HOUSE OF LORDS

Unrevised transcript of evidence taken before

The Select Committee on the Constitution

Inquiry on

SCOTTISH INDEPENDENCE: CONSTITUTIONAL IMPLICATIONS FOR THE REST OF THE UK

Evidence Session No. 2 *Heard in Public* *Questions 16 – 26*

WEDNESDAY 5 MARCH 2014

10.35 am

Witnesses: Professor Alan Boyle, Professor Michael Keating and Professor Stephen Tierney

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Members present

Baroness Jay of Paddington (Chairman)
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Lang of Monkton
Lord Lexden
Baroness Wheatcroft

Examination of Witnesses

Professor Alan Boyle, Professor of Public International Law, University of Edinburgh, **Professor Michael Keating**, Chair in Scottish Politics, University of Aberdeen, and Director of Scottish Centre on Constitutional Change, and **Professor Stephen Tierney**, Professor of Constitutional Theory, University of Edinburgh

Q16 The Chairman: Good morning. Thank you all very much for being here this morning and for the various written comments that you have made, either directly to us or in general, which we have read with some interest. We are conducting this inquiry, I hope somewhat differently from some of other forums that are engaged in this, purely from the constitutional position, because that is our role—we are the Constitution Committee of the House of Lords, and that is our major interest—so we need to proceed with that in mind, which limits the discussion sometimes but none the less, I think, focuses the discussion usefully.

If I may, I will begin by suggesting to you—this comes from somebody who is not as steeped in all these matters as you are, but it is interesting to us—that there continues to be much uncertainty about the constitutional and legal framework for the discussion of the potential of independence. Professor Boyle, you suggested in your written evidence that you saw the whole of the legal framework, as it were, as open to negotiation. Professor Tierney, in one piece that I read by you, you said that there was a question even about what independence was. At this stage of proceedings, six months from the referendum, it would be very

interesting to pursue some of these questions. Perhaps, Professor Boyle, you could begin by giving us, as you see it, the basic constitutional framework and legal principles within which you would expect the negotiations between Scotland, post a positive independence referendum, and the rest of the UK, and say whether you believe that this is simply a matter of political negotiation.

Professor Alan Boyle: Thank you. I think you have come to the heart of the question. There is not a lot of law here. I used to teach constitutional law, and it certainly is not something I have given up, even though I am principally an international lawyer, but you will not find a great deal on these kinds of questions in textbooks on constitutional law. The only directly relevant precedent for us is Irish independence in 1922. That was quite a long time ago and it took place in circumstances that thankfully are remarkably different this time, which needs to be borne in mind when one looks at that as a precedent. The other most obviously relevant precedent with which the United Kingdom is familiar is the decolonisation of our empire, but there are a number of problems there.

The Chairman: And that, presumably, is totally irrelevant in this context.

Professor Alan Boyle: I would not say that it is totally irrelevant; it is almost totally irrelevant. There is a question first of characterisation. The relationship between Scotland, England, Ireland and Wales is not one of colonisation. That needs to be emphasised and in that sense it would be inappropriate to look at those as directly relevant precedents. Equally, the history of Canada, Australia and New Zealand as dominions is that they were never given independence anyway; they just emerged eventually as independent states. So it is a different process.

The only area that might be relevant is one to which I am grateful to one of my colleagues for drawing to my attention. He said, “Have a look at India and Pakistan, because Pakistan was in effect a new state separating from India that was nominally an existing state.” I have cited that

because it is relevant when it comes to precedents on the allocation of debts, liabilities and assets, but that is the only directly relevant one that I can think of in this context.

The only other thing that is relevant in this area is the question of who negotiates. I have a particular familiarity with our relations with Mauritius, for reasons that one or two of you might be aware of. I have read a lot of the correspondence on that and, rather like negotiation with Ireland, it involved government ministers, civil servants and diplomats, but usually in a slightly different constellation. Again, it very much depends on the circumstances.

If you want another example, you could, I suppose, look at the much more recent negotiations over Northern Ireland—the Belfast agreement with the Irish Government and with the Northern Irish political parties. If you are asking who negotiates, that probably provides a reasonably useful template.

You started by asking whether there were any principles of law here, and I think that rather illustrates that there are not. It is fundamentally for the British Government to decide who the appropriate people are to negotiate on behalf of the United Kingdom. I suggest that the only important constitutional principle here is that, whatever emerges at the end of the day, the Government are accountable to Parliament. It seems to me that whatever is negotiated, the precedents all point in the same direction: whatever is agreed between the United Kingdom and Scotland will have to go in some form to Parliament for approval. That is what happened in 1922 and it is what has happened in all the other relevant negotiations since, including the Belfast agreement. That could occur in a number of ways. I have suggested that one thing that the Government might like to consider is a white paper in advance of the negotiations, setting out their position. I say that merely because Scotland has done that.

The Chairman: I am sorry for interrupting, but do you think that there should be such a white paper prior to the referendum?

Professor Alan Boyle: No, not prior to the referendum.

The Chairman: Sorry, I misunderstood you.

Professor Alan Boyle: If there were a yes vote in the referendum, it would certainly be something that the Government should consider. The Scottish Government have set out their views in a white paper. It might be appropriate for the British Government to do the same, and perhaps that could be debated in Parliament. The key thing is that Parliament would have to legislate, so to that extent the Government are accountable. I think the Scottish Government accept that the UK Parliament would have to legislate in an appropriate way.

I think there would probably also have to be something in the nature of an international agreement. Scotland is clearly not a state at the moment. At the moment when it was negotiating it would not be a state, but it would be about to become a state. It would be appropriate to put some of the matters into an international agreement, but that rather depends on the subjects on which there was going to be agreement. There are two obvious ones. The first would be defence matters. There is one rather tricky issue on the Clyde. The second is that, if the parties wish to discuss a joint central bank, I cannot see how you could avoid creating an international institution. That would require a treaty, and that in itself poses some interesting questions of accountability. At the end of the day, the only core constitutional principle I can see is accountability to Parliament.

Q17 The Chairman: We will come back to the assets and liabilities question, for example. Professor Keating, may I ask you the same question that I put to Professor Boyle?

Professor Michael Keating: I am not a lawyer but a political scientist, and what I say may be shaped by that. I think in any case that this is primarily a political question and not so much a legal question. There is no precise precedent that I can think of for this debate and, as my colleague has said, very little law, but we do have the Edinburgh agreement, which is critical. I do not know of anything like the Edinburgh agreement in other cases, but it lays down some general principles which both sides have agreed to respect. It does not give us the detail, but it

is a huge advance on the discussions that are going on in, say, Spain or Belgium, where they have not even got to that point. So that is critical. It pledges both sides to negotiate in good faith, which is as much as we can expect.

I assume that the two sides would exercise an enlightened self-interest; that is, there is no reason for them to be vindictive and do things that might damage themselves as well as the other party. I do not think that there is great political advantage in England in making life difficult for the Scots—if anything, there is a remarkable indifference in England to what is going on in Scotland—so I would expect the Government of the United Kingdom to look after the interests of the rest of the United Kingdom and for Scotland to look after its interests and to reach agreement as quickly as possible, because both sides will lose if this is protracted too long.

Some issues will be extremely difficult: the issue of the pound seems to be very difficult and we have absolutely polarised positions on that. Other things can be compromised on. If it is about money, you can always reach a compromise somehow or other; sometimes, it is a very rough and ready compromise. The Scottish Government have said that you do not need to resolve everything immediately. If the United Kingdom agrees that it would be in the interests of citizens to carry on some joint institutions beyond independence—it is talking about the social security system—that would be possible. That is essentially a political decision; other issues can be resolved relatively quickly. So it depends on good will; it depends on the attitudes of the actors; and it depends on the political climate at the time. That is more important. If those conditions are present, I think that the legal mechanisms can be found, because we have a very flexible constitution.

Q18 The Chairman: We are very aware of that. Professor Tierney, do you want to expand, for example, on your rhetorical question about what independence is?

Professor Stephen Tierney: In terms of the general question of the legal principles that would govern negotiations, it is probably wiser to think about constitutional principles rather than legal principles. I think that there is an important distinction there. In the event of a yes vote, we could enter a situation of constitutional limbo, or at least legal limbo, in relation to Scotland's status within the United Kingdom. In the period prior to independence, there will be a shifting mentality, which is difficult to conceptualise at the moment. I think that we will have to think about an evolving rule of recognition in relation to Scotland and the Scottish political system. That would not affect sovereignty in the external sense—as far as the rest of the world is concerned, Scotland would be part of the United Kingdom until independence—but the internal dimension of sovereignty is already coming under a certain degree of strain. The supremacy of Westminster legislatively has come under at least some tension in light of the legislative reforms since 1998 and through membership of the European Union. I think this would be considerably enhanced by a yes vote in the referendum. If we take parliamentary supremacy primarily as a political fact, that political fact certainly in relation to Scotland would be challenged, if not supplanted, by a yes vote. I think that, on that basis of defined legal principles, Westminster's supremacy would not be a reliable principle simply to fall back on. I am not saying that it would be redundant—it would be absolutely significant for the rest of the UK at least—but we need to think beyond that.

The consequences of that are threefold.

First, the negotiations will be primarily political rather than legal. It is a political science contention in any event that constitutional matters are fundamentally political matters shaped by certain institutions, but there is a bigger point. I think that politics, while they may not be quite the only game in town, might be the only game that can be played, given that it would be very difficult to see where one would go for a legal solution were the negotiations to come into difficulty. We already saw that with the debate about whether the Scottish Parliament

could hold a referendum—there was legal debate about that. Neither side wanted to go to court over the issue of the Scottish Parliament's authority to hold a consultative referendum. People had different opinions, but it was never fully settled. In this situation again, people might be very reluctant to go to court to try to find legal principles to govern negotiations.

A second point is that all we have to go on is the intergovernmental framework set out in the Edinburgh agreement. It has been correctly pointed out that the Edinburgh agreement is primarily about the running of the referendum, not the running of negotiations after it, but it provides that the two governments will work constructively in the best interests of the people of Scotland and the people of the UK if there is a fair and decisive referendum. We can be confident that there will be a fair and democratic referendum. Two bills have passed the Scottish Parliament to regulate the referendum—the Electoral Commission and the Electoral Management Board have significant roles there—so, barring a disaster, we can anticipate a fair and lawful process. On that basis, I think that we can see as a starting point this commitment to work constructively in the best interests of both peoples.

The third consequence of not having a legal framework is that we then need to find constitutional principles. At that point, it would be wise to establish some kind of constitutional platform between the two governments to set out what principles might apply. The search for constitutional principles when the constitution is silent is not unprecedented; it is what the Supreme Court of Canada did with Quebec in 1998. The constitution of Canada was silent on whether Quebec could leave. The Supreme Court, when asked that question, said, "The constitution is silent, but here are some constitutional principles that would apply." The situation here is different. It is not about whether Scotland can leave but about how negotiations would take place. It would be appropriate to try to define some principles and perhaps for the two sides to lay down what those might be. I do not want to speculate—it is a big question—on what those principles might be, but instances of them could be: good faith, a

commitment to respect the outcome of the referendum, transparency in negotiations, accountability, perhaps to both Parliaments, mutual co-operation and respect, reciprocity and, finally, respect for the interests of the peoples of Scotland and the UK. It might be thought that that commitment in the Edinburgh agreement is a commitment that the Scottish side, if you like, would work for the interests of the Scottish people and that the UK side would work for the interests of the UK people—clearly, that would be the intuitive sense—but I think that it would be good to see a commitment on both sides to work for the interests of both peoples. I do not think that is fanciful. If the negotiations are to be constructive and if people are to think that everyone is going to be a close neighbour regardless of the outcome of the negotiations, a commitment by both sides to work constructively in the interests of all the peoples of the United Kingdom as it is today would be a good starting point. That is why I think it is constitutional principles rather than legal principles that should govern the process.

The Chairman: But the constitutional principles will have to be invented.

Professor Stephen Tierney: Invented or found within the constitution. Some of the things that I mentioned could be expanded upon.

The Chairman: I understand. The examples that you have given are very interesting.

Professor Stephen Tierney: In an unwritten constitution, inevitably, we have to find them somewhere.

Q19 Lord Lang of Monkton: Those were three very interesting opening statements. There is clearly a lot that we could discuss about them. The question that was initially asked concerned the legal principles that should govern negotiations. I noticed that in your paper, Professor Tierney, you said, "Are we sure there will be negotiations? This is surely the easiest question to answer", and then you quoted from the Edinburgh agreement. Professor Boyle said that the only legal principle governing the negotiations is that both sides must negotiate in good faith. I think that we all welcome that language and would hope that, if independence

were to come about, the Edinburgh agreement would be implemented on a basis of good faith. I think that the following difficulty arises, however—and this is what I would like to hear our witnesses' views on. The debate between the yes and no campaigns hinges around the word "continuator". Which is the continuator state? What is a continuator state? It seems to me that when the Chancellor of the Exchequer went to Scotland and made it clear that neither he, the Opposition nor the Permanent Secretary to the Treasury could agree to a currency union, he was stating what he felt entitled to state on the ground that the United Kingdom would be the continuator state. I know that there is more than one view on this, but, Professor Boyle, your paper with Professor Crawford lists the three or possibly four options and comes down pretty firmly in favour of the continuator state. The reaction to the Chancellor's statement implied that although many people did not like what he said they did not challenge his entitlement to say it. What I am trying to say is that, before the negotiations start, quite a lot of the material that might be thought to be part of the negotiation may be foreclosed on the ground that the United Kingdom is the continuator state and that therefore this issue or that issue is not an issue for negotiation—currency might be one and European Union membership might be another. Have I got it completely wrong and can you clarify the position?

Professor Alan Boyle: No, you have not got it completely wrong. There is one thing that is not open for debate: the United Kingdom will continue as a state unless it chooses otherwise. There is only one credible view on that. The United Kingdom will still be in business the day after Scotland becomes independent, if it becomes independent, as it was in 1922—and as virtually every other example of separation has shown. The exception was Czechoslovakia, but the Czechs and the Slovaks agreed that they would become two new states—that is a special case. The United Kingdom will still be in business, but there is a separate and distinct question of what you do with the assets of the United Kingdom. There is international law on that. I have attempted to summarise it towards the end of my paper. Unfortunately it is not an

area where the law is entirely clear. There are two rather different approaches—in our own practice in the United Kingdom, we have adopted both approaches in the past. In the Irish example, certainly as regards debts, we simply allocated the national debt on a basis of proportionality to population. There is practice in the Soviet Union, Yugoslavia and Czechoslovakia which allocates assets and liabilities on a roughly proportionate basis. On the other hand, and this is where one colonial precedent is relevant, in the India–Pakistan partition Pakistan was given its share of the assets, but the government of India retained all the liabilities and all the debts. In so far as you can be clear on the international law, it suggests an equitable apportionment of assets and liabilities. You then start arguing about the assets. It is reasonably easy: things in Scotland by and large we would leave in Scotland and they would be Scottish. But are we going to leave them all our nuclear submarines and two aircraft carriers and a third of the Royal Air Force? Probably not—that would seem a bit unusual, to put it mildly. So there are some assets that clearly we would remove from Scotland. Equally clearly, you might say, "Well, there are other assets worldwide. What about our embassies?" Maybe those should be valued and Scotland should be given some proportionate allocation representing the value of the embassies.

Q20 Lord Lang of Monkton: Before asking the others whether they would like to comment, perhaps I may say that the starting point for negotiations has to be got right. The thrust of the Scottish Government's white paper is that Scotland is automatically entitled to share ownership of this and share ownership of that. They started saying that they owned the pound as much as England did, to which the answer, I think, is "No, neither England nor Scotland has ownership of the pound; it is an asset of the United Kingdom." Are the two parties in total equality as they approach these negotiations or is there an unseen roadblock, which the nationalists do not seem to have acknowledged in their white paper, of the continuator state starting as owner of a number of things which would be normally subject to negotiation?

The Chairman: I say for the purposes of information that, in the written evidence that the Scottish Government have given us, they specifically make that point in terms of challenging the basis of our call for evidence.

Professor Alan Boyle: Where would you start if you were going into a negotiation? You would make a more extreme case than the one on which you are ultimately going to compromise, so from that point of view I can understand the position that the Scottish Government are taking. On the other hand, if you look at textbooks on international law, the only thing that they are clear about is that, in the absence of any other rules, the only rule is that you negotiate. In so far as there are precedents, if there was a constitutional principle here on which you might seek to reach agreement at the outset, it might be on an equitable allocation of assets and liabilities; it would then be for the parties to negotiate that. Interestingly, that is the one area where there are international precedents on dispute settlement—the arbitration on German external debts, for example, and various other arbitrations that an international court or arbitral tribunal has resolved what would amount to an equitable allocation where the parties were unable to agree. A second important constitutional principle that you might want to agree at the outset is that, if the two parties are unable to reach agreement, they should resort to third-party settlement in order to determine the balance of debts and assets. That seems a prudent way to proceed. To say that you must negotiate in good faith is fine, but it does not mean that you are compelled to reach agreement; it does not mean that you have to give in to the other side. There is a risk that each side, acting in full good faith, will simply be unable to compromise with the other fully. I think that that is where some fallback position is always wise. In this context, it would be very prudent. Interestingly, the obvious precedent for that is the Jay treaty, which the United Kingdom negotiated with the United States. For a century, we resolved a number of quite important disputes with the United States through arbitration, including the famous Alabama

claims arbitration for the unfortunate supply of warships to the confederates during the civil war. That worked very successfully to de-escalate what might otherwise have been some difficult and testing moments in Anglo–American relations.

Professor Michael Keating: It seems to me that there is broad acceptance that the UK would be the continuing state. Less clear are the implications of that, which is why the disagreement arises about assets, liabilities and participation in common institutions. The position of the Scottish Government seems to be that they have the right to continue participating in joint institutions, the Bank of England being the most difficult example.

Lord Lang of Monkton: Sorry to interrupt, but do you accept that there is a legal distinction between assets and institutions?

Professor Michael Keating: I am not a lawyer, but I am going to make that distinction in my own way, as I think that there is something in that. Dividing assets, which I will talk about in a moment, is one thing, but continuing to participate in existing institutions is another matter altogether. If a country has seceded from a state, it is difficult to say, "We want to continue participating in joint institutions as of right", as opposed to through negotiation. That seems to be a difficult position. If it is in the interests of the United Kingdom to maintain joint institutions, I think they would be maintained; if it is not in the interests of the United Kingdom to maintain joint institutions, I do not think that they would be. I think that it is in the interests of the United Kingdom for Scotland to use the pound, but I do not see that that obliges the UK to allow Scotland to share in the management of the pound, which is a different thing. That is a problematic issue. On EU membership, it also seems to me that the United Kingdom will be the continuator state and will not have to reapply for membership, which some people were suggesting at an earlier point in the debate. Scotland would have to apply for membership, but I think that Scotland has entitlement to membership, because it is a democratic European state meeting all the criteria. That is a different case and needs neither

the UK nor any other member state to suggest that they would veto Scottish membership. It would be a matter for negotiation. As far as assets and debts are concerned, there are all kinds of legal principles, but normally this is resolved on the basis of a political compromise. The simplest principle is something related to population. It is illogical, but it is easy—you can count it. I would expect some compromise to be reached there. Maybe international arbitration could be used if there is not agreement. If it is a case of assets, a third party could try to broker an agreement or even act as an arbitrator.

Professor Stephen Tierney: I published a paper arguing at length that the United Kingdom would be the continuing state and Scotland would be a new state and would have to apply for recognition on that basis. I agree with my two colleagues on the international law position, but I am not sure how relevant that would be in the longer run. The international law position offers not too much information beyond the equitable distribution point. It is also a default position that states would fall back on in the event of radical disagreement or no negotiations. The intention here would seem to be towards a negotiated deal and I imagine that a lot of these issues would be sorted out, but if they are not I do not disagree with what has been said. I think that the institution/asset distinction is perfectly credible. Assets would fall to be divided. If there are institutions or services of the UK state, they are not something that an independent Scotland could simply assume to sign up for. In the Quebec analogy, going back to the mid-1990s, someone light-heartedly said, "You can't make a unilateral declaration of partnership." That, I think, would apply in relation to services that are clearly UK services.

Q21 Lord Goldsmith: Two propositions are being stated. One is that the better view is that the United Kingdom would be the continuator state and then it is all a matter for negotiation. Presumably if the United Kingdom is the continuator state, certain things affect third parties and cannot be a matter for negotiation between the rest of the United Kingdom and Scotland. I

wonder whether you could comment on that and identify examples, if you can see any, where that is significant in terms of what then happens in the negotiations.

Professor Alan Boyle: Most obviously, there are debts. Debts are owed to third parties and the third party may not wish the debt to be transferred to another state. That is the most obvious one. I cannot think of others. By and large, an independent Scotland would succeed to all the treaties that the United Kingdom was a party to, unless it wished to opt out of them. The only problematic issue is that it would have to join institutions such as the UN and the EU, which is not automatic, but otherwise it would be party to the same treaties. To that extent, in so far as our relationship with third parties is governed by treaties, Scotland would still be in those trading relationships. Perhaps my colleagues can think of other examples, but those are the only ones that I can think of offhand.

Professor Michael Keating: There is the question of international organisations. There is NATO and the European Union. The difficulty with the European Union is not the principle of Scottish membership but the terms of Scottish membership and whether Scotland would enjoy the same terms as the UK does, which is the Scottish Government's position. That could create all manner of complications as to whether it gets opt-outs. Then there is the interrelationship between using the pound and participating in European institutions. Because the European Union is responsible for so many domestic policies, it would be important to get that right in the negotiations, otherwise Scotland and England could end up damaging each other.

Professor Stephen Tierney: The reason I think so much is an issue of negotiation rather than international law relates to the point that the Lord Chairman made. The United Kingdom is so heavily integrated that, post- independence, in the longer run there would still be considerable sharing. I am not in a position to set out how that would happen, but it seems that the economies of both countries are so heavily integrated, as well as the pensions system and

welfare system and so on, that there would be strong efforts on the Scottish side to bring about close sharing. This is also in the context of the European Union, where so many of these services are already heavily integrated. Relations to third parties have to be looked at in the context of the broader European Union. It seems that an independent Scotland would be able to join most international institutions fairly straightforwardly, particularly the United Nations. As Michael suggests, the European Union is a more difficult case—maybe not on membership, although there are clearly issues there, but on the terms. Again, that would implicate relations with the UK.

The Chairman: Perhaps I can turn to a more political question, which has constitutional implications—the Westminster general election next year and the impact on Scottish members of the Westminster Parliament.

Q22 Lord Lexden: There are obvious practical consequences for Scottish MPs elected in 2015. Even on the Scottish Government's optimistic timetable, there is no prospect of independence being achieved by then, but there is every prospect of independence being achieved within the lifetime of the next Parliament. I cannot recall any precedent of MPs ceasing to be members of a Parliament to which they were elected. This did not occur after 1918. Helpfully, from the point of view of ultimate independence, Sinn Féin MPs stayed away from Westminster. University representation ceased at a general election in 1950. There are a host of issues, such as the part that Scottish MPs would or would not play while negotiations took place and the consequent legislation, as well as the position that a Westminster Government would find themselves in if there is doubt about the continuance of Scottish MPs for the rest of the Parliament in which independence is agreed. You are all familiar with these matters and it would be helpful if you could comment on them.

Professor Alan Boyle: The only thing useful that I can say—and this is perhaps not a question for a professor of public international law—is that, since I come from Belfast, I have a slight

interest in the 1922 scenario and I am not sure that you are quite right. It is true that the Sinn Féin members did not take up their seats, but they were still Members of Parliament, in the same way that Gerry Adams used to be. So, presumably, in 1922 they were deprived of their seats. I think that that would be a direct precedent.

Lord Lexden: But in 1922 the Irish Free State was, if not wholly in existence, close to completion.

Professor Alan Boyle: Yes, but I think that the Irish Free State Constitution Act 1922—I assume, although I have not looked at this precise point—must have deprived Irish MPs of their seats at Westminster. Although all the Sinn Féin members, which was the vast majority of Irish members as the nationalist party had been decimated, did not sit, there were, if I recall correctly, six or eight Unionist members from Dublin who held university seats. I imagine that they probably sat. So some members must have been deprived of their seats in 1922. I do not think that is the problem. I think the problem here is a difficult one. I am not sure that there is any law on it—we would have to make it up. The real question seems to be the role that Scottish MPs would have between the referendum and independence, not in terms of general legislation, as Scotland would still be part of the United Kingdom and they would still be entitled to participate in law that was going to apply to Scotland—I would not argue with that at all. The key question is, when it comes to the House of Commons and the House of Lords, particularly the House of Commons, having a debate about whatever is agreed between the United Kingdom and Scotland, will the Scottish MPs participate in that debate and in any vote? All I can offer you here is my personal view. I think that it would be strange to have MPs who will be about to disappear and become citizens of another state participating in a debate by the United Kingdom Parliament on whether this was the right deal for the United Kingdom. That seems very peculiar and I think it is where we would have to make up some law. It probably would seem very peculiar to Scottish MPs as well. It would be something, I

would have thought, where a deal between the Westminster parties and the Scottish Government in advance of negotiations would be sensible. Presumably, appropriate legislation could then be passed if necessary to bring that about.

Professor Michael Keating: If we are talking about the time between the referendum and independence, Scottish MPs would remain full Members of Parliament, as they are at the moment. We know about the West Lothian question and the difficulties that has created. This would be much more serious because you would be talking about the future of the country. They would have a right to represent Scottish interests. They would have a right to vote on everything, including presumably the independence legislation. I do not think they would be the main channels of negotiation; I think they would be marginalised. It depends on which party they were in, but I think that they would not be a main channel of negotiation, which would be the Scottish Government to the UK Government. It would be important for whatever UK Government were doing the negotiation to have a mandate among non-Scottish MPs as well. It is not a matter of the law, but it seems an important constitutional principle. I think that any Government would do that, whether it was an agreement on the specific issue of independence among the UK parties or whether it was a formal coalition. Then, after independence, Scottish MPs would withdraw. One can imagine that this would precipitate the fall of the UK Government—we do not know; that might well happen because we know that, occasionally, UK governments have had a mandate that depends on the votes of Scottish MPs. In that case, presumably, we would have a UK election; it would not be a constitutional crisis.

Professor Stephen Tierney: This is where the distinction between a legal principle and a constitutional principle is again relevant. Clearly, Scottish MPs would have the same legal power as other MPs and would take their seats as such, but it might be thought appropriate that constitutional principles should apply. First, should Scottish MPs be involved in negotiating the UK position on independence? There would seem intuitively to be something

not correct about that. Secondly, should such MPs vote on matters affecting only the rest of the UK, particularly in anticipation of a separation of the two countries? At that point, constitutional principles might lead to a suggestion of recusal, or a convention emerging where those MPs would recuse themselves from decision-making on those issues. Then, I assume after 2016, in whatever legislation—if legislation is passed—at the moment of independence provision would be made for the termination of those seats.

Q23 The Chairman: None of you has specifically mentioned the UK general election in May 2015, which is in the middle of this process. A proposal made by the Scottish National Party was that that general election should be postponed, thus avoiding all the issues which you have raised. Is there any suggestion that it would be illegitimate for there to be parliamentary elections in Scottish constituencies in 2015 in advance of 2016?

Professor Stephen Tierney: It is a matter for the United Kingdom to determine. I cannot imagine that there is any appetite to postpone a general election.

The Chairman: It does seem, does it not—at least theoretically—somewhat bizarre that you would be electing MPs for a very limited term.

Professor Stephen Tierney: Yes. I think that it could be relevant to the negotiation process. One factor about that election would be that, if negotiations began before it and there was a new government who came into office with a different approach to negotiations, a party may run in that election on the basis of a harder or a softer line on negotiations. One way to avoid some of those difficulties would be—I do not know what the prospects for it would be—a cross-party arrangement among the UK parties on a negotiating position, similar to the position that they currently have in Better Together. The prospect of a pan-UK approach to negotiations, not only among the main parties but maybe bringing in voices from Wales and Northern Ireland to present a UK set of interests, would dilute the 2015 issue.

Professor Alan Boyle: I do not think that it is without precedent. Let us think back to 1922. There was an election in 1922—the government fell in 1922 and a new one came into office. That election would have included sending MPs from Northern Ireland to Westminster. You have to remember—it may not be obvious unless you are Northern Irish—that the deal done in 1922 was that Northern Ireland would be temporarily excluded from the Irish Free State. It was not thought to be a permanent arrangement. There were to be consultations on the process by which Northern Ireland would be reunited with the Irish Free State; it was fully expected that that would mean that there would be a united Ireland, probably before the next United Kingdom general election. As it happens, those negotiations, as we know, failed; they were torpedoed by intransigence on both sides, but they certainly failed. If you were an MP for Belfast in 1922, you would probably have thought that you had a very limited tenure at Westminster. As it happens, that was not the case. I am sure that the negotiations for Scottish independence will succeed, but who knows what might happen?

Lord Lexden: May I comment on that? Northern Ireland had the right to vote itself out of the new arrangements that were established. No unionist thought that it would fail to exercise that right. So unionists returned at the 1922 election had every expectation of remaining for the indefinite future. The area of Northern Ireland was a matter of continuing discussion. The Boundary Commission in the end left Northern Ireland as it is today, but I do not think that there was any expectation on the part of unionist MPs coming to Westminster in October 1922 that their tenure would be brief.

Professor Alan Boyle: I cannot comment on their expectation, but I can point out that the deal that was negotiated in 1922, if it had gone according to the expectations of the British and Irish governments, would have resulted in a very short tenure at Westminster for the Northern Irish MPs.

Lord Lexden: I think it is called constructive ambiguity.

The Chairman: Which seems to colour all this discussion.

Q24 Baroness Falkner of Margravine: If the assumption was that Scottish MPs would be elected to Westminster in 2015, would you see a conflict of interest if the negotiating team comprised Scottish Members of Parliament, bearing in mind that at the moment the Secretary of State for Scotland and the Parliamentary Under-Secretary of State are both Scottish MPs? Could you not imagine raised eyebrows over the fact that you might have MPs whose seats are in Scotland negotiating on behalf of the United Kingdom from the English, Welsh or Northern Irish perspective?

Professor Michael Keating: I can see that that would be politically highly problematic. I suspect that the Secretary of State for Scotland anyway would not be the main actor in this; it would be at a higher level—it would be pretty serious government-to-government. This question was raised in Canada in 1995 when the Prime Minister was a Quebec MP and they had the referendum, but it was never resolved. It was assumed that he would fall as Prime Minister. He could not credibly carry on, nor could his main lieutenants continue to be the negotiators for Canada. We are in the realms of speculation because there is no precedent. I was trying to remember what happened in Algeria, but I could not. There was a similar question and there was an election; the negotiations went on a very long time. But I cannot remember what happened in that case.

Baroness Falkner of Margravine: What would your views be on the McKay Commission's proposals that, if there was a ratifying vote, the majority of MPs for that vote to pass should not be representatives of Scottish constituencies?

Professor Michael Keating: That is the point that I mentioned earlier. It would be important not just for the final ratifying vote but for the negotiations that the negotiators should be representative of Westminster as a whole even without Scottish MPs. Anything else would not be credible.

Baroness Falkner of Margravine: A subsequent vote to ratify the agreement in order to pass should comprise a majority of non-Scots MPs.

Professor Michael Keating: Yes. I would expect the UK parties to find a way of making that happen by negotiating among themselves. Of course, they might not, but it seems that the unionist parties at the moment are sufficiently united in the campaign that they would probably be able to get an agreed position.

Baroness Falkner of Margravine: Do you agree?

Professor Stephen Tierney: Yes, I agree. There are two issues: one symbolic and one substantive. Even at the symbolic level, I imagine that eyebrows would be raised at the very least at these MPs taking part in negotiations or in voting. If substantively they were seen to have considerable influence in the negotiations or to have a decisive vote on the outcome, I am sure that the political opposition to that would be very strong.

Professor Alan Boyle: It would surely be disastrous if a government pushed through a deal with Scotland on the basis of the votes of Scottish MPs. It would presumably be equally disastrous if a deal was blocked on the basis of votes by Scottish MPs. I cannot see how they could be given that kind of influence in that kind of question.

Q25 Lord Lang of Monkton: Assuming all the negotiations have been concluded, however satisfactorily or unsatisfactorily, presumably the final act would be legislation in the Westminster Parliament. Can you indicate how far that legislation would go? It would clearly sever if not the umbilical cord then all the remaining wires connecting with the rest of the United Kingdom, except those which by agreement had to be maintained. Can you describe what you expect to see in that legislation if it were to come to pass?

Professor Stephen Tierney: From the perspective of Scotland emerging as independent, there would not necessarily have to be legislation. If there was a clear agreement between the two governments, it would presumably be enough for Scotland to go into the world and seek

international recognition, which tends to be forthcoming from other states in situations where a territory leaves with consent. It would make sense for there to be legislation from Westminster, if for no other reason than from the perspective of the rest of the UK, which would say, "We recognise that Scotland is leaving" and to make it clear that United Kingdom laws no longer applied to the territory of Scotland. Everything else in that legislation would depend on what agreement, if any, there is on future shared services and so on.

Professor Michael Keating: I would like the legislation to be a framework and leave the details to negotiation, so laying down general principles, but not all the details, about the shared institutions. I do not think that needs to be in legislation.

Professor Alan Boyle: One question that I have seen reference to—I am no expert on the Scotland Act—is the suggestion that it would be necessary to empower the Scottish Government to negotiate independence.

Lord Lang of Monkton: Under section 30 of the Scotland Act 1998?

Professor Alan Boyle: Yes. If there is a risk of it being challenged otherwise, then it presumably would be prudent to pass some sort of section 30 deal.

The Chairman: We have been given evidence to that effect.

Q26 Baroness Wheatcroft: Given all the uncertainties that you have discussed this morning—the "unknown unknowns" or the "unknown knowns", as you have referred to them in one paper—do you have any concerns that, when the Scottish people go the polls to vote in the referendum, they will have any clear idea what it is they are voting for?

Professor Alan Boyle: I am not sure that that is a question for a lawyer. That is a question for an elector and maybe in that capacity—

The Chairman: We have a political scientist and a legal scientist.

Professor Alan Boyle: The problem is obvious. If you talk to any reasonably thoughtful person in Scotland, which is most of the population, they will make the point, "Well, we're

being asked whether we should negotiate independence, but we don't know what the deal is." If, as we all expect, the answer is to be no, I think that will probably one of the key reasons why, because most of the electorate realise that there is immense uncertainty here, particularly about economic matters, which the Scottish Government simply cannot answer. It would be different if there was a second referendum—"Do we want independence in the light of these terms?"—but that is not on offer. I think that is one of the key problems.

Professor Michael Keating: I always thought that the question was very clear as regards the words, but it is not clear as regards the meaning, because we do not really know what independence is in the modern world and the electorate are very confused. We have a big project trying to clarify the issues, but the more information we provide, the more people are confused and the more we are confused. This uncertainty tends to play to the advantage of the no side, because people feel that it is a leap in the dark.

Professor Stephen Tierney: I think inevitably things will not be clarified to a great extent. It will come down to voters going in to cast their vote with two rival visions, which they have worked out for themselves as they are best able to do, between two rival futures. Whether those are accurate visions of the future, on either no or yes, we do not know, but I think that is what it will come down to.

Baroness Wheatcroft: Would a second referendum be desirable?

Professor Michael Keating: This was discussed at one point. I warned both sides against it—the yes side because you could win the first one but lose the second one, and the no side because, if you have a second referendum, there is a huge incentive to vote yes in the first one, just as a bargaining position. That is why the people who were canvassing a second referendum from the unionist side abandoned it fairly quickly.

The Chairman: We are very grateful to you. As Lady Wheatcroft said in her last question, which I think rather reflected the tone of the beginning of the discussion, we are obviously

dealing with enormous uncertainties at the political, legal and constitutional levels, which we can resolve only by the kind of discussion that we have had this morning, for which we are very grateful to you for taking part in. We thank you for your time.