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The Select Committee on the Constitution

Inquiry on

SCOTLAND IN THE UNITED KINGDOM: AN ENDURING SETTLEMENT

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11 am

Witnesses: Professor Michael Keating and Dr Mark Elliott
Members present

Lord Lang of Monkton (Chairman)
Lord Brennan
Lord Cullen of Whitekirk
Baroness Dean of Thornton-le-Fylde
Baroness Falkner of Margravine
Lord Lexden
Lord Powell of Bayswater
Baroness Taylor of Bolton

Examination of Witnesses

Professor Michael Keating, Director of the Economic and Social Research Council, Centre on Constitutional Change, and Dr Mark Elliott, Reader in Public Law at the Faculty of Law, University of Cambridge

Q1 The Chairman: I welcome both our witnesses this morning—Professor Michael Keating, director of the Economic and Social Research Council’s Centre on Constitutional Change and part-time professor at Edinburgh University; and Dr Mark Elliott, reader in public law at the Faculty of Law in Cambridge and a fellow of the Bingham Centre for the Rule of Law. Welcome to you both. I do not know whether you read our last report, Dr Elliott, in which the rule of law featured when we were looking at the role of the Lord Chancellor.

Dr Mark Elliott: Indeed.

The Chairman: But we will not question on that this morning because we have committed ourselves. We are most grateful to you for coming. We are tackling the draft clauses that have just been published and intergovernmental relations in general. There is an interrelation and an overlap, but that may not always be relevant in some of the questions that we ask or in some of the answers that you give. However, we are happy to cover that territory in any way that emerges in the course of questioning.

I will start the ball rolling by asking whether you feel that the constitutional changes in the Command Paper had enough consultation and scrutiny in advance.

Professor Michael Keating: No, I do not think that they did. This goes all the way back to the famous vow made in the last week of the Scottish referendum campaign, in which the unionist parties promised that there would be more powers for the Scottish Parliament in the event of a no vote. Then there was what I thought was an unrealistic timetable that proposals would be produced by St Andrew’s Day and draft clauses by Burns night, and that
these would be agreed among the parties. This was not debated within the general public. There is not a lot of understanding about what these involve. It was done in excessive haste, and there are all kinds of technical problems. There was no time for a proper discussion with representatives of civil society, and there was no time to do a lot of the technical work needed to make sure that the details of the proposals were right. I could not see what the hurry was. Furthermore, the Command Paper has been almost superseded, as far as the Labour Party is concerned, because it has produced yet more proposals. So we do not even have an agreed draft set of proposals among the political parties. It would have been healthier if the parties had paused a little and taken their proposals into the election, as this would have provided an opportunity for a proper discussion in the next Parliament.

**The Chairman:** Before I go to Dr Elliot, are there specific areas to which you would like to draw attention in which there might be serious implications, either for Scotland or for the rest of the United Kingdom?

**Professor Michael Keating:** Yes, there is the concept of detriment that has been introduced in the Command Paper, which says essentially that if one Parliament does something that imposes a cost upon the other Parliament there should be compensation. That sounds straightforward enough, but it has not been defined properly and potentially has extremely wide ramifications. One could have interpreted it in the narrow sense that if there is a transfer of competences, the money should go with that. But in a broad sense, it seems that almost anything that one Parliament could do could affect the other Parliament. We need to discuss the scope of that—whether it is to have a narrow or broad application, because it could be extremely difficult and get us into all kinds of political and legal difficulties unless it is properly specified.

Another area is to do with welfare, where instead of thinking about what broad blocks of competences the Scottish Parliament might have, the approach has been to take little bits of existing policies out, which is going to cause great difficulties for the rollout of universal credit, which has not yet happened in Scotland. We do not know how that will work. It may have been appropriate at least to pause the rollout of universal credit in Scotland until what was going to be devolved had been worked out.

**The Chairman:** We will come back to these subjects in the course of our discussion.

**Dr Mark Elliott:** I agree with much of that. It is extraordinary that this has been, or is being, done in such haste. While it is entirely politically understandable why the vow was made and why this timetable is felt to have been imposed, it is constitutionally quite extraordinary to
be contemplating really quite significant changes of this nature and to be trying to hurry them through in this way. I welcome the fact that this sort of scrutiny is happening now, and that only draft clauses are being scrutinised, because there is significant room for improvement in some areas. A concern that that raises is whether this scrutiny process is as helpful as it might be if what is being scrutinised is preliminary and will have to change substantially between now and when more crystallised proposals are brought forward. However, it is good that this is happening.

The Chairman: Thank you, and can I also thank you for the paper that you submitted in advance on the permanence or otherwise of the Scottish Parliament and on the Sewel convention?

Baroness Taylor of Bolton: Can I follow up on this? The vow, which I am not sure was totally politically understandable, has led to more problems than it solved, although that is a personal view. Some of the follow-on consequences mean that we are now in a situation where we have what seems to many of us to be a really difficult position for Parliament. We have, more or less, a fait accompli being promised after the next election, regardless of the outcome. Many people would agree with what you have already said: that these new clauses were produced in haste, that there were technical difficulties, and that there was a lack of consultation. However, we are in a new situation, because we are being presented with something that Parliament has a responsibility and a duty to scrutinise, and yet the actual outcome is predetermined by political leaders. How would you recommend that the next Parliament deals with this?

Professor Michael Keating: We do not know what the next Parliament is going to look like after the election, and there is no way in which the existing party leaders can bind the next Parliament. It may be a very fragmented Parliament, there may be no majority, and I suspect that this whole package will be reopened again and negotiated. When it is, I just hope that Parliament will take the necessary time to think these things through properly.

Dr Mark Elliott: There is a political and a constitutional dimension to this. I agree that in political terms it is clear that the Smith agreement is heavy on compromise, but whether that issue is re-opened will depend on the outcome of the election. In constitutional terms, Parliament should feel entirely at liberty to deal robustly with the scrutiny of these proposals. If we compare this with, for example, the Good Friday agreement, we are in very different constitutional territory. The Good Friday agreement represented the culmination of a long, thorough and at least in some respects transparent process, and one that
ultimately received the assent of a large proportion of the people of Northern Ireland and the Republic of Ireland. When Parliament is presented with a Bill like the Northern Ireland Bill that implements that kind of settled constitutional view, its hands are tied to an extent, and rightly so. The Smith agreement is not in that league. I do not think that Parliament constitutionally should feel that it has been presented with a fait accompli, whatever the politics of it might be. It should bear that distinction in mind.

Q2 Baroness Taylor of Bolton: One of the pillars of the Smith commission report was for a durable settlement. Do you think that the issue so far, the draft clauses that we have seen, make for workable legislation on a durable basis?

Professor Michael Keating: No, I do not think that they do. I can see numerous traps there. One is this notion of detriment that I have mentioned. The other is the attempt to give the Scottish Parliament new tax-raising powers but not do anything about the Barnett formula. That is technically very difficult, because we want to know exactly what adjustments will be made to the Barnett formula in response to more tax powers. That should be more transparent than the Barnett formula currently is, and it is politically very difficult because there are a lot of people and MPs in England and in Wales in particular who want to see the Barnett formula, along with financial powers for the Scottish Parliament, revised. However, the way in which the parties are proceeding has been to say, “We are just going park the Barnett formula and not do anything about it”. That is highly problematic.

Q3 Baroness Falkner of Margravine: Professor Keating, I wanted to press you a little on your views about how—I will not use the word “durable”—sustainable the Smith proposals and the draft clauses are in the light of Labour’s commitment to a new home rule Bill and what you have just said about the potential for another commission being established. Am I correct in deriving from your comments that you do not think that this will be the foundation, the basis, for an eventual Act of Parliament?

Professor Michael Keating: No, I do not think so, and if the parties were to try and drive it through, it would be a mistake. The other thing that we do not have is consensus within Scotland. I know that all the parties supported Smith, but they did so for very different reasons. The SNP said, “We’ll ask for everything and take what we can”, while the other parties said, “We’ll concede this and that”, and they all said, “We’ll accept these powers”. However, there has been no consensus in society. The yes side in the referendum campaign has to accept that they lost and therefore say, “Let us join in a realistic settlement for what Scotland can do within the United Kingdom”. On the no side there has to be willingness to
recognise that there is going to be a compromise. This has to come first from Scotland; if there is agreement within the Scottish Parliament, there has to be agreement with the rest of the United Kingdom. All this takes time, but that is how you build a durable settlement.

**Lord Powell of Bayswater:** I absolutely agree with that last remark, but I want to come back Dr Elliott’s point about Parliament’s continuing ability to scrutinise. Of course in theory that must be right. Indeed, we can talk about it, but have we not been stitched up? Will the Whips not be out? The Whips will say that this is what was agreed and it must stand, and scrutiny will be a bit of a farce. Do you not think there is a danger of that?

**Dr Mark Elliott:** I entirely agree with you. That is why I said that the politics and the constitutionality of it are two distinct matters, and the politics may well override and overwhelm the constitutionality. This raises wider questions, in which this Committee has an enduring interest, of how we do constitutional reform and whether this is an appropriate way to do this. It perhaps demonstrates that it is not.

**The Chairman:** No disagreement there.

**Q4 Baroness Dean of Thornton-le-Fylde:** Good morning. For obvious reasons, the majority of the questions and discussions that we have been having are about Scotland, but I would like to move to the impact on the union as a whole, which is probably more important. I want to ask you about welfare, but not yet. Professor Keating referred to it. What in your view are some of the potential implications for the union as a whole of the new devolution settlement put forward by Smith?

**Professor Michael Keating:** One thing that the UK has to come to terms with is that we now have some kind of federal system in this country. It is not a conventional federation. There are different kinds of federalism and federal systems, and this will be a very asymmetrical federation. The notion of federalism is about dividing power and recognising that power is divided. At the centre, as well as in the devolved territories, there has to be recognition of that principle. People are starting to talk about federalism now, but nobody has ever defined it. That is a just a general way of thinking: that the centre as well as the devolved Administrations have to take this into account.

There is a huge question about the distribution of finance, which has been managed over the years since devolution, because there used to be plenty of money to go around. Now there no longer is, obviously. There is a great deal of discontent in other parts of the United Kingdom about what is perceived as Scotland’s favourable deal from the Barnett formula, and that is just not going to go away. At the centre of any kind of devolved or federal system
you have to have some agreed principles for distributing resources. You will always have arguments, of course—it is about money, so that is perfectly natural—but you at least have to have some principles by which you can resolve these. The Barnett formula is based on no principle whatever. It was thought up as a short-term expedient back in the 1970s and it remains only because nobody has thought of a better way of doing things.

**Dr Mark Elliott:** I agree. The notion of shifting towards a federal model is clearly raised by what has been proposed. Lady Hale, the Deputy President of the Supreme Court, said three years ago that we now have a federal constitution in the UK, so we may already be there. In terms of constitutional law, we are not there yet, and when we come to talk about draft Clauses 1 and 2 I will argue that they will not get us there either in strictly legal terms. It has been clear from the beginning that devolution is irreversible in all political senses, and in broader constitutional terms what has been proposed simply cements this idea and makes explicit what has been implicit all along.

**Q5 Lord Lexden:** There is no curbing of this extraordinary tendency to proceed in one part of the United Kingdom without reference to the implications elsewhere. Corporation tax is being brought forward in Northern Ireland, naturally sparking in Scotland an interest in a similar arrangement. It is an extraordinary theme from which our politicians seem to be unprepared to break.

**Professor Michael Keating:** That is right. I am very sceptical of the idea that you could resolve everything in the UK constitution in one go—a big bang approach—because you just overload the agenda and nothing ever gets done. On the other hand, simply proceeding piecemeal is not very satisfactory either. Constitutional change takes place when the political circumstances are right, not because philosophers come up with a plan and people adopt it for good reasons, so politically we have to be realistic. But at least when we are proceeding in one direction, we should be aware of the consequences for other parts of the United Kingdom—that is what is missing here—and not just the consequences for Scotland or Northern Ireland but for the centre of the things that you are doing in the devolved territories.

Thinking about how the devolved territories can be represented in the centre, one thing that we are missing is federal institutions at the centre—a second chamber. We have been talking about the reform of this House and how that might work in. One idea is that there should be a chamber of territorial representation. As well as devolving to the peripheral territories, we should be thinking about how the peripheral territories play in the centre as
well. We have not really had that conversation. Instead, we have proceeded piecemeal, one territory at a time.

**Baroness Dean of Thornton-le-Fylde:** The second part of my question is: are there any constitutional implications of the proposals in the Command Paper for welfare and fiscal devolution?

**Professor Michael Keating:** Mark is the lawyer, so strictly speaking it should be answered—

**Baroness Dean of Thornton-le-Fylde:** Have you seen what Professor Nicola McEwen wrote—

**Professor Michael Keating:** Yes, I have seen Nicola's submission.

**Baroness Dean of Thornton-le-Fylde:** —on the need for “ongoing intergovernmental collaboration … way beyond the Joint Ministerial Committee”, and some mechanisms to manage policy interdependence on a longer-term basis? She ends by saying that if there is none, that will lead to “growing pressure for a further revision of the devolution settlement”.

**Professor Michael Keating:** On the intergovernmental side, I say in my paper, which I submitted for this Committee, that, yes, this is problematic, but I am very suspicious about proliferating intergovernmental mechanisms all over the place, because you plateau the institutional landscape. It is more important, first of all, to get the balance of powers right. What has come out of the Smith commission and the Command Paper is a bit of a hotchpotch of competences here and there without any clear blocks of competences belonging at one level or the other. That is what is going to proliferate all these interdependencies.

**Baroness Dean of Thornton-le-Fylde:** Could you argue, therefore, that welfare devolution is in fact not welfare devolution because so many elements of it are reserved?

**Professor Michael Keating:** Indeed, it is not welfare devolution; it is interpreted in a very narrow way. On housing benefits, for example, there is strangely worded clause that is supposed to deal with the so-called bedroom tax/spare room subsidy issue. That is a very specific issue. Instead of saying, “Let’s devolve housing benefit”, or, “Let’s devolve universal credit” and having a coherent block of things that the Scottish Parliament looks after and other things which the Westminster Parliament looks after, you have bits and pieces that are pulled out. That just unnecessarily complicates matters. I do not think it is effective policy-making; it could give rise to all kinds of legal complications and to dysfunctions, because you
do not get things co-ordinated in the right way. We could have avoided that by taking time to think through the welfare reform and the devolution that are going on and how those two processes can come together in a coherent way. That has never happened. In my centre we are trying to do this, but I fear we may be too late, because by the time we have some proposals this legislation might already have gone through.

**Dr Mark Elliott:** There is nothing I want to add.

**Q6 Lord Brennan:** Professor Keating, Chapter 2 bespeaks financial co-operation and financial responsibility by central and devolved government. So that we understand what the Bill does not explicitly deal with, what happens if things go disastrously wrong and Edinburgh cannot pay its way? It remains the fact, does it not, that the Bank of England and the UK central government are the ultimate guarantors of the functioning of the Scottish economy. If that is correct, you will remember from your visiting professorship in Spain the degree of tension and the complications that have arisen during the recession, whereby central government had to rescue nearly all the autonomous governments' finances at enormous cost. It is not in the Bill, but it ought to be widely known, do you not agree, that this is the correct state of affairs in Scotland, which overall is financially subservient to central government.

**Professor Michael Keating:** The Scottish Parliament has to run a balanced budget. That will be true under the Smith proposals and those in the Command Paper. It is not allowed to run a deficit, which in some federal systems devolved Governments are doing. The main problem about financial viability concerns borrowing powers. If the Scottish Parliament is to get them, the UK Government will have some kind of responsibility, given that this will all count as UK borrowing in international and European statistics, whether as the Scottish Parliament, local government or whatever. However, the provisions proposed are quite restrictive in that regard. The Scottish Parliament will have very limited borrowing powers. This is true now of devolved Parliaments throughout Europe—indeed, throughout the world. A recent IMF publication demonstrates this. For example, the Spanish autonomous communities can no longer borrow in the way they used to in the 1980s and 1990s, because Spain has to ensure that it meets the European deficit targets, and that includes the devolved Administrations. So I think there has been some learning about that and I would not be too worried about the possibility that the Scottish Parliament could go bankrupt because its borrowing power will be very restricted.
Lord Brennan: I was not so much thinking about whether it would deliberately or negligently go bankrupt but about a major recession in which central government have to bail out devolved Governments.

Professor Michael Keating: Yes. That risk is increased the more tax powers the Scottish Parliament has; so it relies less on transfers from the centre but to a large degree on devolved income tax and its assigned share of value added tax. These are vulnerable in a recession because tax receipts will reduce and there will be no automatic mechanism for compensating from that situation. Therefore, the Scottish Parliament will bear the full risk. On the other hand, if there is a boom in Scotland, it will get all the benefit from that. Therefore, there is no countercyclical mechanism built into this. There is some provision for the Scottish Parliament but it is not clear how that will work as regards the ability to borrow in recessions. That needs to be clarified. If you have tax-raising powers, you need borrowing powers because you run up a surplus in good times and then you can run a deficit in poor times. That has not been thought through properly, but it is very important.

Lord Powell of Bayswater: I had wanted to pick up Professor Keating on the intergovernmental aspects, but perhaps we can come to those later. Can we come back to the question of the voting age for 16 and 17 year-olds? Is this not another case of Parliament getting stitched up? Here is a major constitutional change if it were to be applied to the UK, and it has not been done in any other major European country—I think in any other European country at all—yet it is going to be implemented in Scotland by secondary legislation, with Parliament having no chance to effect it. There must be a strong likelihood of a carryover into a future debate in England. Is it right to do these things by secondary legislation, and what else is going to be done by secondary legislation?

Professor Michael Keating: Secondary legislation or a Section 30 order can give the Scottish Parliament the power to determine the voting age, so there will be a parliamentary process but it will be done within Scotland. Constitutionally and legally, that has no effect on anywhere else in the United Kingdom, but politically it will be seen as some kind of precedent. I have the impression that following the experience of the referendum political opinion across the UK is beginning to change on the issue. Some parties in Scotland have already changed their view, having opposed it, saying that it worked pretty well. However, it will still be up to Westminster to decide what the voting age will be in other parts of the UK.
Dr Mark Elliott: It would introduce a great anomaly if people who are 16 and 17 can vote in elections to the Scottish Parliament but are disbarred from voting in elections to the UK Parliament. It puts an onus on those who are trying to justify the status quo in the rest of the UK. This raises a larger question. One of the points of devolution is that different parts of the country are supposed to be able to do things differently—be that on prescription charges, tuition fees or whatever. The question arises as to whether we reach a point at which we say that certain constitutional changes are so significant and cross-cutting that it does not make sense to deal with them on a devolved basis. My sense is that this matter crosses that line.

Lord Powell of Bayswater: You put my point much more eloquently than I did. It is essentially what I was trying to say. In a sense, the change could be done by the back door; because we are doing it by secondary legislation for Scotland, it embeds it there, and the chances of Parliament being able to have a wholly independent debate on the issue here will be lessened. This is of such consequence that it ought to require more than just secondary legislation for Scotland.

Professor Michael Keating: I see no good reason for it to be done by secondary legislation. The only reason that I can think of—I assume that it is the reason—is that it is being rushed through in time for the 2016 elections to the Scottish Parliament and, to revert to my earlier point, making these kinds of changes to that kind of political timetable is not how we should make these sorts of constitutional reforms.

Q7 Lord Brennan: Do you advocate an objective way in which to create a constitutional framework for the future in something like a constitutional convention that embraces all four countries and their futures together, or are we stuck by historical and political circumstance and doing it country by country, hoping for the best? You are both talented men. Is there some way in which one can combine the two—a constitutional framework within which actual progress can be made?

Professor Michael Keating: I am not opposed to a constitutional convention for the UK that could ventilate these issues and have a discussion. I am very sceptical as to whether it would ever reach a conclusion, because the situation is so different in the various parts of the United Kingdom that there will be many demands. For a long time I lived in Canada, which has been trying to amend the constitution since 1867 and has never succeeded. Every time it is attempted, some other group says, “You have forgotten about us. We need to be in there”. People therefore just kind of muddle on reasonably successfully. There may be a
point at which some kind of constitutional convention in the UK could be the culmination of a process of thinking about how the various parts of the UK fit together, but you are never going to get agreement across the UK on the foundations of the constitution. Even within Northern Ireland, the parties agree to disagree about the foundations but agree on institutions—and as long as they work, that is good enough. In Scotland, people think differently about the constitution and sovereignty from the dominant legal discourse in England, and it is futile to try to resolve that because we will just disagree. However, it does not mean that we cannot have institutions that work. If we therefore have this pluralistic notion about a constitution, it can be understood a little differently in different parts of the United Kingdom but we can agree on the constitution. That is probably as much as we can expect. Then we have to address the obvious anomalies that arise—things that really get in the way—and I mentioned the Barnett formula. This view is informed by a spirit of federalism. We recognise diversity across the United Kingdom. That is the way we can find that we can live together. A constitutional convention may be a way of saying, “Okay, we may have our disagreements, but we can at least agree on how we are going to do things, even if our long-term ambitions may be rather different”.

Dr Mark Elliott: There is a gaping chasm between the Heath Robinson way in which we traditionally make constitutional changes here and the sort of “big bang” approach whereby a convention would devise a new constitution. My feeling is that that would be so countercultural and alien that it might not work. We need something more modest than that. We need some sort of process—call it a convention if you wish—that actually tries to devise some sort of overarching sense of where we are, where we want to get to and how we propose to get there. We need, in other words, joined-up thinking rather than this incredibly fragmented approach that we have at present.

Baroness Taylor of Bolton: Triggered by that, I have a quick follow-up question and ask for your views on moving to a more formalised written constitution.

Professor Michael Keating: We are actually doing that already but in a typically British, piecemeal muddled way. There are these proposals to entrench the Scottish Parliament and the Sewel convention. Mark has talked about that and pointed out its difficulties. However, the fact is that we have a written constitution. It may not be codified but many bits of it are in practice written down. It would be useful to think about that, and about how much more of it might be written down and how much of it can just be left to convention. We have not had that, and when we introduce new proposals we never ask ourselves that question.
Q8 Lord Brennan: What do you think about having a Joint Committee of both Houses of Parliament, with the stature of the Treasury Select Committee, whose permanent job would be to consider constitutional change and consolidation of statutes? Should there be some parliamentary vehicle for ensuring that the haphazard approach has some scrutiny?

Professor Michael Keating: That would be extremely useful. It would also involve the devolved legislatures, but that kind of thing would be useful—not by trying to resolve everything in one act but continually reviewing the process and seeing what understandings there are and where there a lack of understanding is causing difficulties.

Lord Powell of Bayswater: I have a small supplementary question for Dr Elliott on his suggested process for bringing about constitutional change. Do you think that higher thresholds for constitutional change in general are a good principle—for example, the requirement for a two-thirds majority, as appears in part of the Scottish legislation, as well, of course, as in the five-year fixed-term Parliament legislation?

Dr Mark Elliott: Yes, I do. One point on which I was going to differ from Professor Keating was when he said that we have a written constitution. I understand his point that we have many texts that stitched together could be seen to perform that function. We do not, however, have a hierarchically superior set of constitutional texts that crucially are harder to amend or change. There is great merit in having certain fundamental arrangements that are more difficult to alter than an ordinary law. One of the interesting aspects of the draft clauses is that that sort of restriction is to be imposed on the Scottish Parliament. It invites the question, “If that is good for Scotland, is it not good for Westminster as well?”

Q9 Lord Cullen of Whitekirk: I turn to draft Clause 1, which states that, “A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements”. I am grateful to Dr Elliot for his paper on this subject. If those words have no legal effect, what is their purpose?

Dr Mark Elliott: To satisfy the drafters of the Smith agreement.

Lord Cullen of Whitekirk: What do you think they had in mind? I know that this is merely speculative, but is there some practical purpose to it?

Dr Mark Elliott: I think that our whole constitution to an extent is built on smoke and mirrors—that we have a set of constitutional laws that say one thing and a set of political practices and conventions that dictate that reality is different. The key difficulty that Clause 1 highlights is the problems that you encounter when you bring those two aspects of the constitution into relationship with each other. The law is that Parliament cannot make the
Scottish Parliament permanent, and clearly this clause does not even attempt to do that. What it is doing, I think, is acknowledging that in political terms the Scottish Parliament is permanent. I think it has been permanent since it began to sit, over 10 years ago, and I do not think that it makes any difference in that sense. It is a statement in a statutory text of a political reality.

**Lord Cullen of Whitekirk:** One point intrigues me. The Scottish Parliament is, of course, a devolved parliament. If that devolved parliament is to be permanent—the word used in this clause—can the UK Parliament at some point in the future order a referendum that might remove devolution?

**Dr Mark Elliott:** Yes.

**Lord Cullen of Whitekirk:** Does that mean that there is a hole in the wording, because it can never be permanent in the absolute sense?

**Dr Mark Elliott:** I entirely agree. As a matter of orthodox UK constitutional law, no Act of this Parliament can make any other institution like the Scottish Parliament permanent. It can say that it is permanent, or it can say more diluted things, such as that it recognises its permanence, but that will not make it so.

**Lord Cullen of Whitekirk:** So it is not just a question of this Parliament being unable to give away part of its sovereignty but a question of what the words can mean. They cannot mean an absolute ban, because there must be some room for exceptions.

**Dr Mark Elliott:** I agree. There are parallels that we can think of and analogies that we can draw. One would be the implications of the European Communities Act 1972 and the extent to which sovereignty there was acceded to the European Union. Another example is legislation that has granted independence to former territories or colonies. I do not think that any of those are a perfect analogy or that any of them necessary implies that this Parliament has given away its sovereignty in a strictly legal sense. Whatever form of words was used in Clause 1, I do not think it would accomplish making the Scottish Parliament legally permanent.

**Lord Lexden:** Would you take a similar view that draft Clause 2 will, in practice, make little or no difference?

**Dr Mark Elliott:** I do. I do not think Clause 2 makes any legal difference. It is a straightforward function of the sovereignty of this Parliament that it can make or unmake whatever laws it wants. That must, by definition, include laws that impinge on Scottish devolved competence. Clause 2 does not take the rule, as it were, in the Sewel convention
and attempt to make it into a statutory restriction on this Parliament’s powers, so certainly as drafted that point would be unarguable.

There are more imaginative ways in which Clause 2 could have been drafted. One possibility would have been to attempt to impose some kind of procedural or conditional restriction on the enactment of legislation by this Parliament impinging on devolved matters. It could have said, for example, that in the absence of a consent Motion passed by the Scottish Parliament, this Parliament would not legislate on devolved matters.

In terms of the law, it is unclear whether a court would treat an Act of this Parliament passed in breach of that kind of condition as valid or not. There are authorities that point in both directions, but certainly the point is at least arguable, and if the framers of Clause 2 wanted to go further, there are respectable legal avenues that they could explore.

**Lord Lexden:** So as things stand at the moment, this could increase confusion, not produce clarity.

**Dr Mark Elliott:** If the matter were litigated, any confusion would be very quickly resolved and the courts would say that it makes no legal difference.

**Lord Lexden:** But Parliament would need to be aware that Clause 2 could make the convention justiciable, and Parliament should be made fully aware of that.

**Dr Mark Elliott:** I do not think that it makes the convention justiciable; the only justiciable question is whether Clause 2 creates a legal restriction on Parliament’s power. That would be answered promptly and clearly in the negative.

**Q10 Baroness Falkner of Margravine:** Both of you dealt quite a bit with intergovernmental relations under the implications of the Smith proposals. Could we explore to what extent fiscal and welfare devolution would impact on the current status quo? Professor Keating, you say that there would be no detriment. You gave the example of the Barnett formula, but would you see welfare and fiscal devolution beyond Barnett also coming into that and there being no detriment? I think of the furore that erupted recently over the mansion tax being raised primarily in London funding the National Health Service in Scotland, for example.

**Professor Michael Keating:** Yes, there are three areas where I said that intergovernmental relations really are critical. One is finance; one is the EU, where there are mechanisms but there are some complaints about how they work; and the third is welfare. As far as finance is concerned, the Barnett formula is not statutory. It is entirely at the discretion of the Treasury, and it has taken Parliamentary Questions and FOI requests for almost 40 years to
extract from the Treasury the basis of the Barnett formula. It would be extremely useful to have more clarity about that. It would be very important, if we are going to get into things like detriments and the implications of mansion taxes or whatever, to have some independent body that does the homework and produces the statistics, just as the OBR does with regard to public spending. Something like that, which would be independent of both levels of government, could say, “Well there is detriment. This is what it amounts to”. That is absolutely critical. The Treasury just deciding this unilaterally is going to get us into political rows and political arguments that will be settled by political haggling. It is important that there is some kind of intergovernmental ministerial committee that can be convened to consider this evidence and then come to a political decision. Quite rightly, the politicians take the decision at the end of the day, but they should do it in a way that is informed by the evidence and that is transparent and accountable.

There will be similar kinds of arguments about the effect of welfare changes at one level on welfare benefits elsewhere. There is this notion of passporting benefits: if you get one benefit, that entitles you to another benefit. If you are devolving some of those benefits, you have to work out that connection. There is the benefit cap, and so on. We are told that that will not be affected by devolved welfare payments, but it will in all kinds of ways. So the first thing I would say about welfare is: try to make the lines of accountability transparent; do not have too much entanglement; do not make the welfare system even more complicated than it already is. Secondly, once again, have some independent source of advice that can provide the figures and have some mechanism whereby the politicians can get together to resolve the conflicts when they arise. I am suspicious of setting up a committee just for its own sake and expecting people to turn up, but where you have these real problems, there is a need for intergovernmental mechanisms to resolve them.

**Baroness Falkner of Margravine:** You mentioned the EU in your opening remarks.  

**Professor Michael Keating:** Yes. The Joint Ministerial Committee on Europe is the only one that has really worked continuously since 1999, because it is necessary for the devolved Administrations and Whitehall to agree a common position where devolved matters are concerned. These mechanisms seem to work pretty well most of the time. The Scottish Government have made some demands with regard to these, saying that the devolved Administrations should have a right to be present in the delegation to the Council of Ministers. You can argue about that. Most of the time they are invited anyway, but if they had a right to be there, that might strengthen things. There are questions about whether the
devolved Administrations are present in the preparatory meetings and the Civil Service meetings and so on—or indeed whether they have the capacity to be present at all these meetings, because it is all right: they can demand to be present everywhere, but if you do not have the capacity you cannot be everywhere. That is a lively debate in Scotland at the moment. It is not high profile politically, but it would be worth revisiting.

**Baroness Falkner of Margravine:** How would disagreements between the devolved Administrations in the area of their perceived interests—whether fisheries, agriculture or whatever—and the main delegation, if they were to be present, be resolved? You would have the United Kingdom speaking with potentially four voices.

**Professor Michael Keating:** The problem lies in the asymmetrical nature of UK devolution. In Germany, if there is a disagreement between the Länder, if it is a Land competence the Länder get together and vote in the Bundesrat. In Belgium, the regions and the communities all have a veto, which sounds like a recipe for the proliferation of deadlocks but it is not, because in Belgium they have this tradition of arguing and haggling and coming to some kind of agreement. You cannot do that in the UK, because the UK Government are also the Government of England and the larger parts and we do not have a territorial second chamber that could make those kinds of decisions. So there is no escape from that dilemma; it is the UK Government who will represent the UK. The important thing is that the devolved Administrations have an opportunity to present their case. They can influence things, not so much by having legal rights but by coming up with good policy ideas and contributing to the UK position. So it is as much up to the practice as it is to any statutory mechanisms. I cannot think of a statutory mechanism that would make that work. Of course, even in Belgium and Germany the state has to speak with one voice. They might argue about what that position is, but they have only one block of votes in the Council of Ministers.

**Q11 Lord Powell of Bayswater:** Let us come back to intergovernmental relations, on which you have made some comments. It is a rather more general question. I think everyone agrees that these clauses would considerably extend and make more complex intergovernmental relations, but we have heard conflicting evidence as to whether the best solution is to seek more formal structures through which these things would be settled or to make much of it depend on the informal relationships. We heard some quite impressive evidence from a number of civil servants who are at the coalface of intergovernmental relations that actually the informal arrangements work much better and would probably continue to work much better in future. Creating formal structures and drawing up battle
lines make it more likely that there will be confrontations. I just wondered where you both thought the balance of advantage lay? Obviously there will have to be a bit of both; I am not saying that we should have one at the exclusion of the other. Which way would you tilt the balance?

**Professor Michael Keating:** There is no point in creating formal structures if they are not going to be used, and they will not be used because people will wonder, “What is the point of coming to a meeting when there is nothing to discuss this month?”, and because if you have unduly formal structures the politicians get together somewhere else and the decision is taken somewhere else. We have to recognise that political reality. That is why I am sceptical about saying that everything can be done in formal institutions. We also do not have that culture of working through legalistic institutions. They do in Germany, but we just do not have that culture anywhere in the United Kingdom. We need a framework—a place where things can be taken. We need a lot more impartial advice about the facts and figures behind many of these things. For the really big issues, where there is conflict we need somewhere where it can be resolved. It may be about finance, it may be about a particular aspect of welfare reform. If so, you can convene this committee when necessary—it does not have to meet every month—to resolve it.

In the case of the EU it is quite different, because there are EU council meetings every month and there is a mechanism that meets quite regularly and works to try to get a common UK position.

**Dr Mark Elliott:** I would add two brief points. One of the perhaps surprising things about devolution so far is that it has been relatively unlegalistic, and the courts have been called upon quite rarely to resolve demarcation disputes. So in that sense the evidence might seem to suggest that a relatively informal approach works.

The only other point I would air more generally about intergovernmental relations is that, to pick up on one of Professor Keating’s points, there is a difficulty when we think about intergovernmental relations and the capacity in which UK Ministers take part in those sorts of processes, because in a sense they are conflicted in that they are both acting as UK Ministers trying to produce a position which the UK as a whole can sign up to and agree to, and at the same time, de facto in many instances, advocating for interests that might be peculiar to England. That has not necessarily been fully thought through so far.

**Lord Powell of Bayswater:** It seems that the great bulk of these discussions are actually conducted between civil servants, and they on the whole manage to do it much better
through informal structures than through having to go regular meetings. The Cabinet Office probably takes a different view. They like to agglomerate everything in the Cabinet Office, but the front-line ministries seem to prefer the informal approach.

**The Chairman:** It has been a very interesting session. Have we failed to cover anything that you would like to unburden yourself of before you leave? You have as long as you like, within limits. Professor Keating, is there anything that we have overlooked or not developed enough?

**Professor Michael Keating:** These were the important issues. I have nothing more to add.

**Dr Mark Elliott:** I would simply add by way of conclusion that these proposals are indicative of the fact that for the last 15 years now we have been in a state of permanent constitutional upheaval, and that seems to me to be quite unprecedented in a mature democracy. Many, many countries have constitutional moments when they decide to make changes and then live with those changes and try to make them work. To see devolution or any other aspect of constitutional change as a process almost without end is to misunderstand what a constitution is about.

**The Chairman:** Yes. This Committee will have plenty to do for the next few years, by the look of it. Thank you very much indeed. It has been extraordinarily helpful, with very lucid, concise and effective answers. We are most grateful.