The Select Committee on the Constitution

Corrected oral evidence: Parliamentary Scrutiny of Treaties

Wednesday 21 November 2018
11.40 am

Watch the meeting

Lord Norton of Louth (The Chairman); Lord Beith; Baroness Corston; Baroness Drake; Lord Hunt of Wirral; Lord Judge; Lord MacGregor of Pulham Market; Lord Morgan; Lord Pannick; Lord Wallace of Tankerness.

Evidence Session No. 1 Heard in Public Questions 1 - 9

 Witnesses

I: Professor Elaine Fahey, Professor of Law & Associate Dean (International), City Law School, University of London; Professor David Howarth, Professor of Law and Public Policy, University of Cambridge; Dr Mario Mendez, Reader in Law, Queen Mary University of London.
Examination of witnesses
Professor Elaine Fahey, Professor David Howarth and Dr Mario Mendez.

Q1 The Chairman: Welcome. We are very pleased to see you this morning. This is our first public evidence-taking session in our inquiry into Parliament and treaties. We are very grateful to you for being with us. Before we put questions, would you like to introduce yourselves for the record?

Professor Elaine Fahey: Good morning. I am from City Law School, University of London.

Professor David Howarth: I am a professor of law and public policy, University of Cambridge.

Dr Mario Mendez: I am a reader in law, Queen Mary University of London.

The Chairman: I will start with a broad question and other members of the Committee will want to come in with more specific questions. Under the system as it now exists for negotiating and approving treaties, is the balance between Parliament and government appropriate?

Professor Elaine Fahey: I will pass all questions that have anything to do with public or national law to my colleagues and defer to their expertise. I come at it from an international relations perspective.

Professor David Howarth: I am going to pass everything about the EU back. As with everything in the British constitution, it depends whether you are looking from Whitehall or from Westminster. From the Whitehall point of view, everything is perfect. The whole process is under the control of Ministers. Parliament does not really get a look-in until after signature and, even after signature, the CRAGA processes are very difficult for anyone to operate, especially in the Commons where the Government control the agenda. So it is marvellous from their point of view.

From the Westminster point of view, obviously the opposite is the case. You have to look at what might be the legitimate interests of Parliament in treaties, and in the context of foreign policy in general. The starting point is the fact that the historic prerogative of the Crown leaves Parliament out, but Parliament should think that it has a legitimate interest in foreign policy—not just the domestic consequences of foreign policy but of foreign policy itself; otherwise, why do we have a Foreign Affairs Committee in the Commons? There is a democratic deficit in the whole process. That applies not just to treaties but to non-legally binding instruments, memorandums of understanding and so on; they also should be part of the process.

Even if you think Parliament should be concerned only with domestic matters, there is the knock-on effect of international negotiations and agreements on domestic policy. For example, can we introduce taxation
on air fuel? There is the Chicago convention restraint. In Canada, there is a debate now about whether its legalisation of marijuana is contrary to three international conventions. So there is always this possibility of a knock-on effect. Even though in theory—because we are a dualist country—we could pass legislation that is contrary to our international obligations, in the policy debate, the prior treaty commitments are always important.

Finally, there is the problem that the present system is just a voluntary one. The Government sign a treaty and then introduce domestic legislation, or some other form of legislation, through Ministers, to bring the situation into line with what would be the UK’s international obligation were the treaty to be ratified. It does it in that order, so Parliament gets a say if there are domestic consequences before ratification. That is purely voluntary. The Government could just not do that. The Government could ratify first and then say to Parliament, “If you do not pass this legislation, we are in breach of our international obligations”. So the system, at least from the point of view of Westminster, is not in balance and should be shifted further in favour of this side of the road.

**Dr Mario Mendez:** Broadly, I would agree with the observations made by Professor Howarth and I would add a couple of observations that are worth thinking about in this respect. If we think about the Constitutional Reform and Governance Act and the provisions it contains in relation to approval of treaties, it is an attempt at placing on a statutory footing a rule that emerged in 1924—the Ponsonby rule—in a different era of treaty-making. So we have to start from the premise that there has been a radical transformation in the remit of treaty-making. Treaties are doing very different things today from what they were doing in, for example, 1924. They reach into all aspects of our daily lives in a way that they did not in 1924. So it seems to me that we should start from the premise that the rule that originally emerged in 1924 applied to, essentially, the range of what was then the remit of treaty-making, and we should recognise that today that remit has radically transformed, leading to all manner of controversial things that are done by treaties—the common focus today is on trade agreements and the ever-expanding areas they regulate. If we start from that premise and say that the Constitutional Reform and Governance Act places that on a statutory footing, albeit while also telling us the consequences of a vote against ratification, we are operating with rules from the early 1920s but we are now in a different era of treaty-making. If we start from that premise, it seems to me that the rules we have currently are democratically anomalous. We might say that if under the practice of the Constitutional Reform and Governance Act we had seen a meaningful contribution being made by Parliament and its committees in relation to treaty-making, it would be much more acceptable—but, obviously, they have not played a meaningful role in relation to treaties that are laid under the Constitutional Reform and Governance Act, and therefore I think that there is a strong case for reform.

**Q2 Lord Morgan:** I know that Professor Howarth has an interest in historical
matters because I had the privilege of being with him on a panel at the Liberal Democrat History Group—so I will introduce a historical aspect to this. Does Parliament have an adequate way of considering what you might call the passage of time in the consideration of treaties? The meaning of treaties can change or be seen to change and it could be argued that the First World War was partly caused by that. The entente with France was supposed to be about one thing and on 2 August 1914 Parliament discovered that it was about something else. Is that a problem that is adequately covered by our present procedures?

Professor David Howarth: That is an interesting thought. Of course, the Ponsonby rule came in, if we are still on historical matters, because Members were concerned about secret treaty-making. That is why they wanted more transparency. We do not have much transparency, even now, in the process of making treaties in the prior part of the story. It is true of course that treaties change their meaning through time, either through the practice of states or, occasionally, through interpretation by the courts. There is a problem there, but there is a more general problem about termination and denunciation of treaties and the power of Ministers to do that—which is, in essence, what caused the Miller problem. If you look at the CRAGA process, it is now generally understood, although some of us thought differently at the time, not to include anything about termination or denunciation and, therefore, there is no opportunity to consider the kind of question that you raise.

The Chairman: On the point you made, how much of it is a problem of process and how much is a matter of political will? You said Parliament has not taken up the opportunity and there is no committee yet on treaties, so it has not even deployed the powers that it has. Is the challenge getting parliamentarians interested in treaties in the first place? However much we change the process, if there is not the political will, it is still going to be government-driven.

Professor David Howarth: We are probably the wrong people to interview about that. You should interview the Members and chairs of the Foreign Affairs Committee in the Commons. It is true, as Mario was saying, that if you look down the inquiries of that committee, there is no sign of any inquiries into treaty-making of any sort. The only time it comes up is if the committee is doing an investigation into relations with a particular country and we happen to be negotiating a treaty with that country. So it must be partly political, because the Select Committees could do more. On the other hand, what would happen if committees tried to be more assertive? Would Ministers simply turn up and say, “If we tell you anything about this, it will undermine our negotiating position, so keep your nose out”? So if you want the system to change, you have to change the process to force the system to move on.

Professor Elaine Fahey: These problems are mirrored globally. At least 160 constitutions all over the world are being surveyed and the trend all over the world is to erode executive dominance and involve parliaments in international relations and negotiations. So, on any view and background analysis of the UK’s position, it is certainly not anomalous:
the trend is towards more participation and different layers of law-making and towards executive dominance being discarded.

**Dr Mario Mendez:** In respect of political will, when the Joint Committee reported on the draft Constitutional Renewal Bill, it proposed a Joint Committee on treaties, and a very strong case can be made for that. There is also the Australian example, so there is an issue of political will here. If we are talking about the terrain of having scrutiny committees specifically devoted to treaties, it raises the question: at what point do they scrutinise? Do they have the potential to scrutinise pre signature or is it post signature and prior to ratification? So there is a big issue of political will. Even if you have a Joint Committee and follow the Australian model, that does not mean that you have what the constitutional systems would generally have in this terrain, which is a parliamentary approval requirement—although admittedly the systems that do have a parliamentary approval requirement are commonly the ones we label monist, where the treaties that are ratified enter into force and are given the force of law, apparently, in those legal systems.

Q3 **Baroness Corston:** Can we look at the United Nations covenants? Very recently, Philip Alston came over as UN rapporteur, I presume on the International Covenant on Economic, Cultural and Social Rights. We can all agree or disagree with what he said, but should there be some provision within Parliament for a right to debate the occasions when we are examined by the UN on civil and political rights, race discrimination, and violence against women—because at the moment they appear to have no force at all?

**Professor David Howarth:** I can answer from a more general point of view about the dominance of the Government in the agenda in the Commons in the first place. We are in the world of Standing Order 14. Standing Order 14(1) states that government business has precedence at every sitting—and then gives occasional exceptions. That dominance has grown over the years until very recently when the Backbench Business Committee was formed, which provides a chink in the armour. So you could say that in the Commons there is a way in which you do this; you do it via the Backbench Business Committee. If Members are interested they can persuade the committee they want a debate on those matters—that is what you would do. The procedures of the House of Lords are a complete mystery to me, so I will put that one back to you.

**Dr Mario Mendez:** I do not have anything valuable to add to that. It seems to relate back partly to the earlier question about whether there is the political will for this. It seems to me that it would be appropriate for there to be debate taking place in Parliament on such matters, but clearly there may well be a lack of political will.

**Professor Elaine Fahey:** It raises another very interesting and important point about non-bindingness. In the Netherlands we have seen a referendum on the EU-Ukraine deal and there are data protection authority agreements with the US on the Privacy Shield. There are a huge number of international agreements which are so-called non-binding
agreements. There is a sliding scale into law-making. Forceful parliamentary scrutiny, information and accountability in all those things form a very important spectrum of analysis.

**The Chairman:** Thank you very much. Lord Judge.

**Q4 Lord Judge:** You mentioned the Miller case. Does the judgment of the Supreme Court, or the process by which we got to the judgment of the Supreme Court, give the Executive any lessons about how they should address future treaty issues? What should we learn from it? That is a double question, so I do not mind in which order you take it.

**Professor David Howarth:** I will start with my conclusion. The whole issue of the termination of treaties should be put on a statutory basis and removed from the prerogative. I am sitting in a room with people who know far more about Miller than I do. Of course, Miller confirms the basic rules of dualism. With the exception of, I think, Lord Carnwath, they confirmed the doctrine that the conduct of foreign affairs is not judicially reviewable. That is on the Government’s positive side. It also confirms the basic rule that the prerogative cannot be used to change domestic law. But the result of Miller provides a kind of puzzle. Professor Elliott is the expert on this one. The problem with Miller is how the court deals with the issue of conditionality; that is the problem that rights could be thought to be conditional on membership and therefore not real and not being taken away by termination of membership. It deals with that by saying that it is not possible for Ministers to make significant changes to the constitution, cutting the UK off from an important source of law, by using the prerogative. That raises the question of what counts as “significant”. It is a question of what Professor Elliott calls “constitutional scale” and introduces a degree of uncertainty into the process. We cannot be going back to the court every time to find out whether a particular termination of a treaty is big enough to count as a significant constitutional change. An example would be termination of membership of the Council of Europe and the ending of our commitment to the European Convention on Human Rights. Is that significant enough? If that is big enough, what other treaties are big enough? To avoid having to go back to the court—which, with all due respect to the practising lawyers and former practising lawyers here, is not a great idea if you are in government or in Parliament—we might want to try to find a clearer way of dealing with termination powers.

**Lord Judge:** Do you want to add anything, Professor Fahey?

**Professor Elaine Fahey:** One of the most important things to say about Miller is how it is understood globally. It is understood to be a backing away from executive dominance and lack of accountability, and public apathy towards globalisation and global trade—so the public interest being viewed in a different light. It is important to keep in perspective that it is not an unusual judgment in that regard, that there are a lot of trends in that direction, and that it sets out the parameters for quite a positive multilevel engagement of institutional systems. But I defer to my colleagues on the more specialist points.
Dr Mario Mendez: Might I make a couple of points in relation to Miller and treaty termination? The first, in general terms, is what we learned from the case in relation to the scope for terminating other treaties without the need for statutory authority. I am not sure what we learn from the case in that respect. It seems a bit muddled when you start introducing notions of constitutional scale and the particular treaties we might withdraw from where there are statutory attempts at some form of implementation of that treaty. Some academic debate has emerged, to which the legal adviser to this Committee has contributed, on the possibility of withdrawal from the European Convention on Human Rights without statutory authorisation, and that kind of thing. Many would think that it would be caught by the Miller ruling, but there is still some debate about that.

The question seems to me to become, what about the many other statutes that exist in the United Kingdom: for example, the International Criminal Court Act, which seeks to give effect to the UK’s obligations under the Rome statute and was passed prior to ratification of the Rome statute? Would that be frustrated in the obviously unlikely event that a Government sought to withdraw from that particular treaty without parliamentary authorisation?

Perhaps I might go from Miller to a point about termination in comparative constitutional terms. Of course we know that the Constitutional Reform and Governance Act says nothing explicitly about termination, and that might be seen to be a shortcoming—it seemed to me a shortcoming at the time that the Act was being passed. People were not raising this in the debate when the Act was being passed and I do not think the Joint Committee focused on this particular issue either. There is a case for saying that we should give Parliament the possibility to have negative resolution—if we are going to have negative resolution on entering treaties—for treaty termination. If we look at this in comparative constitutional terms, modern constitutions—the EU is an exception in this respect—generally now provide for rules in relation to treaty termination that will usually parallel the rules for treaty approval. If you need parliamentary approval, you would usually need parliamentary approval for withdrawal. If you needed a referendum to join a particular treaty, you would usually need a referendum to withdraw. I say “modern constitutional texts”—that of course excludes the United States, which obviously has an ancient text.

Lord Wallace of Tankerness: I was interested in what Professor Howarth was saying about putting the termination of treaties on a statutory basis. If that was a road we wanted to go down and explore, what would the potential downsides be?

Professor David Howarth: The downside would be delay if there was a need to denounce a treaty very rapidly. The simplest way to do this is to include termination in the range of matters covered by the present CRAGA process. I would go further in terms of the process that would be possible under CRAGA. We now have a sifting committee under the
European Union (Withdrawal) Act. The sifting committee can decide whether secondary legislation under that Act is important enough to require an affirmative resolution, and whether it is enough for there to be the negative procedure, or for there to be no procedure at all. A sifting mechanism of that sort could work in this situation. It could be a joint committee or a committee of each House that would decide whether a particular ratification was so important that it needed an affirmative resolution, or whether it was important but not that important, so the negative procedure could carry on.

Those of us who have been Members of the other place know that the negative procedure is, effectively, ministerial control. Under the Ponsonby rule, Ministers gave an undertaking that they would provide time for an annulment resolution, but that is not reproduced in CRAGA—and it is all voluntary anyway. The Government control the agenda of the Commons and the Government can evade all scrutiny if they want to. Or there could be no scrutiny at all by the House, which would deal with the problem of emergencies.

I suppose that the other disadvantage, if you are living on the other side of the street, is that this is all done in the open, which no one in Whitehall wants to see. The policy question here is about transparency in the process of international relations. The old-fashioned pre-First World War view is that international relations must be carried on in secret and that it interferes with the ability of negotiators if negotiations are in the open. Post the First World War, with the advent of open diplomacy, that view shifted, and if you look at the way in which the other side of the Brexit negotiation has happened, and the way the European Commission and Council and the Parliament have been open about what they are negotiating about, and contrast that what it has looked like from this side, you will see that the need for secrecy is not felt as keenly elsewhere as it is here.

Professor Elaine Fahey: On the difficulty about legislating for all this, if you look at all the African countries leaving the International Criminal Court and the US leaving various UN bodies, the problem about legislation at national level is that it presupposes that there are withdrawal procedures in the international organisations. Many of the huge international organisations set up post World War II were not necessarily formulated with clear procedures for withdrawal. There are many conundrums across the world now on this very point.

Dr Mario Mendez: In relation to my earlier point, I was suggesting—and partly I hope answering the question about problems with placing this on a statutory footing—that there is a case for parallelism between the procedures for ratifying a treaty and exiting a treaty, including in the United Kingdom and, therefore, that there is a case for having the negative procedure applying to both. Actually, there is a case for a stronger procedure—but, again, it should be a parallel procedure. Are there problems with placing it on a statutory footing? At one level, we are talking about placing a constraint on the exercise of the prerogative
power on the statutory footing. It is not the prerogative power itself that is being placed on a statutory footing; it is the constraint on the exercise of that prerogative power, and, of course, under the parallel procedures we have the capacity for treaties not to be laid under the Constitutional Reform and Governance Act. We can write into the statute application of the same criteria for entry as for exit and the exceptional circumstances for the Minister laying a Statement, or we could say that treaty termination is a particularly special terrain, it is more significant than entering a treaty, in a sense, and therefore that we will write in even more flexibility for Ministers in that particular area, potentially. So there is a range of options here, it seems to me.

The Chairman: I think we want to follow up some of those points. Lord Hunt.

Q5 Lord Hunt of Wirral: Going back to Professor Howarth’s comments on the European Union—the Council of Ministers, the Parliament and the Commission—approach to treaty negotiations with the UK, given that we will be recommending ways in which we can improve meaningful scrutiny of treaties in a post-Brexit situation, what lessons can we take from the way in which the European Union has dealt with the whole question of treaty and treaty scrutiny?

Professor David Howarth: I would not claim to be an expert on this, but, from my brief acquaintance, the EU system seems very impressive. You have trade treaties under 207 and other treaties under 218. You have a whole procedure under the rules of how the Parliament engages with the other institutions, where the purpose seems to be to carry the Parliament with the negotiations. It is a consent procedure, I think—and, as I say, I am not an expert—and you have to get the consent of Parliament to not all but many of these agreements at the end. To smooth the way to do this, you keep the Parliament informed and the Parliament has its own committees and so on to ensure it is informed. From my superficial knowledge of it, it seems a very interesting system that we could do well to look at. However, my colleagues here are more expert in European matters than I am.

Professor Elaine Fahey: It has been a very significant journey for the European Union since the treaty of Lisbon about generating real power on the part of the European Parliament. It has been interviewing Edward Snowden and Mark Zuckerberg—not you, unfortunately. It has non-binding powers and rules of procedure and the capacity to litigate autonomously to get information to amend the mandate or to make recommendations at all stages—immediate and fully informed powers. You see this in the Brexit negotiations. The UK Parliament looks very much behind the curve. You do not look like you are getting all the information here and now. It is out there on the internet, on Twitter and on the PowerPoint slides of the EU 27. There is the dynamic of engagement with information. We live in a world where everything is leaked. You have a lot to learn about how to bring on board the provisions of the rules of procedure of the European Parliament. If it was
a template for every national parliament, which it is to some degree, that is a very good starting point for an international affairs committee.

**Dr Mario Mendez:** I would agree with some of the observations just made and the terminology used by Professor Howarth of “very impressive” and “very unique”. It is indeed very impressive and very unique—and I would emphasise the unique aspect of this. In the context of the European Parliament we are dealing with a constitutional system in which, if we exclude common foreign and security policy agreements, for which there is no assent procedure, most other agreements under the rules of the treaty of Lisbon require the approval of the European Parliament. In comparative constitutional terms, unlike most other systems in the world which have parliamentary approval requirements, the approval requirements in the EU have real bite because the European Parliament makes them have real bite and makes it clear that it will be willing to veto an agreement when its view has not been taken into account in the negotiating process. This is written into its rules of procedure. There is a framework agreement between the European Commission and the European Parliament that came out after the treaty of Lisbon that essentially stipulates what the European Parliament expects and what the European Commission will do in relation to negotiations on treaties. It is a very unique setting. It is a setting of an economic powerhouse—the organisation that is the European Union—for the purposes of, for example, trade agreements.

There are a couple of other dimensions we need to keep in mind when thinking about the European Parliament in this respect. The European Parliament does not sustain a Government. It is not a parliamentary Executive. No party has a majority in that Parliament. This is not like looking at a parliamentary system where the Executive can go off and negotiate a treaty, and where, even if you have an approval requirement in your constitutional text, you effectively control the parliament and the treaty goes through.

**Professor David Howarth:** Not this one.

**Dr Mario Mendez:** Exactly—it is very different setting. We need to keep its uniqueness in mind in this context. No party has control of this particularly House, so you have to take its views seriously.

**Lord Beith:** To what extent are these proceedings in the European Parliament fully open? Do they depend to any extent on being able to have private consultations with government which do not get into the public domain?

**Dr Mario Mendez:** For example, the INTA Committee, the Committee on International Trade, which is often focused on, does hold public hearings. There is controversy over access to, for example, classified documents, if that is the kind of terrain that you are thinking about in the context of trade negotiations. There is an institutional agreement with the Commission and the Council of Ministers about access to classified information, and that is partly why we have this whole thing with reading
rooms and where you would get access to documents that were being used in the TTIP negotiations with the United States. I think Elaine might be able to offer more than I can on that.

**Professor Elaine Fahey:** There is an exception in the EU regulations in relation to access to documents on international relations. The Parliament has vociferously litigated this exception and has sought to make inroads into it. The Council has said that mandates are still going to be classified for trade on a case-by-case basis. So the EU is not a perfect model and there is a big distinction between trade and non-trade. We see Members of the European Parliament, for example, and members of the LIBE committee, civil liberties MEPs and particular groupings individually litigating, without the support of Parliament, to change EU law, and NGOs actively litigating to expand the exception to international relations. So no, it is not a perfect system and still there are very specific procedures, as my colleague said, about classified and non-classified information. In general, we have seen the parameters of this exception under Article 4 being eroded in the regulations on access to documents.

**Lord Beith:** The other question was whether any national parliaments offer a model which is easier for us to look at because the Executive is in a stronger position than the Parliament. Even that is difficult because most countries do not have our first-past-the-post system and more automatic parliamentary majorities. Are there any good national parliament examples that we should look at?

**Dr Mario Mendez:** When we are talking about national parliament examples, we might want to distinguish between constitutional systems which are of the so-called dualist variety and those of a monist variety. If we go for the more dualist variety of sometimes former colonies of the United Kingdom, that kind of model, the one that is often suggested and was suggested when scrutiny took place on the Constitutional Reform and Governance Act, is the Australian JSCOT—the Joint Standing Committee on Treaties—which has a remit that does not preclude it from investigating prior to signature but, in practice, it only investigates after the signature of a treaty. That emerged in the mid-1990s following a Senate committee report that was produced and accepted, essentially, by the Government. That seems like it has lots of benefits. It is not a parliamentary approval requirement. It is a standing committee from both Houses that scrutinises treaties, but there is concern being expressed in Australia now, particularly in the trade agreement context, that the committee should do things prior to the signature of a treaty because otherwise you are not having meaningful input. What is it that you can say: that this treaty should not be approved? You want feed-in to the process before that.

Of course, if we look to systems that are not of the more dualist variety, we can look at somewhere such as the United States and what happens there in relation to trade agreements, where under the rules of the Trade Promotion Authority, the relevant parliamentary committees have oversight of the President’s conclusion of trade agreements, for example.
Again, it is a legal system in which part of the justification for that is that treaties apparently are the supreme law of the land.

**Professor Elaine Fahey:** It is all fine and well for you to be considering studying other countries and so on, but the trend in international trade is deeper trade agreements and transnational regulatory authorities—so beyond the state. It is complex for parliaments to get to grips with how the models of regulatory co-operation beyond the state are changing.

For example, the TPP survivor, CPTPP, ASEAN models, the EU-Japan agreement, CETA—all the new trade agreements—are models where you have more joint committees with lots of powers and lots of civil society input. Parliament goes further and further down the line of the things that are involved in it. You need to look at models as well as systems because the world of trade has gone this way whereas you might be sitting here.

**Lord Judge:** Do you mind if we go back to the information you were giving us about the EU and the arrangements there? I detected all three of you thinking that this was a great improvement on everything else. To what extent are the arrangements in the EU influenced by the fact that there are 27 or 28 sovereign countries involved in the process as well?

**Professor David Howarth:** It is true that, generally, federal systems have different ways of doing things from unitary systems. Of course, Britain is neither unitary nor federal, but we might want to think about our system, where we have concordats and so on, as one which should involve, perhaps more formally, the Governments and parliaments of Wales and Scotland. They are not sovereign in the same way, but the parallel is not as outrageous as you might think. The real difference in the EU is the political variety of the Members of the Parliament. It is a system that—

**Lord Judge:** Forgive me for interrupting. That is a consequence of the fact that there are 28 different nations represented there.

**Professor David Howarth:** No, I think it is a consequence of the electoral system, because there is a proportional system, so the place is run by agreement between the parties. The whole place runs on dialogue. The starting point for policy-making is different. The starting point for policy-making in Britain has always been what is called DAD. I have mentioned this to the Committee before. DAD is the policy-making process of “Decide, Announce, Defend”. Think about what is going on almost all the time. That is how British policy-making works. We announce policy and do not move from it, whereas the starting point for EU policy-making is not that at all. It is far more inclusive and negotiated from the beginning. Their way of doing things reflects a more negotiated policy-making process in the first place.

**Professor Elaine Fahey:** I would reinterpret your question. Your question is loaded with lots of assumptions, if I might say so.

**Lord Judge:** It was not meant to be loaded and I was making no
assumptions—I was just asking the question.

Professor Elaine Fahey: I meant that in jest. The EU as an organisation does lots of negotiation, for example with the World Trade Organization and UNCITRAL, the body that regulates the internet. The trend towards transparency and civil society participation is overwhelming international organisations, so it is not alone in its efforts to massively open up. Everything can be already out there on Twitter, on the internet, or in WikiLeaks. We have seen this happening. To say as an organisation it is quite esoteric is absolutely true.

Lord Judge: I did not say that. I was asking a perfectly simple question.

Professor Elaine Fahey: Of course.

Lord Judge: Because any organisation has to deal with its members. That is an issue which has to be addressed when you are saying to us that the EU does it in this admirable way. I am not saying it is not admirable, but that is a consequence which we have to face up to, is it not?

Professor Elaine Fahey: The point I would make to you is that there are many examples of this in other international organisations and bodies where similar procedures are being adopted.

Professor David Howarth: To re-emphasise my point, the question here is what sort of policy-making process do you prefer? Do you feel you need to stick to the one we have or do you want change? If we want to have change, it has to start somewhere.

Dr Mario Mendez: It is very much linked to the nature of the organisation. Today it is an organisation with 28 member states. The debate about the democratic deficit in the EU setting has been raging for more than 30 years. This debate links to the treaty-making powers. We have an organisation that has extremely wide treaty-making powers, effectively transferred from its member states, where its member states lose the capacity to have their own independent treaty-making power in that context. It has all these member states and there is enormous pressure on it to have a more democratically legitimate system for concluding such treaties. That feeds into why we have a scenario in which at Lisbon the European Parliament became, effectively, a sort of co-legislature in the treaty-making sphere, or at least most areas of treaty-making. The issue of civil society pressures that are brought to bear on this organisation in the context of these very controversial agreements, particularly trade agreements, as has been happening over the last few years, is central.

Related to that on the member states point is that of course many of the treaties created in the EU setting are mixed agreements. We have not mentioned those so far, and I do not know whether that is coming up, but I would say in that respect they need to meet—as well as the EU’s approval requirements—the domestic constitutional requirements of all
their member states. For those treaties you need to meet whatever the
domestic constitutional requirements are in the relevant member states.
Curiously and interestingly, in the UK that is one area where the
constitutional requirements are more powerful than under the
Constitutional Reform and Governance Act. My earlier observations were
not about mixed agreements and how they are proceeded with
domestically in the UK, but there it is a different set-up, of course, where
we have the affirmative resolution procedure being used so that such
treaties are nominated as treaties under the European Communities Act
1972, Section 1. They are subject to a different, more powerful
procedure.

Baroness Drake: If I jump in on somebody’s question, please call me
out because I was not here when the questions were allocated. Borrowing
from other countries’ experience that there is scope for improving the
democratic deficit that exists on scrutinising treaties in the UK, there are
three stages to negotiating a treaty: the opening, the progress of
negotiations and agreeing the text. Taking the middle one, the progress
of the negotiations themselves, there are real tactical and pragmatic
issues that arise in any negotiating journey, whether it is a treaty or
anything else in life, which have to be balanced against the transparency
and any desired reduction in the democratic deficit. This was a tension
that arose in the early stages of handling Brexit. Would you like to give
your views of what that means for the manner of parliamentary
involvement during that negotiating phase—not the mandate-setting, not
the agreement, but the actual progress it made? How could you do that
efficiently from the negotiating perspective and the transparency and
democratic deficit perspective?

Professor David Howarth: In an ideal world, Ministers would trust the
chairs of Select Committees not to give away secrets—which is, in effect,
the system in the United States when it is working properly. The
executive branch consults not just the chair but the ranking members of
committees on a regular basis: there are four, two on each side. In a
system where there was trust you could have a system of keeping people
up to date with the progress of negotiations. In reality, that is how the
European Union system works.

The problem with Britain is that Whitehall does not trust Parliament. It
does not trust anybody. It does not trust lawyers. There is an inherent
distrust by Whitehall of Westminster. I have always wondered how to get
over this. One way is to just do it and to say to Whitehall, “You have to
trust us”, and amend Bills in ways which are driven by a different view of
the relationship. But it is long-standing view of Whitehall.

This is the reason why in the Constitutional Reform and Governance Act,
we have references to Ministers having to tell civil servants that
Parliament exists. They have to say that there has been some sort of
interchange about how the system works. That is because, in reality, our
system is one of complete separation of civil servants from Parliament.
The Civil Service, for example, does not talk to Opposition politicians. I
once experienced an exception to that and it was quite extraordinary. It
was an exception where the Civil Service suddenly started to talk to the Opposition about a particular Bill—but they were not used to it, and we were not used to it; it is just not the way we do things. The barrier is that attitude of distrust between the executive branch of the Government and Parliament.

Baroness Drake: Does anyone else want to comment?

Professor Elaine Fahey: If you look at the European example, there are no legal limits on the provision of information to Parliament. It is available immediately and at all stages of negotiation. You distinguished in your question, I think, between the stages of negotiation, and that is the important point. The empowerment of the European Parliament in the post-Lisbon context has been without barriers or limitations. The other important point to make about information provision is the role of the Ombudsman in the European Union and the role of an ombudsman in a British context as a vociferous and ferocious warrior of information-provision nudging branches of government. You do not have that same type of system as in other continental systems, with information growing and nudging at all stages of the negotiations. So there is a dual point about an unfettered idea of information and an individual who is passing through those concepts of information.

The Chairman: Do you want to follow up?

Baroness Corston: It would be useful if you could talk to us about the scrutiny of treaties after Brexit. Do you think that a Select Committee would be suitable and at what point in the treaty-making process should Parliament be involved?

Dr Mario Mendez: To an extent, the system we have had under the Constitutional Reform and Governance Act needs to be thought about in the context of us being members of an organisation which has very wide-ranging treaty-making powers, and under which we have different procedures for approving such treaty-making, certainly when they are mixed agreements. If we leave the European Union and repatriate treaty-making powers to the UK, is it acceptable that we have the current set-up under the Constitutional Reform and Governance Act? Under the UK’s constitutional system, that would mean that you would have even less control than previously existed. Under the old system, whether it is an exclusively EU agreement—that is, an agreement that the EU has concluded with other nation states or international organisations—but particularly if it is a mixed agreement, one that the EU has concluded but which its member states, for example the United Kingdom, are also parties to it, it would mean that you would no longer have the capacity to go via the European Communities Act 1972, which presumably will no longer exist, with its procedures for affirmative resolution. On that basis, if we do not change the current system we will, in effect, lose democratic control over our repatriated treaty-making powers.

So my starting point is that by definition we would have to do something—so what should we do in this respect? There are lots of
interesting proposals out there. Both Houses have the capacity to have specialist committees in this area. I think that the Joint Committee proposal has always been an excellent idea but, if we are going to have that kind of model, as I suggested earlier, it is not good enough to have a model where they are only operating post signature. We need a model of treaty scrutiny that takes place prior to signature. It need not necessarily replicate the European Union’s model, but we still have an obvious democratic deficit with treaty-making if we fall back on the Constitutional Reform and Governance Act post Brexit.

It is not enough that we just explore trade treaties in this context. That has been the debate: trade treaties are the terrain we need to address. But it is the broad remit of treaty-making that needs to be addressed. There is many a controversial treaty that is not a trade treaty. We can think very briefly of one that the EU Committee has previously explored: the passenger name record agreement. When the UK leaves the European Union, can we see ourselves negotiating a passenger name record agreement with the United States in future? That is not a trade treaty. Would we think it acceptable that that simply went through the Constitutional Reform and Governance Act’s existing procedure—a treaty with those kinds of implications for privacy standards? My own view would be that that would not be acceptable and it is a good illustration of why we should have something much more potent than the Constitutional Reform and Governance Act.

**Lord Beith:** Would it require legislation to implement such a scheme and would that therefore be an opportunity?

**Dr Mario Mendez:** It seems to me that the common answer to suggestions about democratising the treaty-making power is to say, “That is fine because it would have no effect on UK law unless we have implementing legislation for it”. But the question is: at what point does a debate take place on the implementing legislation? We may be in the terrain of the United Kingdom’s extradition treaty with the US—which is one of the examples that is commonly referenced in this context, where the treaty is negotiated but it needs to be implemented. In my hypothetical example, if a PNR agreement were signed with the United States years down the line, the fact that you might need implementing legislation means that it is a “take it or leave it” treaty at the point that you have negotiated with the United States. On the other hand, the US on its side in those negotiations with the UK would have seen its own Congress and committees having input into that particular treaty—as indeed they did on the UK-US extradition treaty. It is just that when it came to the UK, it was signed and we cannot change it now.

**The Chairman:** I am conscious of the time and we would like to cover devolution in the last few minutes.

**Lord Morgan:** There has been much debate, as you know, about the role of the devolved legislatures in Brexit legislation, and the question of treaties has arisen in connection with the Trade Bill. It has caused a good deal of anger, I think, in Scotland and in Wales, and there is a feeling
that they are being treated like colonial dependencies by the Government at Westminster. What do you feel about this? Should the devolved Governments be involved, particularly in areas which are reserved for them as being within their competence? Generally that has been the case with Scotland, and Wales now has full reserved powers. What are your comments on that?

Professor David Howarth: With regard to Wales, there is a limitation under Section 101 of the Government of Wales Act which forbids the Government of Wales from doing anything which is contrary to the international obligations of the United Kingdom. It is the most extraordinary provision, because it basically violates dualism just for Wales. It means that the United Kingdom Government can impose legal requirements on Wales simply by exercising their powers on an international plane. I have never understood why that is there.

With regard to Scotland, I am not going to comment on the Continuity Bill case, which is now even more incomprehensible. I suppose this comes down to whether we think the concordats have worked—and I think the view increasingly in Scotland is that they have not—and whether we should do something more statutory. The people to ask about that are the people involved, but if the view has developed that these concordats are too easily ignored, we might be moving to a statutory solution. There is this rather odd argument—just one comment on the Continuity Bill case—that the Scottish Parliament can repeal UK statutes if it is within its own area and remit, so we could end up with the most terrible confusion if we do not sort out this area.

Lord Morgan: I am not here to answer questions, but my answers to your questions would be “no” and “yes”.

Dr Mario Mendez: It links in to the previous question and partly to my previous answer. In a post-Brexit context the repatriation of treaty-making powers to the United Kingdom means that if we operate under the existing system, which, if I am not mistaken, is the Concordat on International Relations and the Joint Ministerial Committee’s role in that respect, the devolved Governments have less input into treaty-making than they do under the existing system, where there is, if I am not mistaken, a Standing Committee on European matters. They can feed in more under the existing system as a member state of the European Union, because many of the treaties that are being concluded are being concluded by the EU, either by the EU alone or by the EU as mixed agreements. If we leave the European Union and there is repatriation of treaty-making powers to the UK, it would mean, unless we do something about that, we will fall back on the existing model. Therefore, there is a strong case for addressing that issue in the context of repatriation of treaty-making powers.

In comparative terms, in this respect, where you have a constitutional system which has an approval requirement for treaties, or at least certain categories of treaty, in a federal system, and you have one of the two Chambers representing the states, that kind of model is a mechanism
where, if it is not “take it or leave it” but they can input into the treaty-making process, and where they have representation in one of the Houses, it can allow them also to have input. On the other hand, there are other constitutional systems where you do not have representation taking place and so there is no input.

**Lord Wallace of Tankerness:** The issue arises because you are dealing with treaty-making, which is a function and a prerogative of the state, but the content of that can often involve matters which have been devolved under the legislation of the different countries. Do you have any international examples? Clearly, federal constitutions are a bit different, but can you point in our direction any international situations where there is engagement of the subnational state, both in terms of implementation and in the actual negotiation?

**Professor Elaine Fahey:** In global governance terms, national units are increasingly active and vociferous. Many of the best examples in the world are from parts of Europe and the US. It is part of the broader trend I mentioned earlier about participation in law-making not being an Executive-centred idea. In areas where Scotland was particularly distinctive from the rest of the UK, let us say in education, and those were supported competencies as a matter of European Union law, how education feeds into trade agreements is quite interesting to see in the huge mega-regional style agreements. It is far from an outrageous proposition to say that in global governance terms national units are increasingly empowered as a civil society voice.

**Professor David Howarth:** I suppose Germany is the place to look.

**Professor Elaine Fahey:** And the Netherlands.

**Professor David Howarth:** The Länder can even conclude their own agreements, with the permission of the Federal Government, so I suspect that Germany is an interesting starting point.

**Professor Elaine Fahey:** Belgium is another example.

**Professor David Howarth:** Not the United States.

**Dr Mario Mendez:** Belgium is an interesting example, as is Germany, in this context. In respect of Australia, an inquiry took place in this terrain some 20 years ago. It was called “trick or treaty” by one of the Senate committees and it produced a very famous report—famous in a treaty-making context, anyway, for people who look into those kinds of things. The driver for it was the changing nature of treaty-making and how it impacted on the states, and the fact that it cuts across powers that they would otherwise have. That was the initial driver for the inquiry and why they got their own joint committee—but, of course, it is a federal system in which the other House represents the interests of the constituent states.

**The Chairman:** Thank you very much. I am conscious of time. As you may be aware, we had a session before this, so the Committee has had
rather a full morning. We are very grateful to you for coming and giving evidence and getting our inquiry under way. It has given us a great deal of food for thought. If there is anything we have touched upon where you would like to put in a written submission consequent to this, please feel free to do so. You have been very generous with your time and information this morning and we are extremely grateful. Thank you all very much.