendments published last week are compatible with the devolution settlement whereas the original clause 11 was not? It is because the amendments essentially copy and paste Sewel. Sewel is a rule that has been a core part of our devolution settlement since its inception in the late 1990s and it says of course that Westminster will not normally legislate on matters that are devolved without the devolved Parliament’s consent. That is what the convention says and it is a



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convention that is now not just an ordinary constitutional convention; it is an extraordinary constitutional convention because it is recognised—as Patrick Harvie said—in statute in the Scotland Act 2016, pursuant to a recommendation of the Smith Commission. It is a constitutional convention given recognition in primary legislation.

The rule that Westminster will not normally legislate on devolved matters without, in Scotland's case, our consent as MSPs is exactly the basis of the amendment that was published last week. Powers will not normally be taken into the holding pattern under revised clause 11 without the consent of the Scottish Parliament or, as the case may be, the Welsh Assembly or even the Northern Ireland Assembly.

Searching for a power that is greater than that, which goes from—in your words, Chair—"normally" to "never" is to move from the spirit of devolution, which is intergovernmental co-operation, to something that is quite different, which is giving devolved Administrations vetoes on powers, which does not happen. The Scotland Acts are not full of veto powers; they are full of requirements on Ministers of all colours and in all Governments to co-operate with one another. That is what the revised clause 11 does. That is why, in my view, it is good enough for the Welsh Government, and it is disappointing that it is not good enough yet for the Scottish Government, or at least key Members of the Scottish Government, although if you look at the papers in Scotland yesterday you will see there are some significant differences between key players in Nicola Sturgeon's Cabinet on this issue.

Patrick Harvie: It is a source of great frustration that although there is a lot of common ground here, we disagree fundamentally on some specific issues. Adam Tomkins is absolutely right that intergovernmental and, I would say, inter-parliamentary co-operation should be the norm and is achievable. Since I have been a Member of the Scottish Parliament, that has taken place on a whole range of different issues. During my first session, I was involved with charity law reform. Both Parliaments were conducting charity law reform at roughly the same time, co-ordinating their action, consulting on some of the same questions and legislating in a way that took account of each other's intentions. The same thing has happened with planning. The same thing has happened with issues like the marine environment. Managing the marine environment was one of the examples that we took evidence on when our Committee was hearing from witnesses on the EU (Withdrawal) Bill.

This notion of common frameworks is entirely achievable without an extra restriction on the legislative ability and freedom of the Scottish Parliament or the Scottish Government. It has happened before, it does happen frequently, and it can only happen well, in a respectful way, when neither side of that co-operative relationship threatens a backstop and says, "If you do not do it our way, we will impose a solution." UK-wide common frameworks will be necessary. Everyone accepts that. They are achievable. Everyone believes that. They are going to be best achieved in



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a spirit of respect and co-operation, not in a spirit of intimidation and coercion. That is the way that even this new amendment reads, "We can say we have consent if you have not given it."

Q534 Chair: How much is this in fact an opportunity to resolve an ambiguity in the devolution settlement that was rather expertly fudged by the Sewel convention?

Willie Rennie: It very much is an opportunity. In the last few years or since devolution started we have not had these kinds of frameworks. Perhaps we should have more frameworks across the United Kingdom. Agreeing a mechanism, rather than just the ad hoc basis that we have had until now, might be a good thing. We could move toward that federal structure that I would like to see where the devolved institutions have a greater authority and say over the final decisions rather than the ultimate sanction being from Westminster.

Richard Leonard: There has to be negotiation. There is another tension in the Scotland Act around, on the one hand, the schedule 5 competencies, and on the other hand the demand for the maintenance of a UK single market. Around half of the 24 areas where there is still no resolution, as I understand it, centre around that tension. My view is that the two Governments need to keep working at getting a negotiated settlement around those competencies so that this can then be enacted as a piece of legislation. The people have voted for Brexit and it is incumbent on politicians to work together to find a way through that.

Q535 Chair: I take it from your answers that Mr Tomkins and Mr Leonard would accept the clause 11 amendment as it stands as a sufficient compromise, maybe plus some other things. You would accept that in the Withdrawal Bill, but Mr Rennie and Mr Harvie would not, is that correct?

Willie Rennie: I think further compromise and agreement is required, yes.

Patrick Harvie: You are certainly correct that I would not accept it. I do not think I had quite heard whether Richard would and I hope he is not accepting it.

Richard Leonard: No, we would not accept it, because there are still more aspects of this that need to be addressed. It still fails properly to recognise the 1998 Act and the default position, which is about powers resting with the Scottish Parliament and not the UK Parliament.

Q536 Chair: Does the Labour Party in London agree with that position?

Richard Leonard: I have not spoken to "the Labour Party in London" as you characterise it, Mr Jenkin, but I shall be doing so over the course of the next two days, rest assured.

Chair: You will see that one or two of us have made speeches in the House of Commons that share the view that more could have been done



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to promote trust and understanding around this subject at the onset, so that it is not just Conservatives in the Scottish Parliament.

Q537 Mr David Jones: As you know, the Scotland Act contains provisions that empower the Secretary of State for Scotland in certain cases to direct actions to be taken to ensure the compatibility of any actions taken in Edinburgh with the UK's international obligations. Those powers have seldom, if ever, been used.

Adam Tomkins: Never.

Mr David Jones: To what extent do you think that there is a possibility that they may have to be used after Brexit?

Adam Tomkins: This is the power in section 58 of the Scotland Act and there are equivalent provisions in the Government of Wales Act and in the Northern Ireland Act. These are powers that the Secretary of State has to require devolved Administrations either to do something to comply with the UK's international treaty obligations or to cease to do something that is incompatible with the UK's international treaty obligations, because in international law it is the United Kingdom and not the devolved Administrations themselves who would be liable for any inadvertent—or indeed deliberate—breach of international law. That is what we are talking about.

The section 58 power in the Scotland Act, to my knowledge, has never yet been used. That is a reflection of how well—in agreement with something Patrick Harvie said a few minutes ago—this element of the informal side of the devolution settlement has hitherto worked in the United Kingdom. When there are concerns that UK Ministers have that there may be a development with a devolved Administration that could breach or risk breaching international law, these things are sorted out and ironed out, either at an official level or if necessary at ministerial level, in correspondence and communication between Governments. We have not needed to use the sharp end of the law. We certainly have not needed to go to court, we have not needed to use anything resembling a section 58 power in order to ensure that the United Kingdom is not in breach of its treaty obligations. I would—

Q538 Mr David Jones: If I may interrupt you, to what extent do you think that is going to be changed by the disappearance of the overarching presence of the European Union?

Adam Tomkins: I do not see any reason why it should be changed, but I do see that there is yet again a revived urgency to ensure that what I have called the informal side of devolution—the intergovernmental communications and framework—is fit for purpose. It is going to be stress-tested by Brexit because there is no doubt that the repatriation of powers from the European Union to the United Kingdom—wherever they sit in the United Kingdom—is going to require us all, whether we are in government or in opposition, in Westminster or in a devolved legislature, to rethink the way in which the Governments and Parliaments of these



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islands do business with one another. That is going to be stress-tested, but there is no reason, in my view, to believe that the current informal arrangements cannot continue to adapt and survive.

The Chair talked earlier about “constitutional fudge.” I am all in favour of constitutional fudge if it avoids writing things down in an overly legalistic way, which might make money for my good friends at the faculty, but will see what I regard as political questions ending up in courts of law more frequently and not less frequently. That is why I am nervous about these calls for federalism that we hear from time to time. I think the fudge that we have can continue to work in a post-Brexit environment if the will is there on all sides to make it work.

Chair: We have 45 minutes until the next two arrive. I think we owe it to the Minister to see them on time, so the more you talk about this means we are not going to get through the questions. Do any of you have anything to add?

Willie Rennie: I do not think that politics drives section 58 to be used. We do not have Governments in Scotland that tend to go rogue and therefore I do not believe that it would be used in future; it is a backstop. I think the debate is elsewhere.

Patrick Harvie: I will just add very briefly, I agree that there is no reason to presume that this would become more of a problem in the future, although Adam Tomkins is again right on an issue where we will agree that if indeed we are taken out of the European Union—and notwithstanding there are still many of us who are deeply opposed to that course of action—it will inevitably change the relationship between Governments and Parliaments within these islands and we should be open to having that debate.

The one thing I would add is that there are enforcement powers that are currently often needed to be used against both Governments. I would give the example of air pollution: both Scottish and UK Governments have had to be taken through enforcement actions to ensure that the actions necessary to give people safe air to breathe are being taken. We are still not at the point of fully implementing that, either in Scotland or the rest of the UK. There remains a question about at what level and through what institutions will either Government be capable of having enforcement action taken by proceedings initiated by members of the public or those representing particular interest groups or issues. It is not just about the Scottish Parliament.

Richard Leonard: Very briefly, “fudge” suggests opaqueness. There needs to be transparency and openness and that is why we have called for Joint Ministerial Committees of the future to be on a statutory footing, for their minutes to be available and for people to understand decisions that we take on their behalf.

Chair: We will come to that. You will be getting an opportunity to talk



about that. Rupa Huq.

Q539 Dr Rupa Huq: I think people have already dealt with this to some extent. Since the Scotland Act 1998—Tony Blair originally said it would be like a parish council—these devolved competencies and powers have incrementally grown. It is a Mystic Meg question: how do you foresee this in the post-Brexit world if we do end up going out? Like you, I hope we will not.

Adam Tomkins: I do not think the next chapter of our ongoing conversation about the future of devolution in the United Kingdom is going to be about more powers; that is what most of the last 20 years has been about. The next chapter is going to be about more co-operation, not more powers. It is not the self-rule bit of the equation that we need to focus on now, not the things that we, as MSPs, can do for ourselves because they are devolved. It is how we integrate devolved Government with reserved Government. It is the shared communication and rule. That needs to be the focus now, and not an endless search for more powers.

Patrick Harvie: Since the creation of the Scottish Parliament, which most political parties campaigned for, even though the one political party that campaigned against it has grown accustomed to it and has grown to support the existence of the Scottish Parliament, there has remained throughout all of that period a sense that some—particularly some parts of the UK Government culture—seem to regard the Scottish Parliament almost as a Department of a part of the UK Government, which happens to be accountable to an elected Chamber. That needs to change. If we are going to have a fully respectful relationship between the different institutions, we need also to respect the separate democratic legitimacy and that is still missing to some degree.

Adam Tomkins: I agree with that.

Chair: That was nice and brief. Anybody else?

Willie Rennie: It is not necessarily the transfer of the powers that is the big debate. I think it is the co-operation between the different parts of the United Kingdom and the reform of the UK institutions—whether it is the House of Lords or other arrangements—that is what needs to change. The Scottish bit has progressed very well. You could argue about more tax powers in some areas and some other legislative powers as well, but by and large, that is relatively mature and should be allowed to develop. It is the co-operation, the co-decision making across the United Kingdom that needs to change.

Q540 Dr Rupa Huq: That is what I wanted to ask about next. Richard Leonard, you said that there should be a statutory footing. We have heard this a lot in our evidence, and also when we went to Cardiff, where they let us in their Parliament. You would not allow us over your threshold. Not you personally, but the statutes.



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Chair: Can I just deal with that, please? There is at the moment something of a little standoff between the Scottish Parliament and the United Kingdom Parliament. We have capacity issues in our rooms. If we can provide reciprocal access we should be allowing each other's Committees to meet on our own premises. It is work in progress, but I hope that—

Richard Leonard: Yes, we should, absolutely.

Dr Rupa Huq: Hopefully next time we can do it there. For intergovernmental relations going on a statutory footing, what principles should underpin these relationships?

Richard Leonard: There should be parity of esteem. The situation is we are going from a model where you have a European Commission usually taking the initiative, subject to scrutiny by a European Parliament, which is then agreed upon or not through qualified majority voting—or unanimity in some areas of policy—by a Council of Ministers, which is then subject to the European Court of Justice to oversee. We do not have any of that apparatus here. That is obviously a multinational organisation, but we need to consider within the UK what then works.

Often in Scotland we have seen things almost on a bilateral basis; I think we need to look at things on a multilateral basis for the future. Willie has mentioned it and you took evidence in Wales where people spoke about the exploration of a qualified majority voting model, and I think that is right. In my view, it has to be seen as part of a wider reform agenda for the distribution of power inside the UK. Adam disagrees, but it leads me to a consideration of a federal model; it leads me to a consideration of the reform of a national regionally elected senate-type of model in its place. It could help to address some of these issues, as well as the joint ministerial working model that we have spoken about.

Patrick Harvie: If there are going to have to be—and there may have to be—significant powers that are jointly exercised by Ministers of multiple Governments throughout the UK, then there also needs to be equally powerful inter-parliamentary scrutiny mechanisms. Those are absent. There are significant formal ways that we can do that through joint meetings, which have not happened very much. There have been some issues where different Committees have had video-conference meetings and so on, but it is not quite the same as jointly sharing a scrutiny role. I was about to call you Convener, but is it Chair?

Chair: I would be honoured to be called Convenor.

Patrick Harvie: In that case, Convenor, the little symbolic matters, like whether a Committee of one Parliament can meet in the other's building, do matter. We were just discussing security passes before the meeting began. The original intention when the Scottish Parliament was created was that they would be reciprocally valid and recognised between the Parliaments. The Westminster authorities were reluctant to proceed with



that. These little symbolic things could do a lot to reinforce that we are, and always will be, regardless of our constitutional relationship, in some form of relationship and communication between us.

Chair: We could make a safe assumption that the House of Lords is going to be an intractable issue for some time. What should we be doing in the meantime? Adam Tomkins.

Adam Tomkins: On the question of whether intergovernmental relations should be placed on a statutory footing or not, which I think was part of your question—

Q541 **Dr Rupa Huq:** It was an assumption. The question was meant to be what are the principles and mechanisms if we do go ahead with all this?

Adam Tomkins: I am not too bothered about whether it is on a statutory footing or not. I am much more bothered about whether it works. You could have an informal system of intergovernmental relations which has no recognition in statute at all and which works brilliantly; you could have a very formal or overly formalised legislative suite of powers and obligations with regard to intergovernmental relations that do not work at all. What matters is whether it works or not, not whether it is on a statutory footing or not.

The challenge that Brexit is going to pose to this—it was already a challenge that was being posed, but Brexit brings it to the fore even more because of the nature of some of the powers that are being repatriated from the European Union—I very strongly agree with what Patrick Harvie had to say about Whitehall. So far there has been a complete failure to recognise in Whitehall that effective intergovernmental relations will need to include co-decision and some mechanism by which policy decisions are made jointly between different Administrations. That will not always be easy because it will often be the case that different Administrations have different political preferences in different parts of the United Kingdom. What we need to do is to find an effective mechanism—whether it is on a statutory footing or not does not matter—of enabling that co-decision, that joint decision and policy-making to work. Again, I am very strongly in agreement with what Patrick Harvie had to say about this: there needs to be robust inter-parliamentary scrutiny of that joint decision-making process. Richard said that the problem with fudge is that it lacks transparency, it is opaque and he is absolutely right about that. We do need to think very carefully about how we open up the structure of intergovernmental relations to effective parliamentary scrutiny.

In the Scottish Parliament, we have two rules, which as I understand you do not yet have in Westminster. Those rules are not always adhered to in the Scottish Parliament, but they are there. One rule is that the relevant Committee of the Scottish Parliament is entitled to see the agenda of any joint ministerial meeting before that meeting takes place, preferably in time for us to be able to call that Minister to account and say, “What do you plan to talk about when you go down there?” or, “What do you plan



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to talk about when the Westminster Minister comes to visit you?" We are also entitled to see the minutes of those meetings as soon as possible. That does not always happen. For example, for the most recent meeting of the Joint Ministerial Working Group on Welfare, which is a bilateral between the DWP and the Scottish Government, we have not seen the minutes because there is a disagreement about what SNP Ministers said at that meeting.

The rules are not always honoured as I would like them to be as an opposition MSP, but they are there, and that is at least the start of a way in which you can try to secure some kind of effective parliamentary scrutiny of what Ministers talk about behind closed doors in these various formats and meetings.

Q542 **Dr Rupa Huq:** Willie, you wanted to have it on a proper footing.

Willie Rennie: Yes. The processes work when the spotlight is on, but as soon as the spotlight is somewhere else, that is when it is prone to break down, and it will not matter as much politically at that stage. For the first few years of the Scottish Parliament, we wanted to make it work, everybody wanted it to succeed, so the co-operation and the consent all worked. Then we had the independence referendum and everybody was tip-toeing around that issue, so there was an interest in making it work. If independence goes off the agenda, which I hope it does, there is a potential for us just to slip and not to consider these issues.

Q543 **Dr Rupa Huq:** Adam has already said yes, but should there be inter-parliamentary scrutiny of these intergovernmental relations? What should those bodies look like? What would they consist of or how would they be constituted?

Richard Leonard: The truth is the detail of that has still to be worked through, because it needs to be something that is sufficiently fleet of foot that it is workable, because there is an important role to hold to account those multilateral discussions that I hope will be taking place. Precisely how that is composed, certainly sitting here today, is difficult for me to describe. The intent, the principle has to be there that there needs to be parliamentary scrutiny of any ministerial decision making in the future.

Patrick Harvie: We turn back to where we began the discussion: the amendments to the EU (Withdrawal) Bill. If a future mechanism is going to fully respect the principle of parliamentary consent, decisions that are jointly made by Ministers in some kind of intergovernmental arrangement that require parliamentary consent clearly require the consent of all the relevant Parliaments, not only one of them. The approach to how that is achieved, how the debate reaches the point where mutual consent can be given, it is about communication and understanding and listening, but ultimately both Parliaments—or all Parliaments and Assemblies, if that is the case—need to be in a position to say yes or no and be respected.

Q544 **Kelvin Hopkins:** You have already given quite comprehensive comments



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on the question I am going to ask, but before that, this Committee ran an online public forum to canvass public opinion in advance of this session and found that 98% of respondents indicated that the UK and Scottish Governments and Parliaments do not work successfully together, with only 0.1% indicating that they work well together. That is a pretty devastating result. Do you have anything to add to what you have been saying about how we can build trust and mutual respect?

Adam Tomkins: On the Brexit side it is beginning to happen. There is a forum at which the Chair and I have met on several occasions now called the Interparliamentary Forum on Brexit. I probably have its name wrong, but it is an informal coming together of the convenors, deputy convenors, and chairs of Committees in the Scottish Parliament, Welsh Assembly, House of Commons and House of Lords just to exchange notes and ideas about the way in which our various legislative Houses are seeking to hold Ministers to account for the way in which they are trying to deliver the Brexit process. The Chairman has welcomed that, I have welcomed it, as has Bruce Crawford, who is the convenor of the Committee on which Patrick and I both serve. That is a very useful start.

If there are rules in either the House of Commons or in the Scottish Parliament that somehow prevent Commons Committees from meeting in the Scottish Parliament estate or vice versa—and certainly it is not straightforward getting into the Westminster Parliament if you only have a Scottish Parliament pass—these are the sorts of things that could very easily be sorted out on a logistical basis. The easier we make it for ourselves to do business with each other, the more likely we are to do business with each other. We will probably find that we quite like each other and we have quite a lot in common, we quite like doing business with each other and we will do it more.

Richard Leonard: I do not know how big the sample size was to arrive at that 98% vote. The truth of the matter is that the—

Chair: I think there were 1,300 respondents. They were self-selecting.

Richard Leonard: A decent sample size, yes. But I suspect it is a reflection of the narrative in Scottish politics at the moment, which is largely caricatured by the UK Government doing things to us, when I would always qualify it by saying it is a Conservative Government that is taking these decisions, but that is not often how it is caricatured. Even when the same party was at least sharing power in the Scottish Parliament, and in power at a UK level, there were still tensions then. While there were discussions that took place—and it is probably easier within the context of being in one party, or one party sharing power in one institution and being in power in the other—there were still some difficulties around that. I do not think at that point the public perception would be a 98% sense that the Parliaments or the Governments do not work together co-operatively.



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That sets us a challenge, doesn't it? If there is broad agreement that that 98% dissatisfaction rate—or however it is relayed—means that there is an awful lot of yardage/meterage that we can gain to pull that back, clearly it makes more sense for Governments on this shared island to be co-operating.

Q545 Kelvin Hopkins: The whole thing is complicated if you are suggesting different political parties in power in different places, the divisions between political parties everywhere, the divisions within political parties—which is equally complex—and it is all coloured by views on the EU, views on independence and so on. It is not just an academic discussion between professors.

Patrick Harvie: You are right that if there is going to be a stable constitutional relationship between Scotland and the rest of the UK, and Scotland is inside the UK—albeit that issue will no doubt resurface at some point—it has to be a relationship that is capable of surviving periods when there is political closeness between different Administrations and where there is a great deal of political distance between the Administrations, when the relationships are warm and friendly and when they are less so.

I would not rule out the possibility that your poll or survey result more reflects the fact that disagreements and arguments get more coverage. I would mention again the issue of marine spatial planning and protecting of the marine environment. It is a complex, multi-layered area of legislation and regulation. It took years to deal with through both Parliaments. There were many competing interest groups around access to and use of the marine environment, some of it devolved, some of it reserved, some of it European. It is a good example of how co-operation can and does exist and has taken place well when both Parliaments respect each other's legitimacy and do not try to tread on each other's toes, but listen and try to achieve something that is consistent and coherent. It does happen. It just does not get a lot of play in the media, understandably.

Willie Rennie: The politics does drive the narrative—the story that it is all loggerheads between the UK and the Scottish Governments, and it is not the case that it is always like that. What might repair some of the damage that has been done over this process is if the Scottish and Welsh Governments were to win the day in an argument that the UK Government did not agree with and they were quite clearly unhappy about that outcome. That might just show that the institutions and the frameworks in the United Kingdom do reflect the diversity that is within it. I do not know what that subject would be. It might be this one, it may be another issue, but on occasion the small guy winning might repair some of the damage that has been done as a result of this whole Brexit process, which I think Adam would agree has been cack-handed. It has been crass in its management because it has been imposed. There was little discussion; getting a dialogue working effectively has been hopeless.



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Something like that might repair some of the damage that has been done.

Q546 Chair: We have done three reports, if I am correct, on inter-institutional relations and we have come up with a number of suggestions. I would be interested in your reaction to some of them. One is, as we have discussed, putting JMC on to a statutory footing. Another was that there should be somewhere less political to discuss the distribution of powers and formation of joint frameworks—something more like the Calman Commission—where these things were looked at more forensically, dispassionately and expertly. What do you think of the suggestion that there should be a standing advisory commission on shared powers?

Willie Rennie: I think the second one is always political. It is going to be difficult to make it in a more neutral, non-political environment. The first one is a very good idea. It is something that we have supported for some time and we did through the Smith Commission process. Michael Moore was a strong advocate of making the JMCs a much more central part of our intergovernmental and inter-parliamentary arrangements. We are very much in support of that. The second one, it might be worth doing, it might make it more neutral, much safer and much more professional, but I think the idea that it would not be political is stretching it.

Q547 Chair: I will remove that suggestion, that it is not going to be political, but to have more paper, more discussion, more process around these issues on a permanent basis, rather than just relying on the Government making a proposal and then everybody reacting. Anybody else?

Adam Tomkins: I am inclined to agree with Willie about both elements of that, at least in some measure. As I have said before, I do not think it matters whether JMCs are on a strategy footing or not, what matters is whether it works. One of the things that would make it work is more transparency and regularity around the process and all of that.

Chair: You have given us very interesting ideas.

Adam Tomkins: Do we need a standing Committee on powers and where they lie? No, I do not think so. Do we need to do some pretty quick learning from other countries around the world or in Europe where there is multi-layered Government—whether federal, formally or not—about how Governments communicate and co-operate with one another in the design and delivery of shared policy responsibility? Yes, we do. As I said in an earlier answer, all of our conversation about devolution in the last 20 years has been about powers and now it needs to not be about powers, it needs to be about co-operation and how we deliver that.

Patrick Harvie: I do not think any of us should pretend that we have all the answers to this question, I think everyone is slightly feeling their way through this process at the moment. In relation to the way that you framed the question, you made a reference to the Calman Commission. I think that would not be a good model, because it was explicitly



established with an intent to exclude two of the political parties in the Scottish Parliament. It was explicitly designed to be a discussion that excluded the possibility of independence even being considered. If you are doing that, then clearly the political parties, which were at the time the largest and smallest in the Scottish Parliament, could not sign up to that remit. It was initiated by political parties and there seemed to be no willingness to be flexible about that remit and to ensure that it could be the broadest possible discussion. It would need to be the broadest possible discussion, recognising those fundamental differences.

Q548 **Chair:** It would have to be a Calman-plus-plus to satisfy you?

Adam Tomkins: The only time that all five political parties in Scotland have sat around the table together to talk about Scotland's constitutional future is the Smith Commission, and there is no member of the Smith Commission who wants to do that again.

Patrick Harvie: Largely because it was given an absurdly complex job on a break-neck timescale. I do not think any of us would be looking for emergency crash courses of that kind in the future.

Richard Leonard: JMC on a statutory footing and learn some international lessons. I met with the Swiss Ambassador last week. Of course they are outside the EU and they have mechanisms in place to make sure that there is alignment with the decisions taken in the EU around the single market so that they can retain access to it. I am not saying for a minute that we should simply transplant the Swiss model here, but I think we need to learn from those international experiences of life beyond membership of the EU and fashion it in a way that suits our circumstances, which very much now include the devolved Parliaments and Assemblies of the United Kingdom.

Q549 **Chair:** We looked at how we can develop the inter-parliamentary forum on Brexit. At the moment, there is very little that happens formally and we have suggested that there should be some kind of inter-parliamentary council of the United Kingdom that would meet regularly, rather modelled on the Council of Europe, and scrutinise the intergovernmental process. What do you think of that idea?

Willie Rennie: You need to make sure that it is seen as a body that has influence over the process. There is a danger you can set up bodies that are not that influential, with people who are not that influential, they do not carry the weight and the authority. You need to be sure that you send people that are sufficiently senior and who would only go to it if it did have that authority. Setting up a whole range of bodies, more is not necessarily better; making sure they have authority is the way to go.

Richard Leonard: I much prefer the abolition of the House of Lords.

Chair: Again, it is a safe assumption that is not going to happen for a long time.



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Q550 Kelvin Hopkins: Chair, can I comment that one of the problems with commissions, and any kind of body set up in the British Isles, is that the control is always at the centre, and Prime Ministers in particular make sure they have their placed persons on those Committees to make sure they get the right result. That is what has really happened.

In some areas, it is absolutely vital to do that: in Northern Ireland, the balance between the two sides was always most carefully scrutinised and arranged, especially in the Northern Ireland Housing Commission back 40 years ago, to make sure the housing was fairly allocated. That had to have the right political balance. If there was a majority for, shall we say, the republican side rather than the unionist side, that would have caused problems in Northern Ireland.

The one seat majority for unionism—that was okay and it worked. But Prime Ministers classically control appointments, and the most extreme example perhaps was Tony Blair, who made sure that he had people on certain bodies and commissions to make sure that things happened. Specifically House of Lords reform, like Richard Leonard, I was an abolitionist and I asked why that was not one of the options considered. I was told that was not on the agenda, basically, “Shut up.”

Chair: Your question is?

Kelvin Hopkins: My question is are these going to be independent bodies or are they, in our system, going to be fixed?

Adam Tomkins: The more we can talk about substance rather than process the easier it will be for the process to sort itself out. Let me give you an example of what I mean. At the moment, we are partway through what is the biggest single transfer of powers from Whitehall to the Scottish Government and that is in the field of social security. I also sit on the Social Security Committee in the Scottish Parliament. We need to talk with the Work and Pensions Committee in the House of Commons to find out how DWP and the Scottish Government are handling the transfer of powers and how they are handling the transfer of information about the transfer of those powers to the Scottish Parliament and to the House of Commons. We do. We do not worry too much about the process because we have a specific policy issue that we need to address substantively.

I think that is the level at which this should work post-Brexit too. If it turns out that there is a significant argument between different Governments at different levels or different Governments of political colours about agricultural subsidy or about food labelling, then the relevant Committees of the House of Commons and the devolved legislatures can—and should—get together to jointly hold those Ministers to account for what they are doing in those meetings.

Q551 Chair: Can I also ask what is your reaction? We are doing one or two housekeeping things in Committees: we are arranging for Committees, if I am correct, to be able to accept a guest—and that guest could be a



member of a Committee from a devolved Parliament—into the Committee for the cross-examination of a Minister or the cross-examination of a key witness. We think this would be quite a significant development. Do you think the Scottish Parliament would consider a reciprocal arrangement along these lines?

Adam Tomkins: I do not know whether it would, but for myself I think that it should. The more we can integrate each other in our work of holding Governments to account for the work that they do in terms of intergovernmental decision-making and intergovernmental co-operation that happens in the United Kingdom, the more we can do to help ourselves undertake that task robustly, the better our democracy will be.

Q552 **Chair:** We have the advantage that any Select Committee can meet anywhere it wants. I do not think you have the same freedom in the Scottish Parliament, I think your Select Committees have to meet on the premises, or at least in Scotland. Correct me if I am wrong. We would very much like to welcome formal meetings with Scottish Committees at Westminster and maybe even joint meetings between reciprocal Committees. Is this something you think we can fruitfully discuss?

Patrick Harvie: All of these options should certainly be explored. I am also a member of the Procedures Committee in the Scottish Parliament, so if your Committee wanted to write to either the Presiding Officer or the Procedures Committee to explore those issues, I expect there would be some openness to them. I do think though that there are other aspects that go beyond parliamentary rules. Many devolved parliamentary Committees, certainly in Scotland—and I suspect elsewhere—have found it very difficult to get UK Ministers to come and give evidence. There will always be UK decisions that impact on wholly-devolved areas. Housing, for example, has been fully devolved since the creation of the Scottish Parliament, but if the rules on housing benefit change—which obviously are held at a UK level, or largely have been—that clearly is going to have an impact on Scottish housing policy. You need to be able to take evidence from, and hold to account at some level for their impact on devolved issues, UK Ministers. That has been profoundly difficult.

Q553 **Chair:** I would very much like to re-emphasise the point, personally I would like reciprocal access through exchange of passes to each other's premises; I think that would be sensible.

Finally, in our previous session Professor Michael Keating told us that we should develop a set of principles underpinning future UK devolved Government relations. What do you think that set of principles would look like?

Richard Leonard: The principles need to include transparency, they need to include an end to very often what is seen as a very London-centric view and—

Chair: We feel this in England too, you know.



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Richard Leonard: Which is why I think the idea of putting things on a statutory footing makes so much sense, because I do also think that would work, the principles of transparency, equality and position. How we then resolve that within the context of England I think is a big question. Does that look like England, Wales, Northern Ireland and Scotland or does it look like England subdivided in some way, in a method yet to be determined and agreed upon? In the end, that is for the people of England to decide upon. There has to be, at the end of it, some kind of equality of esteem and a greater equalisation of power as well.

Chair: A last word, anybody?

Patrick Harvie: I am not sure there would be a huge amount of value in writing down a set of principles as a wish list if in fact they are not being adhered to. There is a huge amount of work and it will take a long time to improve intergovernmental relationships and inter-parliamentary mechanisms as well. If that hard grant is done—and I suspect it will have to be after the profoundly divisive issue of Brexit is resolved one way or the other—then it may be possible that a set of principles can emerge as an accurate description of what is happening rather than as a wish list.

Willie Rennie: I think trust, respect, a learning culture of recognising that different parts of the United Kingdom can do things and do them well; it does not have to necessarily be created by Westminster in order to be effective. Openness and equality is another principle that should be regarded too. As long as Westminster continues to represent England as well as the United Kingdom, there will be an advantage of Scottish parliamentarians or Welsh Assembly Members going on to UK Committees to ask about relevant issues. Whether it is the other way around: you could argue in the area of international development, which we have done more on, there may be an advantage of having some reciprocal agreement. I do not think there would be a great advantage in having UK parliamentarians scrutinising Scottish Health Ministers about the Scottish NHS, because it is wholly devolved. We need to clarify the UK constitution before we could have a truly reciprocal arrangement going forward.

Adam Tomkins: I am a bit more sceptical about this. I do not think there is such a list of principles in the United States, Canada or so far as I know even in Switzerland—certainly not in Germany—which are all very functioning and mature federal jurisdictions. What there is a much more significant need for is a change of culture and understanding in Whitehall that this is not a unitary state; it is a multi-Government state, it is a multinational state. Leaving the European Union does not mean in any way that we revert to the constitution of 1972, which is the year we joined. We are leaving the European Union in a constitutional environment that is very different indeed from that which pertained in the early 1970s.



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I think that is understood in Westminster, but is not always understood in Whitehall. If I could have one single wish out of this, it would be that that change of culture could happen sooner rather than later in Whitehall. That would avoid a lot of the problems that we have encountered since June 2016.

Chair: Thank you very much. With the permission of your colleagues, if that could be the last word. It has been a smashing session and you have given us plenty to think about and some good ideas for some further recommendations to make. We are very grateful to you. The Committee will adjourn for five minutes. The Minister is here and we will resume at 11.30 am precisely.

Sitting suspended.

On resuming—

Examination of Witnesses

Witnesses: Mike Russell MSP and Ken Thomson.

Q554 **Chair:** Welcome to this final session this morning in Edinburgh of the Public Administration and Constitutional Affairs Committee of the House of Commons from London. We are very pleased to have our final witnesses in front of us. Please could you identify yourselves for the record?

Mike Russell: Mike Russell. I am Minister for UK Negotiations of Scotland's Place in Europe, which is the long way of saying Brexit Minister.

Ken Thomson: I am Ken Thomson, Director General for Constitution and External Affairs, which is the long way of saying that I am a senior official supporting the Civil Service on Brexit.

Q555 **Chair:** Just some scene-setting of questions. How often does the First Minister speak to the Prime Minister?

Mike Russell: In the last year on three occasions she met with the Prime Minister. The frequency varies. For example, the structure of the JMC process, which we will go into at some stage, through JMC plenary would mean that they met more often if the plenaries took place more often. If the Prime Minister attended the British-Irish Council, which the Taoiseach attends, the First Minister attends and the First Minister of Wales attends, then there would obviously be other occasions. But the JMC plenary—I think I am right in saying—from the independence referendum in September 2014 until the Downing Street meeting in October 2016 had not been in session. Probably infrequently would be the answer.

Q556 **Chair:** How does it compare to previous Prime Ministers?

Mike Russell: I do not think it had been very much more frequent. Clearly when Gordon Brown was Prime Minister, with a Scottish



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constituency, the opportunity might have been greater. I do not think it has been that regular. The lynchpin of it is the JMC plenary, which gives the opportunity for it to happen.

Q557 **Chair:** What about the regularity of your conversations with Damian Green and now David Lidington?

Mike Russell: When the JMC was altered—a new part of the structure was established: the JMC (European Negotiations), which came out of the Downing Street meeting in October 2016—the intention was that the JMC(EN) would meet on a monthly basis. It met in November, December, January and February, and then did not meet again until October. I met David Davis between those meetings as well to discuss details of what was taking place. The UK General Election in June 2017 interrupted the process, but I did see David again very quickly after that election to talk about the Withdrawal Bill.

The conversations with Damian Green and David Lidington have tended to take over the role in terms of dealing with the devolved administrations and have been frequent; there have been telephone conversations and face-to-face meetings and the JMC(EN). In the last month I have met David Lidington twice and I have certainly spoken to him on the phone twice. Those are more frequent and the discussions are probably more intense. That is the same with Damian Green, who I thought very highly of and made a very strong contribution to that developing relationship. Also because—and no doubt we will come on to this—he also altered the nature of the JMC, which was significant. It has not gone far enough, but he made some significant changes.

Q558 **Chair:** How would you characterise relations between you.

Mike Russell: On an individual basis they are perfectly civilised and positive. There are very difficult issues to be dealt with.

Chair: We will come to those.

Mike Russell: I am sure we will. But on a personal basis I cannot complain about that. They have been positive.

Q559 **Chair:** How often do you speak to your Welsh counterparts?

Mike Russell: That has become very intense in the last 18 months to two years because of the nature of the Brexit process, because Mark Drakeford, who is handling this matter for the Welsh Government, and I obviously have many issues in common. Particularly with the Withdrawal Bill and the Continuity Bill it has been very regular. I would be speaking to Mark usually every fortnight to 10 days. We have met at JMCs, we have met on other occasions and we have met when we delivered speeches or papers at a variety of conferences. So intense, and intense with Northern Ireland until the Northern Irish Government ceased to function.



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Q560 **Chair:** At official level, what kind of dialogue takes place?

Mike Russell: Pretty constant.

Chair: Mr Thomson?

Ken Thomson: It is pretty constant. The various more formal groups that the Minister refers to have officials in support of them, so just as there is a JMC there is a JMCO group of officials. Those people are in touch very frequently in the run-up to the formal meetings, but also to exchange information and keep in touch with each other from time to time.

Q561 **Chair:** With your Welsh counterparts as well?

Ken Thomson: Likewise. The Welsh and Northern Irish still are represented on those groups too.

Q562 **Chair:** But how substantive are those discussions compared to the discussions between Ministers?

Ken Thomson: A lot of this is what is called in the civil service sherpa work. The sherpas have been the people who take the Ministers to the summits so this would not be determinative meetings, but they are meetings at which we prepare the agendas, prepare papers, ensure that the issues are brought to a point or worked through in such a way that Ministers can make the best use of their time.

Q563 **Dr Rupa Huq:** The Scottish Government have raised concerns with the UK Government in relation to the EU (Withdrawal) Bill. What has been your experience of consultation and engagement with the Westminster Government concerning the Bill?

Mike Russell: It is a question of before and after the publication of the Bill. The normal work that would be done on a Bill that would require an element of legislative consent—clearly this Bill would—would be to have very close liaison between officials as the Bill is being drafted so that any difficulties can be ironed out. That did not take place. I discussed the Bill in outline at one of the JMC(EN)s with Ben Gummer, who was then responsible for the Bill. There was then a hiatus. I raised the Bill at the JMC plenary in Cardiff in January 2017 with the Prime Minister directly and we were told that we would see the Bill at some stage. Then the election intervened.

We were shown the Bill at the very end of June or beginning of July—I would have to check the date—between officials, with it due to be published within a fortnight; in other words it was finished. We had great concerns with the Bill at that stage and I went to London to see David Davis about the Bill on 3 July to explain that we could not accept the Bill in its current form.

Since then there has been very substantial engagement. It has been at the centre of discussion at the JMC(EN)s, which were held in October,



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December, February and March. It was also the subject of bilateral meetings of myself, John Swinney, David Lidington, Damian Green and David Mundell before that. It has also been the subject of discussions with the Welsh Government. We still do not have a resolution of the central issue around that Bill, although we have made substantial progress on some of the other issues surrounding the Bill.

Q564 Dr Rupa Huq: Initially in January, then the election. How long before it was published did you have sight of the Bill?

Mike Russell: A fortnight. The Bill was finished. It was not in draft form, it was finished.

Q565 Dr Rupa Huq: It was not even a draft for comment that civil servants would have input into?

Mike Russell: No. We saw nothing. The Chair raised the issue of the nature of the discussions in JMC and between Ministers and between officials. It is important to focus on that as much as the number of those meetings. At many JMC meetings there would be a remark made by one Minister or another there had been 20 meetings of officials. The actual quality of those meetings varied quite substantially and there was a frustration that we did not know—and there is still a frustration—what the policy is or the thinking leading to the policy. That applies to every area.

Migration is an interesting issue, that we have never had a substantive informed discussion about migration in terms of the options, which the UK Government are considering for its White Paper. A matter I raised with Brandon Lewis when he came to the JMC(EN), I think in December last year, because we needed to know, if these matters were considered, what the UK Government were considering in those areas, because we would want to respond to that. That has been the problem. It has been difficult to get the information required to lead to a meaningful discussion, which Ken would be able to comment on.

Ken Thomson: Usually in order for the civil convention to work if the UK Government are contemplating primary legislation, which impacts on a devolved area, the way that the civil convention works assumes that the legislation will be seen in draft and worked through over usually a period of many months. By the time the Bill is published, the Governments would have agreed and the Scottish Minister would be in a position to recommend consent to the Bill. But that is not what has happened in this case.

Q566 Dr Rupa Huq: You said you did raise some red flags. What was the reaction? It is presented as a fait accompli, you are kept in the dark?

Mike Russell: I remember at the JMC(EN) I raised this with Ben Gummer and I suggested Ben came to Scotland and we sat down and talked about this. It seemed a good idea, but it did not happen. When I raised it with the Prime Minister we all agreed in the JMC plenary that we



needed to see the draft Bill and we needed to see the timetable for the Bill. That did not happen.

When we saw the Bill, an election intervened—and elections do intervene—there was obviously not going to be an exchange of information, and there was not even between officials. We then, after the election, started to say very quickly, “We need to see this document.” There is a letter from myself and Mark Drakeford laying out some issues for David Davis for the future after the election, but we did not see it until, I think, the last day of June. It was due to be published in the first fortnight of July and its publication was put off. It was published on 18 July, but it was in finished form. There were no draft discussions and that is a problem.

Q567 Kelvin Hopkins: The Scottish Parliament has passed a Continuity Bill. What is the purpose of the Bill and why did the Scottish Government think it necessary?

Mike Russell: The purpose of the Bill is to make sure that there is no cliff edge, no legislative uncertainty when Brexit takes place. It is no secret that I do not support Brexit, but we have managed, as a Government, to differentiate the legal issues—the issues of ensuring that there is continuity of law—and the political and policy issues. In this area we were absolutely clear that there needed to be certainty for businesses and others. Our first preference was to give legislative consent to the UK Bill. It remains our first preference because it is the clearest way to do it. But as we have not been able to reach agreement, both ourselves and the Welsh last year began to talk about anything we could do ourselves. If we were not able to grant legislative consent through our formal processes, we could not just leave it at that. We had to have something to come in to support that.

That was the idea of both Continuity Bills and those Bills developed over a period of time. Our wish was that we would not bring them. It is an odd thing in legislative terms to have a lot of work going on and a piece of legislation—I have been a Minister in other departments; I am used to that process—and saying, “We do not want to do this,” but eventually timing back from Royal Assent and from the passage of the EU (Withdrawal) Bill, we felt we had to bring it. We took it through the Parliament on emergency terms. The Bill contains a clause that allows us to essentially destroy the Bill if we have to do so, if there is an agreement with the UK Government. But it provides the legislative certainty, it provides the repatriation of the powers, it creates the circumstances in which powers are given to Ministers just as the UK Bill does, but somewhat differently.

There is a much stronger test in terms of how Ministers should act. That Bill has taken on the Charter of Fundamental Rights, and it also has a keeping pace power. It is our approach to taking these issues forward. The Bill passed 95 votes to 32 in the Scottish Parliament. There is in Scottish legislation a month, 28 days, in which nothing happens and then



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it can go for Royal Assent. That is to allow a challenge in terms of competence; that challenge has come from the Advocate General, and now it will go to the Supreme Court. The Welsh Bill was also challenged, but I understand that as part of the agreement they have reached with the UK Government that reference will be withdrawn.

Q568 Kelvin Hopkins: How soon before publishing the Bill did you share a draft of the Bill with the UK Government?

Mike Russell: We only shared it on publication or the day before publication; that is not normal. But we have ourselves to the stage where there is a very substantial lack of trust on both sides. Both of us regret that, but we did not trust the processes for that Bill to go into the system and for it to emerge unscathed, so we did not share it.

Q569 Kelvin Hopkins: So quid pro quo for the UK Government's decision not to show the Withdrawal Bill to you until it was finalised?

Mike Russell: I hope it was not a quid pro quo. What it does reflect, regrettably, is the trust on which this relationship has to be based is at a low ebb—probably the lowest ebb I have experienced. I was a member of the JMC Committees in 2009, when I was in charge of Culture and External Affairs, and I do think the system has even less trust in it than it had then.

Q570 Kelvin Hopkins: There is some work to do to rebuild trust in these matters?

Mike Russell: Yes.

Q571 Mr Marcus Fysh: The Welsh Government have agreed to amendments that the UK Government have proposed to the EU (Withdrawal) Bill. I was wondering if you might be able to say a little bit about why the Scottish Government take the view that those amendments are not a workable or acceptable compromise.

Mike Russell: I am happy to do so, and I do so without criticism of the Welsh Government. I work very closely with Mark Drakeford; that is a decision for them. We spoke last Monday on the phone and at that stage committed ourselves to continue to work together on a range of issues to do with Brexit, and I will see him this week in London on Wednesday prior to a JMC that is due to take place.

The political context is different, I just make that point. Wales voted to leave, Scotland voted very substantially to remain, so perhaps a political setting of this is different, and of course the devolution settlement is different too. They have just moved from a conferred to a reserved powers model. We are firmly founded on a reserved powers model.

The core issue has not been resolved. Many of the other issues we discussed in the Bill have been resolved. The core issue has not been resolved and that lies in clause 11. Essentially what will happen in these circumstances is that the Scottish Parliament will have its legislative



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competence very substantially overruled for a substantial period of time. Not just in the 24 areas that are likely to be the subject of frameworks, but in any other area that the UK Government chooses. That tying of the Scottish Parliament will be by legislation, whereas a commitment from the UK Government will be voluntary.

There seems to be, in terms of Mr Hopkins's issue on trust, a lack of trust from the UK Government in the other Governments operating honourably and operating according to agreement. We are willing to do one of two things: either to enter into an agreement with the UK Government on the basis of trust, we are happy to sign an agreement to say that we will not knowingly and not unreasonably withhold our agreement to any of the frameworks—we have agreed many of the frameworks—or to revert to the established systems that exist when seeking Scottish Parliament approval, because we believe that the principles of devolution should be observed. Brexit may be many things, but it should not be taken as an opportunity to undermine the devolved settlement and that is what we believe it would do.

Q572 Mr Marcus Fysh: Have you thought about any other ways of offering a compromise other than this concept of consent not to be unreasonably withheld?

Mike Russell: Yes, there are two alternatives. We have made them very clear. I have made clear and the First Minister has made clear in the last week we are very willing to sit down and discuss these. The House of Lords is considering the devolution amendments on Wednesday. There is a great deal of thinking going on among the peers. Lord Hope, I understand, will table amendments. There are others. I think Jim Wallace will table amendments. There is thinking going on there.

There is a very clear choice. One is to have this written agreement, which we are happy to enter into, and that is very similar to the Edinburgh agreement for the independence referendum, or revert to the standard way in which devolution operates, which is well understood and can operate by means of section 30 orders. What is being proposed here is an additional backstop restraint upon the Scottish Parliament, but without an equivalent backstop restraint upon the UK. We think that is unreasonable. We also think it will have deleterious effects. This covers a whole range of subjects—farming, fishing, environment—in virtually all the devolved areas, and we believe that this will be not be in the interest of the Scottish people. That is why we take this position.

Q573 Mr Marcus Fysh: When you think about your concept of how this might be able to work, what effect do you think that would have on the balance that is currently there in the devolution settlements? I am thinking in particular how would you think about solving the English question about how we make sure that particular regional English interests are taken into proper account these matters of having to set common frameworks.



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Mike Russell: The UK has an established constitutional framework. Devolution is the established constitutional settlement. The “settled will” Donald Dewar called it. We have to operate with that. If parts of England wish to have a different settlement I am not in a position to comment upon them. I do speak as somebody who was born in Bromley, which is not a hot bed of Scottish nationalism, but I have long since given up any view that I should have an opinion on that.

From our perspective, there is an established settlement. From our perspective, that is what should be allowed to work and it should not be undermined. It is being undermined by this proposal. That is the position we have taken. It is a position we took with the Continuity Bill that had a very substantial support in the Scottish Parliament. We are now about to take through the revised legislative consent memorandum through the Scottish Parliament. We start that tomorrow. The other parties will come to their view on it. But this is an issue about ensuring that the powers of the Scottish Parliament, as established, can continue.

The best way for these relationships to operate is on the basis of trust and it is on the basis of being able to work as equal partners. That was very much the rhetoric that came out of the independence referendum in 2014, that if the Scottish people did not vote for independence there would be a partnership of equals. It is important that if that is what the commitment is, it is honoured.

Q574 **Mr Marcus Fysh:** My final question is with regard to clause 11. Do you think there is the political will between the two Governments to come up with a compromise position that works, or is it now too late?

Mike Russell: It is not too late. I am absolutely clear that we are willing to enter into an agreement. I have made that clear all along. I was saying this yesterday in an interview, it is perhaps easier now because we are absolutely clear on what the one issue is that still remains to be resolved. We have gone through a very lengthy process and very substantial work has been done by all of us. I have acknowledged that. Mark has acknowledged that. David Lidington has acknowledged that. We have worked very hard at it. Now we have a single issue that requires to be resolved and it is a very clear issue. The House of Lords are discussing it on Wednesday. There is still time for that. The Bill in the House of Lords is not until 16 May. I am entering into discussion this week. I would like to see a resolution.

Chair: Does anybody else have anything they would like to add to that? Thank you for your candour. We are hopeful that there will be a resolution and we have not come here to ask divisive and unnecessary questions.

Q575 **Mr David Jones:** Mr Russell, as you are aware, the devolution settlement as currently framed confers powers upon the Secretary of State for Scotland to make directions requiring the Scottish Government either to take action or to desist actions in order to ensure compliance



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with the United Kingdom's international obligations. It is likely that there will be many new international obligations that the UK Government will enter into post-Brexit. To what extent are you concerned that this power may have to be exercised and what is your view as to the likely consequences politically as opposed to constitutionally of the exercise of such powers?

Mike Russell: I would hope that it did not have to be exercised because I would hope that the discussions we were able to have about the interest of the various parts of these islands could be resolved amicably between us. But the point is a very good one because it is one that illustrates that there is already a power that exists within the Scotland Act to tell the Scottish Government to do something. I cannot pretend I like that, but I acknowledge it exists, and that is part of the devolution settlement. Until the devolution settlement changes then that will not change.

What I believe being attempted in clause 11 is another backstop power to add to that backstop power, so that there is another way of ensuring that the Scottish Government does not do something. That is what we object to. I am not trying to overturn the existing constitutional settlement. That may be something I would like to see happen, but that is not what we are doing in negotiations. What we are trying to do is to ensure that we deliver something that is workable.

I would hope sense, negotiation and trust will produce circumstances in which there is an agreement. There will be issues, particularly trade issues, where there will be a substantial difference of opinion between Scotland, Wales, Northern Ireland and the rest of the UK. It is important that those are talked through in a sensible fashion, as happens elsewhere. It does happen in the Canadian system. It is a federal system, but it does happen in that system that the provinces that have responsibility for certain items are involved in those discussions. If you look at the Canadian treaty with the EU, it was required for those provinces to be involved in those discussions and it was the EU that required it so that there was a sensible set of outcomes. That is what we need to aspire to. But if we believe that inevitably there will be a need to implement things in that way that might be self-fulfilling and I do not want it to be.

Q576 **Mr David Jones:** Do you see the need for new formal structures to be put in place in order to accommodate this new relationship the UK will have with the rest of the world?

Mike Russell: I can see the need for structures to be put in place. I can see a pressing need to revisit the relationships, so they are put on a better footing and I support a statutory footing. That is why the contribution the Welsh Government made last year in the publication of their paper was very helpful.

Brexit, whether you support or not—and you and I are on opposite sides of that, but respectfully disagreeing with each other—creates a huge



changed set of circumstances. You therefore have to look at the constitutional settlement and say, "How do we strengthen that so that everybody believes that they are able to operate in the most effective way possible?" One of the things that Lord Mackay of Clashfern proposed in the House of Lords was a Council of Ministers of these islands that would look at the issues and frameworks and would discuss how they operate and there would be a dispute resolution procedure arising out of that. That seems to me the type of thing that we need to talk about. There has not been a genuine attempt to put the JMC process on a statutory footing, apart from a proposal by the Law Society of Scotland some time ago. It was done on the tailcoat of another Bill, which was not very sensible. It needs to be talked about.

Mr David Jones: And us.

Mike Russell: And yourselves as well. It goes without saying your wisdom on these matters. But it needed to be done and probably still needs to be done.

Q577 **Mr David Jones:** Beyond the Council of Ministers, what about institutional relations between the legislatures?

Mike Russell: That is important too, but we will not get there if the proposals presently being discussed essentially create the circumstance, as the current amendments that the UK Government are bringing in the House of Lords this week, that even if the Scottish Parliament votes against something it is taken to be consent. That is going in the wrong direction. If you are going to have a system that works then it should respect the decisions of the legislatures but should operate in a way that it is possible to achieve consent by negotiation and discussion. That is the best way to do it.

Q578 **Kelvin Hopkins:** If I may just add something to what has been said. Some 10 years or so ago I was a member of the predecessor Committee of this Committee and we visited Scotland. In a meeting it was put to us by an MSP that Scotland is culturally social democrat—much more so than England—and you are in government actively to benefit society and that is seen to be a good thing. For example, state aids, public procurement—all of these things will become free to indulge in after Brexit. Is this not an attractive prospect?

Mike Russell: It is a very beguiling argument you are putting. I do not agree with it for two reasons. One is because the operation of public procurement already reflects in Scotland the social democratic values. It is possible to do so with the public procurement process that we have. We have a different public procurement process south of the border. The possibility is that this is seen as a reserved area, which is of course the argument the UK Government are putting at the moment. That will become very much a UK-style public procurement process, which would have the opposite effect of the one that we wanted.



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State aids is an interesting one because people chafe about state aids very substantially, but I am a believer. It is not a heretical view; I believe in the importance of the single market. The state aids process is a very important process in underpinning the single market, and the benefits of the single market are espoused also very strongly of course by Conservatives and others over the years. The benefits of the single market are extremely powerful and therefore a state aid process is a benefit to that. Sometimes it is annoying, but most of the time, it operates in a way that allows that level playing field.

The parallel I will give you—and I speak as a former Environment Minister—is there are times if you are the Environment Minister you do chafe against the environmental directives because you want to do things in a different way. But the overall benefit of those environmental directives and the environmental policy that has been pursued has been enormously beneficial, so I am not tempted. In fact, I think the likelihood of a severe deterioration in those is probably what I am looking at.

Q579 Kelvin Hopkins: I will not prolong this, but there have been occasions when the European Union and its institutions have been very concerned and very sensitive about state aid and have challenged the use of state aid. They believe in a free competitive market, but they do not believe that specific Governments would help their own industries.

Mike Russell: There is a good argument for so doing. There are of course exceptions in state aids and the way in which you operate the state aid system is one which is not absolutely inflexible. I am certainly not saying the EU is a perfect institution, but I am saying that to demonise state aid in the way that it has been demonised is, in my view, inaccurate. To allow that to be an issue that becomes solely a UK issue will run the risk, in my view, of it becoming considerably worse for Scotland rather than better.

Q580 Chair: I am very interested in this area because of course the EU has tended to create very tight straitjackets around things like public procurement policy and state aids policy, which are basically international rules that the European Union is interpreting. To what extent are you saying that some of the flexibility to interpret the meanings of these international obligations should be held locally rather than laid down by the United Kingdom Government?

Mike Russell: Public procurement is an area where the Scottish Parliament's competencies intersect with EU competencies. There is an element of both within the operation of public procurement within Scotland. There is a specific Scottish public procurement organisation. It operates of course by EU rules, but it also tries to operate to reflect local circumstances. That is the principle of subsidiarity, which is a principle that underpins the EU as well as elsewhere. But then of course you can look at the WTO and its work in public procurement and say even if you were completely outwith the EU, even if you were determined to have nothing to do even with any voluntary agreement with the EU, you would



find yourself in pretty much a morass in Geneva as soon as you had done so.

I think the shared competencies are something that works for Scotland. Of course they are not perfect and of course there will always be an element of chafing on both sides, but I think that has worked pretty well and, with respect, I do not think it would work any better—in fact, I think it would work considerably worse—if those powers were reserved to the UK and the Scottish Parliament was forbidden from legislating within them for a period of up to seven years, which is what could happen.

Q581 Mr Marcus Fysh: One of the things we discussed in one of the sessions earlier was the idea of having practical workstreams through which we can together exercise this idea of a shared elucidation of our goals and not necessarily having to have them on a statutory footing. I am on the International Trade Committee of the House of Commons. We are undertaking an inquiry as to what the best methods are, looking at best practice around the world, of essentially building consensus within the nation, for the wider nation, for us to be able to have an idea about what our goals, for example, in making new international obligations, should be. Do you have any thoughts as to the way that Scotland might like to be involved in that sort of thing?

Mike Russell: There is discussion going on, of course, about what those structures might look like and I am very heartened to know that the Committee is looking at those things because I think it will be important to recognise that where there are frameworks operating, and a framework of some sort that operates in terms of trade, fully knowledgeable of the fact that international obligation is going to be imposed, as Mr Jones has said, would be very helpful. Those frameworks will apply in different ways and be of different types. You can look at a very deterministic framework, for example, in animal health, where it is quite clear you would wish to have a framework that recognised the same imperatives and operated in the same way in animal health.

My own view is it should also have a keeping pace power with the EU, given they are going to be passing primary legislation almost all the time, but that is another issue. That framework would be very different from the type of framework you are talking about where there needs to be a fairly wide-ranging discussion and formula by which international trade arrangements can be come to.

There would be some parts of that that would be require to be delivered in Scotland and therefore there has to be an agreement that can happen. That needs consultation and regular working together and a structure that is effective and which we all trust. Those are the elements that need to be put into it. We are presently quite a long way away from that, but it is quite right that we should look at it, and we should look at it elsewhere, as it does work—as I just indicated—in Canada and it does work in other places. We need to work out how it can work for us.



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Q582 **Chair:** Moving on, Mr Thomson, we discussed briefly the relationships between UK and Scottish officials, but can I press you a bit more on that? At a meeting of Perm Secs, the Scottish Permanent Secretary, Leslie Evans, gave what she has described as, "a pretty frank presentation on behalf of the three devolved Administrations about our experience of working with the UK Government on EU exit and the challenges and opportunities ahead." Could you, without wanting to cause you or anybody else embarrassment, set out what the difficulties are and what needs to be done about them?

Ken Thomson: It is an interesting question. You will have gathered from the Minister has said that there are substantial areas of disagreement between the Governments and part of the purpose of the work that officials do is to ensure that we can be frank about those, both as to the substance, which we have been talking about, but also as to the process. The process is challenging for all of us, in part because of the asymmetry that one of your previous witnesses referred to. The UK Government is a much larger organisation or set of organisations and it has to deal with a larger range of issues on any one day. Expecting everybody in it to be fully conversant with all the detail of the devolution settlement or the issues that arise between Governments would be unrealistic, but it is important for the system as a whole to have the capacity and the understanding within it to be able to focus on these issues where they do arise and make sure that we do not start from the wrong place, because that makes it harder to get to the right place.

Q583 **Chair:** What you are saying is that knowledge and understanding of what devolution is and how it operates is hampering the discussions because you have to start meetings by explaining some very basic things?

Ken Thomson: That can be the experience. There quite a lot of things that we do to build that understanding and capacity. The Cabinet Office runs a programme called Devolution and You, which is designed to spread that awareness around. We second staff to each other. On Friday, in fact, in Edinburgh, the policy profession had a four-nations conference with people from the UK Government, the Scottish Government, the Welsh Government and the Northern Irish Executive sharing our experiences and approaches to a range of policy challenges, not limited to Brexit.

Q584 **Mr David Jones:** The issue of devolution awareness in Whitehall has long been a problem. At the start of the coalition Government a system of devolution champions was put in place across Whitehall. Do you know if that system still prevails there?

Ken Thomson: Yes, it does. In fact, my counterparts in Whitehall have been recognising the need to strengthen that, given the significant additional weight that Brexit puts on the intergovernmental relationship, both formally and informally.

Q585 **Mr David Jones:** Notwithstanding the presence of devolution champions



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across Whitehall, there is still, in your opinion, a great deal of ignorance of devolution amongst officials in Whitehall?

Ken Thomson: "Ignorance" is your word rather than mine, but—

Q586 **Mr David Jones:** What would your word be?

Ken Thomson: I think it is hard for a large system such as the Whitehall system to be fully conversant with all the detail of both the devolution settlement and the issues that are live within it. What you need to have in order to make all of this work is a good general awareness and then the ability to focus quickly on the issues that need to be resolved. The experience that Mr Russell has been describing is one of having made significant progress on those issues, but not yet having got to a solution on that one. That is the prime challenge at the moment in that relationship.

Q587 **Chair:** I was parliamentary private secretary to Michael Forsyth when he was Secretary of State for Scotland and I would say this problem predates devolution. It is embedded in the Whitehall culture, "Oh, what about Scotland? What about Northern Ireland?" What more can be done to improve the communication with officials who are advising English Ministers and UK Ministers on policy, their familiarity with the devolution principles and settlement?

Ken Thomson: To give you quite a brief answer, there is a combination of formal structures and informal relationships and networks and we do our best to ensure that the second of those happens through the Civil Service contacts. The formal side of it takes us back into how the JMC works and whether we could strengthen that.

Q588 **Chair:** You mentioned this policy profession four-nations conference. What came out of that conference that is going to make it better?

Ken Thomson: Out of that, and also out of exchange visits and so on, what I took from that event last Friday was that, setting aside Brexit, but even embracing the set of issues that Brexit throws up, there is a lot of commonality in the kinds of challenges that we, as policy officials, face in the four Administrations. They tend to be complex and systemic and not susceptible to quick wins or easy answers. Back at the time that devolution happened there was a phrase that was used a lot. This was created in some sense as a policy laboratory in the United Kingdom where it would be possible, for example, for the different Administrations to take different approaches to, for example, smoking cessation. Scotland introduced a ban on smoking in public places before other parts of the UK. In many places, that system works. You see approaches being taken that are different between the different Administrations and the Administrations learning from each other, both Ministers and officials, but it does not always get us agreement on the most intense discussions.

Q589 **Chair:** To what extent do you feel there is a sense of obligation on Permanent Secretaries to ensure that they include advice about



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devolution implications in any policy they are advising a UK or English Minister to adopt?

Ken Thomson: I would be surprised if that was not the case, especially in the Departments in Whitehall that have the most salient devolution issues.

Q590 **Chair:** Where does it fall down? Where does the lack of attention come from?

Ken Thomson: There are two things that can get in the way of making progress on reaching agreement and one is lack of knowledge and familiarity with the issues, and that can usually be resolved if you can get the attention of people focused on to it. The second is simply that the Administrations are led by different politicians and they have different views. If the policies are different, then you can expect a disagreement and then you have to find ways of resolving those through a political process.

Q591 **Chair:** We know there is plenty of that. To what extent has the frequency and quality of intergovernmental meetings improved the flow of information to the Scottish Civil Service so that the Scottish Government is more capable of preparing for Brexit?

Ken Thomson: The pattern and the flow of information very much reflects that driven by the ministerial engagement that Mr Russell has mentioned. If there is going to be a JMC(EN) or a plenary, then in the run-up to that there will be a lot of communication and activity. But it would be wrong to give the impression that this is somehow occasional or a set piece; there are e-mails and phone calls between officials in the different Administrations all the time.

Q592 **Chair:** But the regularity of JMCs actually intensifies the official exchange of information.

Ken Thomson: It focuses attention in the way that I described, yes.

Chair: As one would expect. Anything to add?

Mike Russell: The regularity of JMCs does that, but probably it fades away quite quickly. There needs to be a more sustained approach.

Q593 **Dr Rupa Huq:** The Welsh Government has put forward proposals for the reform of intergovernmental relations and it has popped up in every panel we have spoken to today and also in Cardiff when we were there. Do the current set of arrangements require reform? You have just said the JMCs are unreliable. What would you do? How would you reform them?

Mike Russell: I think everybody agrees on the need for reform. This Committee has agreed on that, every parliamentary Committee that looked at it, a huge amount of academic study on this and there have been very small reforms that have helped the process a little. I have to



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say that Damian Green slimmed down the JMC(EN) quite substantially from what it had become. There is a tendency for UK Ministers to attend, and more and more UK Ministers to attend. I think it works best if it is a comparatively small ministerial meeting, ideally one from each of the devolved Administrations—Northern Ireland always has two, of course—and then the equivalent number of UK Ministers. It does not help if it spreads beyond that.

I once went to a JMC (Europe) meeting in 2009, at which I believe there were 21 UK Ministers, myself and Rhodri Morgan. It did not produce much dialogue in terms of what took place. The small reforms have worked. I commend the Welsh paper; I think there are lots of good things in it. There now needs to be some determination to produce a reformed JMC system that can stand the processes of Brexit and go beyond it. That will require the UK Government to want that to happen. I think there is an indication that the Welsh Government and the Scottish Government are very keen to have reform. I have not seen any equivalent desire from the UK Government to have that reform. Of course there is a difficulty with Northern Ireland. There was a revised memorandum of understanding that was to be implemented, which was never able to be implemented because they could not get agreement in Northern Ireland, so there is that issue to resolve, but it does need to be resolved.

Q594 Dr Rupa Huq: Just an aside, do you know why it is that we, as Westminster parliamentarians, were not allowed to have this meeting in the Scottish Parliament? Is that history or something?

Mike Russell: I do not know, but I am sure we can find somebody who does know.

Dr Rupa Huq: It just seems a bit anomalous. We were able to go to the Cardiff Assembly.

Mike Russell: The separation between Government and Parliament is such that I would not have the answer to that.

Dr Rupa Huq: It is not your fault.

Chair: We do meet in the Cardiff Assembly.

Dr Rupa Huq: Yes, we were there just last month.

Mike Russell: I am unaware of that, but no doubt an answer can be provided.

Chair: To be fair, I think there are some reciprocal arrangements we could offer to the Scottish parliamentarians that we are working on.

Q595 Dr Rupa Huq: You are welcome anytime.

How would you see dispute resolution between the two arms, three arms, whatever. Would it be Acas? Relate?



Mike Russell: That has always been the most difficult element in the JMC, because essentially presently dispute resolution means that the UK Government get to decide, so it is not even-handed. The JMC equally does not meet outside London. I think it has met twice outside London, both times in Cardiff. The agenda is usually essentially agreed by the UK Government. There needs to be a much more equitable process; maybe an independent secretariat would help.

Dispute resolution: it is very difficult to see, because the concept of Westminster parliamentary sovereignty gets in the way of equitable dispute resolution. I think that requires a lot of discussion, because without some discussion of that, then we will not get a dispute resolution that is satisfactory to the devolved Administrations. Presently that undermines the whole process, because at the end of the day you cannot really get anything out of it if you come to a disagreement.

Q596 **Dr Rupa Huq:** Finally, should there be—I am sure there should be—inter-parliamentary scrutiny of intergovernmental relations? How should that be constituted?

Mike Russell: There is an element of that in the Scottish Parliament. I report, and from each JMC I would write to the relevant Committee telling them it has taken place and what has been discussed and I am often questioned upon it. Indeed, in terms of Brexit, I have taken to reporting to the Chamber from time to time on key developments and would continue to do so. I think that does require to take place. It would be interesting. I know there are informal meetings now between some of the parliamentary Committees. I think you yourselves have taken part in those. I think it would be interesting to see how those could develop.

Q597 **Chair:** Can I intervene on just one thing? We were talking a minute ago about the Welsh Government's proposals for the reform of intergovernmental relations. Can I be clear, do you support those?

Mike Russell: I support them in the sense that I think there are lots of good ideas in them. They have never come to the stage where we have sat down and said, "We will take this one and not that one," but I support the process that they have started off and engaged in. There are elements in them; the idea of a Council of Ministers I think is absolutely right. When you come to issues like qualified majority voting, I am not against that, but I would want to spend some time considering it. There are issues for the Westminster Parliament more than for ourselves. But I think they have started something very well. Unfortunately, it has not yet been taken up by the UK Government as part of the process of change.

Q598 **Dr Rupa Huq:** This Committee ran an online public forum to canvass public opinion—I think there were 1,300 responses or something like that—in advance of this session. I think the figures have been slightly manipulated to take out spoiled responses, but a staggering 98% of all respondents indicated that the UK and Scottish Governments and Parliaments do not successfully work well together and only 0.1%, a tiny



fraction, indicated that it is all working harmoniously. What can be done to develop and rebuild—maybe it was never there—or build in the first place mutual trust and respect between the Westminster and Scottish legislatures?

Mike Russell: I think you have to see that as part of a wider issue. There is a survey today that was published in terms of confidence in the UK political system and the lowest confidence in the UK political system is in Scotland at 16%. In London, I think it is 41%. There is a very substantially low confidence in the UK political system. In surveys, the Scottish Government gets a much higher rating than the UK Government all the time in terms of what it should do and trust in it. There is an issue in there that is part of the process of our times; devolution has been part of that process.

I think it is possible to envisage a better set of arrangements through formal arrangements between the Governments through a JMC process; that has never worked. Perhaps we are all at fault for allowing that to continue for 20 years, knowing that it is deeply flawed and it is not satisfactory for anybody. I have never heard from any colleague in Scotland or in Wales satisfaction with that system, so it is a matter of reform of that system. Maybe Brexit is the impetus that is needed for a radical reform of that system. But there also needs to be an understanding that for the devolved Administrations, they see that as being a system in which the four countries sit down and come to an agreement together; they do not just go to London to a meeting and it is a foregone conclusion.

I am delighted to see you here, but you yourselves know—and I know the Chair is a seasoned traveller to and from Scotland—for me to go to a JMC(EN) in London is considerably more difficult, for example, and the Welsh to go to a JMC(EN) in London and much, much more difficult than for the UK Minister going to a JMC(EN) in London. That needs to be factored into these processes as well. We have some issues to resolve and it would give some confidence perhaps if we were seen to be attempting to resolve them.

Q599 **Mr David Jones:** Mr Russell, do you think that part of the problem is that the current devolution settlement is pretty inflexible—that there are hard edges of devolution that could do with being softened and elided? I will give you an example. I wanted to come in on the earlier session and ask a question about Mr Rennie, who essentially said that the health service, for example, in Scotland did not have any interest for England, which of course is not the case in Wales, as you probably know, where English patients rely heavily upon medical services provided in Wales, yet of course they have no political representation in the Welsh Assembly. Do you think that maybe that is an aspect of the matter that needs revisiting, trying to find ways of accommodating people who are at the moment being disadvantaged by these hard edges in the devolution settlement?



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Mike Russell: I cannot think of any such hard edges in the Scottish settlement.

Q600 **Mr David Jones:** I think that is probably because you have such a large thinly populated border area between Scotland and England.

Mike Russell: There are some pragmatic solutions applied where there are issues that could arise. For example, and many of you may know this, the administration of the Solway and the Border Esk are done in different ways as rivers. The Solway is administered by Scotland, the Border Esk is administered by England. That is a practical solution, rather an elegant practical solution, to the administration of two rivers that might create difficulties in terms of fisheries of one sort or another. I do think there have been pragmatic solutions. I am unfortunately old enough to have been in at the beginning of devolution, and at the start of devolution there was a lot of work on cross-border bodies so we would understand how things worked.

I do think the opposite might be true. I think we need to be clear exactly and codify exactly what the relationships are. Because we have a reserved powers model, that is clear and we should stick to that, but perhaps what we now need to do is to make sure that we are clear and codify the way in which we work together. That may be the substantial issue, which of course you are addressing here, because we have never had that in a clear fashion.

Q601 **Mr David Jones:** Possibly, for example, Scottish participation sometimes in Westminster Committees and vice versa.

Mike Russell: That would be an idea that is worthy of discussion. Equally, when Scottish Parliament Committees ask Westminster Ministers to appear in front of them to discuss, that should be seen as something worth doing. I know that David Davie is incredibly busy, but I think he has been asked five or six times and has not been as yet, so that does create a circumstance in which people say, "Maybe he does not want to come." I have to say that I appear in front of Scottish Parliament Committees and Westminster Committees and I think it is important that we all do that.

Mr David Jones: I can only say that as a former member of the Welsh Affairs Select Committee, I understand your pain.

Q602 **Kelvin Hopkins:** Briefly, Mr Russell, I heard the word "fishing" in your recent oration. I wonder if Mr Thomson could tell us whether there have been any deep-dive discussions on the future of the fishing industry. I have to say that there have been some excellent presentations by the fishing industry at Westminster, in which Scottish fishermen have taken a leading role, I have to say. It strikes me from these presentations that we could solve all the problems throughout the CFP and have a much better fishing industry for everyone concerned. Have there been any discussions, Mr Thomson?



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Mike Russell: Am I allowed to respond as well?

Ken Thomson: I will leave the question of the fishing policy to Mr Russell, but yes, on the question of areas in which we need to understand the issues thrown up by Brexit, fisheries is obviously a key one of those, as is agriculture and the rural environment generally. Indeed, when we are thinking about the areas in Whitehall where we need to ensure that the relationships are the best and we work together well, whether or not there are disagreements, then our counterparts in DEFRA are near the top of that list. Yes, there is a lot of work going on around agriculture and fisheries.

Mike Russell: One should be careful about seeing the Scottish fishing industry as a monolithic industry, of course. I represent the constituency of Argyll and Bute, which has a very substantial fishery and the Clyde Fishermen's Association is no longer a member of the SFF. The Scottish Fishermen's Federation of course have a different view of how things should proceed, particularly as their main market would be exporting shellfish to the Continent and the prospect of being able to do that without let or hindrance, if I may call it that, is not at all good at the present moment.

Q603 **Chair:** The devolved competencies and powers of the Scottish Parliament have developed over the period since the Scotland Act in 1998. Until such time as you achieve your desired goal, which is Scottish independence, do you have a vision of how devolution should operate as part of the United Kingdom?

Mike Russell: If I may go back and quote Donald Dewar, at the outset it is a process and not an event. Devolution has been changing and maturing and we learn more about it. I think it was David Cameron who observed that the UK Government seemed to have devolved and forgot. That might be one of the issues, for example, as Ken has talked about, in terms of knowledge of devolution. I do think the time is right to take the relationships and to make sure that they operate in a well-understood and well-ordered way and the way in which they presently operate is not well understood and often is not well ordered, so I think that is a matter for attention. You are right to say, Chair, that my own view is that there needs to be a continued growth in the powers of the Parliament and then we will be able to operate as good neighbours rather than, as the old adage has it, as a surly lodger.

Q604 **Chair:** Until such time as Scotland votes conclusively to leave the United Kingdom, if devolution is to continue to be a process, it has to be a two-way process and these hard edges, which my colleague Mr Jones was talking about, perhaps need to be blurred a little more. I am thinking of other areas, not so much cross-border issues, but that the development of these frameworks are going to be very blurred areas of shared responsibility. Is there anything else you would like to add?



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Mike Russell: We have said from the very beginning of this process that we are more than willing to enter into those frameworks; we are keen to see those frameworks established; they have to be established on the basis of trust and mutual respect and operated in that way. Provided they can operate in that way, then you will find we will be effective partners in operating them.

Q605 **Chair:** What do you think are the immediate next steps to pursue that?

Mike Russell: We have to resolve the issue of clause 11 of the Bill on the basis of trusting each other and then we can get on and set those frameworks up. The deep-dive process has been successful. By and large, we have learnt a great deal. There is a great deal of information in the system now. Those frameworks can operate—they are not all going to be identical—but in order to do so, we have to have the ability to operate as partners.

Ken Thomson: Can I just add one point to this question of blurring in the responsibilities? I would take the opposite view, which is that it is really important to be clear about which Government is responsible for and accountable to Parliament for what. Once you are clear about that, then you need to emphasise the importance of working together. This does work well in many areas, for example, in co-operation on terrorist incidents or terrorist threats, where you have a separate independent prosecutorial system and police service in Scotland needing to work very closely with its counterparts in the rest of the United Kingdom. That does work pretty well, so it is possible to have sharp edges on accountability and responsibility and work together well.

Q606 **Chair:** In organisational terms, I think you would call it clarity about roles, responsibilities and tasks, even if there is shared responsibility and shared accountability.

Ken Thomson: Exactly.

Chair: That is the way I would phrase it. Would you agree with that?

Ken Thomson: Yes.

Chair: Can I add that we are very pleased to have had new evidence, which we have agreed to publish today, from the Presiding Officer of the Scottish Parliament, Ken Macintosh? He has expressed very strong support for inter-parliamentary relations and cross-parliamentary scrutiny of inter-governmental relationships. We agree that that is a very important part of the building of trust.

Unless there is anything else you want to add, we can let you go pretty well on time, Minister.

Mike Russell: Thank you. Thank you for coming to Edinburgh. I am sorry your original visit was snowed off, but I am glad you are here now.



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Chair: I am very sorry it was, but it seems that each time my Committee comes to Edinburgh, the Government suffers a resignation, so next time we come we hope to be less disruptive.

Mike Russell: As long as it is not the Government of which I am a Member. Thank you.

Chair: Thank you very much indeed.