



OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities and Human Rights Committee

Thursday 3 November 2016

Session 5



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EQUALITIES AND HUMAN RIGHTS COMMITTEE

7th Meeting 2016, Session 5

CONVENER

*Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)

*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

*Mary Fee (West Scotland) (Lab)

David Torrance (Kirkcaldy) (SNP)

*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Nicole Busby (University of Strathclyde)

Dr Tobias Lock (University of Edinburgh)

Dr Cormac Mac Amhlaigh (University of Edinburgh)

Judith Robertson (Scottish Human Rights Commission)

Professor Muriel Robison (University of Glasgow)

Lynn Welsh (Equality and Human Rights Commission)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 3 November 2016

[The Convener opened the meeting at 09:30]

European Union Referendum (Implications for Equalities and Human Rights)

The Convener (Christina McKelvie): Good morning and welcome to the Equalities and Human Rights Committee's seventh meeting in session 5. I ask anyone who has a mobile device to please switch it to silent or flight mode. We have apologies from David Torrance, who is unwell, and Alex Cole-Hamilton will join us as soon as he can.

Our first item is on our inquiry into the implications for equalities and human rights of the United Kingdom's departure from the European Union. Our first panel comprises Lynn Welsh, the head of legal services in Scotland for the Equalities and Human Rights Commission, and Judith Robertson, who is the chair of the Scottish Human Rights Commission.

Welcome and good morning. Thank you for the written evidence that you have provided and the support that you have given committee members on understanding the rights agenda. We appreciate your support and we particularly appreciate your coming to speak to us about the specific issue of the implications for human rights and rights-based policy should the UK leave the EU.

I have a broad opening question. Will you both give us some insight into the implications for the rights agenda, the Human Rights Act 1998 and other human rights obligations should the UK leave the EU?

Judith Robertson (Scottish Human Rights Commission): Before we turn to the implications for the legal protections for human rights, it is worth reflecting on broader human rights concerns about Brexit. From our perspective, the first of those is the impact on poverty and on people having an adequate standard of living, which has already happened and will continue to happen in the short to medium term. For example, we can speculate that Brexit is likely to have an almost immediate impact on people's rights to an adequate standard of living, as enshrined in the International Covenant on Economic, Social and Cultural Rights.

The falling pound, at least in the short to medium term, will mean rises in the cost of living, especially in relation to food and fuel. The UK relies heavily on food imports, which amount to 30 per cent of its food. The price of food will rise if sterling falls and remains low for a prolonged period.

Food insecurity is already on the increase. That can be seen through increased reliance on food banks and the proportion of people who are living in fuel poverty, which remains well above acceptable levels. That is not likely to improve in the current post-Brexit economic climate. It is worth making the point that that is not for the longer term; it is happening now and will happen in the short term.

In the longer term, we must be wary of the Brexit circumstances of economic uncertainty leading to a levelling down of workers' rights in the name of economic competitiveness. Unions have already expressed concern about that. On the flipside, a positive human rights record and progressive protection should be seen as a means of attracting inward investment and supporting people in supporting the economy, as opposed to a race to the bottom on workers' rights to make our country more attractive having removed ourselves from the EU.

How long do you want me to continue, convener? I can give the committee a reasonable introduction and then stop, if that would be helpful.

The Convener: That is fine—carry on.

Judith Robertson: I will cover the bases and then members can come back to me on the key points.

On the implications of Brexit for legal protections, the Scottish Human Rights Commission is concerned that human rights protecting fairness, justice and dignity stand to be eroded as a result of the UK's changing relationship with Europe. The Charter of Fundamental Rights of the European Union became legally binding on EU institutions and national Governments with the entry into force of the treaty of Lisbon in 2009. It is directly applicable in the domestic law of the UK by virtue of the European Communities Act 1972 and in Scotland by virtue of sections 29 and 57 of the Scotland Act 1998.

The charter reaffirms the rights, freedoms and principles that are already recognised in EU law; it creates no new rights. It is divided into a number of sections. As the charter applies only when an EU member state acts within the scope of EU law, it will cease to be binding on the UK and to have effect in domestic law once the UK has formally left the EU.

The charter provides a range of protections in relation to EU law; it does not give us particularly new rights. When we leave the EU, those protections will no longer be there. I can detail some of the protections if the committee likes, but the information is out there in the public domain. The charter also contains rights and freedoms that go beyond those that are protected by the European convention on human rights, such as the right to protection of personal data; the right that arts and scientific research shall be free of constraint and that academic freedom shall be respected; and the right to a fair trial, which is not restricted to civil rights, civil obligations and criminal charges.

From our perspective, the potential loss is threefold. There would be a reduction in human rights protections—basically, the loss of charter protections within the scope of EU law—and, beyond that, the loss of rights to privacy, data protection and a fair hearing. Furthermore, an EU exit may represent the loss of the potential for the fuller protection of the social rights and principles that are contained in the charter. That is what could happen in the future. If we were no longer in the EU, the UK would no longer access the progressive changes that could be made in the context of EU progress. That potential progression would be gone. Finally, the charter has been of value not only in its provision of substantive social rights but in the contribution that it makes to the interpretation of a range of rights as what we call a consolidating instrument—something that brings together rights and articulates and strengthens the scope of human rights.

Another dynamic that it is important to outline is the increased vulnerability of the European convention on human rights. As members will know, the convention is an instrument not of the EU but of the Council of Europe, so it is not directly under threat as a result of our leaving the EU. However, it is worth considering that the impact of the loss of the charter and withdrawal from it will be that the convention will become increasingly vulnerable to UK withdrawal. As a deterrent to holding on to the convention, EU membership is being removed, along with the mitigating protections that are provided by the Charter of Fundamental Rights of the European Union.

There is apparently dispute as to whether membership of the EU technically requires states to be signatories to the European convention on human rights. At one level, that does not matter, because the expectation is that the EU demands a high standard of human rights protections in its member states; any attempt by the UK Government to remove itself from the European convention or to stand back from aspects of it would be, at the least, frowned on by the EU, and

the UK Government would be called to account for that. However, when we leave the EU, that will no longer be the case.

Although the European convention on human rights is not made vulnerable directly by the UK's leaving the EU, leaving the EU will mean that the EU's holding-to-account process, which concerns its general expectations of the standards that countries are expected to meet, will be withdrawn from the UK. That will strengthen the ability of an Administration at Westminster to stand back from aspects of the convention, which would be of significant concern—particularly given the context of the public debate on the convention and standing back from aspects of it.

I will stop shortly to allow the committee to ask questions on what I have said about the implications for rights. The principal risk concerns the current impacts on the most vulnerable and marginalised, given the economic uncertainty and the new trading environments, which could lead to an erosion of rights, the loss of legal protections that the charter provides and the risk to the European convention and the backstop that Europe provides in that context. Those are our three key points in relation to the potential risks.

Lynn Welsh (Equality and Human Rights Commission): I will concentrate a wee bit more on the equality side, to complement what Judith Robertson said about human rights. A lot of equality rights in Britain came from the EU in the first place, and most of them are enshrined in the Equality Act 2010. When Brexit occurs, that act will remain in place, so there will not necessarily be an immediate diminution of those anti-discrimination rights, but who knows what might happen beyond that? The underpinning EU requirements that mean that the act is as it is will be removed, so the act could be chipped away at. Obviously, we do not want to see that.

There are rights that are not in the 2010 act that come directly from the EU. They will drop away earlier, although the UK Government has said that the great repeal bill will hold in place those rights until they are given further consideration. We support the holding in place of the regulations that would otherwise disappear when the European Communities Act 1972 is removed, which would allow all that regulation to be considered properly over a period, rather than for it all to drop off a cliff at the time of Brexit. We will want the UK Government to do a full equality and human rights impact assessment of any suggestion that any of that law be removed.

The 2010 act goes beyond EU regulation in many areas, including goods and services protection, disability and sexual orientation, which were not directly required to be covered. There is concern that those areas could be chipped away

at more quickly or that other provisions, such as those on the amount of money that a person can get if they succeed in a discrimination claim—under EU law, that amount is not allowed to be reduced—could be removed or reduced fairly quickly.

As a commission, we—along with others, including academics—want to map out not only where the areas are that might be under attack but where there might be opportunities—if there are any—from EU regulation no longer applying. It has been suggested that, for example, we could extend positive action, which at the moment stops when it becomes positive discrimination under EU law. There might be more opportunity to extend such action slightly further. In addition, the removal of procurement rules might allow an opportunity to look at building better equality and human rights considerations into procurement. We are trying to look at the situation positively, not just negatively.

Like Judith Robertson, we are concerned that we might lose the European charter of fundamental rights. That gives not only a human rights protection but an equality and anti-discrimination protection. The benefit of, for example, the non-discrimination part of the charter is that a person does not need to attach another right when they make a non-discrimination claim, in the way that they would have to under the ECHR. Under the ECHR, a person would have to have a right-to-family-life claim, for example, to which they could attach an anti-discrimination claim, whereas under the charter, that does not need to be done—a person can just go for a non-discrimination claim. We will lose that right as soon as Brexit happens and the charter falls.

We are also concerned about the lack of continuing court decisions. A lot of the decisions that have been made in the European Court of Justice have been influential in expanding and improving our equality legislation. The court has looked at trans status and sexual orientation as part of sex discrimination, as well as at the difference between insurance payments for men and those for women.

09:45

Many and various ECJ decisions have improved our legislation, but its rulings will not have the same effect as previously. We are concerned that people might start to relitigate on equality legislation if it is no longer looked at through the lens of European regulation and the decisions of the ECJ, which it has to be at present. Will people start to reopen things such as equal pay by saying, “We don’t need to consider this in the light of what the EU thinks; we think our British legislation means this instead”?

There are wider pieces of legislation from the EU in the pipeline that we might not particularly see as anti-discrimination legislation. For example, a large European accessibility act is in the pipeline to open up requirements for accessibility in things such as ticket machines, ATMs, televisions and phones. Disabled people are constantly fighting for improvements in that area and, once that legislation gets through the EU, it will bring huge benefits for them. However, it is unlikely to come through before we leave, so we will lose that influential legislation.

That covers our general concerns about Brexit.

The Convener: Thank you. Given the time, I will open up the session for questions from colleagues.

Jeremy Balfour (Lothian) (Con): Thank you for your presentations. I have a couple of questions. I will start with a question for Judith Robertson, but Lynn Welsh should feel able to jump in as well if she wants to.

I suppose that the key point is that the risk is a potential risk, in that none of us knows what will happen in the next two or three years. That has to be the caveat. If the Scottish Parliament or Westminster wants to relegislate on things that are currently within European law, there will be nothing to prevent that.

You mentioned things that might go. However, I presume that, over the next two to three years, if there is a will to legislate in this Parliament or at Westminster and a belief that that is appropriate, that could happen. Why do you believe that it will not happen?

Judith Robertson: You are absolutely right, and we warmly welcome any statements of intent that will generate such action. The aspect that I was going to discuss next is what the Scottish Parliament can do. Not only is there nothing to prevent it from acting, but we recommend that it should proactively put in place mitigation measures, look at the areas in which it can build in protections that will otherwise be lost—within the Parliament’s competence—and, more progressively, put in place protections that do not exist at present. That extends to aspects of law such as the incorporation of economic, social and cultural rights. The Parliament is extremely well placed to bring into Scottish law the ability for citizens to have redress in relation to those rights, and it could make world-leading progress on that. To be honest, the Parliament can do that now. It does not need to wait for Brexit to make that happen—it is within the Parliament’s gift.

On Westminster, you are again absolutely right. Although there are no guarantees and we do not know what the great repeal bill will look like, it is intended to do just that—to repeal. Once that bill

has been passed and we have left the EU, we will be able to make progress, but there is a distinct concern that that will not happen, for a range of reasons. A key aspect is that we need independent trade negotiations to provide a context in the UK that will protect things such as workers' rights and health and safety. There are a range of protections that do not come from the EU and are in domestic law, but to create competitiveness—apparently—those things might be removed, diminished or gradually undermined.

It is clear that there is no guarantee. We could go further, but there are risks.

Jeremy Balfour: Lynn Welsh used the words “chipped away” a number of times. Why do you think that things might get chipped away? Ultimately, is it not a positive thing that this Parliament and our courts will be able to make the decisions that reflect what the Scottish and British people want? I am not quite sure that things necessarily will be chipped away. If they are, there will have had to be political will for that to happen. Do you sense that coming? Your presentation felt slightly negative. Would you like to comment on that?

Lynn Welsh: That probably is true; it was perhaps more negative than it should have been. In our job as a regulator, we get concerned when there are changes as substantial as this one. As I said, we know that a loss is likely if we do not remain in the EU regulatory framework. Even if we keep the legislation that we have, it will take great will from both Parliaments to progress here changes that are made in Europe. You are right that it would be possible to do that, and the Equality and Human Rights Commission would very much want to look at that. We will keep people abreast of changes in Europe.

You are right that regulation and legislation can be made here. We have looked at the areas that I commented on, such as a reduction in the awards that are available in discrimination cases, because the present UK Government previously considered reducing or removing them before it realised that it could not. It has had a view on that and, if that view continues, it may be an issue once the EU regulation that stopped that change falls.

We hope that positive opportunities will come from leaving the EU. We are trying to see what they might be and, like Judith Robertson, we are trying to see how much could be done in Scotland. Equality of opportunity is mostly but not entirely reserved, so that is perhaps more difficult to deal with than discrimination, but there are a number of areas—such as the public sector equality duty, which is an obvious example, and equality in housing, taxi regulation and education—in which the Scottish Parliament has used its powers to create not discrimination law but equal

opportunities law. It would be good if the Parliament considered how that could be extended and how the devolution of equal opportunities that came through the Scotland Act 2016 could be used to advance equal opportunities in Scotland.

The Convener: In both your presentations you said that there was work that could be done to secure protections. Have you done any work on the scale of what is needed and its implications, such as how long it would take and what areas we should target in Scotland and at the UK level to ensure that some of the protections remain in place?

Lynn Welsh: The short answer is that my commission is starting to do that. It is a huge piece of work.

The Convener: So it is huge.

Lynn Welsh: I would think so, yes.

We have already started looking at what the devolved equal opportunities may look like and what the Scottish Parliament could do with them, but the Scotland Act 2016 is not the clearest piece of legislation in the world. We now want to look much wider and consider what devolved rights will come back from the EU—not all of them will go to Westminster; some will come here—and how many human rights and equality areas could be involved in that. That will take quite a bit of work, but we will do that piece of work across Britain and particularly in Scotland.

I suppose that there are early opportunities. Judith Robertson talked about poverty. Obviously, the right to trigger the socioeconomic duty has now been devolved to Scotland, and the Government has indicated that it intends to do that relatively quickly. That is not a panacea to deal with the problems that may or may not arise from leaving Europe, but it is certainly a good step forward that the Parliament and Government could take quickly.

Mary Fee (West Scotland) (Lab): Will you expand on the issue of employment law and workers' rights? A huge amount of stuff has come out of Europe on the protection of workers. There are two strands to my question. One is about the on-going implications of the move towards leaving Europe. In some sectors, there is a lot of resistance to the workers' protections that have come out of Europe. Do you have concerns about a chipping away of those protections in some sectors before we get to the point of leaving Europe? Secondly, after we leave Europe, we will obviously be at risk of losing the protections and employment legislation that come from Europe. Post-Brexit, is there a way that we could peg ourselves to what is happening in Europe so that we match that?

Lynn Welsh: There should be no chipping away of those protections before we leave, because the EU floor, if you like, will still be there, so they cannot be removed. The UK Government has committed to keep, through the great repeal bill, all the stuff on things such as fixed-term and part-time working—all those regulations that might otherwise fall away. Therefore, we do not expect a diminution in those. We hope that that will never happen, but it certainly will not happen for a period.

Judith Robertson: One of the big unknowns is what our trade relationship with Europe will look like. In the European Community's trade relationships, it makes demands relating to aspects of human rights and workers' rights. Please do not misunderstand me; I am not saying that we are going to wipe away our employment legislation. Although that might not be protected by Europe, in our relationship and negotiated trade agreement with it, we might be able to advocate for, look at and hold on to aspects of that legislation. Who we have relationships with, how the trade negotiations are handled and what their substance is will have an impact. It is to be welcomed and actively encouraged that we make rights—whether human rights or workers' rights—a key part of those negotiations, so that they are not left off the ticket but are part of the consideration. If rights are not part of the consideration, the risks will increase over time. That is an important aspect to hold in our thoughts.

Mary Fee: My concern is that, if we wait until we leave, that will be too late, because things are already starting to slip. As part of the negotiations, is there a job for Europe, too, when it is negotiating with us, to say, "If you want this, this is what we expect of you"? There are two sides to the coin.

Judith Robertson: Absolutely—that is exactly right.

Lynn Welsh: In all Europe's trade negotiations and in the European Economic Area, countries have to meet the requirements on employment rights generally if they want to trade. Therefore, it is likely that those rights will be on the table from Europe anyway. Again, the extent to which workers' rights will be affected very much depends on what kind of Brexit we have.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning, and thank you for your presentations. You rightly spoke about the fact that the Parliament is already empowered to go further on the human rights agenda, should it so wish, particularly through the incorporation of various international treaties into Scots law to give our citizenry access to justice. However, that obviously comes down to political will. Will you

give us your reflections on the fact that various Administrations at Holyrood and Westminster have to an extent hidden behind European rulings on unpalatable human rights decisions? I am thinking about things such as prisoner voting. As we know, that type of thing was used by the leave campaign to further its cause. With the withdrawal of that pressure from the EU, what do you think will happen? Is it now about political will and us having to take tough, grown-up decisions, which we are empowered to do? Do you see any barriers to us taking those decisions? It is quite a multifaceted question.

10:00

Judith Robertson: Yes. Fundamentally, there is a job to do to understand the human rights implications of this and to promote to the population the idea that human rights are for everybody. Even prisoners have human rights. On the characterisation of some rights as "unpalatable", the Parliament could play a particular role in making the discussion, as you say, more mature and responsible. We would, as a civilised society, like to engage all our citizens in the universal application of those rights, as is enshrined in the treaties that we are signed up to. That is an important aspect of the terms of the debate.

The Parliament could play a significant role in improving the terms of the debate. It could hold itself responsible for ensuring that the terms of the debate do not characterise as unpalatable human rights decisions that are genuinely holding our Governments and their actions to account for the rights of individuals in all sorts of settings. That is my statement in relation to the fundamental point.

On some of the specifics, there is real potential. What is interesting in the whole public debate around Brexit is the degree to which people's rights are being brought into sharp relief—they are being brought into focus—partly because of the risks attached to it. That creates an opportunity. It creates a political space that the Parliament can move into to say, "We are going to take some progressive action here. We are going to act to ensure that the backstops—the protection that the EU provides—will be not just maintained but added to, developed and built on."

That message, and a broader articulation of what the human rights agenda really means, can be really positive for our citizens. Human rights are something that we all have in relation to almost all aspects of our lives and it is very important for the Parliament to be committed to ensuring the delivery of those rights—and not just the message.

Alex Cole-Hamilton: For the record, I do not find prisoner voting unpalatable at all. I think that

we absolutely need to recognise that voting is a fundamental human right.

I welcome your answer. We need to rise to that challenge and grow into that space. We have to take these adult decisions for ourselves. We will not be able to rely on a European court handing down rulings that we have to follow but which we say we do not like when they are not palatable.

That is the challenge and I think that, up to now, the Parliament has failed to meet that challenge, particularly around the incorporation of other rights treaties. I declare an interest as a former convener of the Scottish Alliance for Children's Rights. In that sphere of interest, children do not have access to justice when their rights are impinged because the United Nations Convention on the Rights of the Child is not incorporated. Thank you for your response—I think you articulate very well the challenge that is before this Parliament.

Judith Robertson: There is an important aspect that Parliament can take into consideration as well as holding the Government to account for. I do not place all the responsibility on the Parliament, although it has a big share of it. It is around the potential opening of a gap between the rights that the EU goes on to provide to its members and our rights. Potentially, if we do not monitor the new rights that are provided by the EU, our rights will either go backwards or not progress. It would be important for the Scottish Parliament and Government to monitor that and to make an explicit commitment that they would maintain our rights—Mary Fee made that point—and take action to do so as legislation went forward in the EU. That would be no small task. As Lynn Welsh said, the scale of that would be huge, and significant resources would require to be applied to that process in Scotland.

Lynn Welsh: Leaving the EU would not mean that we left the European convention on human rights and the European Court of Human Rights. They are quite separate from membership of the EU, but I do not think that public perception always sees that difference. However, the European convention will still be directly applicable to us.

The EHRC is also in favour of international treaties being incorporated properly into law in Scotland and down south. Particularly if we lose some rights through leaving the EU, introducing international treaties into our law might fill some of the gaps in discrimination law as well as in human rights law. There is always an opportunity in Scotland for us to legislate in that way if we wish to do so.

The EHRC also suggests that, if the Human Rights Act 1998 is changed or a new bill of rights comes on to the table in the near future, that will be an opportunity to look at how we could attach

some of the new Charter of Fundamental Rights of the European Union to British human rights law. There are concerns about having a change to the 1998 act or a new bill of rights, but there will be opportunities to use that to expand and extend human rights in Scotland.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): On the point that was just made, the UK Government has made it clear that it wants to abolish the Human Rights Act 1998 and replace it with a bill of rights, whatever that might be. I hope that we guard against the notion that we can chip away at rights and replace them at a future date. At least some of us think that it is naive to assume that the UK will replace the 1998 act with something that is equally good or better. The witnesses have articulated some of the justified worries and fears around that.

On Scotland's part in the process, our Parliament is required to ensure when it passes bills that they comply with human rights obligations. How do you see that position panning out if we lose the 1998 act but Scotland wishes to retain it and is obliged to legislate on the basis of the act in the Scottish Parliament?

Lynn Welsh: The Scotland Act 1998 requires the Scottish Parliament to legislate in line with human rights and EU law, so I guess that both those aspects would have to be removed at some point if we leave the EU and/or do away with the Human Rights Act 1998. I guess that it would be for the Scottish Parliament to take a view on what happens in relation to that. The 1998 act is a reserved enactment and therefore not one for the Scottish Parliament. However, anything that follows that, given that human rights are a devolved issue, is absolutely in the hands of the Scottish Parliament. If the Scottish Parliament did not want to see the contents of the 1998 act go or wanted to go beyond that, it would be perfectly open to the Scottish Parliament to do something about that.

Judith Robertson: That is clearly a constitutional issue, but we would still be bound by the terms of the European convention on human rights. There is no threat to that position at the moment, although Theresa May said previously that she thought that the UK could withdraw from the convention. However, such a possible move seems to have been put on hold and we are still bound by the terms of the European convention on human rights.

The vagaries in constitutional law as any changes progressed would be interesting. My expectation would be that a bill of rights could potentially replace the Human Rights Act 1998 within the Scotland Act 1998. I know that there are views in the Scottish Parliament and the Scottish Government on the repeal of the Human Rights

Act 1998. From the perspective of the SHRC, we would oppose a repeal of that act, which we think provides strong and good protections in a range of areas. We believe that there is no need to repeal it. Any further progress that we might want to make on the delivery of people's rights can be done through additional legislation. The Parliament and the Government can do that, and that can happen at Westminster.

We are very clear that there is no need to repeal the Human Rights Act 1998 and we would oppose any attempt to do so, notwithstanding the constitutional issues that that would raise. My understanding is that the constitutional issues are one of the big factors preventing the repeal of the act, which, from my perspective, is a positive thing.

Willie Coffey: Lynn, you talked about European legislation that might be coming along that we would miss out on when the UK leaves the EU. You mentioned anti-discrimination measures to do with ticketing machines, phones and TVs that would be of especial assistance to disabled people. For me, it is unthinkable that the UK would not want to comply with that legislation. Even from a trading perspective, if the UK wishes to retain any kind of trading relationship with the EU—I am sure that it will try to negotiate such a relationship—it would be utterly ridiculous for it not to observe, and not to be obliged to observe, such legislation when it comes through. Norway will be in a similar position when it comes to maintaining its trading association with the EU.

The sense that the UK can walk away from the EU, take back all the relevant powers and ignore everything that is happening in the EU is just a mirage. The UK will have to comply. Do you have a view on how the trading negotiation between the UK and the EU will pan out in that regard?

Lynn Welsh: To be honest, that is such an "it depends" question that it is quite difficult to answer. I gave the example of that proposed legislation because, if we had stayed in the EU, it would automatically have had to be transposed into UK law in its entirety. As that will not happen, how it comes in, if it comes in and the extent to which it comes in will all depend entirely on the relationship that we have with the EU in the future. If there is a strong trade relationship, it is likely that the UK would be required to comply in some way, but there is a huge degree of uncertainty. I know that that is unhelpful, but at the moment that is the position.

Willie Coffey: The same would apply to the rights of EU citizens in the event that they remain in the UK. I cannot imagine that the EU would be happy to enter into any kind of trade relationship with the UK if the rights of its citizens in the UK were to be diminished. Do you think that that might

be uppermost in the minds of those at the negotiating table over the next few years?

Lynn Welsh: I do not know is the short and truthful answer. We have certainly called on the UK Government to clarify its take on what might happen to EU citizens who are presently in Britain. The Scottish Government has been strong in welcoming the additionality that our EU brethren bring to the country, but I honestly do not know what the UK Government is likely to do in relation to its relationship with the EU. Again, that will depend on what kind of Brexit relationship we end up with.

Judith Robertson: That issue and many others come back to fundamental principles. The situation needs to be monitored. We need to be alert to the issue of whether people's rights will be eroded and, if so, what we are going to do about it. For me, the issue is less about the likelihood of that happening and more about what the reality is. We need to know what the terms of the debate are and what is on the table, as we are not party to that. If that is an outcome of the process, we must be aware of it and look for progress rather than regression. That is the fundamental principle that we seek adherence to.

10:15

Lynn Welsh: We also have to continue to condemn and stop the kind of hate crime issues that we are seeing not so much in Scotland but certainly in England and Wales, where abuse and hate crime seemed to suddenly bubble up just after Brexit. Again, we all must work hard to ensure that that sort of thing does not take hold in any way and that while they are in Britain people are treated properly and respectfully.

Willie Coffey: Thank you very much.

Annie Wells (Glasgow) (Con): In the negotiations over Brexit, in which Scotland will play a part with the UK Government, will there be an opportunity to change or add to the Scotland acts to ensure that more human rights stuff gets devolved to the Scottish Parliament if, in the negotiation process, the Parliaments meet and cannot agree what they both want?

Lynn Welsh: Human rights are already devolved—

Annie Wells: But we were talking about the charter and things like that. If we were to leave the EU and therefore leave the charter, could we in Scotland say that we would take it on instead?

Lynn Welsh: When the last Scotland Bill went round, there were calls from various organisations including, I think, the Scottish Trades Union Congress for employment law and discrimination and equality law to be devolved. Those matters

were not on the table then, but such things are, I guess, always open to negotiation.

Judith Robertson: I suppose that, if you are opening up the terms of the Scotland acts because of the relationship with human rights legislation—the Human Rights Act 1998 and EU law—you might be able to look at other areas in which you might want to increase devolved powers. That is entirely within the gift of political will, but the potential is there.

The Convener: I have a couple of other questions, but I should give you some breaking news: the UK has lost its court fight with regard to article 50, which means, apparently, that the issue will need to go to Parliament. We do not know the details of that as yet, but it puts a different complexion on matters. Obviously this thing is a moving feast and changes by the hour.

Let us get back to the committee's business, because we are running out of time for this evidence-taking session. Recently I was struck by the number of projects and policy forums that exist and the actual practical help that people are getting to realise some of their rights, whether that be access to the job market for people with a disability, support for and advice on benefits or support for young people who are facing challenges in their lives. However, a lot of that support comes from EU structural funds. How do you see us moving forward with regard to realising the rights of many people who might be in protected characteristics or marginalised groups? In many cases, the law is great, and we can access it should we want to; however, for many other people, that is beyond their ability, and many of the organisations and groups that I know have worked directly and in very practical ways to realise people's rights might be under threat. How might what is happening undermine the progress that we have made?

Judith Robertson: You are absolutely right to highlight an important aspect: the immediate and longer-term implications of the way in which Europe has disbursed its funds and its attempt to redistribute wealth through such means. That is effectively what it is doing, and that redistributive aspect will be lost to some extent as far as the EU is concerned.

Clearly we have the capacity to mitigate that by, for example, replacing funding; indeed, I believe that the UK Government has said that it will do that for certain aspects up to 2020. An important consideration is what happens beyond 2020. After all, that is only three and a half years away, and I think that the full realisation of people's rights in Scotland and the rest of Britain will take longer than that. As a result, we would welcome commitments from the Scottish Government with

regard to mitigating the long-term impacts of that loss.

I also think that such matters need to be understood and mapped, because I do not think that we understand the full implications of this, the data and the impact on people's rights. In fact, a couple of weeks ago, I attended a session at which a Cambridge academic asked for a human rights audit of the impact of withdrawal. That is a really interesting proposition, because it is important to understand how this move will impact on people's rights, and that is absolutely an aspect of it.

The Convener: It is a real worry.

I am sorry, but we are really constrained for time this morning, and we have run out of time for this panel. We could certainly talk in much greater detail about all this, but I am sure that we will work together on the matter as we move forward. Thank you for attending the meeting and your support in allowing us to understand the issue.

I suspend the meeting briefly to allow a changeover of witnesses, so if you want a really quick cuppa, grab it now.

10:21

Meeting suspended.

10:25

On resuming—

The Convener: Welcome back to the Equalities and Human Rights Committee. We will move on with our agenda item on the implications for equalities and human rights of a UK exit from the EU.

With us, on our second panel, are: Dr Tobias Lock, a senior lecturer in EU law and human rights, and Dr Cormac Mac Amhlaigh, a senior lecturer in law, both from the University of Edinburgh and both interested in human rights; Professor Muriel Robison, a lecturer in law from the University of Glasgow with a specific interest in equalities; and Professor Nicole Busby, a professor of law at the University of Strathclyde.

I thank all of our equalities specialists for coming to the committee. I know that they sat through the first session, so they have a fair idea of where we will go with our questioning.

I will open with the same question with which I opened earlier. Will each of you briefly give us your thoughts on the implications for our rights-based agenda of a UK exit from the EU?

Dr Tobias Lock (University of Edinburgh): I will recap what we currently have in UK and Scottish law. First, we have the Human Rights Act

1998, which incorporates the European convention on human rights. That has nothing to do with the EU, of course, so Brexit will have no immediate implications in that area—the Human Rights Act 1998 will continue to be in place. Let us leave aside discussion about a British bill of rights for a moment.

We also have EU-based rights protections. The Equality Act 2010, which is largely based on EU directives, is an act of the Westminster Parliament, so Brexit will not immediately affect it either—unless, of course, it is expressly repealed or amended by the Westminster Parliament in the procedures that it will have to go through.

The bit of EU law that is critical is the European charter of fundamental rights, which is part of the treaties of the EU. If the treaties cease to be binding on the UK with withdrawal from the EU, the charter, too, will cease to be binding on the UK. The only reason why it is applicable in the UK legal order is the European Communities Act 1972. If that act is repealed, which is the whole point of the Brexit exercise, the charter will lose its binding nature in UK law unless, of course, the great repeal bill or some other act of Parliament keeps it alive for the time being.

That is the situation in a nutshell.

One important thing about the European charter of fundamental rights is that it is not universally applicable. It applies in Scotland and the UK only where we are implementing EU law, which happens in two broad scenarios. One scenario is where a public authority is acting on the basis of EU law—for example, when a public authority requires somebody who is applying for planning permission to carry out an environmental impact assessment. It must be something like that that is based on a EU directive. The other scenario is where a public authority seeks to derogate from EU free movement provisions. For instance, if an EU citizen who is living here commits a crime, is asked to leave the country and is being expelled, we have to take into account not only EU free movement law and the limitations on the expulsion of EU citizens, but the charter and the right to family life as guaranteed by it, and eventually the matter can be decided by the Court of Justice of the European Union.

10:30

One other aspect of the charter is that the remedies that we have under it are different from those that we have under the Human Rights Act 1998. If you go to court to say that your human right to a fair trial has been infringed because an act of the Westminster Parliament does not allow you to make a claim in court, the best that you can get out of the proceedings is a declaration of

incompatibility. You will still lose your case, but the court can make a declaration of incompatibility. That could lead to a quicker amendment of the act to make it compatible with human rights, but there is no guarantee that that will ever happen. Prisoner voting is a case in point—there has been a declaration of incompatibility and a case in the European Court of Human Rights, but the act of Parliament is still there and still does not allow prisoners to vote, which is arguably against the Human Rights Act 1998.

It would be different under the charter. If you or a public authority is acting within the scope of the charter—within the scope of EU law—you have the duty to ignore an act of Parliament that contravenes the charter. Equally, if a court reviews the compatibility of an act of Parliament with a charter right, it has to set aside the act of Parliament for those proceedings. That is what we call, in EU law, disapplying. It does not lead to invalidation of the act of Parliament; it leads to disapplication of the act of Parliament, and the claimant wins the case.

That is the key difference with the charter and is why the charter has some practical value. Even in light of the Human Rights Act 1998, that will presumably be gone after Brexit.

Dr Cormac Mac Amhlaigh (University of Edinburgh): Thank you for the invitation to come here. As a constitutional lawyer, I am quite excited by the judgment that we heard about 10 minutes ago.

The Convener: I can imagine.

Dr Mac Amhlaigh: As a preliminary point, a good argument could now be made to require a legislative consent motion from the Scottish Parliament for Westminster to be allowed to pass legislation to trigger article 50. That will probably take up the business of the Scottish Parliament in future.

On the specific questions that we have been asked to address today, I have two brief points. First, for me, the most significant impact of Brexit from the human rights point of view is on the question of withdrawal from the European convention on human rights. When that has been touted in the past three or four years and people have talked about a British bill of rights and potential withdrawal from the ECHR, one of the major stumbling blocks has been that it would create problems for us as an EU member state because of the way in which the ECHR is woven into EU law and the expectations of other EU member states that human rights should be respected.

With Brexit, that large obstacle to withdrawal from the ECHR has been removed. Therefore, Brexit makes ECHR withdrawal easier; it facilitates

withdrawal from the ECHR and it might make it more likely in future—notwithstanding the fact that the current Government has stated clearly that that is not its intention. However, the legal obstacles to withdrawal from the ECHR will be easier to get over after Brexit, which is an important point that is worth emphasising.

The second point is on the specific implications for Scotland. When you look at the reserved provisions in the Scotland Act 1998, it is interesting to note that they include some of the major areas in which EU law gives strong fundamental rights protection. For example, EU law on data protection is quite significant and it is a reserved matter, as are consumer protection, equal opportunities, and employment and industrial relations. That is significant because it means that what happens at Westminster will have a profound impact on Scotland—the Scottish Parliament cannot legislate on it.

When we consider the question, we have to consider the likelihood of Westminster implementing parallel protections. Obviously, it is within the competence of the Westminster Parliament to provide parallel cover for the gaps that Brexit will create by removing EU law on fundamental rights and protections in certain areas. However, we have to think about the likelihood of that happening. With this current Government, it is highly unlikely. When the Prime Minister was Home Secretary, she had a lot of problems with the ECHR and the European Court of Human Rights. The previous Government and the current Government wanted to repeal the Human Rights Act 1998 with a British bill of rights; and, prior to becoming Prime Minister, Theresa May said openly in a speech that the UK should withdraw from the ECHR.

We have to look at the political likelihood of the situation and, with the current Government, I find that parallel protections would be extremely unlikely after Brexit.

Professor Nicole Busby (University of Strathclyde): I thank the committee for inviting me here today. I agree with all the points that have been made. I also listened to the earlier comments from Judith Robertson and Lynn Welsh, and I will build on a couple of those.

The maintenance of protections around social standards is a particular area of concern. The loss of the non-regression principle, which is built into European law and means that we cannot go below the current standards or protections but can only build on or maintain them, could have devastating effects on workers' rights. Law is not static but is constantly developing, and the levelling-down of employment rights is of particular concern. If, in the case of a hard Brexit, those protections are withdrawn and we see threats to or vulnerabilities

in human rights protections such as have been outlined coming into play, the need to compete globally without those EU protections and without the non-regression principle will be a matter of great concern.

That is the case not just in relation to the equality rights that we see under the equality directives but in other areas of workers' rights. The EU has been particularly active in, for example, protecting rights in transfers of undertakings through the acquired rights directive, and working time legislation depends largely on European provisions that are still subject—as is the transfer of undertakings legislation—to decisions by courts in a national context and in the European Court of Justice. We would potentially lose all that and, if we lose the developments that might happen through case law, we stand to lose a lot.

European case law—the case law of the Court of Justice of the EU—has given us lots of progress in certain areas of equalities and employment rights. There has been notable progress on the rights of transsexual people, including the protection of employment rights for transsexuals and the development of associative discrimination, and there are still things in the pipeline—potential progress that we do not yet know about. Losing all that would worry me a lot. The interplay is complex but important. It is where a lot of the progress on the protection and further development of workers' rights is made. For me, that is a major area of concern.

Professor Muriel Robison (University of Glasgow): I agree that, because the vast majority of EU rights are implemented in British law through the Equality Act 2010, as Tobias Lock said, Brexit will not have any immediate effect on them—especially given that we have heard that the great repeal bill will bring across all the European laws, which, as it will be an act of Parliament and not secondary legislation, will be less vulnerable to any immediate changes.

However, equality rights will still be vulnerable because, given that Britain has no constitution and, therefore, no constitutional guarantee of equality, a lot will depend on what the Government of the day—whatever its political complexion—does subsequently with the Equality Act 2010.

A lot of those rights are now entrenched and there is a broad degree of political consensus regarding them. Nevertheless, for some rights—for example, the right not to be discriminated against on the basis of age—there is perhaps less political consensus on the appropriateness of legislating. When equality rights might be seen to impact on economic competitiveness might be when they are particularly vulnerable, depending on the complexion of the Government that is making the decisions about those rights going forward. I am

thinking particularly about the right to equal pay and some pregnancy and maternity rights and protections.

That said, it occurs to me that there might be some opportunities. Through the Scotland Act 2016, this Parliament has had devolved to it some further powers over equal opportunities and will no longer be constrained by the requirements or, in some cases, the limitations of European law. I am thinking in particular of gender quotas, in which I know that this Parliament has a particular interest. Some constraints on what the Parliament can do on that have been created by EU law. Without those constraints, there might be an opportunity to go further, if that is what the Scottish Parliament wishes to do.

The Convener: Those are a lot of interesting aspects.

We have concentrated on wider issues, but I would like to home in on the rights of EU citizens who are currently in the UK, whether for work or study or because they have decided that Scotland and the UK are their home. What will the pressures on those rights be? The Brexit campaign created an atmosphere that was poisonous—I do not use that word often—with regard to those who have chosen the UK as their place to be. What are your thoughts on that? Is there any way that members in this place can protect their rights? I know that what we can do is very limited—I am answering my own question in that respect.

We need the thinkers of this land to consider how we can ensure that we protect people from that horrible atmosphere and help them to maintain their place in the country where they have chosen to live and study.

Dr Lock: The rights of EU citizens who are currently in the UK are largely derived from the EU treaties. As EU citizens, people have a right to come here to live, work and study under EU free movement laws. If they are wealthy enough, they can come here and do nothing, provided that they have health insurance of some sort.

If people have stayed here for five years or more by the time that EU withdrawal happens, they will be able to apply for permanent residency under the citizenship directive. If they get a permanent residence card, it will be difficult to expel them from this country, even after Brexit, I would say.

The people who are most in danger, if you will, are those who will not have stayed here for five years. They will have exercised their rights and come here in good faith—certainly, that is what they did if they came here before the referendum—and there is no certainty in law as to

what will happen to them. That is what I would say, although my colleagues might disagree.

During the referendum campaign, an argument was made for there being such a thing as acquired rights under international law, which would be protected, but I think that that argument was wrong. The 1969 Vienna convention on the law of treaties was quoted. It does speak of acquired rights, but they are the acquired rights of parties to the treaties, which are states. We are not concerned with such rights; we are concerned with—I would probably call them not human rights, but individual, subjective rights. There will need to be something in the Brexit withdrawal agreement about how the right to stay of those affected—which will include UK citizens who are living in the EU, of which there are almost as many, I think—will be protected. That is one thing, and agreeing that will not be a huge political problem, because it will be reciprocal.

However, an important question arises from that. At the moment, EU citizens who live here have a right to be treated equally and to not be discriminated against on the basis of their nationality. That right is not protected per se in the Equality Act 2010, as we can see in relation to various rules concerning non-EU citizens, who are treated worse than EU nationals in some respects. University fees is an example: non-EU citizens have to pay more to study at our lovely institutions.

Will those rights continue, at least for those who have been living here—who have had those acquired rights, if you want to call them that? Will they continue to have the status of being immune from discrimination? Will that be possible in the future? Will we be able to require them to carry an identity card when nationals do not have to carry such a thing, and so on? All of those questions have to be resolved as well as the questions about people's status and their right to stay.

10:45

Mary Fee: I have a follow-up question to the one that the convener raised and the question that Willie Coffey started on in the earlier session.

In that session, I asked about what would be at risk for employment law and workers' rights. All of the panel members, in their opening comments, answered the question that I posed, but a further question follows on from the discussion that we have just had. After Brexit, what recourse to law would EU citizens who live here have? Would they be bound by UK law, or would they be bound by EU legislation if they were in dispute, say, with an employer or had any human rights issue? Could they still say that they wanted to go to the European Court of Human Rights or that they wanted us to respect the EU legislation according

to which they, as an EU citizen, are entitled to be treated. Where would they be?

Dr Mac Amhlaigh: On the point about EU citizens, immigration is a reserved matter, so that is not something that the Scottish Parliament would have a lot of power over. It very much depends on the Brexit agreement and the political mood at Westminster.

Post-Brexit EU citizens' rights will depend on what is agreed. Presumably, depending on their immigration status, they will have the same general protections as UK citizens. EU law will not apply, so they could not argue EU points or try to claim EU rights in domestic courts.

Until such time as the UK withdraws from the European convention on human rights, they would still have recourse to the European Court of Human Rights. If the Human Rights Act 1998 survives as a British bill of rights, we assume that it would apply to everyone currently resident in the UK, so that would not depend on immigration status, unless the British bill of rights makes a distinction on immigration status and the enjoyment of rights, as some people have tied into it. However, I do not think that that will make it into a final draft of a British bill of rights, because it goes against the whole ethos of rights being fundamental and universal, and so on.

Alex Cole-Hamilton: We live in interesting times and, as we have seen even in the course of this committee meeting, this very strange tale is taking yet another turn, with the High Court ruling that the UK Government cannot automatically initiate the article 50 trigger without a vote in Parliament. In that context, and knowing that there are many unknowns out there, could the panel give us what they believe to be the extent of the parameters of the questions, in terms of the absolute worst-case scenario? What is the horror show that keeps you awake at night?

What is the best-case scenario? What should we aim for in terms of success in making sure that our rights continue seamlessly in a post-Brexit Scotland, that our EU nationals are protected, and that our own rights keep in step with the EU? Could you set out those parameters?

Dr Mac Amhlaigh: The most significant aspect of the judgment in terms of scenarios is that, provided that the Government does not appeal and provided that the Supreme Court does not decide against the High Court—which could still happen—it is now within Parliament's gift to set conditions on triggering article 50. That is really significant because although there is some consensus around Brexit, in that it seems that it has to happen, there is not consensus about what it should look like.

The Westminster Parliament can, through legislation, attach conditions to triggering article 50, including giving the Government a mandate for negotiations. That is significant because it could include things such as a requirement that the UK be part of the single market, that there be fundamental rights protections and all sorts of other things.

The best-case scenario would be a Norwegian-style European Free Trade Association/European Economic Area model; the worst-case scenario would be a hard Brexit, for all the reasons that you are reading about in the media day to day. That is all that I have to say about that more political question.

The Convener: I see Professor Busby nodding her head.

Professor Busby: I agree with those points. We have presented the worst-case scenario because we are looking at the situation through the eyes of those who are used to the status quo. I would argue for retaining the status quo, for the reasons that we have given. When we are talking about this topic—as was the case in my earlier comments about workers' rights—I am considering the worst-case scenario, which is the hard Brexit in which we lose all those protections.

There are lots of scenarios in between hard Brexit and retention of the status quo—the Norwegian model is one option, and it would preserve all the protections that we spoke about. There is not a customs union with Norway, so the situation there is different from what we currently have, but in relation to inequalities, workers' rights and other protections, the model looks favourable.

The best-case scenario, which is unlikely, is that we retain all the protections that we currently have.

Professor Robison: As a starting point, we should at the very least retain the Equality Act 2010. It has very good protections; indeed, it goes beyond European minimum requirements on equality. As has been discussed, the type of Brexit will influence the extent to which the Equality Act 2010 and such legislation continue to develop and improve along the lines of the positive changes that happen at Europe level, which have, largely, been good for equality.

Dr Lock: The worst-case scenario would be that all the rights would be repealed—the Human Rights Act 1998 would be repealed and we would come out of the European convention on human rights. We would, in effect, go back to 1950 in terms of rights protections. Britain joined the ECHR in 1951; I think that it came into force in 1955. We would go back to a time before most of us—if not all of us—were born.

The best-case scenario would be something along the lines that the other witnesses have outlined. It is worth our while to think about rights in terms of reciprocity and non-reciprocity. A lot of rights that concern the committee can be replicated by Westminster and, to a lesser extent, by Holyrood. You can have human rights standards that are good unilaterally without being bound by EU law; that is not a problem. However, you will reach limits when it comes to citizenship rights, because they are very much dependent on reciprocity. Of course, you could say that all EU citizens are welcome even if EU member states do not grant our citizens the same protections, but that is unlikely.

In a discussion on Brexit, the great repeal bill and what types of EU rules we would like to retain—or not—it is always worth while to think in terms of reciprocity or non-reciprocity. If rights are non-reciprocal, it is no problem to retain them because that would not do any harm to the legal order; rather, we would to an extent be just freezing them. If rights are reciprocal, it might be difficult to retain them unilaterally because they might not make much sense.

Jeremy Balfour: I have two questions. First, I may not have picked up where EU citizens will fall if they are in this country after Brexit. Would not their situation just become similar to that of people from South America, North America and other parts the world? Why would they suddenly become a legally different type of individual? I may have picked you up wrongly on that; I am not quite sure exactly what you are saying.

I will move on to my second question. I thank Dr Lock for the interesting papers that he submitted. They took me back to my studies of law—sadly, I was one of the first students who had to study European law to be able to become a solicitor, so I am always slightly wary of it. I am interested in Dr Lock's comments in paragraph 8 of his submission, in which he says:

"Brexit will lead to a weakening of the legal human rights framework in the UK."

That is a very bold statement. To go back to my question to the first panel, surely we can implement all of the framework, either here or at Westminster, so why does that statement have to be true? You have talked about the worst-case scenario, in which we go back to the 1950s, but I do not see any political will to do that in the mainstream political parties. That seems to me to be an interesting statement to make near the start of your paper. Why is Brexit so negative?

The Convener: Was your first question directed to somebody in particular?

Jeremy Balfour: No—it is to whoever wants to answer.

The Convener: Okay. Dr Lock—do you want to come in first?

Dr Lock: On the question of EU citizens, at the moment, North Americans, South Americans or whoever—non-EU and non-British citizens—cannot come here to work without a visa. People need to go through the immigration procedures and cannot bring their spouse here if they do not earn enough money. Those people are in a worse position than EU citizens are at the moment. That is what I meant. That is one instance of people not being treated equally with nationals.

As regards the weakening of the human rights framework, it is good that Jeremy Balfour linked that point to his previous question. At the moment, in the absence of Brexit, the human rights framework is to a certain extent immune to reform because Britain cannot get rid of the charter of fundamental rights easily without leaving the EU. Of course, Britain could repeal the European Communities Act 1972, but that would be contrary to all sorts of legal obligations. The framework is there and is pretty much entrenched in the legal order. If Brexit happens, that framework will disappear, which will open up human rights in general to further-reaching reform.

The charter replicates the ECHR and adds a good few other rights. We might well ask what the point is of reforming the Human Rights Act 1998 and introducing a British bill of rights to set out expressly that certain serious criminals can always be expelled without having to take into account the right to private and family life—one of the ideas that is being floated at the moment—if that would not apply to EU citizens. Therefore, it would only ever be a half-hearted reform.

You asked whether we can replicate the framework. Of course we can—"we" being politicians and parliamentarians. EU law in the UK legal order has generally led to strengthening of the courts—although some people might disagree with that. Individuals can go to court and get remedies including disapplication of an act of Parliament that they cannot get under the common law because of the supremacy of Parliament.

We could argue that we should bring the power back to Parliament—where it properly belongs. That is not a wrong argument in any respect, but the main question that those who advocate that must ask themselves—and answer—is whether Parliament can in practice really balance rights properly and make legislation that is fair on those who are in a minority and who will never even have a chance to be in a majority in Parliament. The whole idea of the Opposition opposing and then getting into power because it is such a good Opposition does not work for some people who are disadvantaged, including people who do not have the vote because they are foreign. I am just

putting that out there—I am not making a judgment that that is a wrong argument, but I think that those conditions need to be fulfilled.

Jeremy Balfour: There is another side to that coin. Is it right for unelected judges to have more power than a sovereign Parliament? This Parliament and the Westminster Parliament have in recent years seen things that we want to do being superseded by judges making decisions that have gone against the political will at that time. This is the debate, is it not? Should the courts or Parliament the final big decisions?

11:00

Dr Lock: That is the philosophical debate. If you want more power for Parliaments—I am not saying this because I am the biggest fan of judges, or anything like that—they have to be capable of performing the function properly, through committees such as the one that I am in here.

Jeremy Balfour: I accept that point.

Dr Mac Amhlaigh: On the point about parallel protections, of course it is within the gift of the Westminster Parliament to re-legislate the entire Charter of Fundamental Rights of the European Union if it wanted to do so. I argue that the Scottish Parliament could also produce a Scottish bill of rights because human rights are a devolved matter. The Human Rights Act 1998 is not devolved legislation, but human rights is a devolved competence so Scotland could certainly do something parallel within its competence.

We have to look at political likelihood: the current British Government does not seem to be particularly likely to do that, given its hostility to the Human Rights Act and the fact that the Prime Minister has spoken out against the European convention on human rights—in fact, she has endorsed withdrawal. Hypothetically, of course, it is possible to parallel protection, but politically it is quite unlikely.

On the point about unelected judges overruling politicians, that is a much-misinterpreted issue, as far as I am concerned. It is something that I do a lot of research on. When we talk about democracy, we have—if it is the justification for parliamentary sovereignty—to think about the fact that, at Westminster, only one of the three branches of Parliament is elected.

In some ways, and given the current make-up, the courts look a little bit like the House of Lords. They can influence legislation and make recommendations about it, but they cannot strike it down, which is pretty much the same power that the House of Lords has in legislating under Parliament. It is a little simplistic to say that this is about democracy and about courts versus

Parliament. The situation is much more complex than that: we need to understand and bear in mind that, at Westminster, only one of the three branches of Parliament is actually elected. The courts can look a little bit like an accountability chamber, in the same way as the House of Lords can.

Of course, it also depends on one's point of view about democracy—you have to define your terms. What do you mean by democracy? For example, some people would suggest that having courts patrol a right to vote is crucial for a democracy—including, perhaps, prisoners. This is about interpretation and what we mean by “democracy”, and it is about the role that the courts can play in facilitating democracy and vindicating democracy by ensuring that everybody has a franchise and that people are not arbitrarily deprived of their right to vote. Courts can have a pro-democratic role to play.

I understand the point that is being made, but we need to understand what is at stake when we talk about that.

The Convener: Do our other two panel members want to contribute at this point?

Professor Busby: I will, very briefly. I agree completely with Cormac Mac Amhlaigh's points about the importance of an independent judiciary, particularly with regard to international law, which is the job of the European Court of Human Rights.

I will just add one other thing about the possibility of replication of the rights that currently exist under the convention and under EU provisions. The complexities of trying to replicate those rights cannot be underestimated—it would be a huge job. There is some interesting research out just this week from the “The UK in a changing Europe” project, which is funded by the Economic and Social Research Council. The research says that the complexities of trying to negotiate out and then replicating the rights would be completely overwhelming and would take up many years of the Westminster Parliament's time—and possibly that of the devolved Parliaments. It seems like an impossible task. We need to bear in mind how complicated the system is and how much work that would entail.

Professor Robison: I certainly agree with that. One of the particular difficulties with replication or the great repeal bill bringing over all EU law is the status of the decisions of the Court of Justice of the European Union.

Some decisions of the court have not yet made their way into amendments to the Equality Act 2010. What is the status of those judgments, for example, pre-Brexit? There is also the issue of the extent to which the decisions of the European Court of Justice will continue to be relevant post-

Brexit in interpreting the laws that have been brought over.

Another factor to consider is that when British courts reinterpret laws, one of the principles that they will take into account is the intention of Parliament. If it was the intention of Parliament to legislate to implement EU law, then EU law will still be relevant to that interpretation.

Those are examples of the complexities that we will see in bringing over all the law. What happens will depend on what that means. I suppose that that will be in the detail of the bill.

Willie Coffey: Dr Mac Amhlaigh said that a legislative consent motion will be required in the Scottish Parliament—I presume, to unpick our legislative compliance with the convention and so on in the laws and the acts that we pass. Will you expand on that and explain why you believe that? I ask your colleagues also to give their views.

Dr Mac Amhlaigh: Are you referring to my comments on the judgment that came out this morning?

Willie Coffey: No. You said that an LCM will be required in the Scottish Parliament.

The Convener: That was in relation to the judgment.

Dr Mac Amhlaigh: Yes. I have only read a summary of the judgment, so this is a little bit off the cuff, but the reasoning would be as follows. From my brief scan of the summary that I managed to get on my phone, the court said that the exercise of prerogative powers, which is an executive power, would have the effect, ultimately, of changing legislation, and that for that reason the act of exercising the prerogative to trigger article 50 would go against the European Communities Act 1972. The constitutional status is that statutes trump exercise of the prerogative—one cannot use prerogative to undermine or bypass statute.

My interpretation of the court's ruling is that the act to trigger article 50 would undermine the ECA, which means that we would need a piece of legislation to change or amend that act and give the Government the power to trigger article 50. That is my understanding. Given that EU law is sewn into the Scotland Act, as you all know well, a change in the effect of EU law in Scotland would require an amendment to that act, for which we know that a legislative consent motion would be required.

That is a broad, in-a-nutshell argument. That is how it would flow, although it is a bit more complicated than that. Does that answer your question?

Willie Coffey: It helps, yes. Is it too much to ask your colleagues to offer a view on that?

Dr Lock: A legislative consent motion might be required for the great repeal bill, as well. If it says that all EU law that is in place will stay in place, there are an awful lot of Scottish statutory instruments that have brought EU law into Scottish law, mainly in the environmental sector, but also in others—the common agricultural policy and agriculture being an obvious example. That, of course, means that Westminster would be legislating on devolved powers, which would trigger a legislative consent motion, I believe—if that is what the great repeal bill is supposed to do.

The great repeal bill is potentially dangerous and the Scottish Parliament will have to be careful about whether it will consent to it or not, if doing so would give the Government so-called Henry VIII powers to amend legislation in the future. It might say, “Okay, we’re going to freeze all the EU law that is currently in the UK legal order including in Scotland, Wales and Northern Ireland, no matter what. That is going to stay on the statute book, but we’re going to give the Executive powers to amend or repeal that EU law if it sees fit.” That would be a massive transfer of legislative powers to the Executive. First, it would fly in the face of taking back control for Parliament, but secondly it is really problematic in democratic terms.

Willie Coffey: Is there time to ask Professors Busby and Robison the same question?

The Convener: Yes.

Professor Busby: I do not have anything to add to what has been said. I have not looked at the judgment on my phone or anywhere else yet, so I would be less confident and maybe more cautious.

Professor Robison: The only thing that I would add is to agree very much with Dr Lock about Henry VIII powers.

The Convener: Is that how the royal prerogative is described?

Dr Mac Amhlaigh: No. It is a statutory power that says that the Government is entitled to change or amend legislation.

The Convener: Okay. Thank you for the clarification. I am sorry, Professor Robison.

Professor Robison: There is a real concern about that. The Equality Act 2010 is an act of Parliament: it is not secondary legislation. As I understand it, the repeal bill would give the Government the power to amend both secondary and primary legislation in certain areas. Colleagues are probably better informed about that than I am. It would be real cause for concern. As has been discussed, issues around democracy would be of concern in that case.

The Convener: Thank you. There are more questions than answers in that respect.

As colleagues have no further questions, I thank you so much for coming along today. We could talk for hours about some of this stuff and, as we have seen, it seems to change by the day. Thank you for your written evidence and the evidence that you have given this morning. You have certainly given us food for thought and maybe some actions to take in seeking clarification on certain points. We really appreciate the time that you have given to be here this morning.

11:11

Meeting continued in private until 11:26.

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