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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
29th Meeting 2025, Session 6

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Jamie Halcro Johnston (Highlands and Islands) (Con)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Neil Bibby (West Scotland) (Lab)
*Keith Brown (Clackmannanshire and Dunblane) (SNP)
*Patrick Harvie (Glasgow) (Green)
*Stephen Kerr (Central Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Aileen McHarg (Durham University)
Professor Stephen Tierney (University of Edinburgh)
Professor Adam Tomkins (University of Glasgow)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 13 November 2025

[The Convener opened the meeting at 09:20]

Legal Mechanism for any Independence Referendum

The Convener (Clare Adamson): Good morning and welcome to the 29th meeting in 2025 of the Constitution, Europe, External Affairs and Culture Committee. The only public item on our agenda today is to begin taking evidence in our inquiry into a legal mechanism for any independence referendum.

We have received apologies from Dr Daniel Cetrà. We are joined in person by Professor Adam Tomkins, John Millar chair of public law, University of Glasgow; Professor Stephen Tierney, professor of constitutional theory, University of Edinburgh; and Professor Aileen McHarg, professor in public law and human rights, Durham University. A warm welcome to you all.

I will open with a general question. In your submissions to the committee, which were provided ahead of today's session, you outlined international examples of constitutionally regulated secession processes. However, what are your views on whether there is significant enough alignment between any of those examples and the United Kingdom's constitutional arrangements such that they may inform a potential legal mechanism for a referendum?

Professor Aileen McHarg (Durham University): The UK's constitutional arrangements are extremely flexible. We could, therefore, design almost any process for, or route to, independence that would fit with our constitutional arrangements, provided that it had, at some point, the sanction of the UK Parliament. That is really all that would be required. The UK Parliament could, if it wanted to, delegate steps in the process to other institutions, or it could retain for itself all the powers to authorise referendums and determine the trigger conditions and so on. One of the examples that I used—it is not an international example but it is an example of a regulated secession process—is that of Northern Ireland, so we have an example within the context of the UK constitution.

It is worth pointing out that the sovereignty of the UK Parliament means that nothing is ever absolutely binding. The process under the Northern Ireland Act 1998 does not, in fact, purport to bind the UK Parliament. It places obligations on the secretary of state to lay proposals before Parliament if there is a vote in favour of Irish unification, but it does not bind the UK Parliament to accept it. However, if the UK Parliament were to deny a clear expression of the people of Northern Ireland to leave the UK, it would be enormously problematic, and it is very difficult to imagine that happening.

The existence of a legal route within the context of the UK constitution does not change the fact that it is, ultimately, a political matter and that things can be changed, but it does change the terms of political debate. That is one reason why there is a lot of searching around for some sort of legal route, because, although it would not provide guarantees, it would change the nature of the debate over the right of Scotland to become independent.

Professor Adam Tomkins (University of Glasgow): I do not, in fact, have anything to add to that. I agree with everything that Professor McHarg said.

However, I should say that, although the convener and members of the committee know me in a different capacity, I am not here today in any party-political capacity. Along with Stephen Tierney and Aileen McHarg, I am simply trying to help the committee with our understanding of the constitution, as best we can.

Professor Stephen Tierney (University of Edinburgh): Given that reference has been made to international examples, I will add that there is a point of category distinction between a constitutional question and a state question. Very often, the question of Scottish independence is talked about as the "constitutional question". However, other countries clearly distinguish constitutional change from the issue of breaking up the state.

The American constitution, for example, has clear mechanisms for amending, and even for rewriting, the constitution. However, the Supreme Court there has distinguished that very clearly from secession, which it has said is a different issue; secession is not about changing or rewriting the constitution but about leaving the entire state, and the court has ruled that to be unlawful.

I also cited the German Federal Constitutional Court on an issue involving Bavaria, in relation to which it made a similar distinction between constitutional change within the German federal constitution and breaking up the state.

We will perhaps come back to some of those issues later, but that distinction is important. Within the United Kingdom, however, we have tended not to put much weight on that distinction. It is generally agreed that, on the basis of consent, it is

possible for parts of the United Kingdom not only to argue for change—for devolution and so on—but to leave the state entirely. The international precedents, or comparators, are interesting, in the first instance, in drawing out that distinction, which we do not always do in the United Kingdom.

Professor Tomkins: What Stephen Tierney said is absolutely right. However, it might also be helpful to bear in mind that there are a number of different ways in which law and politics can be distinguished from one another. There cannot be independence for Scotland, or any other part of the United Kingdom, without legal instruments: without an act of Parliament. However, the process by which we might eventually get to that legal instrument is a political process. The process of secession would, therefore, require both political campaigning and political results, and legal instruments.

Legal instruments would be required in order to set some of that process up—as there were in 2014—and legal instruments would then also be required in the event of any kind of yes vote, whether here or anywhere else in the UK, and whether for Scottish independence or reunification of Ireland or whatever it might be.

As with so many areas of constitutional governance, political processes and legal processes, and political campaigns and legal instruments, are intertwined. When we think about the constitution in the round, we need to think about both the law and the politics of the constitution, whereby I do not mean party politics but political processes such as campaigns and debates and so on.

The Convener: We will move to questions from the committee.

Keith Brown (Clackmannanshire and Dunblane) (SNP): I have read your submissions and we, as a committee, have also had a chat with some advisers, all of whom are as esteemed and as knowledgeable as the members of this panel.

The submission that stands out to me is that of Adam Tomkins. I do not want to overstate it—and Adam Tomkins can correct me if I am doing so—but that is because of the extent to which it talks about the people as being central to this, which is often forgotten when we talk about legal and constitutional architecture and so on. However, as Professor Tomkins says at various points, the simple fact is that

"the decision-maker is the people of Scotland".

That is very true, whether it is about trying to force the issue of having a mechanism to achieve independence or stay in the union, or whether it is about actually taking that decision. I think that it is also true of the European Union, where I have worked for a number of years in the European Committee of the Regions, and now the Council of Europe, which is often said to be bound by its constitutional and legal architecture. Very often, it will follow the people; the people are supreme in relation to that.

However, apart from in Adam's submission, that point seems to be relatively absent. Aileen and Stephen, is that because of the way in which you were asked to contribute to this session, which is about finding a legal mechanism? Adam has made his position clear, but does either of you want to say something about the extent to which the people are pretty important in all this?

Professor McHarg: I think that I said in my submission that there was lots of political recognition of the right to self-determination or popular sovereignty or the right to decide—however we want to call it. That is really important; I absolutely agree with Adam Tomkins that it is important. I liked his analysis that the issue is a question of settled will and that we will recognise that when we see it. That is probably right. If it becomes impossible to deny that the people of Scotland want independence, I think that there will be a second referendum.

09:30

There will not be a second referendum of the nature of the 2014 referendum, which was very much a process of opinion forming. That is for various reasons—that referendum was a unique and one-off situation. However, we might get to a situation in which a second referendum is a confirmatory referendum, as the 1997 devolution referendum was a confirmatory referendum of the already established and clearly evidenced will of the people of Scotland to have their own Parliament. That is where the energies of independence campaigners should be directed. They are wasting their time looking for a legal route to independence. If they want Scotland to be independent, they need to persuade a significant majority of the people of Scotland that that is the best constitutional route.

Professor Tierney: I considered that my invitation to contribute was as a legal scholar—that, as you say, Mr Brown, I was principally being asked to discuss the legal situation. That invitation was on two levels, because it struck me that, to some extent, we were also asked to reflect on the international law position and, in particular, the international law principle of self-determination, which does exist. I felt that it was important to lay out my understanding of what the position is under international law and what courts have said, including the Supreme Court of Canada and the UK Supreme Court, which endorsed the Supreme Court of Canada's position. I felt that it was

important to put my understanding of that on the record as a legal scholar and a lawyer.

In my submission, I distinguished between the international law position and the internal constitutional question. I felt that it was also important to explore what the Supreme Court of the United Kingdom has said on interpreting section 29 of the Scotland Act 1998.

On the point about popular consent, the third question that we were asked was about political accountability and the right of people to campaign for things. I do not have anything authoritative to say about that. Given that the international law position and, as far as I can tell, the domestic law position are clear, it is now a matter for political debate. Do the Scottish people and their political representatives have the right to campaign vigorously for independence? Absolutely. Do they have the right to debate independence, to engage and to say that it is a political claim and a political right? Absolutely. However, in my submission, I simply sought to distinguish the political debate from the legal position.

Keith Brown: I have a question on the legal position, based on your submission and also what we heard earlier from our advisers. When this inquiry came about, I asked how consent can be exercised in relation to the Act of Union, if it is said to be democratic and voluntary. However, from what you said and from what we heard from the committee's advisers—Aileen McHarg also mentioned this in her submission—I know that there seems to be a view that the treaty of union is not that relevant to the debate that we are currently having. Am I getting that wrong?

Professor Tomkins: I think that that is right, Mr Brown. For the record, I agree with what Stephen Tierney and Aileen McHarg have just told the committee. There is a great deal of clarity in the British constitutional set-up about which people we are talking about. In the context of Northern Ireland's constitutional future, we are talking about the people of Northern Ireland; in the context of Scotland's constitutional future, we are talking about the people of Scotland.

There have been debates in the past about how that might be defined. Are we talking about the people who live here? Are we talking about the people who were born here? Are we talking about the people who were born here and might now live somewhere else in the United Kingdom? There are ways that the definition can be tweaked—largely unhelpfully. It is perfectly clear as a matter of constitutional practice, constitutional theory and constitutional principle in the UK that, when we think about questions of secession or independence for Scotland, the decision maker is the people of Scotland. The question then, I suppose, is what the legal or political route is that we need to follow in order to put that question to the people of Scotland.

Those are the issues that we are trying to grapple with. In answering those questions, I think that you are right, Mr Brown, that there is nothing in the treaty of union that is particularly helpful—or unhelpful. It is not where I would start my analysis, and it did not feature in the analysis that I sent to the committee. I do not think that any of us mentioned it. If we did, it would have been only in passing.

Professor Tierney: I completely understand that there can sometimes be frustration when lawyers present a legal position that does not seem to tally with a preferred political position or even a point of moral principle that people think should apply.

It seems to me that the Acts of Union have always taken on rhetorical importance. People have always referred to the union of 1707 as being a voluntary union. One of the reasons why, legally, we tend not to discuss the Acts of Union is that, apart from in one case in the 1950s, the courts have tended not to have much truck with them. It is also because section 37 of the Scotland Act 1998 makes it clear that the Acts of Union have effects

"subject to the provisions of the Scotland Act."

The Acts of Union have therefore tended to pass out of discussion in a debate that is now really about the Parliament's competence within the Scotland Act 1998.

However, the popular question is an important one. One of the reasons why secession is so clearly outlawed in states such as the United States and Germany is that they have a conception of one people—in other words, that there is one American people and one German people. That is universally accepted, and secession therefore becomes effectively impossible. In the United Kingdom, we do not have that. Rhetorically, politically and morally, we have continued to accept that the United Kingdom is a multinational union. On that basis, Scotland and the Scottish people are recognised as distinct.

So, when I say that it is now just a political debate, that does not mean that it is not an unbounded political debate; it takes place within the context of Scotland and the Scottish people being recognised as a distinct and important entity in a way that equivalent Länder or states in America are not. There is a very important point in that, but it is, ultimately, a political point that has to inform political debate and does not directly inform the legal debate.

Professor McHarg: I tend to agree. The importance of the treaty of union is in having

sustained the idea of Scotland's separate nationhood, which then became reflected legally in international law terms in that we are recognised as a people with a right to self-determination. It does not tell us what self-determination means, but the basic idea that Scotland is a people is not really contested.

As has been said, legally, that does not really help us, not least because the treaty of union states that it is to last "for ever", which, if you were so minded, you could interpret as a constitutional ban on secession, but it has not been treated like that. The Irish Acts of Union 1800, which were also supposed to last for ever, did not stop the formation of the Irish Free State, which became the Republic of Ireland.

A specific argument that I have recently seen being made relates to the claim of right of 1689, which is one of the guaranteed provisions of union. It is argued that that creates a right to popular sovereignty, but it simply does not do that. The claim of right confirms an idea that was contested in 17th-century Scots constitutional law about the nature of monarchical power, and it confirms that contractual monarchy or limited monarchy won out over the divine right of kings. That has been linked to ideas of popular sovereignty, but nothing in the claim of right—and nothing that I have been able to find in pre-union Scottish constitutional history—in any sense resembles a legal doctrine of popular sovereignty or a legal mechanism for triggering popular sovereignty.

Again, that is politically important. The claim of right has helped to sustain our relative autonomy within the union, but it does not give us a legal trump card that could be used to overcome the much clearer modern authority that, as Stephen Tierney says, is based around the Scotland Act 1998 and the sovereignty of the Westminster Parliament.

Keith Brown: With regard to the legal route, we have heard evidence on Saint Kitts and Nevis. However—I could be wrong about this, and I am happy to be corrected—a more recent precedent seems to be the Turks and Caicos Islands. I think that, last year, the UK Government passed a law allowing the Turks and Caicos Islands to have a referendum and move on to independence, if it chose to do so. I am just stating that because I am sure that I heard it somewhere. It would interesting to know whether any of the panel can tell us anything that they know about that particular situation.

Professor Tomkins: I would be very cautious indeed about analogising from the position of former colonies to Scotland's position. I do not know anything of the details of the processes with regard to Saint Kitts or the Turks and Caicos Islands, so I cannot give the committee any help in that respect. However, on the general principle, which is reflected in all the authorities that we have brought to the committee's attention, including the Quebec secession reference and the UK Supreme Court's decision in the Lord Advocate's reference, it is very clear that any international legal right to self-determination obtains in specific contexts, including colonialisation, or decolonialisation, and oppression. Those conditions plainly do not obtain in Scotland's case. Whatever we think about Scotland's current constitutional arrangements, the Scottish people are not oppressed, and Scotland is not a colony of any kind of British empire. On the contrary, Scotland was, as you know, part of the imperial force. I would therefore be very cautious about analogising from that context to ours.

Keith Brown: I am pretty sure that the UK Government would not have given as the reason for its granting that authority that the Turks and Caicos Islands were a former colonial possession. That is not the basis on which it would do that, and I do not think that the case being made in that respect is based on its status as a former colony. I do not know what its status is just now; it might have dominion status, but I am not sure. I am pretty sure, though, that the UK Government would not have justified its actions by saying that it was an ex-colony. That being said, I do take your point.

Professor McHarg: Like Adam Tomkins, I do not know the details of the Turks and Caicos Islands situation, but it is a colony—it has a Governor General. The process of decolonisation is not just one of the cases in which a right to so-called external self-determination—that is, the right to become independent—is recognised; it is, in itself, subject to quite detailed, specific procedures in international law, with obligations imposed on all states, including the host states, to facilitate the process.

I therefore agree with Adam Tomkins. We are just not in that space. There have been attempts to argue that we are, but I think that they are wholly misconceived in terms of our constitutional history. We are an integral part of the UK state; we are not a colony.

Keith Brown: Maybe I introduced the confusion here. I do not think that that is what is happening with the Turks and Caicos Islands; it has not made an appeal to the United Nations or other international bodies on the basis of its origins as a colonial state. It comes back to the point that, if the UK Government decides that it wants to allow for an expression of self-determination, it can do so itself, and, indeed, it has done so on that basis. It

is not, to the best of my knowledge, part of a wider campaign.

I have a final question. We have had a lot of discussion in this debate about the once-in-a-generation idea. It was mentioned by a couple of very prominent people on at least a couple of occasions—with, I think, a misinterpretation of what was said—but it seems to have been elevated almost to the status of a constitutional convention and become a cast-iron law. I point out that, during the 2014 referendum, it was said that the only way of securing Scotland's place in the European Union was to vote no, and that has not been continued as a constitutional convention. What is your view of the once-in-a-generation tenet?

Professor Tomkins: It is political rhetoric and not a constitutional convention. I do not mean to demean that—indeed, I have engaged in plenty of political rhetoric myself in the past—but that is what it is. It is certainly not a rule of constitutional law—subject to one exception, which I will come to in a minute. It is not even a constitutional convention. The statements that were offered in the 2014 campaign about the referendum happening once in a generation, if not once in a lifetime, were political statements, and they should be taken as such, in my view.

09:45

It is self-evidently not the case in the United Kingdom that, once you have had a referendum on an issue, you cannot have another referendum on the same issue some time later. There have been two referendums on the UK's membership of the European Union, in 1975 and 2016. I am not very good at maths, but I think that that means that they were 41 years apart. There have also been two referendums on Scottish devolution, and they were 18 years apart. The only statutory reference to anything pertaining to this—and it is not a reference that uses the term "generation"—is in section 1 and schedule 1 of the Northern Ireland Act 1998, which provides that there cannot be what that legislation refers to as a border poll within seven years of the previous one.

There is no legal answer to the question, "How long is a generation?", because it is not a question of law. However, there are precedents with a small p, if you will, that we can point to and which suggest a period of somewhere between 7, 18 and 41 years. That might give you some sense of an answer to how long a generation might be.

Professor McHarg: I completely agree. Under the Northern Ireland Constitution Act 1973, the minimum period between border polls was 10 years. Therefore, if we are talking about statutory ideas of what generations are, they are actually quite short.

I think that it was just an opportunistic interpretation of campaign rhetoric that, to me, seemed to be about encouraging people to vote because they might not get another chance, rather than any sort of intention to promise not to seek another referendum for a generation, whatever that might be.

Of course, the once-in-a-generation argument loses force the further we get from 2014, and we might expect other types of argument to be made. Indeed, other reasons have been used for rejecting a second independence referendum. For Theresa May, it was simply that

"Now is not the time."

For others, it has been that public support was not high enough or that there are higher priorities, such as dealing with the pandemic, climate change or whatever.

This highlights one of the features of our lack of legal regulation. There are no trigger conditions and no limiting conditions. It is simply a question of when the time is right.

Professor Tierney: The thing about constitutional conventions is that they are important. Because our system is so fluid, and because the UK Parliament is able to do what it wants, conventions take on a particular significance. They are rules—they are not just political claims—and they are rules that the people who are subject to them feel bound by, not just politically but constitutionally. They think, "I must behave in this way to act in conformity with the constitution." That is really important, and it means that we cannot find new conventions easily, because they have to emerge over time through precedent and through clear evidence that the people who are subject to them feel bound by them.

That is quite a high hurdle and, like Adam Tomkins and Aileen McHarg, I see no evidence to suggest that a political claim of this nature could in any way be considered to be a constitutional convention. Even if it was so, we now know that constitutional conventions would not be enforced by the courts. However, that is not to say that they are not important. I would say that, were there such a convention, it would be very important, but I cannot see the structure of a convention in that political claim.

Keith Brown: Thank you.

Jamie Halcro Johnston (Highlands and Islands) (Con): I do not want to labour the point, but I think that it is worth clarifying that the suggestion that the only way for Scotland to stay in the EU was to vote to stay in the UK has been

misrepresented repeatedly. The European and External Relations Committee was written to by the European Commission at the time, and it highlighted that leaving a member state would mean leaving the European Union. That point was made by the European Commission.

Moreover, the once-in-a-generation suggestion—I absolutely agree about the lack of precedent in that respect—was actually part of the Scottish Government's white paper. It was therefore not just two prominent people who were saying that, albeit that they were the First Minister at the time and the First Minister who followed.

My question is about settled will and how we might determine what the feeling of the Scottish people is. We have talked about "the people". What is your definition of settled will?

Professor McHarg: It is like the term "generation"—it is not subject to a precise definition. At the time of the 1997 referendum, why did we think that devolution was the settled will? It was because public opinion polls consistently showed high support for it and there was cross-party support for it. There had been the Scottish Constitutional Convention and it was a big topic of debate. I do not think that we can define it any more precisely than that. It would be a mistake for anyone to put a precise number on it, because you can tie yourself down.

Fluidity, constitutional silence and all those things can be extremely useful in trying to deal with the big existential questions that we are talking about today. It is like saying that the Scottish National Party or some other pro-independence party winning another overall majority should be the only trigger. That is not likely to happen so, if you want another referendum, it does not seem sensible to tie yourself down to something like that. This is inevitably fluid, and there are advantages in it remaining so.

Jamie Halcro Johnston: A number of parties have talked about the flexibility of the constitution, and Professor Tomkins mentioned that, too.

One of the difficulties in determining what the Scottish people want is that opinion polls fluctuate, even when we talk about devolution. According to YouGov polling last year, 21 per cent of people in Scotland would happily abolish Holyrood. There is obviously still demand for the Parliament, but that could change, because support for independence started on a low basis. I am not advocating the abolition of Holyrood, by the way. It is interesting how much weight we put on opinion polls. We know that opinions on independence are relatively equal, depending on which polls we look at. However, it is not a priority. How much weighting do you give to priority for another referendum or independence? It is difficult to pin down this aspect of the whole debate. What do people in Scotland actually want and how will we ever determine that?

Professor Tomkins: There is no clear answer to that. I completely agree with Aileen McHarg that it is a bit like defining "generation". It would be better not to do that, because the great advantage of the system that we are in is its flexibility, or its fluidity, as Stephen Tierney referred to it a few moments ago.

The downside of that is that there is a substantial dose of vagueness. However, as I say in my written submission, if that upsets you and you want more precision, you should be careful what you wish for, because the international evidence is that the clearer you are in your constitutional arrangements about laws relating to secession, the harder secession is. I know that not everybody in the room wants an independent Scotland, but those who do should be careful about pushing too hard against the vagueness, even though the vagueness is frustrating. Stephen Tierney talked about people being politically frustrated with the constitutional arrangements, and I understand all of that.

How do we tell what the settled will of the Scottish people is? There is no one test. It is not about one election result or even a series of election results. It is not a party political judgment, and it is not quite a matter of consensus. It is not the case that everybody in the room has to agree. However, this is where losers' consent, as it is sometimes colloquially known, really matters. In 2012, there were people who did not want an independence referendum, but they recognised nonetheless that the time had come for one to be held. In 1997, there were people who did not want devolution, but they recognised that, by that point, it had clearly become the settled will of the Scottish people. Neither of those positions has ever really been contested. That is the place that you need to get to in order to show that there is settled will.

The meaning of settled will can change, as it clearly did in relation to devolution between 1979 and 1997. It was changed not only by party political campaigning, but by non-party political campaigning. It was changed by momentum. That is the only word that I wrote down in my notes when Aileen McHarg was speaking, and I agree with her on that. Settled will is a reflection that momentum is now behind an idea, project, reform or change. With independence, there does not yet seem to be a great deal of evidence of that momentum but, as I say in my written submission, it would clearly be contrary to the settled will of the Scottish people for anybody to take independence off the table. Equally, that independence should be

pursued as a matter of pressing priority right now seems to be a minority position. People seem to want independence on the horizon, but no closer than that, thank you very much.

That is only my estimate as a citizen; it is not an expert view. How do I know that? It is from talking to people, as you do, and from reading the opinion polls, as you do. I think that, earlier, Aileen McHarg used the phrase, "We will know it when we see it." That is completely unsatisfactory as a definition, but it is probably the best that we can do.

Professor Tierney: I would not try to define the idea of settled will or how it should impact on political actors. However, I would perhaps ask, "Settled will to do what?" Going back to my earlier remarks, I note that the independence question is categorically different from the creation or extension of devolution. Constitutional change happens very easily in our country, as we saw with the creation of devolution, the Scotland Act 2012, the Scotland Act 2016 and all the legislation for Wales. Constitutional change on territorial questions happens very straightforwardly.

However, there are two distinctions between the creation and extension of devolution and what we are talking about. First, those changes are reversible: if you try to do something through the 2012 act or 2016 act and it does not seem to work, the UK Parliament can then legislate or go through the same process and we can go back to where we were. That is not the case with independence, which would be a categorical, abrupt and significant change, not only to the constitution but to the state.

Secondly, it is not only internal actors who are involved in the decision. When you change your constitution, the international community generally does not want to know, provided that you do not introduce constitutional standards that violate international law. When you secede from a state, you involve others, because there is the law of state succession, which is about which state succeeds to legal personality. There is also the issue of recognition of the new state. The international order has, at various points, emphasised the importance of territorial integrity and the stability of states.

I am not saying for a moment that those are insurmountable hurdles to Scottish independence. All that I am saying is that all of that, together, raises independence or secession to a categorically different level from increasing devolution or even turning the UK into a federal constitution, because those are internal constitutional changes.

When we talk about a settled will to do something, we have to be careful not to think that there is an easy continuum from the settled will to extend the powers of the Scottish Parliament to the settled will to break up the state. It has to be recognised that those are categorically different decisions. I am not saying that it should not be allowed or that it should be deemed unlawful, immoral or anything like that, but we have to be careful about what we are talking about when we discuss settled will.

Jamie Halcro Johnston: You have covered a couple of other points that I was going to ask about, so I will leave it there and perhaps come back in later. Thank you.

Patrick Harvie (Glasgow) (Green): I appreciated Adam Tomkins's frankness about "We will know it when we see it" being clearly inadequate but the best we can do. It might be that, in the interface between the legalities and the politics, it is not possible to have a position that is free of contradictions.

10:00

I want to pick up a couple of points in Adam Tomkins's paper about the use of referendums more generally, and I am interested in everybody's views on this. Several referendums that are not about secession are mentioned, and you make the case that we should use referendums not to determine or to find out people's views on an issue but to establish what we think we already know. Among others, you gave the example of the alternative vote referendum as one that successfully settled the question. I would push back against that a bit, because it did not settle the question of whether electoral reform is necessary. The Lib Dems are not here, and they might push back against this, but they skilfully negotiated a coalition agreement that gave them a referendum on a voting system that nobody wanted. The AV system was not anybody's choice, so it was almost designed as a scheme to put electoral reform on the back burner, but it did not settle the question of whether it was required, and, with the genuine prospect now of a far right Government in the UK, that should send chills down all our spines.

I would ask for your reflections on the experience of other countries that use referendums more frequently on non-secession issues. For example, Ireland has had a range of referendums on issues on which it was not really known how the public would vote. Common sense might have said that the public would have supported doing away with some of the misogynistic language in the constitution in the recent referendums on family and care, but those expectations were confounded, and the public voted quite comprehensively for what I would consider to be archaic language. Therefore, there

is surely a case for using referendums to ask, genuinely, what the view is and to establish whether there is a 50 per cent plus one majority, rather than to confirm that there is an overwhelming settled majority that we already know about. Should we learn from Ireland's experience of having a level of direct democracy as the trigger point for putting those questions to the public? Ireland used citizens assemblies in a number of instances to determine questions that the political process either could not resolve or was in deadlock over.

Professor Tomkins: Those are very fair questions, Mr Harvie, and thank you for them. In broad terms, I agree with you. There are as many different styles and types of referendums as referendums that have been held, and I am trying to learn from best practice. I think that I am saying this as a private citizen, rather than as a professor of constitutional law, but it would be a shame if we had not learned from the mistakes of 2014 and 2016, neither of which was a particularly happy referendum experience. By that, I mean that they did not do everything that was asked of them. What was asked of those referendums was that they were fair, legal and decisive. They were fair, probably; they were legal, certainly; but they did not really settle the issues that they were asked to settle, did they? We are still here talking about independence and the processes towards independence. Perhaps you disagree with me, but I am telling you how I honestly see it.

The contrast between the 2014 referendum in Scotland and the 1997 referendum in Scotland could not be greater. There is no coherent argument that the 1997 referendum in Scotland did not settle the question of whether we wanted devolution. I am not altogether sure that I agree with the evidence that Professor Tierney just gave the committee that independence is somehow categorically different from devolution, in terms of thinking about settled will. I am not sure that that categorical difference would be reflected in any source of constitutional authority, so I would read across from settled will with regard to devolution to settled will with regard to independence. I would not set the bar higher or differently. That is perhaps a disagreement between the two of us.

However, if we want to, we can certainly try to learn from the experience of other jurisdictions with regard to referendums. Ireland might be one example, California might be another and Switzerland might be a third. However, I would be cautious for two reasons. The first is path dependency, because we are not Ireland, Switzerland or California. Our experience has shaped what we think of referendums and Ireland's experience has shaped what Ireland thinks of referendums, and our experiences have been different, so path dependency becomes quite powerful. The second is constitutional transplantation, which I am generally allergic to. Constitutions, particularly those such as the British constitution, happen from the ground up rather than from the top down.

If you put all that together, what I am trying to suggest in my evidence is that there is a better way of doing an independence referendum than what we did in 2014, and that it is a way of doing an independence referendum in future, which is more likely to happen than not, and that is that we ask the question only after we have already pretty much determined what the answer is going to be. That is not what happened in 2014; it is what happened in 1997. If we want to learn from our experience of holding referendums, we might want to try to emulate 1997 more than we want to emulate 2014.

Patrick Harvie: I see that others want to come in, but, first, one part of what was different between those referendums was that in 1997 there was a very clearly defined proposition being put rather than a general one, and I would suggest that one of the reasons why the EU referendum in 2016 resulted in such chaos was that every flavour of Brexit imaginable was on offer, not a clear, defined and solid proposition. However, had the result been no, I do not think for a moment that the Brexiteers would have gone away and spent the next decade saying, "Oh well, we lost that one. Let's talk about something else instead."

Professor Tomkins: I am not holding up 2016 as a good example to emulate. I am holding it up as a bad example that we should try to avoid.

Patrick Harvie: Yes. Aileen McHarg wants to come in, too, so I just want to remind everyone that I finished my first question by asking whether there should be discussion of the potential for a direct democracy element—some way in which the public themselves can assert that they, or a substantial body of people, are ready to have the question put, in order to do an end run around the political deadlock.

Professor McHarg: I want to slightly disagree with Adam Tomkins, because I think that he is conflating two issues. One issue is the concreteness of the proposal, and the other is how sure you are about how the public will vote on that proposal. If you compare the two devolution referendums, you see that the 1979 referendum was on a much more concrete set of proposals, because it was after the enactment of the Scotland Act 1978, but that did not settle the question at all, because we had another referendum 18 years later.

On the question of independence, before we came in, we were talking about the sense of dejà vu, but I remember lots of discussions in 2014

about whether we should have one referendum or two referendums and when the referendum should take place. On something as big and important as independence, waiting until there is a concrete set of proposals—which is really a question of negotiation between the Scottish and UK Governments—before you ask the Scottish people, "Do you really want this?", is a bit late. In these contexts, something on the principle is unavoidable.

On your question about whether there should be a democratic element that triggers the process, you could design such a secession process. The Ethiopian constitution provides an example of that, whereby there is a trigger process for the territory that wishes to secede. There needs to be a vote in the appropriate legislature, which triggers a duty on the federal Government to organise a referendum.

To go back to our concrete legal position, the difficulty is that the reservation of the union, as the Supreme Court confirmed it in 2022, could stop the Scottish Parliament and the Scottish Government doing other things that might have that triggering effect. The Supreme Court decided that a referendum can be related to the union not because it has any legal effect on the union but because of its political effect on the union. That creates an area of uncertainty about what degree of political effects we are talking about that would bring something within the reservation of the union. There are uncertainties there about what could be done.

Patrick Harvie: If we were to move the question about an element of direct democracy element away from the issue of secession or independence, and towards how the people of Scotland assert their right to make a decision on a matter of importance, that is a question that the political process is failing to engage with. Is that not one way of putting a clear mechanism into the hands of the public, which allows them to force the political process to respond?

Professor McHarg: The difficulty is that none of those things is, in and of itself, outwith the competence of the Scottish Parliament. It is not outwith the competence of the Scottish Parliament to legislate for referendums; it is outwith the competence of the Scottish Parliament to legislate for a referendum on independence. If you are talking about creating some other kind of direct democracy mechanism, that too would be subject to the competence limits on the Scottish Parliament.

There is a degree of uncertainty about how far the Supreme Court would push the idea that the preservation of the union encompasses things that might have merely a political effect on the future of the union rather than a legal effect. It might say that referendums are something completely different and separate and that they have a particular political authority that puts them in a separate category. However, we might see the opposite argument being made, particularly if it is perceived that what is being done is trying to get around the reservation of independence referendums.

Professor Tierney: That is a really important set of questions. On the first one, I have a few quick thoughts. First, when we talked about settled will, I discussed how secession is not just a constitutional question but is, at least, a very big constitutional question and, arguably, there is a category difference. It is fundamental to have a referendum; I do not think that there is a way to settle the issue other than by a referendum. Referendums can be done well. You were on the committee back in 2012, Mr Harvie, that I advised on the independence bill. I thought that that worked well and was very collegiate. There is a route in that way.

Secondly, it is an important idea to have a package to take to the people in the referendum about how things will look afterwards. Ireland is an important precedent in another way. The referendum in Northern Ireland in 1973 was largely boycotted by nationalists and simply inflamed what was already a bad situation. In comparison, in the Northern Ireland referendum of 1998, both communities went to vote on a package that they had all agreed on. Therefore, they were not being asked the big sovereignty question; they were being asked to vote on the Belfast agreement and there was fairly broad consensus in favour of that.

The model that Adam Tomkins was talking about—in which, in a referendum, people vote on the end deal—is ideal, particularly either when society is quite evenly split or when there are some deep divisions. The problem with that approach is that it is a catch-22 situation. If you are going to vote for independence and say, "We would like the UK to agree to what independence will look like," it is in the interests of those who do not want a yes vote not to agree to a package. It was the same with Brexit: if the leavers had gone to Brussels and said, "Please do the deal with us on a new trade agreement before we have this referendum," Brussels would have said, "No—of course we won't do that. It will just encourage a leave vote."

In an ideal world, there is a Belfast agreement-style deal that is put to the people, but, realistically, when it comes to secession votes like the one in 2014 and the one in 2016—which was, realistically, a secession vote—you will not get that.

10:15

As a point of principle, the second idea, about getting people together in some kind of deliberative enterprise to agree about how they go forward, is a good one. The problem with such deliberative exercises is that they quickly become elite driven. It depends who sets them up and sets the terms for them. We have seen precedents for that in Canada in changes to the electoral system in provinces. They set up citizens assemblies to discuss that, which seemed like a good idea. You get to the point that political elites determine how those processes go, experts come in and determine how the process goes or the citizens assembly comes up with a scenario that, in the end is entirely unrealistic to the political class, who say, "Well, this wouldn't run." That happened with the electoral system that was produced in Ontario. I can see the point of an intermediate step, with some kind of deliberative popular discussion. A deliberative popular discussion is always a good thing, but the danger in setting these things up is that those who set them up path determine how they go. You have to be really careful about that.

Professor Tomkins: We have had a citizens assembly in Scotland. Was the question not about what kind of country we want Scotland to become or to be or something like that?

Patrick Harvie: There was one on Scotland's future that was a bit vague and undefined. There was another on climate, which perhaps fell into the category that Stephen Tierney was talking about, in the solutions that it came up with.

Professor Tomkins: I agree with what Stephen Tierney just said. I am all in favour of democracy in Scotland being spread beyond the representative model of this Parliament and our local authorities, and of participatory democracy being more widely experienced and encouraged. If you want to do that in Scotland, you might be advised not to start with the constitutional question, because we know that it is divisive. Why not have a citizens assembly about assisted dying, for example? Why not have a citizens assembly about any number of difficult moral political questions that our Parliaments are, with respect, struggling to deal with at the moment? I do not just mean this Parliament; I also mean the one in Westminster. That issue is really important to a lot of people and is precisely the sort of thing that we could have a citizens assembly about. I would be inclined to think that participatory democracy might stand a better prospect of gathering pace if you took it away from the constitutional question.

On Aileen McHarg's point about legislative competence, I am not sure that citizens assemblies require an act of the Scottish Parliament to set them up. I do not think that the ones that we just talked about required legislation.

Patrick Harvie: I do not think so.

Professor Tomkins: I do not think that there is anything in the 2022 Supreme Court judgment to suggest that it would be outwith the competence of the Scottish Government or the Scottish Parliament to explore ways in which to broaden participatory democracy in Scotland, even on the constitutional question. I would not read the judgment in that way at all.

Patrick Harvie: I have taken quite a lot of time on this, convener, but I just want to acknowledge that, when I talked about having some element of direct democracy, I did not necessarily mean a citizens assembly as the format for that. However, it is something that I would like to explore further.

George Adam (Paisley) (SNP): Good morning, everyone. It is nice to see Professor Tomkins, and unusual to see him at the other side of the table instead of here with the rest of us.

Ironically, as a former minister who was in charge of referenda and participatory democracy, I agree with Professor Tomkins that our two citizens assemblies were too vague and our questions were too big and could have been broken down. Assisted dying is a perfect example. When I came in as minister, I asked, "Why don't we have a citizens assembly on a difficult question such as assisted dying?" I cited what Ireland did with some of the difficult questions that it faced. However, that is entirely different from what we are talking about today.

When I was a minister, I would talk to people who, like me, were pro-independence, and they would say, "You're in charge of referenda, George. Just do it." I would cite many of the arguments that have been made today. I would say that we would not gain anything, we would not be any further forward and we would be in the Catalonian situation.

I take on board what Professor Tomkins said about being careful what we wish for and the idea that the flexibility of the UK constitution might be helpful. Our advisors have talked about the Canadian paradox, whereby the UK Supreme Court took on one aspect of the question, whereas Quebec could not enable a referendum on its own—that would be for the Canadian Government. We did not get to the next part, however—that, if there was a clear process and reasoning, and if the political process got to the stage where a referendum could be held, there would be open dialogue and everything would be done in good faith. Would that kind of aspect have helped us here, so that we were not almost in a no-man's-land? As every one of you has said, when the act happened and everybody knew that we were moving forward politically with the argument, the UK Government had the right to

negotiate in good faith, rather than just saying, “Now is not the time.”

Professor Tomkins: The duty in Canadian constitutional law on the federal Government and on the other provinces to negotiate in good faith is triggered only after there has been a yes vote, as it were, in the province that wishes to secede; there is not a duty to negotiate in good faith in the run-up to the referendum.

George Adam: But we cannot even get to that stage politically, although we know that a majority of Scots believe in independence. That is where the frustration comes in: there is not the ability for us to go forward.

Professor Tomkins: It is not for me to advise nationalist politicians about what they should do in trying to establish that it is the settled will of the Scottish people to pursue independence, except to say, with respect, that that is your job. If you want independence for Scotland—and I know that you do—your job is to persuade the people of Scotland to embrace that so that it becomes manifestly the settled will of the Scottish people. As you have heard all three of us say, any United Kingdom Government or Parliament that seeks to frustrate that settled will pay a significant political price.

I know that you want more clarity than that, but I cannot give it to you, because I do not think that it exists.

George Adam: Anyone else? As he grasps at straws.

Professor Tierney: I hope that this is not an oversimplification, but the way in which I see the Spain, Quebec and UK situations, in a nutshell, is that, while Catalonia can neither hold a referendum nor get independence even if it held a referendum, and is hence excluded on both counts, and while Quebec, within Canada, can hold a referendum, as it has a constitutional right to hold a referendum whenever it wants, although there is no constitutional right to secede, even in the event of a yes vote, and that would have to be negotiated, Scotland is in the reverse situation, in that the Scottish Parliament has no right to hold a referendum but there is a generally accepted political principle that, were there one and were there a yes vote, that would effectively be an automatic right to go. It would have to be negotiated, but the principle would be conceded. You are right to say that the hurdle in Scotland is the referendum, but the principle of secession is there. Quebec is in the reverse situation, as I see it.

Professor McHarg: In Northern Ireland there is no role for the local devolved institutions; it is a question for the Secretary of State for Northern Ireland. In the Re McCord case, the Northern Ireland Court of Appeal said that the secretary of state had to exercise their functions impartially, in good faith and bearing in mind the right to self-determination of the people of Northern Ireland. That is in the context of a statutory scheme. We could imagine similar arguments being made here at the political level—that it is not something where decisions should be taken on a partisan basis.

Stephen Kerr (Central Scotland) (Con): Earlier, our committee advisers gave us the same sort of picture that you are giving us. Basically, this whole discussion is fundamentally political. Adam Tomkins, you talked about the “vagueness” of the British constitutional arrangement—and you described the fact that it is vague as a strength. I ask you all to tell us what is certain about the legalities surrounding the constitutional arrangements that we have in these islands. What is certain in law? That is your area of expertise.

Adam, why not go first? Tell us what is certain.

Professor Tomkins: That is a horrible question. What is certain is that those on all sides of the argument agree that the decision maker is the Scottish people and that the test is “What is the settled will of the Scottish people?” Those on all sides of the argument accept, for the time being, that there is no route to a referendum to test that settled will without the consent of the Westminster Parliament, under either an act of Parliament or a section 30 order, as was granted under the Edinburgh agreement in 2012. All of that is either expressed in, or can reasonably be implied by, the Supreme Court judgment from 2022. That is what is certain.

In comparative terms—we have talked about Germany, the United States, Spain and Canada; Aileen McHarg has talked about Ethiopia, which is a jurisdiction that I know nothing about; we have also talked about Northern Ireland—the UK constitution takes a notably permissive approach towards secession.

I leave it at that.

Stephen Kerr: Okay—that is fair enough.

Professor Tierney: I would say that two things are clear, as a matter of law. One is that there is no right to secede under international law. There is not a prohibition against secession, but there is no right recognised under self-determination that would require international intervention. Given that no one is really taking that argument seriously, the question is fundamentally an internal one.

I hope that committee members will realise that I do not approach the answer to the question—which I think is clear—from a partisan position in any way. In 2012 I published a blog in which I argued that there was a plausible legal argument that the Scottish Parliament could stage a referendum on independence. In 2012 I believed

that to be the case—that there was at least a plausible argument. I no longer believe that to be the case. As far as I am concerned, the UK Supreme Court has now crystallised the legal position very clearly: it is outside competence for this Parliament to legislate on something that relates to a reserved matter, and the Supreme Court has told us that the union is a reserved matter. We thought that there was some wriggle room around section 29(3) of the Scotland Act 1998, because we define a reserved matter by its effects in all circumstances.

One argument was that an advisory referendum might not have the effect of ending the union. That is where the grey area was, and I thought that that was worth exploring. It has now been explored, and the UK Supreme Court said categorically that there is no distinction in law between an advisory referendum and a binding referendum. Both are beyond the competence of this Parliament. As I say, I am not, and have never been, a member of a political party, and I do not say that to make a partisan point. To me, as a legal scholar, the legal point is now crystal clear.

Having said that, we live in a free and democratic society, and the United Kingdom constitution is characterised by that. It is open to people to make a political argument. There is now a precedent to take forward the independence question politically, and it is free and open to people to argue questions about "generation", "settled will" and so on.

The matter of the authority of this Parliament to hold a referendum is now categorically clear. If you are asking me what is clear, then that is clear.

Stephen Kerr: Good.

Professor McHarg: I agree with what has been said. As I said earlier, the fundamental point is that any process by which Scotland becomes independent requires, at some point, the sanction of an act of the UK Parliament. The content of that act is not fixed, however. The UK Parliament could amend the Scotland Act 1998 to give the Scottish Parliament the power to hold referendums on a one-off basis, or it could give it permanent and unrestricted power. That could take any form. I think it unlikely, but the UK Parliament could delegate power to this Parliament to declare independence if it wanted to do so. The one thing that is fixed is that the UK Parliament has to decide what the process is, and it has the final word.

Stephen Kerr: The permissiveness and vagueness work for both those who would wish to pursue a secessionist argument and those who would wish to retain the current constitutional arrangements.

10:30

Professor McHarg: There is a big academic debate about vagueness, or what is called constitutional silence. Constitutional silence can be helpful and unhelpful; there are circumstances in which maintaining a degree of constructive ambiguity is helpful, and there are circumstances in which it becomes very unhelpful. My personal view—and I should say that Stephen Tierney and I co-authored the blog that he mentioned, along with other people—is that ambiguity over the power of this Parliament to legislate for a referendum had come to the point where it needed to be settled. It was no longer helpful; indeed, it was becoming obstructive, and what was helpful was for that question to be clarified.

More generally, though, the fluidity and uncertainty of the process remain to some extent helpful, although I can also see the argument that that is unhelpful. According to that argument, frustration over the lack of a clear route to independence itself becomes a constitutional grievance that fuels support for independence. That is a possibility, and if you do not want such an outcome, that might be an argument for saying, "It's time to clarify the process." However, as we have seen from international examples, and also from the Northern Ireland example, there is a real risk that clarification of the process would not be favourable to those seeking independence, because, from their perspective, it might put too many hurdles in the way of that process.

Stephen Kerr: In balance, then, does that permissiveness, or that vagueness, weigh in favour of anyone in particular as opposed to a codified secessionist legal route?

Professor McHarg: At the moment, I think that it is probably still beneficial, but I can see that there might come a point when it is not.

Professor Tierney: I do not think that the position is vague—I think that it is very clear, but fluid. This Parliament does not have the authority to stage a referendum, but the UK Parliament 100 per cent has the authority to offer one, either through a section 30 order or through a distinct piece of legislation. That is very clear.

I should say that the UK has a political constitution, but it is not a written constitution, so it all comes back to politics. I do not see the situation as being vague—it is simply fluid and political.

Stephen Kerr: So, the vagueness exists for the secessionists, with regard to the route.

Professor Tomkins: When it comes to the question of how you persuade the United Kingdom Parliament to legislate for an independence referendum, there are those in the room who

would say that the answer to that at the moment is vague, and there are those in the room who would say that they are frustrated at that vagueness. That is where the vagueness lies, but Professor Tierney is entirely right with regard to the clarity of the competence of the respective Parliaments. There is no disagreement between us on that.

Stephen Kerr: Right. Thank you very much for your clarity—and your certainty—around the fluidity of the situation.

Keith Brown: I have a very quick question that it would be great to get a quick answer to, because I am genuinely confused about the matter, and then I want to ask another question after it. It seems to be the fashion to refer to secession rather than independence—fair enough. What is it that we are seceding from if we agree independence?

Professor Tomkins: We call it secession, because that is the term used in international law. It is not at all a loaded term—it is coterminous with independence. I know that those who want independence in Scotland do not call themselves secessionists. None of us means it as a term of abuse in any sense.

Keith Brown: But what would we be seceding from?

Professor Tomkins: The United Kingdom.

Keith Brown: Not the Act of Union?

Professor Tomkins: No. Secession is an act in international law in which a territory secedes from a state. The state is the United Kingdom, so Scotland would be gaining its independence from the United Kingdom. In other words, Scotland would be seceding from the United Kingdom. That is how it works in international law, as I understand it.

Keith Brown: I am grateful for that clarity, but it raises in my mind the question whether it would be possible to have in Scotland a legal referendum on having no confidence in the Supreme Court, but that is just my own view.

I could be wrong on this, so please feel free to correct me, but a kind of narrative seems to have built up with regard to the two referenda that were held on devolution. In the second referendum, a lower bar was set rather than a higher bar, and instead of its coming about because of a change of mind, it came about because of an increase in support. In the 1979 referendum, there was the perverse and very unusual—indeed, unprecedented—rule that allowed the votes of the dead to count towards a no vote, and there was also the 40 per cent rule. However, support still grew over time.

I think that Professor McHarg made this point—I am paraphrasing here, because I do not want to put words in her mouth—but that kind of obstruction to a democratically expressed view will tend to lead to an increase in support for the view. I think that I have got that right. People in Scotland voted in 1979 on having an assembly—I am just old enough to remember it—and it was refused. Did that refusal in itself lead to an increase in support over a period of time?

I should also point out that the settled will was never a precondition of the 1997 referendum. People might say that, but it was never a precondition. When it comes to the idea that we can set that kind of precondition and that there must be some settled will that meets a certain bar—and I know that you have all argued against that, because the term is so vague—I point out again that that was never part of the 1997 referendum. I am happy to hear any comments on that point, but we should be clear about the history of the two devolved assembly referendums.

Professor Tierney: On the use of the terms “secession” or “independence”, I absolutely agree with Adam Tomkins. “Secession” is simply a synonym. I use the term to emphasise the point that I have continually made that, to my mind, this is not simply a constitutional question; it is a question that involves not just internal but external actors, and it involves engagement with the international community from whom an independent Scotland would seek recognition. Therefore, I think that the term “secession” places the act of seeking independence in that broader international context in which it should be set.

When it comes to a referendum to achieve that, what are the precedents? The Supreme Court of Canada said that the rest of Canada might have a duty to negotiate with Quebec in the event of a referendum, if there were a clear majority on a clear question. It did not explain what it meant by that, but some have read it to mean possibly a supermajority, which is the sort of issue that you were talking about, Mr Brown, when you referred to the 1979 referendum. Another example would be Montenegro breaking away from Serbia in, I think, 2006, where a 55 per cent majority was needed.

It is not, by any means, universally the case that a supermajority is required in secession referendums, but some argue that, given the importance and the one-offness of such a referendum, a supermajority should be built in. As I have said, it is not a universal rule, but it is something that some people have argued for, given the significance of the decision, which is very different from ordinary constitutional decisions.

Keith Brown: The referendum in 1979 was not a secessionist one—the one in 2014 was.

Professor McHarg: I want to make a couple of points, the first of which is very picky. "Secession" is not entirely a synonym for independence, because in some circumstances, as would be the case in Northern Ireland, the seceding territory will form part of another existing state, instead of becoming an independent state. It is worth clarifying that the right of the people of Northern Ireland to secede is only to form part of a united Ireland, not to form an independent Northern Ireland.

On the question of turnout thresholds, supermajorities or other such obstacles, the Scottish and Welsh devolution referendums of 1979 are the only ones that we have ever had in the UK that have had any kind of turnout threshold or special majority, and the resentment that it caused in Scotland—after all, there was a majority, just not a sufficient one—is, I think, the key reason why it was never done again. There are arguments to be had in principle on whether we should have supermajorities, but we also have to recognise that these debates take place in particular contexts, and in the context of the UK, supermajorities have a bit of a bad reputation.

The Convener: Neil Bibby, you will need to be very quick, please.

Neil Bibby: On that very point, a clear outcome of any referendum that establishes the settled will of the people of Scotland is what is desired, regardless of whether there is a requirement for a supermajority.

This also takes us back to the point that Professor Tomkins made earlier. In the 2014 referendum, it was not just the Scottish Government that was arguing at the time that there was a democratic mandate for a referendum through the Scottish Parliament elections; there was a sense that not just the Scottish Government and the UK Government, but both sides of the debate in Scotland—yes and no—had decided that it was time for those questions to be put. If you want that sort of clear and concise outcome in any future referendum, there will have to be consent, not just at a UK Government versus Scottish Government level, but within Scotland and on both sides of the debate—or as close to both sides as possible, because you are never going to get unanimity on this matter—that such a referendum should take place.

Professor Tomkins: I do not really have anything further to add, convener, but I agree with that.

Perhaps one point that I would make in relation to what Keith Brown just said is that I do not think that we are suggesting—certainly, I do not think that I am suggesting, Mr Brown—that settled will has become any sort of precondition. That is not the phrase that I would use. The constitutional reality, as all three of us have tried to explain it, is that there cannot be an independence referendum without Westminster's consent, so the question is, how do you persuade Westminster to grant that consent in whatever form it comes?

The suggestion, certainly from me, and perhaps from others, is that the way in which you persuade Westminster to grant that consent is a political process, not a legal process. It is a political process whereby those who want an independence referendum demonstrate that it has become the settled will of the Scottish people to pursue independence or at least to have an independence referendum. I would not describe that as a precondition; I would describe that as a way of making sense, as I said earlier, of the whole of the constitution, the legal rules, which are now clearer than they were, and the political negotiations and campaigning that happen under the umbrella of those legal rules.

The Convener: I will ask the final question.

Professor McHarg mentioned the idea, "You will know it when you see it." I have to say that as a data scientist working on the EU referendum, I saw it in Scotland. I was devastated to have been taken out of the EU, given that 64 per cent of the Scottish people supported remaining in the EU. Given that that was a statement and a consensus from the Scottish people about our position, what does it say about our democracy and the state of the union that Ireland received many concessions, albeit mostly through the Good Friday agreement, but Scotland received absolutely no concessions on the access to the EU that we would want?

Professor McHarg: Politics.

The Convener: Fair enough.

Professor McHarg: The different treatment in Northern Ireland was driven not by any internal constitutional considerations but by the fact that Ireland is a member state of the EU, shares a land border with the UK and managed to make that land border a negotiating red line for the EU.

If you look at the internal constitutional litigation—there is quite a lot of it from Northern Ireland—the position of the UK Supreme Court is just as uncompromising in relation to Northern Ireland as it is in relation to Scotland. The Scottish Government attempted to argue that the Sewel convention created some sort of binding veto power over triggering article 50, but a series of arguments were made in relation to Northern Ireland, including on the basis of the principle of consent under the Good Friday agreement, and those all failed and were rejected. That is simply a reflection of the differing political resources that

were available to the Scottish Government and—not the Northern Ireland Executive, because that was not operating for most of that time—to those groups in Northern Ireland who wished to maintain an open border.

Professor Tomkins: I mean no disrespect at all, convener, when I say that yours is a political question, and in a former life I would have risen to its bait, but it is not a question for a constitutional lawyer, so if you will forgive me on this occasion, I will not do so, save to say that the constitutional position with regard to Northern Ireland is materially different from the constitutional position with regard to Scotland, and those differences are reflected in part in the Northern Ireland Act 1998 on the one hand and the Scotland Acts on the other.

Northern Ireland's constitutional future is wrapped up in the Good Friday agreement, or Belfast agreement, which is an international agreement with another state. Right now we are talking about states and secession, and the difference between a state and a territory that is not or not yet a state is absolutely material, not only in international law but also in constitutional law with regard to Northern Ireland's future. Just as I said in answer to Patrick Harvie's questions, we can learn a lot from comparative experience, but we cannot necessarily transplant other people's experience to our own. Scotland's constitutional journey, route and future are Scotland's, and they are not necessarily the same as those of Northern Ireland or any other part of the United Kingdom.

Professor Tierney: I have a very final reflection, which is that I know that it is frustrating when lawyers come along and seem to be telling people what they cannot do. One thing about being a constitutional lawyer in the United Kingdom, compared with being one in Germany or America, where the constitution is almost impossible to change and secession is not allowed, is that your job is to tell people what they can do. We have a political constitution; it might not be one that everybody around the table particularly likes, but the United Kingdom constitution is incredibly flexible. These questions are political, but if you make the political argument, all you need to get the constitutional change is a straight majority in the House of Commons. There are not many constitutions in the world that work like that, but our system does work like that, and you can go down the road, even so far as breaking up the state, on the basis of a straight majority in the House of Commons, so yes, it is political, but it is certainly not unachievable for people who want to make political arguments.

The Convener: Thank you all for your attendance. We will have a very short break before we move into private session, because we are a little behind time.

10:46

Meeting continued in private until 11:15.

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