

Joint Committee on Human Rights

Oral evidence: [What are the Human Rights implications of Brexit?](#)

HC 695

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Members present: Ms Harriet Harman (Chair); Fiona Bruce; Ms Karen Buck; Jeremy Lefroy; Amanda Solloway; Baroness Hamwee; Lord Henley; Baroness Lawrence of Clarendon; Lord Trimble; Lord Woolf.

Witnesses

Professor Sionaidh Douglas-Scott, Anniversary Chair in Law, Queen Mary, University of London; **Professor Colm O’Cinneide**, Constitutional and Human Rights Law, University College London; **Professor Graham Gee**, Policy Exchange; **Ms Marina Wheeler QC**, 1 Crown Office Row.

Q1 Ms Harriet Harman MP, (Chair): Could I welcome you and thank you for coming to give evidence to us for our first session on human rights and Brexit. I would remind you that we are a Joint Committee of the House of Lords and the House of Commons, and obviously we are cross-party. We are very grateful that you are taking the time to come and see us.

Would you like to introduce yourselves to the Committee and just take a few sentences to say, if you would, what you think are the human rights issues that will arise, if any, when Britain exits the European Union? We will start with you, Sionaidh.

Professor Sionaidh Douglas-Scott: My name is Sionaidh Douglas-Scott and I am Anniversary Chair in Law at Queen Mary University of London. I am also the special adviser to the Scottish Parliament European external relations committee Brexit inquiry, but I speak here in a personal capacity.

I think the implications of Brexit on human rights are quite serious. There has been quite a lot of news about the implications for EU citizens who have moved from one state to another and the effect of Britain's withdrawal on their residence and free movement rights, and that is one thing to worry about, but I think there are also implications for British citizens, UK nationals, who stay put. The EU has provided many, varied rights for British nationals. For example, non-discrimination rights, social rights, privacy/data protection rights, we have the Charter of Fundamental Rights, and I am quite concerned about what will happen to these in the event of Brexit.

I know there has been talk of a great repeal Bill and mention of the fact that EU provisions would become incorporated, nationalised, into UK law. My fear is that, in the absence of any EU protection to back up, to provide an extra layer of protection for certain rights, those rights will be at the mercy of various attempts to repeal them. The problem is that some of the most important rights that we have through the EU currently take the form of secondary legislation, such as the Working Time Regulations, so it would be quite easy to repeal that; even if they take the form of statutes, such as the Equality Act, they would be susceptible to repeal. I am worried about that in the absence of a written UK constitution. There is no entrenchment for fundamental rights of the sort that you find in many other jurisdictions. Some of these rights have been incredibly important for citizens, when it comes to rights at work, equal treatment, social protection, and others, and for them to be susceptible to repeal, as we are already hearing, in the case of statements made earlier this week by Grant Shapps, for example, concerning the possibility of repealing certain workers' rights, I am quite concerned about that. I am also concerned about the prospects for the charter but I feel perhaps I have said enough for the time being. I will be happy to return to the charter later.

Marina Wheeler: Thank you very much for inviting me. I am Marina Wheeler and I am a practising barrister. I have a grounding in EU law, a training there, and practised initially for a number of years there, but more recently I have practised in this jurisdiction, predominantly representing the Government in public law cases. I am speaking here, drawing to a significant extent from my own practical experience, without the benefit, as my colleagues, of an academic approach, but I hope that that will be useful.

I think it is useful in discussing the impact of Brexit on human rights to distinguish between different rights, and I think the discussion will be assisted by focusing on, on the one hand, rights that have been generated themselves by membership of the EU. Into that

category come rights to live in other member states, to work there, perhaps to own property, all sorts of rights that generate from the treaty and from the secondary legislation that emanates from the treaty. That may also include employment rights and discrimination rights but focus on those that come specifically from EU membership.

A separate category that is useful to discuss are what one might call fundamental rights per se. There we are looking more at the system for regulating and protecting fundamental rights, and I see that as comprising in this country predominantly the European Convention on Human Rights and the Human Rights Act as our base mechanisms for protecting human rights, and I think one could add into that the Equality Act. The charter I would say is the same category of mechanism but of course it is a much more recent and novel mechanism.

I put that into three categories: rights generated by EU membership, system for protecting fundamental rights, and probably employment and discrimination rights in a separate category. The rights that have been generated by EU membership of course will change, and they will change very significantly, because the result of the referendum, I would say, gives the Government a mandate to withdraw from the European Union and renegotiate our relationship with the EU. That means revisiting that whole panoply of rights that emanate from EU membership. How they are going to be renegotiated, what they will look like at the end of that negotiation process, of course, we do not know now. That will be a process in which parliamentarians of course will be intimately involved, but that is up for grabs and that is the impact of the referendum.

A separate category, as I have said, is the system for protecting fundamental rights and what remains, of course, is the bedrock of our human rights protection, the European Convention on Human Rights, which emanates from our membership of the Council of Europe, and the Human Rights Act, which gives effect to that within the national jurisdiction. My personal view—and this is on the basis that leaving the EU will mean we are no longer bound by the Charter of Fundamental Rights—is that being freed from the charter's application will in fact strengthen our domestic human rights system. I am happy to elaborate on that in due course if it would assist the Committee.

Three brief points: one, the charter is a very poorly crafted mechanism; secondly, its relationship with the ECHR is very confused and my suggestion is it undermines the impact of the ECHR—I think there is a democratic accountability question because the circumstances in which the charter became applicable in the United Kingdom were

somewhat controversial; indeed, the United Kingdom negotiated a protocol, which was thought to be an opt-out, and indeed Parliament was told that it was an opt-out, but through case law it has emerged that the charter is not something that applies in a different way to the UK to the other member states. I also think, importantly, that public confidence in European supervision of human rights is already at a low ebb, and we can see that by virtue of the fact that it has been Conservative Government policy to repeal the Human Rights Act. If one supports supervision at a European level, I would suggest that the charter was an instrument too far, and the public I think were probably not well acquainted with the charter because its impact is relatively new, so they had not yet become aware of quite the breadth of its scope. My view is that, once they did become aware of it, it would further undermine European supervision and that would be on balance a bad thing for human rights protection in this country.

That is probably enough on an initial basis. Thank you.

Professor Graham Gee: Good afternoon. My name is Graham Gee. I am a professor of public law at the University of Sheffield. I am also a member of Policy Exchange's Judicial Power Project. I am grateful to the Committee for the invitation to appear this afternoon. This Committee does vital scrutiny work within our constitutional order and no doubt will do following our withdrawal from the European Union. I also commend the Committee for making considerable efforts to find and hear a range of different views on this matter.

That said, I broadly agree with a lot of what Marina Wheeler said, so I will make two very brief points about what she terms the system-wide architecture of rights. There are very real concerns that withdrawal will lead to a diminution of rights within the UK, and Professor Douglas-Scott has given us an example of those concerns. They form part of a larger anxiety about changes to our constitutional arrangements after withdrawal. For sure there will be a lot of complicated legal questions, both during and after withdrawal, and in the short term there will be considerable constitutional uncertainty. Against that backdrop, it is important to recall that there is a strongly held view that withdrawal will lead to an enhancement of our constitutional arrangements, including, as Marina Wheeler says, the ways in which we go about protecting rights. On this view, the central significance of withdrawal is to restore parliamentary freedom, authority, responsibility, and judgment for a large swathe of policy questions, questions that will often touch intimately on rights. The legislative choices that Parliament makes, Parliament will be accountable for those

choices, and those choices will be informed, as Marina Wheeler says, by our existing common law and continuing international legal norms.

The second point I would make is to emphasise that membership of the European Union is in no way a prerequisite for effective rights protection. There are a number of countries that protect rights just as effectively as EU member states, and very obviously more effectively than some other EU member states. Three in the Westminster tradition would include Canada, Australia and New Zealand. Those three countries also provide an example that it is possible to have a very commendable regime of rights without relying on a supranational court such as the Luxembourg court.

Professor Colm O’Cinneide: My name is Professor Colm O’Cinneide. I am professor of constitutional and human rights law in University College London. Very briefly, my take on this issue you are looking at is that UK withdrawal from the EU need not lead to negative consequences for human rights protection but it does create what I would describe as points of potential vulnerability, areas of heightened concern, which risk having a disproportionate impact on groups in society that are less able to access the democratic process and to have their issues flagged up in public debate, such as the obvious group, non-nationals, and other groups, such as members of disadvantaged groups, traditionally protected by anti-discrimination law, who have great difficulty in getting their issues on the political agenda, who have traditionally benefited to a large extent from human rights protection that has emerged indirectly through EU law. That is why I characterise the situation as creating points of vulnerability rather than necessarily intrinsically leading to negative outcomes in its own right, so to speak.

When you look at the totality of human rights protection, EU law does not contribute to a substantial extent to that when viewed in the totality of the UK. However, there are certain specific areas, which you will be well aware of, such as discrimination law, migration rights, data protection, labour rights, where the influence of EU law has been extremely substantive. It has helped to shape and influence UK law. For example, pregnancy discrimination law as we know it today has been to a considerable extent the creation of EU legislation and the case law of the Court of Justice of the EU. Now the constraining influence of EU law will presumably fall away, creating these potential points of vulnerability. If you do not mind me quoting Spider-Man, with great power comes great responsibility. What will happen now is that Parliament will have greater freedom to legislate in these areas but that greater freedom will bring with it a greater responsibility to

bear in mind the potential impact of new laws operating and taking effect in areas traditionally subject to EU law constraints. This Committee, I have to say by way of conclusion, will play an invaluable role in that process in making sure that UK law as it develops going forward adequately takes account of these points of vulnerability.

Q2 Fiona Bruce: Good afternoon. I am already finding your evidence fascinating. Thank you for coming today. I want to ask a question about the right to remain under Article 8 of the European Convention on Human Rights. This is the right to private and family life. Initially, because there is a question that relates to practice, could I address this to Marina, but then others please come in. The question is what level of protection does Article 8 offer EU citizens now resident in the UK post Brexit, and if those rights are not protected under that article, would you expect there to be significant litigation over citizenship rights?

Marina Wheeler: What I have wanted to try and communicate is my take on it is that, when we are looking at rights such as the rights of residence, we are by virtue of the referendum in territory where we are going to see very significant change. In a sense, I take your question as assuming that we are trying to protect the status quo as it is now, and I think it is important to recognise that that is unlikely to happen. Exactly what the aim is of the renegotiation, what precise relationship we are looking for, and what precise degree of rights of residence and movement we envisage and wish for post Brexit, is not yet known. I for my part—and I am sure my colleagues will come in if they disagree—do not see Article 8 having enormous value in this discussion, because by the very nature of the exercise that we are embarking on, we are looking at some kind of quite fundamental change.

There is nothing wrong and nothing that breaches human rights standards in a democratic decision to review a set of arrangements that have been entered into by means of a treaty and then given effect by statute in the Europe Communities Act. We are totally free to enter into that process, generate some proposals on what we want those reciprocal rights and obligations to look like, and subject them to parliamentary scrutiny. They will then of course have to be implemented into law by means of statute, and of course, throughout that process everyone involved in that, parliamentarians as much as anyone else, will be required to pay regard to the rights of those individuals involved.

Lord Woolf: Could you clarify that in regard to what you said earlier, that there is nothing inconsistent. My immediate thought was, somebody comes to this country under an existing

regime, and assumes that they are going to continue to have the right to remain in this country. If this country were to take the view post Brexit that they were no longer to have any right to stay here—and one of the things that has already been debated is whether it is ethical—and I use the word “ethical” to distinguish between ethics and human rights—to use them as a bargaining chip, which is the criticism which is sometimes made in the House of Lords of the Government’s approach. Surely that is a fundamental change being made for people who are in this country from what they were led to believe would be the position if they came and established themselves as they are entitled to in this country? I therefore query your saying there is nothing fundamentally wrong about it.

Marina Wheeler: As I see it, there are different categories of people. There are those who have been here and were here before the referendum vote on 23 June. Then there is a category of people I think you are referring to, who might come—

Lord Woolf: I was thinking of the ones who were here before the referendum.

Marina Wheeler: Certainly if one is looking at expectation and anticipation, the prospect of a referendum which would be likely to pose a question of in/out in binary terms in that sense had certainly been trailed for a significant time. I am distinguishing between the status of those individuals who have come since 23 June and what sort of relationship might be agreed and arranged for them. As I understand it, we are looking at the earlier period. Certainly it must be right that it is in the interests of both EU citizens here and UK citizens living abroad for there to be clarity as soon as possible about what the arrangements will be and the extent to which they will continue to enjoy the EU rights in accordance with the position as it was before 23 June.

In essence, it seems to me that that is now a matter of political negotiation. We are now in a curious position, as I understand it, where we know exiting the European Union is to be achieved through the mechanism of Article 50. It has never been used before but it sets out some parameters. The first step in that is a decision. The second step is notifying the EU bodies about the decision and starting the clock ticking for exit. We are in a position now where we have the President of the European Commission saying that no negotiations can begin until Article 50 is triggered, but we also have domestically litigation that is challenging the Government’s right to trigger Article 50 without an Act of Parliament sanctioning that. We are in an unusual position where we know that there are matters that, on an ethical basis, if I can use your analysis, need to be determined, because of course people would like to know the parameters so they can plan their lives. That is

acknowledged but the resolution of that I see as in essence a political question and not one that is determined, although it may be informed in a broad way, by Article 8 rights.

Chair: Thank you. Have any of the others anything?

Professor Sionaidh Douglas-Scott: In response to the question and a couple of things my colleague has said, first, it is interesting that the litigation that has been ongoing over the past couple of weeks very much concerned itself with rights and whether it is possible through an act of the executive, the prerogative, to take a step that will remove human rights without the consent of Parliament. That is what the litigation was about, and these are the rights we are talking about, the rights of people to free movement and residence. One cannot just say the Government can take a step through negotiation of an international treaty that will involve the removal of rights that have been conferred by Parliament through the European Communities Act without further ado.

Secondly—I only have three points to make so I will not go on for too long—when it comes to Article 8 of the European convention, I do not think it is an adequate replacement for the rights that currently exist in EU law of free movement and residence; it does not go nearly as far as those do. There will be a loss, and this will be a complete loss of those rights in some cases. However, there are issues relating to the referendum, in so far as a court might find that EU nationals resident in the UK have had interference with their rights post Brexit. There is an issue of whether that interference is lawful, because Article 8 is a qualified right. There is a right to respect for family and private life, and the Government can justify its actions. The Government might, for example, say there was a referendum, and people exercised their rights in voting in the referendum. I am not sure that would satisfy the test of legality according to Article 8 of the European convention in terms of justification. It is not foreseeable. People voted but they did not necessarily vote to strip a huge amount of rights from others to leave the single market.

The third point is, of course, ethics are important in this case, and of course this is a very worrying situation for those who are worried about their future in the UK, but ethics are not sufficient. We are talking about law as well, and where legal rights are at issue, they are capable of giving much greater protection than moral considerations. If we are simply relying on the Government to be moral, to act ethically, they may very well but they may not. One cannot tell with human beings sometimes how they will react, so I think it is very important if there are legal rights to be asserted that they can be asserted.

Chair: Can I follow up the points Harry and Fiona have raised? Could you envisage a government arguing that they are justified in an interference in what otherwise would be an Article 8 right by virtue of the fact that they are negotiating, as Harry identified, and using these people as a bargaining chip to set against the rights of our UK citizens in other European countries? Can you envisage that argument around Article 8 making any headway in the court?

Professor Sionaidh Douglas-Scott: It might be tried out. I am not sure that would pass muster. Perhaps more likely would be arguments based on economic wellbeing of the country, or the rights of those who voted in the referendum to exercise their democratic right to vote but, as I said before, it was not very clear what people were voting for when they voted in the referendum, and whether they were voting to leave the single market and cut off rights of free movement as they exist at present. I think the bargaining chips argument probably would not cut very much ice with a court.

Chair: The second point, which is to pick up a point that Marina made, are you saying that there are somehow three categories of people—there are plenty of categories. There are people who would want to come after we have left and Article 50 is sorted and finished. We are leaving them to one side for the moment. There are people who come after the referendum, but let us leave them to one side for the moment. What about people who came before the referendum? Are you implying that there are two sorts of people who came before the referendum: those who came at a time when the debate had got to a certain level and therefore somehow came at their own risk, and people before that who were not at their own risk and therefore whose rights you would see as more firmly established? I thought you were saying that somehow people who have come here knowing there was a debate about our membership of the EU should have realised they were coming at their own risk and that should be taken into account.

Professor Sionaidh Douglas-Scott: I would not want to be seen to be supporting that argument but I think it is an argument that might be made. There is more than one category of person who arrived before the referendum, because I think there will be some who arrived before the referendum who will be able to assert after five years they have a right to remain which will have become fully recognised by 2019, when presumably we may leave the EU. There will be others who will not satisfy that, so their status in the UK will be under a question mark. That is where I think it might be argued in that case that it would be justified in chipping away a bit at some of their movement and residence rights. What I was

questioning was on what basis the Government might try to justify removing those rights, the legitimate aim it would put forward to defend itself from a claim under Article 8 of the European convention. It would have to show that it had a legitimate aim. Legitimate aims refer to national security, the rights of others and economic wellbeing. Those are, I presume, the sorts of justifications the Government—

Chair: So you are envisaging in court a mini re-run of some of the arguments about why people voted as they did in the referendum, a rather unedifying spectacle?

Professor Sionaidh Douglas-Scott: It would be unedifying, yes. All I am saying is, if the Government are saying these people have no rights under Article 8, notwithstanding that there is an argument that their rights have been interfered with, they have to justify their conduct, and I am asking what the Government's reason would be for justifying that conduct. What is the aim, what is the purpose of removing these people's rights?

Chair: Colm, do you want to come in on this point?

Professor Colm O'Cinneide: Yes. In my view the Article 8 ECHR issues are much more specific than perhaps you have necessarily heard so far, as you have been giving a generalised picture. There is a clear strand of European Court of Human Rights case law that says if you have become embedded in a community—that you live there for an extended time, your children go to nursery, et cetera—state interference with that embeddedness through deportation for national security reasons or immigration control or other considerations has to reach more exacting standards of objective justification. This means that EU nationals who have come here under free movement rights and have become embedded in the UK, the more embedded they are, the greater their Article 8 rights, and the greater the objective justification that the Government will have to mobilise to justify the deportation.

To complete the Article 8 picture, the key distinction, to my mind, is not going to be between exactly when someone arrived, though that may be relevant; the real consideration is this question of embeddedness in British society and the objective justification that the Government bring to the table to justify any withdrawal of residency rights, deportation, interference with their ability to maintain a continued existence in the UK. That for me is the point of legal tension as opposed to perhaps the ethical tension. Of course, legislation may deal with this. It may simply say everyone will find a way of saying “Everyone embedded in UK society, you are free to stay, we welcome you”, but if legislation does not

do that, Article 8 becomes a very live issue, and it would be remiss of me not to tell you that there are discussions out there about Article 8, potential cases already in the pipeline.

Chair: There is plenty of litigation that could be had around levels of embeddedness, whereas if there were a date, it would be less so. Can we look at the other side of the picture with Amanda?

Q3 Amanda Solloway: As Fiona said, it is absolutely fascinating and I am intrigued when you talk about what people voted for, but I am not going to ask that question because we would be here for quite a while. We have had the Immigration Law Practitioner Association and they told us, “There is much more certainty for British citizens and their family members living in other EU states than for other EEA nationals and their families in the UK”. My question is: what is your assessment of the rights of UK citizens in other EU countries post Brexit? Shall I start with Professor O’Cinneide?

Professor Colm O’Cinneide: I will be very brief. A lot depends on the future shape of UK legislation in this area. Obviously, there will be a risk, for example, if future UK legislation on withdrawal from the EU substantially dilutes the existing rights of EU nationals resident here in the UK, that there will be retaliatory action; that obviously creates the risk. Interestingly enough, Article 8 could then become relevant to protect the right of UK residents in Spain and elsewhere. This is of course a two-way process; the ECHR acts as a protective layer across Europe, so Article 8 could intersect this debate in potentially quite important ways to guarantee rights on all sides, depending on what happens as the process of withdrawal unfolds.

Professor Graham Gee: I agree with Colm’s analysis there. If I may, I would like to briefly touch on Fiona Bruce’s question on the right to remain, and to echo largely Marina’s analysis. I agree that the legal status of EU citizens who are lawfully resident in the UK at the point of withdrawal is essentially a political question for national political authorities to decide. I agree with Marina that, in resolving that question, our national political authority should take into account continuing international legal obligations, including the ECHR, and should take into account the interests of UK citizens who are resident in other member states, but I would broadly agree with Marina that this is not a question that should be resolved by human rights law and not by Article 8, right to family life and private life, considerations. I agree also with Marina that, as a general moral proposition, there are very strong, infeasible moral reasons that would compel an institution such as this to

guarantee the position of EU citizens who are lawfully resident in the UK at the point of withdrawal. Distinctions may have to be made between those who were here with a right to remain prior to 23 June, and the other distinctions that have been made. I am echoing Marina's analysis.

Chair: Can I butt in there and probe something you are saying? If we have committed to Article 8, which Sionaidh has obviously reminded us is not an absolute right; there are other issues that have to be taken into account, but what it is not is a political decision which can glance across at people's human rights under Article 8. Article 8 is something that we are committed to and, in making political decisions, we should be careful not to breach it. It seems to me you are postulating it the other way round. Whatever we decide in Parliament, surely we have to be compliant with Article 8? We cannot just refer to it; we have to be fully compliant with it. It is not merely something to be taken into consideration; we have to maintain our compliance with it. It is a human right which we have signed up to. It sounds to me as if you are saying that is now a dead duck; all you have to do is make a political decision. I do not think that is right legally.

Marina Wheeler: Can I say one thing about that? I think maybe this confusion rests on how we define the rights. Maybe the issue is about what a human right is, in that the rights to reside, to live in another member state, to buy property, et cetera, are not in themselves human rights; those are rights that derive from the arrangement with the EU.

Chair: We are talking about Article 8 rights. We are not talking about—

Marina Wheeler: There are those rights, and what that means is that the UK is free of course to withdraw from that arrangement, to withdraw those rights. We know it is not going to be an absolute—

Chair: You mean withdraw from the convention?

Marina Wheeler: No, sorry, withdraw from the community, the club, that is the source of all of those rights. As one withdraws from there, the renegotiation—

Chair: It is the convention that is the source of Article 8, not the European Union.

Marina Wheeler: That is right, but I think what is being suggested is that that process somehow engages an Article 8 right. There is no Article 8 right to live in another member state. Article 8 is a right to respect for private, family life, home and correspondence. Of course, it has been interpreted very widely by the convention, but I think the only way in which Article 8 arises in this discussion is if you find an interference with something I think Colm was calling embedded rights. I cannot see, certainly on anything I have heard

so far from the Government or as part of this withdrawal process, that there is a question of the terms of the renegotiation being such as would envisage deportations of EU nationals. Of course we know some fixed points, which are that an EU national who has been resident in the UK for five years achieves permanent residency, but then of course there is a grey area, and that is the grey area in which it will be necessary for a democratic decision to be taken, and negotiations undertaken with the EU about precisely how those new rights are drawn up. It may be that some Article 8 issues arise but to my mind this is somewhat premature, in that we simply have not reached that process yet.

Lord Henley: You talk about a grey area and you say people obviously have a right to remain if they have been here for five years. Thereafter, if it is less than five years, they might have to rely on the Article 8 right to family. At that point, unless Parliament makes a decision saying two years, three years or whatever, it would in the end be a question of fact and degree as to whether they could make use of Article 8 of the convention.

Marina Wheeler: Parliament needs to make that decision. It is for the Government and Parliament to re-craft those rights.

Lord Henley: Sorry, I am being very dim. Even if Parliament said three years, even under three years, it would still be possible under the convention, by fact and degree, to show that you had the protection of Article 8 to stay here. Is that right?

Marina Wheeler: I would question that. That is not to say that such a claim might not be brought to challenge whatever eventual arrangement is agreed.

Lord Henley: It might apply to X but not to Y is what I am saying. I see a nodding over there. A cut-off has been imposed by Parliament at, say, two years, for the sake of argument, but some people under two years might still be able to show that—.

Chair: That must be right. Surely Parliament cannot override Article 8? That is the point, is it not?

Marina Wheeler: Of course, Parliament is subject to Article 8.

Chair: Because of the embeddedness point.

Lord Henley: That would be a question as I put it.

Chair: Case by case, individual by individual.

Marina Wheeler: Of what Article 8 requires on the facts.

Chair: Yes, in each individual case, and that is not something Parliament can interfere with, whatever we have legislated, because of our Article 8 commitment.

Marina Wheeler: Yes, but when Parliament comes to determine or sanction or debate the arrangement that is concluded as a result of this process, it will take into account Article 8 considerations. That will be part of that process.

Professor Colm O’Cinneide: Let me give you a practical example. I, as I suspect many other lawyers have, have had many people coming up to me, at my child’s nursery, in the street, emails from friends of friends, asking me “What is our legal situation now?” Let me give you an example of one from north London from a friend of a friend, an author, who has two children, and she has MS. Her partner is a French national. He has not worked since he came to the UK because he looks after the children while she writes and copes with her medical treatment. That has all sorts of implications under EU law, which I will not go into the detail of, but basically his right to free movement under EU law is extremely restricted because he is not here for employment as such. He has been living in north London looking after the kids for five or six years now.

If UK law post withdrawal from the EU changes, which means that he no longer has a right to maintain a residence in the UK, and all associated protection from potential exposure to deportation, potential denial of access to the NHS, potential denial of access to social welfare protection if necessary, there will be an Article 8 issue, because he has not an embedded right in the legal sense but his life has become embedded; his family life is embedded in the UK. If the UK is going to justify substantially restricting his ability to maintain that family life in the UK, it is going to have to show some very strong objective justifications. This is the type of scenario which would be very useful for human rights-compliant legislation to think about, and to address the rights of individuals such as that person as and when the UK completes the process of withdrawal from the EU.

Chair: Thanks, Colm—not to mention her right, which will also be engaged.

Professor Sionaidh Douglas-Scott: A quick observation on the situation we have just been talking about: I think it is important for there to be guidance quite soon, because European convention Article 14 also concerns discrimination within the ambit of the other rights, including Article 8, so if there is seen to be discrimination against one group of people who had come at a different time but whose situation was not made clear, there could be a problem with rights compliance there.

Secondly, I wanted to come back to the question that was asked about whether the situation for British nationals in other EU states might be better. One way in which it is different is that EU law would continue to apply to them with regard to the EU law on third

country nationals, which they will become, so they will also be subject to EU law on third country nationals as well as to that state's own domestic law. There is also the question though what would happen if expats chose to return to the UK because of the impact of Brexit, and, supposing they had married third country nationals, other EU nationals, the question of whether they could bring those persons back with them within the ambit of UK immigration law. I do not think their situation is completely straightforward either.

Chair: That is a very interesting further point.

Lord Woolf: I was unclear on what you said. In approaching this problem, am I right in saying it is critical to keep in mind the difference between the rights that come to citizens in this country through the Human Rights Act, which is not directly affected, am I correct in saying, by Brexit? Secondly, with regard to that, there is a different issue going to arise, and that is the talk about a British Bill of Rights, because if there is a British Bill of Rights, that could directly affect the Human Rights Act. That is not now important, and in particular is not important because statements on the political level have been that the policy now is not to reduce the rights of the British citizens of this country by the repeal of the Human Rights Act and the replacement of the European convention by a British Bill of Rights; it is said very clearly that is going to be the base. Am I right so far? Nobody disagrees.

Professor Sionaidh Douglas-Scott: Yes, that is certainly my understanding.

Lord Woolf: Equally what will not be in dispute are those convention rights. Then there are those rights at the present time because of what has been done on the European level, and those will be affected by Brexit, and will clearly be dealt with. That is a second category. The problem comes into the question of how we protect those rights that supplement what is in the European Convention on Human Rights, which, once we are no longer entitled to rely on European law, are no longer going to be directly available. That is the sensitive area.

Professor Sionaidh Douglas-Scott: Yes.

Lord Woolf: What would you say needs to be done to produce clarity there?

Chair: That is an easy one.

Professor Graham Gee: It is easy for me but I am not sure everyone in the room will agree, which is why this forum is so important. On the substance of the rights, no doubt there are a great many rights that a decent community ought to protect that are currently protected by EU law, and no doubt that is in part because of the contribution that the UK has made to law making at the EU plane. To echo something I said in my introductory remarks, there is nothing about EU membership that requires those rights to be protected.

Those rights will be transposed into domestic law following the withdrawal, and the decision will have to be made by institutions such as this as to whether or not to enhance, maintain, decrease, or change the content of those rights. Those are questions on which people will reasonably disagree; people will share a good-faith commitment to rights but disagree about which rights we should be protecting, what the content of those rights is, and what appropriate limitation of those rights might be in concrete circumstances.

To take Lord Woolf's second category of rights, EU law rights, in a systemic fashion, I think a common assumption that is made is that somehow the EU legal regime provides a better, stronger way of protecting rights. On balance—and assessments life are normally in the round, all things considered—I disagree with that assessment, for three main reasons. First, the type of judicial review of legislation that we see at the EU level allows national legislation to be disapplied, that is, to be rendered invalid, where it is inconsistent with rights protected by EU law. Pause for a second to note people are going to disagree about what those rights are. Just because a court identifies them as a right requiring a particular thing does not mean they are going to agree with that.

The type of judicial review found at European level is much more hard-edged than the type of judicial review we see under our domestic human rights apparatus, the Human Rights Act, or at common law, and it is more hard-edged in as far as it culminates in the invalidation of national legislation which is inconsistent with EU law. To my mind, getting rid of that hard-edged judicial review of legislation on human rights grounds, whether by way of the charter or general principles of EU law, will be a positive step, because it will reflect and recognise the right of rights. What is the right of rights? The right of rights is a phrase that harks back to William Cobbett, a pamphleteer from the 18th century. Today we understand the right of rights to denote the fact that the people who bear rights ought to be able to participate in debates and decisions about those rights, including about the content and appropriate limitation of those rights. Getting rid of hard-edged judicial review of legislation would be an improvement, and here I disagree with Professor Douglas-Scott.

The second advantage would be the non-application of the Charter of Fundamental Rights. As Marina Wheeler said at the outset, there are at least three reasons why the non-application of the charter would be a welcome development. First, its haphazard drafting and adoption; secondly, the fact that Protocol 30, which was intended to enshrine the UK's understanding of the limited reach of the charter, has been rendered a dead letter by a

decision of the Luxembourg court, and thirdly, the prospect of the Luxembourg court taking a very aggressive, expansionist approach to the charter has hung over us for some time.

Perhaps the most important reason why withdrawal will lead to an enhancement of human rights relates to the changing judicial culture, and here I am conscious we have a very eminent retired judge among us. Membership of the EU has changed how our domestic judges view their own role and the balance of our constitution more generally. To my mind, it is to be hoped that withdrawal will encourage our domestic judges to hew to a more traditional understanding of their role.

Under EU membership our domestic judges have become accustomed to the idea that Acts of Parliament are not the highest form of law, and that attitude has spilled over outside the EU context. We see it in obiter dicta in the famous case of Jackson around 10 years ago, obiter dicta from Lord Hope and Lord Steyn, who cite EU membership as contributing to their view that our domestic judiciary outside of the EU context can strike down Acts of Parliament. That was a claim made by two judges of one of our highest courts, informed by how EU membership has changed judicial attitudes.

For sure there is a risk that some domestic judges may see withdrawal as giving them licence to do novel and more adventurous things in their own right, and it is also true that many lawyers and judges will fear that removal of limits on our national institutions, and seek to encourage judges to develop novel approaches in the common law to discover common law rights. All of that, to my mind, would be an unwelcome development, and understates the capacity of our parliamentary democracy to protect rights.

Chair: Can I ask you for some examples there? You have talked about the haphazardness of it, the hard-edged nature of the judicial review, the expansionism, and the sense that our own judges have somehow gone off the leash and decided not to take sufficient account, as you would have it, of Parliament, and feel free therefore to look more widely for support for what they were wanting to do anyway. Can you give some examples that might persuade us that this is a bad thing rather than a good thing? One person's hard-edged judicial review is another person's right to a review of an action which has been detrimental to them.

Professor Graham Gee: For sure, and I think the premise of your question is a very important one. The issues that we are discussing today are both contestable: "What should the judicial role be?" and they are contested: "We disagree on what that role should be". To give you a good example of our domestic judiciary transgressing the previously settled

limits on their role, I mentioned obiter dicta in Jackson, but a recent example would be the case of *Evans v Attorney General* relating to the Freedom of Information Act, where in crude terms the Supreme Court read out of the Freedom of Information Act the ministerial veto.

Chair: Is this obiter dicta? Can you do anything better for us than obiter dicta? You have set it quite high but your example is obiter dicta.

Professor Graham Gee: Obiter dicta from Jackson. I will park that to one side but note that, of course, obiter dicta in one case can inform the development of judicial attitudes.

Chair: Yes, but the question is has it? This is why I am trying to get some concrete examples of why what you are saying is something that should be welcomed as a likely outcome.

Professor Graham Gee: *Evans* is a decision of the Supreme Court where by a majority they effectively wrote out the ministerial veto in the Freedom of Information Act. That is arguably an example of the courts taking a very proactive, aggressive approach to statutory interpretation in ways not true of 20 to 30 years ago. People will disagree on whether that is a good thing or a bad thing. I am inclined to think that, on balance, it is an unfortunate development.

Fiona Bruce: Professor Gee, there was an indication, prior to the Assisted Suicide Bill, which was voted down in this Parliament very clearly, by more than half of the House of Commons, by members of the judiciary that they were minded to review the law on assisted suicide. I wonder whether you think that is another example of where the judiciary were perhaps minded to overstep their boundaries in determining legislation?

Chair: Is this in relation to the EU?

Fiona Bruce: No, but I am talking about the trend of the judiciary.

Professor Graham Gee: This is my third point as to why withdrawal might be of benefit in human rights protection to suggest that it would encourage the judiciary to respect the limits of their role in ways which reflect the rule of law. What is the first and best protection of our rights? It is the rule of law, and that involves courts respecting the limits of their role. I agree with Fiona Bruce that some of the judgments in *Nicklinson* are arguably evidence of this aggressive judicial attitude, to use a poor word. I should also note that the project with which I am involved, the Judicial Power Project, has published a list of 50 problematic cases which span the Strasbourg court, the Luxembourg court and our domestic courts, all of which in totality illustrate the ways in which judicial power has

grown over 20 to 30 years. Again, views will disagree whether that is a good thing or a bad thing.

Chair: I still feel the example Fiona has brought in is—if you can give us some examples about decisions where judges have made decisions which fly in the face of, flout Parliament’s will, on the basis that they have scope for that from the EU charter and that it has been a bad thing.

Professor Graham Gee: An example from a couple of weeks ago would be the case of *CS v Home Office*. This is a decision of the Luxembourg court where—

Chair: If that is the Luxembourg court, that is not what I am asking. You are saying that it has changed the attitudes of our judges, the domestic court. What I am asking for is an example of where the domestic court has gone off the leash, is flouting Parliament’s will, because of the EU charter, and once we are out of the EU charter, the judges will be back in the box they are supposed to be in. We need an example of where they have been out of the box and need to be back in.

Professor Graham Gee: I fear I may not be making myself as clear as I would like. I am saying that the spill-over effect is not limited to how our domestic courts approach EU law. In some respects that is of a lesser interest, because the final arbiter on the content, meaning and interpretation of EU law is the Luxembourg court. More important to my mind is how the spillover effect has changed how judges domestically approach a large swathe of questions, particularly on rights, so this would be in domestic judicial review, on HRA cases, as well as on EU law. An example that might come to mind would be the Court of Appeal decision in *Benkharbouche*, the details of which I am afraid elude me for the time being, but I would certainly be happy to provide the Committee with details afterwards.

Professor Sionaidh Douglas-Scott: I would like to respond generally to what Professor Gee has just said in response to Lord Woolf. I will try to keep it as brief as possible. First, regarding the substance of rights that will go, we should remember that some rights will go altogether when we leave the EU, because they will not be able to be incorporated in any form because they are involved with EU membership, such as voting for the EU Parliament or the rights of free movement and residence. They are never going to be replaced in the same form, and some rights will be completely lost. Of course, many may well be incorporated into UK law.

The question then is, have we benefited from our EU membership? Has that given enhanced value to rights? I think in some cases it has, in some cases it has not, but certainly there are some cases on equality law—when the UK joined the EC, Britain had an Equal Pay Act but important decisions of the European Court of Justice ensured that principles such as equal pay for work of equal value for men and women, which had not been applied in the UK before then, were applied. One could point to quite a few decisions of the European Court of Justice which have enhanced the level of rights protection.

Also, regarding remedies, I think it has been very important for litigants, because there has been the possibility of disapplying certain Acts of Parliament. There have been very few such examples in the human rights field in the UK. The example my colleague gave of *Benkharbouche*, decided a year or two ago, is one of the very few cases where the British courts have disapplied provisions of an Act of Parliament because they violated the Charter of Fundamental Rights, namely the right of access to a court in that case, in the context of a claim for state immunity by a foreign embassy.

It depends on what view you take about that. For some people, the fact that an Act of Parliament could be disapplied in favour of fundamental rights will be a very disagreeable thing. For others, who might say that fundamental rights should trump legislation in certain cases, particularly when it concerns the right of access to a court, a different view will be taken. I would suggest we can certainly find enough case law from the European Court of Justice to show that it has provided added value in protecting fundamental rights, some of the time. My complaint about the European Court would be that it had not gone far enough in some cases; quite the reverse in the case of social rights, for example. There is quite a lot to dislike in cases such as *Viking v Laval*, because it has not recognised fundamental social rights to the extent of enforcing them. I would say it has been too timid rather than gone the other way.

Finally, my colleague Graham Gee referred to other jurisdictions, Australia and Canada, which of course do not submit to the strong jurisdiction of an international court. The Canadian example is an interesting one. I do not know a great deal about it but the Canadian charter of rights contains the possibility of invalidating legislation, which is not the situation we have with the Human Rights Act here in the UK. In a sense, that is what I was trying to get at earlier, that sometimes it is important to entrench certain fundamental rights. I see that as being an important aspect to the rule of law. Lord Bingham, in setting out the principles of the rule of law, included fundamental rights, and if you cannot protect

them, if you cannot provide a remedy for them, the rights are not very valuable. Sometimes I think that kind of strong judicial review can be a very valuable thing, carefully applied by a careful court.

Chair: Oliver, do you want to explore whether or not your question has already been answered?

Q4 Lord Henley: Quite a lot of it has. I wanted to come back to the whole question of the charter of rights, which I gather you, Professor Douglas-Scott, said contains about three and a half times as many rights as we have in the convention. Then Professor Gee went on to make the case very valiantly that it is not terribly well drafted. What I would like to ask all of you is, do you think that much would be lost if we removed that, stuck to the much simpler convention that we have been signed up to for years and years—we more or less drafted it originally but then signed up to some years later—something simpler along the lines of the Ten Commandments—and there is a lot to be said for keeping things simple—and allow Parliament to do the rest by whatever extra add-ons we wanted. Do you want to start?

Professor Sionaidh Douglas-Scott: Yes. The charter was drafted quite swiftly. It differs considerably from the European convention, to the extent, as you know, that it contains many more rights, and of course, all of those rights would go, particularly the social, employment rights, which are not present at all in the Human Rights Act.

Lord Henley: Those are the ones that it might be more appropriate for Parliament to make.

Professor Sionaidh Douglas-Scott: If Parliament were so minded, yes, and it had not chosen to do so prior to the charter becoming binding. The other really important thing to remember about the charter though is that the charter only applies to the extent that the member states are applying EU law; it does not apply outside of the ambit of EU law. The point of the charter is to ensure that EU institutions themselves comply with fundamental rights. That was a gap in the way that the original Treaty of Rome was drafted. It was not human rights-compliant, so that fills that gap, and because member states spend so much time implementing EU law, it would not have made any sense to have excluded their actions from the ambit of the charter. As I suggested earlier, there are very few cases where national courts have set aside Acts of Parliament for violation of the charter.

The charter was drafted originally in 2000 as if binding. It may not have been beautifully drafted, but I have heard a lot of complaints about the drafting of the European convention, which had a great deal of British input, and seems to have worked quite well, I think. I do

not think we should be too critical of the charter. Of course, when it was updated at the time of the Lisbon Treaty, the so-called horizontal clauses were amended to ensure that application of the charter should not mean that the EU exceeded its competencies. Those provisions are written into the charter.

Lord Henley: Who else on the panel would like to say something? Professor Gee possibly?

Professor Colm O’Cinneide: Very briefly, on the wording of the charter, it is important to remember that the charter is a bit of an amorphous mass precisely because different rights were inserted into it at the insistence of different national governments and parliaments. For example, it protects the right to strike and other social rights. From the UK perspective, we look at those and go “That’s not the sort of thing that should be in a charter of rights” but they were inserted precisely at the insistence of the Nordic parliaments, in particular the Swedish Parliament, to protect what they viewed as fundamental rights relating to freedom to strike and so on. One reason why the charter is a bit of an amorphous mass—which it is—is precisely because it reflects the input from all over Europe, like many other things within the EU framework.

Of course, in relation to your wider question, “What are we losing?” in many ways it is a historic discussion. Frankly, I think very few people expect UK courts to be cheerfully quoting the charter in five or 10 years’ time after the result of the referendum. As you have heard from Graham and others, the impact of the case law has been very limited. The Benkharbouche case was an interesting one, because it opened the way for an allegedly abused domestic worker to sue for a violation of fundamental labour rights and race discrimination against the Sudanese embassy, which would not otherwise have been available. Apart from that it has had very little impact either in the UK or at wider levels of EU law, with the exception of data protection, where it has had a considerable impact, which is controversial and disputed, but, interestingly enough, is likely to continue perhaps to shape UK law in the future; for various complicated reasons, data processors will want to comply with Court of Justice jurisprudence and so on.

The final point I would like to make about the charter, very briefly, is that, in losing it and in losing the constraining effect of EU law, something interesting happens. You heard Graham’s argument earlier, but he said something very interesting, and to my mind slightly undercut his position in this context. He referred to the right to participate in decisions that shape your life but, of course, most of those who benefit from EU law at the moment—non-nationals, migrants and so on—are not able to participate in democratic

decisions that shape their lives; they do not vote in general elections, for example. EU law has historically protected those groups to some extent in a way that national law has not replicated. The question, the challenge, for Parliament going forward is, once you lose that backstop, to make sure that the rights of those people are not lost in the process. EU law has kept those rights in the mix, so to speak. That now goes away, so the challenge for Parliament is to keep a focus on the rights of those unable otherwise to participate.

Marina Wheeler: May I add a few words about the charter? I think it is absolutely right to explain why the demise is not to be mourned and perhaps give a couple of other practical examples, as requested, about its impact. It is right to stress when one is looking at the charter that its aim was indeed to control the acts of the EU institutions, and of course, that has become more important as the power of the institutions has increased: the ability to take such acts as freezing the assets of a bank suspected of involvement in terrorism, to take one example. Through an evolution of the charter being struck down initially as part of the constitutional treaty and then re-emerging in Lisbon, it has in fact taken on a relevance in relation to member states that was not initially anticipated.

The original idea for controlling the EU institutions was in fact that they should accede to the Convention on Human Rights, because, as Lord Henley has said, that is of course the pedigree; it was the instrument that was drafted after the Second World War, political and civil rights, long pedigree, and developed rights through the jurisprudence of a court that is specifically dedicated to human rights, namely the court in Strasbourg. The EU court, so Luxembourg, decided that it was wrong to accede to the convention because it was wrong for the EU to be subject to another jurisdiction, so we have the charter.

The point about the charter is that, yes, as has been said, it has 50 rights as opposed to the 20 of the convention, and is drafted in a way that it is not clear what is a right and what is a principle. It is not even clear what is intended, if at all, to be justiciable. The UK of course had this negotiated a protocol. There has been a lot of debate about whether that was an opt-out or whether it was clarifying, but what is absolutely clear is that it was not intended or envisaged that the charter would be used as another alternative way of challenging domestic legislation or acts of the executive, and that is what has emerged, and it has been used that way.

I do not entirely agree with Professor Gee in saying it has not had much impact. It has had quite a significant impact. Bearing in mind how new it is as well, it has had a very significant impact in a number of areas, including national security, which of course is an

area of great concern. What I think is fair to say we were looking at is a very likely increased use of the charter, for the main reason that claimants of course recognise—Benkharbouche is a good example of this—that if you are successful in a challenge, you achieve a result that is much more—you can call it effective or you could call it draconian in the way that you look at it, but it gives the court the ability to set aside inconsistent national provisions or legislation.

The problem with that, and why I would say that is not a desirable thing, is that when we enacted the Human Rights Act—and of course that was a lengthy process. I am sure many of you were involved in that. It took many years to bring rights home—a very careful balance was struck between the powers of the courts and the powers of the legislature. What emerged was, if there is an inconsistency between a human right and national legislation, the ability of the court to issue a declaration of incompatibility, and then it is for Parliament to take the step of correcting that. I think what was thought at the time, and was of course debated in Parliament, was that was the right balance for our constitution.

Because the charter has come in in this way that nobody expected—we suddenly found we were subject to it; the protocol that we thought was an opt-out was not an opt-out—we now find there is this very draconian approach to setting aside national legislation.

To finish, and I know I am taking a bit of time, a couple of reasons why this is a bad thing. With the charter sitting alongside the convention, many of the provisions of the charter overlap with the convention, and it was said that they were simply mirroring the convention provisions and we could expect that they would be interpreted in a way that was consistent with the convention jurisprudence. What we have found is that there is a parallel body of interpretation that has been developing. An example of that is the case of *Digital Rights Ireland*, where the court in Luxembourg struck down a directive that required data to be retained. It was an important measure in the fight against terrorism and serious crime. The point there was that Luxembourg interpreted the scope of Articles 7 and 8, privacy and data, in a way that departed from the Strasbourg jurisprudence. They went further than Strasbourg but without referring to the Strasbourg jurisprudence.

That is one example. There are other examples, and there are certainly examples where lawyers on behalf of claimants in cases involving national security, for example, a revocation of a passport or a decision not to issue a passport, where it has been argued by claimants that the charter gives a right that is more extensive than the convention. What that means is, in a sense, a re-working of all sorts of positions that have been established

over some decades of dialogue between the domestic court and the Strasbourg court. One has to ask what the value of re-working that is. I would suggest it is in nobody's interests to have a whole new development of parallel jurisprudence. In fact, it undermines legal certainty, which is bad for claimants and for governments, who need to try to take steps that they know are lawful.

I would suggest that means that to simply be left with the convention, its long-established jurisprudence, which will continue to evolve with the Human Rights Act, is a much clearer and more coherent way of protecting human rights. It also keeps the constitutional balance that we decided was effective.

Chair: Can we move on to David's question, and shortly thereafter on to Karen's.

Q5 Lord Trimble: We have had some reference to the Repeal Bill that the Government have made reference to, and it is so far the only concrete step that we are aware of that is going to be taken, and we do not know exactly what this Bill will do. The Prime Minister has said that the idea is to take the existing EU legislation and move it over, as it were, to become UK legislation that can be amended by Act of Parliament thereafter, and would give us the opportunity of dealing at leisure with all the details of that rather than having to do it immediately.

Have you any views as to what the exact nuts and bolts of this Great Reform Bill should be? What should it focus on? This is the first thing we are going to have in Parliament actioning the Brexit, and I think it is important that we take that first step soundly and properly. I would welcome your views as to what the nuts and bolts of this Bill should be.

Chair: Please try and be concise. I know it is a giant question but please try.

Professor Graham Gee: The key issue, as I see it—we do not know the details—relates to Henry VIII clauses. As you know, Henry VIII clauses empower Ministers to make delegated legislation that can amend or repeal primary legislation. The temptation for Ministers will be, in the face of transposing all this EU law, and they might want to get rid of big chunks of it, that they should have very wide Henry VIII clauses. That is a temptation that should be resisted. Overly wide Henry VIII clauses in skeletal legislation would give Ministers too much power.

I would commend to the Committee a recent report from the Bingham Centre on the Rule of Law in the Brexit context, where they recommend that Henry VIII clauses in the Great Reform Bill should be used infrequently, drafted very carefully, and only in primary

legislation which carries with it sufficient detail, criteria and substance to ensure legal certainty. Very particularly, the last point on this is that we should not throw out the baby with the bathwater, and Parliament should insist on the usual approach to Henry VIII clauses, the delegated powers committee, and have guidance which Ministers should follow. This should be clearly identified. There is a preference for the affirmative resolution procedure and any justification to explain why they are going with the affirmative or negative procedure. That is the key issue so far as we know at the moment.

Chair: Thanks. Does anybody have anything to add?

Professor Sionaidh Douglas-Scott: Two points, which I will keep as short as possible. The first is that I completely agree with what Professor Gee has said on Henry VIII clauses. The second is that an awful lot of the provisions we have in EU law now refer to EU institutions, agencies, standards. I think that will create a drafting nightmare, because we are members to many EU directives. Should the Court of Justice give a new interpretation on that directive or should new standards be set by the Commission? This will be very tricky and raise questions of where we want to go with the new jurisprudence from the Court of Justice. This will cover a multitude of things, from tobacco regulation or whatever.

The next point is I think there are key devolution issues there. It raises the issue of legislative consent of the devolved administrations, because the great repeal Bill, should it incorporate en masse, will be incorporating some matters that are devolved matters. This is another rule of law issue, I think, because there is great uncertainty, and certain politicians have said legislative consent would not be given. That raises the prospect of a constitutional problem.

Lord Trimble: We always have the fall-back, in that it is quite clear that this Parliament is sovereign and the devolved bodies are not.

Professor Sionaidh Douglas-Scott: Yes, but there is the Sewel Convention, and it would be a breach of a constitutional convention if their permission were not sought or it were ignored. That would still be unconstitutional behaviour.

Lord Trimble: We had a stand-off for nearly a year in Northern Ireland over some matters. Thankfully, they were resolved at the end of the day but they could not have been resolved without the fact that there was in the background the ultimate power in this Parliament. That might have to be tested again.

Professor Sionaidh Douglas-Scott: I would see it as a political question and I am a lawyer, so I would not hazard a guess as to how that would be resolved.

Q6 Ms Karen Buck: I suspect the question I am going to ask you will draw out the same slight differences of perspective that we have already heard in response to previous questions. It has been argued in some quarters that the EU has been a driver for progress, particularly around anti-discrimination legislation. What we know of course is that none of these things will be static; there will be continual change, and there will be progress in Europe. To what extent is there a risk—and this will obviously depend on the extent to which you agree with the proposition that the EU has driven that progress—that we will be left behind, with European legislation continuing to make progress in that area and the UK not moving forward at the same pace? Marina is shaking her head.

Marina Wheeler: Very briefly, my perception is not that the EU has been the driver. Harriet probably knows more about this than many but my perception is the UK has always been at the vanguard of discrimination rights and has pushed through, or at least been instrumental in pushing through a lot of the EU legislation on equality. I completely agree with what has been said before but many important decisions of the Court of Justice have developed that. I see no reason why exit from the EU should not permit us, if it is the democratic will of the people, to continue to maintain a very high standard, and to implement our discrimination legislation in the vigorous way in which we have done up to now.

As for being left behind, again, if we watch other EU member states enacting new forms of legislation, there is nothing to stop us matching that within our own domestic sphere. Certainly my hope would be that there is no reason for strong protection of rights in the discrimination sphere and the promotion of equality to suffer as a result of exit from the EU.

Chair: Jeremy, do you want to chip in at this point, and then we can have the answers taking into account your point when they answer Karen's question?

Q7 Jeremy Lefroy: Thank you very much. I just wanted to raise the question that presumably, if the EU Charter of Fundamental Rights comes over into UK law under the great repeal Bill, and it is not then repealed and still has effect—and maybe there would be a parliamentary majority against it being repealed; I have no idea—in effect, as far as I understand, particularly through the case law accreting around the Charter of Fundamental

Rights, you would have some conflicting bits of legislation on the statute book. Would my understanding be correct?

Marina Wheeler: I would not anticipate—and I have to say I do not know what my colleagues think—that the charter would come over. Essentially, the charter now has the effect of a treaty, and of course we are not going to enact the treaty as part of UK law, so I think I disagree with the premise there, but it may be my colleagues see it differently.

Chair: Are you saying in response to Jeremy's question the point is that anything that is derived from the EU charter then is left behind, or are you just talking about for the future? Are you talking about for the future, Jeremy, or rights that we have acquired because of our ...

Jeremy Lefroy: I may be wrong but I have assumed the charter will come over as part of the great repeal Bill. Whatever you think about it, and my personal view is it is a huge range of things from almost totally insignificant to the incredibly important all mixed together, which is why I was uncomfortable with it in the first place, but it will come—what you are saying, Ms Wheeler, is that you do not think it will come over, which would be a surprise, I think, to many MPs, who were thinking that the Government were intending that it would all come over and that we would then decide whether this bit stays and this bit does not.

Chair: We have heard from Marina that we are leaving it behind.

Professor Colm O'Cinneide: I would strongly disagree with Marina that UK law has been always the driver in the vanguard. There are key elements in anti-discrimination law, such as the legislative prohibition on religious discrimination, sexual orientation discrimination, and discrimination on the basis of age in employment, which were only introduced in this jurisdiction because of the requirements of an EU directive. You can trace lots of aspects of anti-discrimination law which owe their origins to the EU legal framework. I have written a 10,000-word paper on this, if you want it. I do not recommend it necessarily.

Interestingly, the Equality Act 2010 is a very fine piece of legislation, which levels and gives UK anti-discrimination a very solid, admirable legislative basis, but, getting back to the question, lots of anti-discrimination law is interpreted by reference to past precedents from both UK courts and Luxembourg. Some of those precedents, the more recent ones, take into account the charter, others take into account general principles of EU law or are simple interpretations of the text of the directive.

What I think many of us working in detail in this area are curious about is how the Great Repeal Act is going to alter the status of all this previous precedent, some of which is incredibly important in the day-to-day functioning of, for example, indirect discrimination requirements. This is why I keep on emphasising the point: it is incredibly important that parliamentary scrutiny processors like yourselves start probing some of these issues about the continuity of existing precedent. UK courts will, I presume, post withdrawal be taking the final decision as to the status of charter judgments or other decisions of the Court of Justice, but it will be interesting to see what they make of established precedent and obiter, perhaps influential persuasive judgments still coming from Luxembourg in relation to some of the originating instruments of key elements of UK law.

Chair: We have a set of variables that might happen now. We will have to have a grid. I am not sure whether the Government have a grid but somebody needs to have a grid which includes interpretation, previous judgments based on EU law, future ones—perhaps you can start drawing up that grid, and that would be very helpful, I am sure, to everybody.

Lord Woolf: I would like to enquire into the position of treaties which are made at the European level, for example, in relation to family matters, where they play a significant role. Post Brexit, how do we still have the benefit, which presumably we want, of those treaties although we are no longer a part of the European Union?

Marina Wheeler: May I answer, because the Repeal Bill—and this encompasses both points—as I see it, is the end process, it is the end of the negotiation process, and all of these questions, including precisely that important question about how we can make sure that judgments in family cases are still recognised and respected across borders, because of course, we will still have citizens living, working and moving throughout the European community and the UK. That is all part of the process of, in a democratic way, and of course with Parliament at the heart of it, deciding how we want this future relationship to look. There is no single answer. Similarly on the charter. I have no authority to say what will happen to the charter. I simply expressed my understanding but, as I see it, you will all have a role to play in discussing and debating what parts of the existing relationship it is thought important to retain, and that eventually will find its way into the Repeal Bill. The Repeal Bill is not simply a question of transposing law in an automatic way; it will be the fruits of this extended period of debate and negotiation.

Chair: The trouble is we are not involved in the negotiation.

Jeremy Lefroy: Is that not precisely what the Government have said, that it will be a wholesale transfer of *acquis communautaire* two years down the road? I did not understand that as being with all this adjusted for various bits and pieces that have been decided in the mean time. I took that as being what is there at that time, on that day, will then go into British law.

Professor Graham Gee: I think the Bill would have to, for example, address the point that Colm made, quite rightly. The question is: what will be the force of the jurisprudence of the Luxembourg court post Brexit, the day we leave membership? That is a key issue that will have to be addressed up front, at least to some degree, and to my mind also that is a more important question than the charter hanging over, which I suspect, come what may, will not be on the scene.

Chair: That is a new issue. We do not have to address that now because it is addressed by virtue of our compliance with the charter.

Professor Sionaidh Douglas-Scott: I think this is an absolutely huge task and I wonder, even if Parliament were to be involved, how it would have the time to do it all. For every single provision there will be hugely complicated issues. Many EU provisions refer to member states and, as I said before, to standards, to EU institutions, there will be issues such as transfer of prisoners—is that to continue and if so, how? I cannot see how there is going to be the time to go through each of these, which is why I understood there was a more general proposition at issue, similar to what had happened with a lot of countries which had obtained independence over the past century, with one very general or a couple of general clauses.

The charter, whether you like it or not, raises a very real problem, because it refers to applying only in the context of member states when they are implementing EU law. If we are no longer implementing EU law, where does that leave the status of the charter? Somebody has to take a decision on that, and if you do not, you have a rule of law issue asking to what extent it applies.

Chair: Can we move on from this point to the issue of trade agreements. This is something we raised in our discussions on our inquiry to do with human rights and business compliance with human rights in the international field.

Q8 Baroness Lawrence of Clarendon: As we start looking at our trade deals with human rights clauses, and as the UK withdraws from Europe and we begin to negotiate our own

trade deals, should we model our current wording on the EU or should we look to have stricter standards around that?

Chair: For agreements that are bilateral.

Professor Colm O’Cinneide: I think that is an absolutely fascinating question. It is a very big question. As you know, the EU has many important human rights clauses in its trade agreements which are periodically activated. These are not empty vessels; they become legally important. The question for the UK going forward in negotiating its own non-EU integrated trade agreements is whether it is going to carry over those EU frameworks, whether it will improve them by adding more detail, more substance, or whether it will dilute them or ditch them. There are three options: copy the EU model, carry it over; enhance it; or dilute it. These are very big political questions, and an awful lot will depend on the negotiations, how difficult or easy they are. There will be pressure to dilute human rights clauses. No one likes them, so there will be substantial pressure. A government negotiating under pressure to achieve quick free trade clauses will find itself tempted to dilute. That will then give rise to imbalance between the EU standards and the UK standards, and that will certainly prove controversial.

Marina Wheeler: Can I add one point? It is a very interesting point and an important one, and I am sure that as a policy issue it must be looked at very carefully. My understanding is that although the EU has used human rights clauses in its trade agreements for many decades, in 2009 the Council changed the policy to no longer include them in new trade agreements but to have human rights clauses in the side, co-operation agreements, and no longer called them human rights clauses but political clauses. As I understand it, that was in part because the view was taken that in reality they are more political than human rights, and it is very difficult to try to enforce them. As I understand it, there have only been a handful of cases where the EU has sought to enforce a clause, and it has done so where there has been, say, flawed elections in a country where there is a trade agreement, or perhaps a coup d’état, and the result has been that development aid has been shifted from the government to, say, civil society as a result. That is how in practice they seem to be used. The question is, is that a valuable mechanism? Should it be in a trade agreement, or is there some other way of exercising that sort of governance leverage?

Professor Sionaidh Douglas-Scott: Very briefly, I think there would be a lot of public interest in the nature of investment protection clauses if they were to appear in these

treaties, given the amount of interest in TTIP and some people's dislike of it for that very reason, the extra fora that have been included in some agreements for investors to enforce their particular rights outside of the usual court mechanisms. That would be something I think to watch out for, and there has been some disquiet about that.

Baroness Lawrence of Clarendon: There has also been a question from the farmers around their own trade, fishing rights, and all these other things that come into it. In fact, this afternoon I was at an event where somebody was saying that, because we have no idea what would happen after Brexit, nothing has been prepared. This is why all these discussions are coming in now, because there are concerns about how it will affect their own trade.

Professor Sionaidh Douglas-Scott: The devolved nations have concerns. They have no trading rights independently as such but it is something they are investigating.

Chair: Can I thank you very much indeed? I think we are on the tip of the iceberg here, and you have answered our questions as fully as you possibly could and helped raise many more. I think this will be an ongoing process. Thank you. We will be reverting to your 10,000-word memorandum and combing through all these issues as we go forward. Thank you very much indeed for your evidence to us today.