HOUSE OF COMMONS

Women and Equalities Committee

Oral evidence: Ensuring strong equalities legislation outside the EU, HC 799

Wednesday 16 November 2016

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Watch the meeting

Members present: Mrs Maria Miller (Chair); Jess Phillips; Maria Caulfield; Mrs Flick Drummond; Ben Howlett; Angela Crawley; Mr Gavin Shuker.

Questions 1 - 38

Witnesses

I: Professor Sandra Fredman QC, University of Oxford; Karon Monaghan QC, Discrimination Law Association; Dr Panos Kapotas, University of Portsmouth; and Professor Satvinder Juss, King's College London.

Written evidence from witnesses:

- Dr James Head and Dr Panos Kapotas
- Oxford Human Rights Hub, Oxford University

Examination of Witnesses

Witnesses: Professor Sandra Fredman QC, Karon Monaghan QC, Dr Panos Kapotas and Professor Satvinder Juss.

Q1 **Chair:** Good morning, and can I thank you all for joining us this morning for our first evidence session in the Committee's inquiry on ensuring strong equalities legislation after the EU exit? I would like to start the session by asking you to say your name and the organisation that you are here representing, and then we will follow the usual course; colleagues are bursting with questions to ask you. I really do understand that everybody may not feel that they want to answer every question, so please just indicate if you would like to contribute to the answer in that particular set of questions, and that will be absolutely fine.

***Karon Monaghan*:** I am Karon Monaghan, a barrister practising principally in the sphere of equality and discrimination law.

***Professor Fredman*:** I am Sandra Fredman. I am a professor of law at Oxford University, Director of Oxford Human Rights Hub, and I have done a lot of work on equalities and discrimination over many years.

***Dr Kapotas*:** I am Panos Kapotas. I am a senior lecturer in law at the University of Portsmouth, and I am also working on equality and European Union law.

***Professor Juss*:** I am Satvinder Juss. I am a Professor of Law at King's College London and a practising barrister.

Chair: Thank you all again, and I should stress that we know how much time this takes out of your diaries. You are all incredibly busy people and we are incredibly grateful to you for taking the time to be with us today. Ben, you are going to kick off with our questioning.

Q2 **Ben Howlett:** I am. If you have never been in a Select Committee, I am not a lawyer. My other half, who is a lawyer, is not in the room, and I often have to ask him an awful lot about these questions. I am going to put a scenario to you, which might be a very good way of opening up the discussion on this issue. If Britain had not joined the EU, what would equality laws look like in the UK today?

***Karon Monaghan*:** If I may say so, that is a really good question.

Ben Howlett: I am going to say that at dinner tonight with my other half.

***Karon Monaghan*:** It leads me into a point that I would really like to emphasise, which is that much of our equality law does not derive from EU law at all, and in many respects we have been the leader insofar as equality law is concerned. On things like, for example, race relations legislation, we were among the first in the '60s and then the '70s, and we

had pretty compelling, wide protections against race discrimination 20 years or so before the EU even had competence to legislate in the field.

Our equal pay laws were driven largely by social campaigning; we all know the stories about equal pay law. Many of our domestic laws derive from domestic statutes, and are not in any sense originating in EU law. That is the same today. Much of the Equality Act, which had wide and cross-party support, of course, derives entirely from domestic legislative measures, and does not have any root in EU law. The short answer is that we would still have those laws.

***Professor Juss*:** The public sector equality duty, for example, has no equivalent in EU law, particularly in its application outside the employment sphere in relation to disability, sexual orientation and the like. The big observation to make here is that the United Kingdom has in fact been a world leader in terms of equality and human rights protections. This particular Committee, therefore, has a vitally important role to play in ensuring that, as we exit, proper surveillance and monitoring is undertaken.

At every level, at every phase and at every juncture, whatever changes are envisaged, there must be a proper equality impact assessment and human rights impact assessment, with a view to ensuring that not only are present commitments maintained, but there is no regression from what we already have.

***Professor Fredman*:** I entirely agree that there is an excellent record from Parliament on equalities legislation. I would also like to add that the UK has been a very strong partner in developing EU law. While it is often thought that EU law is just an imposition, in the field of equalities, it has been a very mutually beneficial, interactive process. At this point, we should also say that much of the EU law that we have received and incorporated is also our law, because we have participated in the input to it.

There are aspects of the Equality Act that we derive from the EU, which we should not forget about. Although we did have equal pay, the concept of equal work for equal value came in through EU law, which is also an international standard through the International Labour Organisation. Protection for part-time workers has come from EU law, but again it is something that the UK participated in strongly, because protection for part-time workers came out of what has been called social dialogue, which was an agreement between European trade unions and the European employers' associations. Going forward, we need to embrace the fact that a lot of the EU law that is now part of UK law was something that we actively contributed to, and should continue to see ourselves contributing to in an ongoing way.

Q3 **Ben Howlett:** On that point, before I move on to Panos, if we had not been part of the EU, is a particular set of protections for part-time workers something you feel that the UK would have introduced anyway?

***Professor Fredman*:** That is a counterfactual hypothetical. It is quite difficult to say, because a lot of the work that has been done on equality has been seen as co-operative and a partnership. You can get protection for part-time workers from indirect discrimination under what used to be the Sex Discrimination Act. As we know, the vast majority of part-time workers are women, and they still have many detriments in the workforce. The fact of being part-time can count as what is called a policy or practice that proportionally disadvantages women. However, indirect discrimination is a very cumbersome way of proving it, and it was a great step forward when the EU gave specific protection to part-time workers.

Equal value I hope we would have incorporated, because it is an international obligation under the ILO. However, it is hard at this point to say exactly, historically, what might have happened. One other thing that we need to stress in EU law, and which perhaps needs much more expression in UK law, is the principle of effective remedies. That is also something that might have developed, but there is a strong principle that there should be proper, effective deterrent remedies for discrimination, which is possibly not expressed without EU law at the moment. We would need to include that.

Q4 **Ben Howlett:** Forgive my ignorance, but could we just explain what effective remedies are?

***Karon Monaghan*:** Access to justice, for example.

***Professor Fredman*:** Basically, you might have a beautiful statute on the book, which we have, but it can be very difficult for anybody to go and get their rights vindicated by getting to a tribunal. Also, if the compensation is very low or is not enforced, and there are no deterrents, then it is not a genuine right. That is the argument.

Ben Howlett: Maybe that exposes the fact that I am not a lawyer.

***Dr Kapotas*:** Very quickly echoing what others have already said, especially Sandra, there are two points that we need to consider in relation to a question such as this one. The first is that, obviously, the key concepts in equality law are not necessarily static. The concepts develop through time; the way we understand what falls under the definition of race, what counts as direct discrimination or what counts as indirect discrimination develops over time.

The question of whether we would have been in the same position that we are in today in 2016 without the interaction with EU law, without the interaction with a system and a legal order that inevitably draws insight from another 27 member states, is a very difficult one to answer indeed. It is likely that we would not be at exactly the same strong position, insofar as equality protection is concerned, as we are today.

Sandra already mentioned or implied the second point that I would like to make. The fact that we will be exiting the EU does not necessarily mean

that we will sever all links, insofar as the interpretation and the development of these concepts is concerned. The fact that we will no longer be directly bound by the decisions of the Court of Justice of the EU on equality, for instance, does not mean, automatically or inevitably, that these decisions cannot be taken to into account in continuing to develop the concepts and the protection of equality.

Q5 **Ben Howlett:** I will move on to the next question, which is broader. Given the amount of permutations that could end up happening as a result of leaving the EU, and our future relationships with all the different governing bodies, I am just wondering if you have thought about the potential impact of each of those particular types of Brexit. I am not talking about "hard Brexit", "soft Brexit" or anything like that, which you have seen in the papers. I am talking about how we keep those relations with particular institutions and the impact on equalities. I know it is a very hypothetical question right now, because we have not necessarily discussed yet what the types of Brexit look like, but have you come up with any thoughts, from a legal point of view, as to what those permutations could end up resulting in?

***Karon Monaghan*:** Certainly for my part, it is very difficult to answer that question. There are so many possibilities. If we want to stay in the single market, does that inevitably mean that we will have to accept certain fundamental rules about free movement, most of which encapsulate concepts of discrimination and equality in one way or another? If we do not stay a part of the single market, we may free ourselves from any obligations deriving from EU law in this field, but it is, certainly for my part, very difficult to answer. I do not know if any of you have anything.

***Professor Juss*:** Of course, you are entirely correct that, without knowing precisely what the arrangements are when we Brexit, it is difficult to say what we preserve and what we do not. I would just say two things. Insofar as we have domestic rights-enhancing law that has an EU underpinning, we should take care to ensure that that is not diminished once the EU goes and the underpinning goes. Insofar as we have EU rights-enhancing law that has no domestic underpinning, which renders it vulnerable, we ought to implement those provisions before it is too late. There are provisions, for example, in the Equality Act 2010, which has been a consolidating statute to such an extent that there are some 113 previous statutes that have been amalgamated in it. Those provisions that have not yet been implemented and brought into effect should now be brought into effect.

Q6 **Ben Howlett:** This might lead quite nicely into the bit that we do know, in that the great repeal Bill is the Bill that has effectively been tabled. We know that is going to be put through both Houses of Parliament. On the basis of what you have just said there, what would you say is the best type of great repeal Bill not detrimental to equalities in the UK? What component parts, such as the Charter of Fundamental Rights,

regulations, directives, etc., do we need to ensure are incorporated into that, so we do not go backwards, and in fact create a platform from which we can go forwards instead?

***Professor Juss*:** I am glad you have mentioned the great repeal Bill, because our starting point should be that as recently as last month, 2 October, Prime Minister Theresa May said, "Existing workers' legal rights will continue to be guaranteed in law…as long as I am Prime Minister". Secondly, insofar as there are any changes to be made, she has said that these will be subject to full scrutiny and to full parliamentary procedure.

Thirdly, the EU acquis—that is the consolidation of all applicable EU law that comes to bear upon us—will be domesticated and put into domestic law, so that businesses and workers will have clarity and certainty as to what we have got. On that last point, what she has said is that the great repeal Bill throws it completely open, so that it is now open to Parliament to amend and repeal certain provisions, but also to improve upon existing rights. Where those protections really need improving upon, with the UK already having been a trailblazer, that can be done.

***Professor Fredman*:** On both of those questions, one of the most important things is that there is a reaffirmation of the commitment to equality. We know that equality is a fundamental principle of EU law and that has, as it were, imbued the way in which a lot of the equality provisions are interpreted at EU level, which has been to further the principle that equality is a value. The UK is unusual in not having a constitutional protection for the right to equality, which many other countries do. In some ways, the EU has performed that function.

Particularly now, whatever happens over Brexit, the Parliament will be, through parliamentary sovereignty, the primary protector for equality. It would be very important in a great repeal Bill to have a statement of some of these values and that there is a fundamental principle of equality as a value. That would be the first thing. The important thing about that is that it means that courts in this country, when they are interpreting equalities legislation, interpret it in a broad way and see limitations as needing to be justified to a high level.

The second thing is that we are in a good position from an equality perspective. The Equality Act is a statute, so it is not dependent on the European Communities Act, which is true for anything that is secondary legislation under the European Communities Act. However, there are some regulations that are not yet included in the Equality Act, one of which, as I said, is a part-time workers regulation.

It would be useful for a right to effective remedies to be in the package that goes forward, as well as, generally speaking, a commitment to have proper regard to the development of EU law as it goes forward. Equality is not something that is country-by-country; it is a much broader project. If we could particularly see this as a value-based principle and keep that idea alive, that would be very important.

Q7 **Ben Howlett:** Karon, on that point and in terms of the previous answer, do you also see that there are other areas of equalities legislation, for example the Charter of Fundamental Rights, where it would be appropriate to look at some areas of reform, or not actually incorporate parts of EU directives directly into UK law?

***Karon Monaghan*:** Just picking up on Sandra's point, which is linked, apart from EU law and the fundamental concept of equality law that derives from it, we also have international obligations and ratified conventions that themselves confer broad principles of equality, and which the United Kingdom has decided to bind itself to. We can draw on that and incorporate some broader equality guarantee.

I would again like to endorse what Sandra has said. There is no reason why the Equality Act should form any part of the great repeal Bill at all; it is a separate parliamentary statute, so in a sense we might regard that as safe. However, we need as well to scrutinise those other areas of law derived from EU law that in particular will affect equalities within the workplace. The part-time work directive is an obvious one, as are the transfer of undertakings regulations—the acquired rights directive—which protect workers when their employment is transferred to another employer. That has a particular impact in terms of contracting out in the sphere of public services, which can impact particularly on women; contracting out of cleaning is a very typical example. There are pretty significant protections within the transfer of undertakings regulations that derive from EU law in the acquired rights directive. We need to be careful not to lose sight of those broader protections that impact specifically on women.

If I may just say one thing to follow up, I also think that we can see leaving the EU as liberating. I am a remainer, so I have no political interest in saying this. Not only has it introduced progressive laws, but it has prevented us from introducing even more progressive laws. For example, in the sphere of procurement, we have been precluded, to a great degree, from ensuring that those private companies operating in the public sector comply with equality standards or good employment practices when entering into contracts for public services.

It is now very difficult to include a contractual term in the context of public procurement to say you must ensure equality standards or good working standards are maintained, because of the impact of EU procurement laws. We can see it as a liberating force as well, and I would not want to lose sight of that.

***Professor Juss*:** That is absolutely right. Another example would be that sections 158 and 159 of the Equality Act talk about positive action, and that is fully mandated and endorsed by EU law. On the other hand, however, there is a whole gamut of ECJ judgments that have prevented various forms of positive action. With that going, one is now liberated to in fact develop the law in relation to positive action.

Q8 **Chair:** Can I just press you a little further on the Charter of Fundamental Rights? If we did not carry that forward in some way, shape or form, what would be the consequence and would that be the right thing to do? Would it matter?

***Professor Fredman*:** The Charter of Fundamental Rights is meant to be recording and pulling together all the rights that are already there. It is quite clear in the charter that it is not introducing new rights. The useful thing about the charter is that it brings together all the rights in one place, and it then can do some of the job of giving guidance and a framework for how equality law could be interpreted in a broader sense.

One of the big things about the charter is that it incorporates the European Convention on Human Rights. The European Convention on Human Rights, as we know, is not limited in the number of grounds. At the moment in EU law, we have six grounds. Under the Equality Act, we have a list of grounds. Under both the European convention and the charter, you can develop the grounds, or what we now call protected characteristics, to include new things. The reason I say that is, at the moment, if you want to include a new protected characteristic, you have to get a parliamentary amendment, whereas if it is more open-ended it can go through the courts and it can be more responsive to social developments.

One of the big ones is HIV and health status, for example. There is a lot of stigma and discrimination against people on the basis of HIV status. You could argue that it is disability, and it can be deemed disability, but now, under the European Court, there has been new jurisprudence saying that it is a status all on its own, just as we included pregnancy, which was deemed sex discrimination. There are other things that could be responsive. The other thing about the charter, as I said, is that it gives us a value base to see that equalities are about not a narrow technical interpretation, but a broad and dynamic one.

***Dr Kapotas*:** Insofar as the state obligations stemming from the charter are concerned, the key point is the relationship between the charter and the European Convention on Human Rights. As long as we remain a signatory party to the convention, and as long as the Human Rights Act continues to incorporate the principles and rights enshrined in the convention into our domestic legal order, the effect of losing the charter from our domestic legal arsenal will be minimal.

It will be minimal in the sense, as Sandra said, that most of the rights enshrined in the charter are already seen as guaranteed by the member states of the EU. That was the primary aim of the charter: not to create new rights, but to consolidate what was already there in the constitutional traditions of the member states. Also, insofar as civil and political rights are concerned, these rights enshrined in the charter are mirrored by the European Convention on Human Rights.

In and of itself, the fact that in leaving the EU we will no longer be bound by the charter does not automatically, inevitably or necessarily entail a lowering of protection of rights, including equality. If a lowering of protection occurs, then the responsibility for that lies squarely with Parliament and the Government. It is a choice that the Parliament will make to lower the standards of protection.

***Professor Juss*:** The risk here is that the obligation to apply the charter only makes itself felt upon national parties and EU institutions when EU law is an issue and is being implemented. Once you take away EU law, the charter falls. The charter is a wonderful edifice in incorporating European human rights law, EU law and the constitutions of the main EU countries, and it has, of course, rights like data protection, transparent administration by ethics, which you do not see in traditional human rights law. However, there is that risk. One place where you can safely cocoon these rights is in the new Human Rights Bill. That is where they can go.

Q9 **Chair:** Can I ask one supplementary question to Sandra? From what the other two respondents have just said, I do not understand how the charter would remain responsive in the way that you talk about if we are out of the EU and the Court of Justice. You are saying basically that the charter enables the law to be responsive to developments that may not currently be foreseen as requiring equality protection. How would that technically happen if it was simply enshrined through a great repeal Bill? It would require a cross-reference back into the European Court of Justice, which may be quite controversial.

***Professor Fredman*:** Sorry, I did not mean to say that. I meant to say that there are aspects of the content of the charter that it would be very valuable to retain going forward in UK legislation. I agree very much with Satvinder that the charter is part of EU law, but I thought that the thrust of your question was about the substance of the charter and what aspects of the substance of the charter would be useful for us to incorporate actively into UK law. That is what I meant.

Q10 **Chair:** You mean the substantive benefits.

***Professor Fredman*:** That is right: the benefits of the content of the charter. You are absolutely right; the mechanism for remaining part of the EU charter would be very complicated. However, when we are thinking about this great repeal Bill, what needs to be done by Parliament to make sure that the UK remains at the forefront of equality legislation is to take substantive parts of the charter that would add value to what we have already. That was what I really wanted to say about the list of grounds being non-exhaustive or open. There are aspects of the content of the charter that would be useful for us to retain and domesticate as our own.

Q11 **Maria Caulfield:** I want to move on to the Court of Justice of the EU, because my understanding is that historically it has had a legally binding role in any disputes that involve EU law. Obviously, when we Brexit, that

role will change. There are a number of options or other models that countries like Norway use, where the Court of Justice of the EU still has a strong influence, even though it is not legally binding. Can I ask your expert opinions about what UK courts' future relationship should be with the Court of Justice of the EU, and what will influence those options?

***Karon Monaghan*:** Picking up where we were a while ago, it really does depend on what the model is for leaving. We know so little about that at the moment, because it is obviously still being worked through. However, assuming that there was no formal relationship with the Court of Justice—in other words, it was not binding at all—as Sandra was saying, it is still likely to be influential.

When we do cases here, we typically ask the court to consider cases from Canada or South Africa—countries whose legal systems, social norms or broad political commitments are fairly similar—because we learn from them. It is likely that there would be some drawing on the Court of Justice case law, even if we were not formally bound by it, but of course it would not have directly effective impact; it would not require our courts to comply with any judgments, but it is likely to inform them.

***Professor Fredman*:** This is a really, really important issue. First, take a scenario whereby we are entirely separate from the EU, and the Court of Justice no longer has its role in producing binding judgments. It would be a great pity and a great loss to equalities legislation if the ongoing case law of the Court of Justice was not considered to be important for the ongoing interpretation of the Equality Act.

There could be some signal given in whatever great repeal Bill, or however the Equality Act should be amended going forward, to say that in interpreting this Act, domestic courts should take into consideration and have due regard to the ongoing jurisprudence of the Court of Justice. The South African constitution, for example, says that the courts must consider international law in making their decisions. That is very similar to what is under the Human Rights Act at the moment.

The second question is about existing case law. Because of the intertwined nature of the way in which the jurisprudence on equalities has developed, many of the provisions in the Equality Act are there to mirror or transplant EU standards. The interpretation that courts have given in the past should still be binding as binding precedent going forward, unless some of the legislation changes significantly.

Where the same wording remains, then past decisions of the European Court should have the same weight of precedent that they have always had. Obviously, if there is a closer relationship, as with Norway, then the Court of Justice might already have an ongoing role. However, assuming that it does not, it would be good to build into the Equality Act some ongoing interaction with the European Court, because it has some very strong, very progressive jurisprudence on equalities.

***Dr Kapotas*:** I entirely agree with Sandra and Karon. I want to emphasise that the possibility of building an obligation for national courts to take account of the CJEU jurisprudence when interpreting national law is very much part of our domestic legal order in sections 2 and 3 of the Human Rights Act, insofar as the Strasbourg court—the European Court of Human Rights—is concerned. I do not see any reason why something similar cannot be provided for with regard to the relationship with Luxembourg, regardless of the type of Brexit.

Q12 **Chair:** Do you actually need to amend the Equality Act to do that? Can the courts not simply decide that they want to have regard to the European Court of Justice case law?

***Dr Kapotas*:** The short answer is that it is a matter of whether the courts are bound to do so, or whether they choose; they have complete discretion in looking at foreign law.

Q13 **Chair:** They would not need to have an amendment to the Equality Act to be able to do that, but it would not be an obligation for them to do it.

***Dr Kapotas*:** Exactly. Under the Human Rights Act, there is an obligation for national courts to take into account the case law of the European Court of Human Rights when interpreting national law. Unless such an obligation is built into the Equality Act, my assumption is that there would be discretion of national courts to do so, but no direct obligation stemming from the law.

***Professor Juss*:** I agree with the broad thrust of what has been said. The Prime Minister has said that we will come out of the jurisdiction of the European Court of Justice. The big question then is: what happens to, first, concepts of equality that we have borrowed from EU law and are now embedded in our system? Secondly, what happens to kindred concepts we have that mimic, for example, similar concepts in EU law? It seems to me that, given lawyers have this idea of judicial borrowing, it is inevitable that the highest courts in the land will seek to decide matters in a uniform way, so that there is a uniform approach across Europe; unless, of course, Parliament decides to take any of those rights away. I think that would continue.

Q14 **Mrs Drummond:** We have covered most of what I was going to ask, which was about the European Convention on Human Rights and whether we could cover the gaps that were going to be left by coming out. Also, I just want to know your opinion on the British Bill of Rights and how that relates then to the European Court of Human Rights. Obviously it has not been written yet, but is that going to help as we come out of the EU? I know that sounds slightly muddled, but I am confused.

***Karon Monaghan*:** It depends what is in it. I suspect that a lot or perhaps even all of the rights in the convention, which of course we were largely responsible for drawing up, would find their way into a domestic Bill of Rights. For example, I doubt anybody is going to say that we ought not to have a right to life. I doubt anybody is going to say that we

ought not to be tortured or subject to degrading treatment. I doubt anybody is going to say that we should make slavery lawful, and so on.

The rights in the convention are so pretty fundamental, I suspect, given our domestic traditions, that we will find them in a Bill of Rights in any event. If that is so, then we might say that we now have an opportunity to build our case law and it embeds them in our own jurisdiction. The real issue is what is going to be in there, but the rights in the convention—the right to express religious belief, the right to express views and opinion, freedom of expression, and so on—are pretty closely connected to our ordinary political traditions.

Q15 **Chair:** Will some people not assert that the European Convention on Human Rights will mean we are covered anyway when we leave the EU; that it will be all fine and we do not really need to worry about anything else, because it is the panacea?

***Karon Monaghan*:** In terms of equality, no, because there is no freestanding equality guarantee in the convention. The Convention right to equality is dependent upon, or parasitic upon, the other Convention rights being engaged. In other words, you can complain of discrimination in relation to access to justice; you can complain about discriminatory, degrading treatments. What you cannot complain about is being discriminated against at work generally. There are exceptions and it does not lend itself to a simplistic answer, but it is not as compelling in terms of equality as EU law, and indeed as compelling as our Equality Act.

Q16 **Chair:** So it is not the quick fix when we leave.

***Karon Monaghan*:** No.

***Professor Fredman*:** Just to add to what Karon said about the European convention, article 14, which is the equalities guarantee, needs to be decided in conjunction with another right. There is not a right to work, as such. There is a right to private life and so on, but there is not a right to work. The strong part of EU law is that it covers employment discrimination, and it also means that, under the Equality Act, private employers are under certain obligations.

The European convention only applies to the state; it does not apply to private bodies. In the whole field of employment, which is about the relationship of employers to workers, the European convention is quite limited unless you get further legislation that says that the right to equality applies in the employment field. That is exactly what the Equality Act does. There are three things: the equalities guarantee is not self-standing; there is no right to work; and it does not bind private employers. This means that, at least at this level, EU law and the Equality Act are far superior.

Q17 **Mrs Drummond:** So we can put that in a British Bill of Rights as well, and that would strengthen us.

***Karon Monaghan*:** The convention?

Q18 **Mrs Drummond:** Yes. How does it relate to the convention? That is what I am really asking. If we had our own British Bill of Rights, how does that relate then to the Convention on Human Rights?

***Karon Monaghan*:** Again, it would depend what was in there and whether we transplanted all the rights that are presently in the convention into a domestic Bill of Rights. As I say, it is difficult to see what we would not put in there.

Q19 **Mrs Drummond:** Would the convention still override our Bill of Rights?

***Karon Monaghan*:** It depends whether or not we leave the Council of Europe. The Council of Europe is obviously separate from the EU and is the institutional and political framework that has produced the European Convention on Human Rights. If we were to leave that, then we would not be bound by the convention and we would not be bound by the decisions of the European Court of Human Rights.

However, that would be a huge step. We have been part of the Council of Europe since its conception, and indeed we were largely responsible for drafting the convention. It would be a huge step. If we stay in the Council of Europe, as a matter of international law obligation, we are bound by its decisions.

It will not be directly binding, unless we say, as we did in the Human Rights Act, that we need to take account of their decisions when we make our own domestic law. Again, I would be really surprised if in interpreting something like slavery or trafficking the domestic courts did not have a look and see what the European Court of Human Rights said, even if we were incorporating those rights into a separate Bill of Rights.

***Professor Fredman*:** It is also a minimum and not a maximum. As long as you do not fall below the floor, you could well do better, in fact. Countries are encouraged to improve on that. If the British Bill of Rights improved on the European convention, then it would not say, "You cannot do that; we will pull you down again." There is no maximum. As long as you satisfy those minimum standards, you are encouraged to do better. It would be an opportunity, if it is taken that way, to improve on the standards of the European convention, and then that would be a really important step forward. Whatever happens in the European convention, it would not pull us down; it would just support it from the bottom.

***Karon Monaghan*:** May I follow up with one point about that? It would provide the opportunity, for example, to introduce a free-standing equality guarantee. As I say, under the convention, it is dependent upon another right being engaged. There would be nothing to prevent the UK in a Bill of Rights introducing a freestanding equality guarantee, which would be important and add value, and to some extent deal with the losses that would derive from leaving the EU. We would get some form

of freestanding equality guarantee through the charter. We could do that in a Bill of Rights.

***Dr Kapotas*:** I have two very quick technical points. Removing ourselves from the European Convention on Human Rights system without removing ourselves from the Council of Europe means one thing and one thing only. It means that we will find ourselves in a pre-1998 or pre-2001 state of affairs, whereby we are bound by the European Convention on Human Rights, but, because the convention is no longer incorporated into our domestic legal order, whenever a national court is faced with a challenge pertaining to a violation of a convention right, it will not be in a position to adjudicate on that particular challenge, and that would be a route, for that particular applicant, to the European Court of Human Rights. I wanted to make this perfectly clear.

We either decide to remove ourselves entirely from the Council of Europe, which is the equivalent of removing ourselves entirely from the United Nations, such is the magnitude that we are talking about, or we simply repeal the Human Rights Act that incorporates the European convention into our domestic legal order, which means that we refuse the opportunity to our national courts to decide on convention issues, complaints and challenges. That means that an applicant before a national court then would have no other route than to go to the European Court of Human Rights in Strasbourg. That is the first technical point. Karon mentioned it already; I just thought that it was extremely important to make this distinction.

The second technical point is that we keep saying, and I have been so far saying, that there is nothing precluding Parliament or the Government from introducing stronger equalities legislation, because both EU law and the European Convention on Human Rights system operate as a floor of minimum rights, as Sandra said. The truth of the matter is that quite often, when we had the opportunity to do so, we have not done it. Obviously, Karon and Sandra are absolutely right that the right not to be discriminated against within the convention system is not self-standing. It needs to be read in conjunction with another article. There is now, and there has been for a good seven years, a protocol to the convention, Protocol 12, that creates a self-standing non-discrimination right, which the UK has not become part of or ratified.

I just wanted to bring to the table the idea that our optimism that Parliament can in fact increase protection of equalities may not be entirely justified on the basis of practice so far. That is not to say, of course, that our equality legislation is not quite strong.

***Karon Monaghan*:** It goes further. It goes much further.

***Dr Kapotas*:** Of course, that is exactly my point.

Mrs Drummond: Thank you, that is really helpful.

***Professor Juss*:** The interesting point that Karon makes is that we have not had a free-standing equality provision, and section 12 of the European Convention on Human Rights says, "The rights and freedoms set forth in this convention shall be protected", and then refers to the basis of race, religion, nationality and so on and so forth. That has not been ratified. It is the equivalent of article 21 of the charter. If we were to have that, then that would provide real protection. At the moment, we have article 14, which is the anti-discrimination provision, but that is parasitic upon a violation of other rights. You have to show a violation of the right to marry or the right to family life under article 8 and so on. It then kicks in, but otherwise it does not. That is something that we ought to be doing.

As far as the latest Act is concerned, it is difficult to see to what extent one should be taking it seriously, because it is prefaced with all kinds of naughty suggestions about mission creep and how the European Court told us to allow artificial insemination for prisoners in 2007, how it has told us to grant voting rights for prisoners and how, as Karon was saying, if we imprison people permanently, that violates the right to be free from inhuman and degrading treatment, and it ends by saying that what is really needed is a sensible, common-sense approach.

It is difficult to see what one means by that. It is certainly not clear that the effect of that is to extricate ourselves entirely from the Strasbourg court. You can have that, and it allows our judges to have their first bite of the cherry, so that it comes before the High Court and Court of Appeal, but thereafter, if we remain members of the Council of Europe, you have the pre-1998 position and you go off to Strasbourg. Up until now, apart from the Hirst decision on prisoner's rights, most decisions from Strasbourg have been followed in this country.

Q20 **Angela Crawley:** I am keen to come back to points that were made earlier. You expressed that you were quite optimistic that the UK could continue to exceed the current laws that exist or that came from the European Union, and that you believe that the UK could enhance them. If we are working on the assumption that there is a basic level, is there also the danger that the UK could dilute those rights through other forms, such as a British Bill of Rights, whatever that is? Secondly, how does this work in relation to, for example, the devolved competencies of the Scotland Act, into which it is written? I would be interested to hear how you anticipate that this would work in practice.

***Karon Monaghan*:** Scotland has gone further in some respects than England and Wales, particularly in relation to its equality duties. It has been a leader in that area and you have much more robust equality duties enacted through your devolved powers under the Equality Act. You are a model for the rest of us.

Angela Crawley: We will keep you right; do not worry.

***Karon Monaghan*:** Certainly, there is much you can do and have done under your devolved powers. Unless they repeal the Scotland Act at the same time, they will still be there. No doubt they could be strengthened, but that is more of a political issue. Certainly, the Equality Act extends to Scotland, as you know. You have particular powers, some of which were enacted under the Equality Act, to introduce specific measures. You have done so, and you have introduced more robust ones, with the equality duties being the paradigm example.

***Professor Fredman*:** On the first part of your question, as I said in the beginning, because there is the principle of parliamentary sovereignty, without the EU, Parliament is the custodian of equalities legislation going forward, which does mean that there is a risk that it could dilute the legislation. Obviously, the best scenario is if, through Parliament, we protect human rights and we protect the right to equality of minority groups. The whole point of human rights and the right to equality is when Parliament does not do that. That is when, in a democracy with a constitutional right to equality, there are some limits on the extent to which Parliament can decide to undercut equality. Without a constitutional right and without the EU, Parliament has a big responsibility. There are certainly risks and challenges in the system of parliamentary sovereignty.

The risks are not only that Parliament will openly repeal aspects of the Equality Act, which it is entirely entitled to do, but also that it will not have time to keep pace and so neglect it. Thirdly, perhaps even more problematic would be the Government using its powers of secondary legislation to undermine the Equality Act. Parliament needs to be very much on its guard to prevent that occurring either through what are often called Henry VIII clauses, which involve using secondary legislation to change primary legislation—and that is a risk of the great repeal Bill—and, even more so, through Government using their powers to not have to go through Parliament to do certain things that could be undermining. We have seen, say, through regulatory powers, the increase in tribunal fees, for example, has meant that the numbers of people who have been applying to vindicate their rights under the Equality Act has dropped by something like 70%.

***Karon Monaghan*:** It is more than that in equal pay. In pregnancy, it is 81%.

***Professor Fredman*:** As I said, you could have very good statute on the books, but that does not matter if people cannot vindicate their rights. That can be done through regulatory powers. The other thing that can be done is to define the concept of "worker" more narrowly, so that you leave out precarious, marginal workers, many of whom are women. That could narrow the impact of the Equality Act. You could introduce qualifying periods of one to two years, which has been done for unfair dismissal. One of the things, as I said, that is really important is that EU law insisted on no cap on compensation under discrimination law. That

third risk of undermining equalities through regulation is something that this Committee, for example, would have a really important role in scrutinising and looking out for.

Everyone has to keep working, which is why I say that, if there could be a kind of preamble or something in the Equality Act to say, "Equality is a fundamental principle", that would be a strong signal that, unless there is an absolutely clear and express statement in legislation that we intend to remove this right, the courts should attempt to vindicate the right, which is what the Court of Justice of the EU has been doing. That is the responsibility of Parliament. As far as Scotland is concerned, as Karon has said, there are lots of ways in which Scotland can improve on the Equality Act in exactly the opposite way, through the Scottish powers, and hopefully it will continue to do that.

Q21 **Chair:** Can I just ask a point of clarification on that, Sandra? The very first question was: "If there had not been an EU, where would we be now with our equality law?" The general consensus was that the world would be quite a good place, because this is really quite central to who we are as a nation. You have just said that there might be a need to express on the face of the Equality Act that equality is a fundamental principle. That would tend to suggest that you do not feel it is, at the moment, expressed clearly enough within our statutes for you to be comfortable that it would not become subject to political whim.

***Professor Fredman*:** Yes. Everything is fine if everything goes fine. If Parliament continues to protect equalities then we do not need any kind of safeguards. You have to guard against the situation in which it does not. Because equality is about minorities who often do not have the same kind of voice in Parliament as majorities, there needs to be some kind of a strong statement. Until now, because it is a fundamental principle of EU law, it has been, in a sense, incorporated, because we have always worked with EU law and it is not as though EU law has been a stranger. I feel that it would be very important for Parliament going forward to include that express statement of values to make it absolutely clear, to the legislature, the Executive, the courts and the people, that this is a value, as it would be if we had a constitution, as in many other countries, that gave a right to equality.

Chair: Does anybody else want to add to that?

***Professor Juss*:** It is a very important area, and I entirely agree, because this is the area where we are most vulnerable. I began earlier by saying that we have EU rights enhancing law that has no necessary domestic underpinning. In terms of secondary legislation, we have regulations that have direct effect, but directives that do not. There are, for example, rights of atypical workers, which are fixed through the part-time work directive and temporary agency work directive. Those will be at risk unless implemented. Atypical workers are essentially members of ethnic minorities and women, so that is a particularly vulnerable area. You also have, in addition to that, the recast directive, the framework

directive and the race directive, all of which collectively help workers at the workplace in terms of the protected characteristics. That is at risk. There are also, rather interestingly, things that the EU is doing that have nothing to do with discrimination but are designed to enfranchise and strengthen the rights of protected groups. For example, there has been a spate of disability rights in relation to transportation by air, rail, bus and so on and so forth. That is not discrimination per se, but it is an attempt to strengthen those rights, and that will be at risk. That will be at great risk.

***Dr Kapotas*:** There is an inherent weakness in not having a codified constitution and not having a general equality or non-discrimination clause. The weakness is that when we move into uncharted territory, national courts that will have to interpret the law in 2019 or 2020, post-Brexit, may find themselves in a position where the relatively easy tool of constitutionality control is not going to be available. So in countries with written, codified constitutions, which all include an equality clause, a national court, when in doubt when interpreting the law, might have resort to the fundamental constitutional principle. This is what Sandra has been talking about.

I would just like to second the idea of including explicitly a presumption in favour of an interpretation that strengthens or retains the level of equality protection post-Brexit, rather than an interpretation that might lower the standard of protection. If that presumption is not there in the law, again, national courts would presumably have the discretion to either retain the same standard of protection or to adopt an interpretation that leads to a lowering of the standard. Parliament has the power to remove that discretion or part of this discretion by introducing a presumption as Sandra said.

Q22 **Maria Caulfield:** I have a quick point just so I can clarify something in my mind. I get your concern about not having equality protection as we move forward, and that currently the EU has equality as a fundamental principle in EU law. We just heard from Sandra that that can be undermined now, in terms of secondary legislation and regulations that can be brought in that do undermine that. Is it not an opportunity to tighten that so that regulation and secondary legislation do not undermine the existing principles of protecting equality?

***Karon Monaghan*:** Presently, as Sandra said, the Government, through some of their regulation-making powers, or Parliament can already introduce laws that undermine the principle of equality. However, there is a floor that comes from the EU that has direct effect, so it can set aside those regulations if they undermine the principle of equality in an area covered by EU law. If EU law goes, that safeguard is lost.

Q23 **Maria Caulfield:** Is that safeguard working? You gave a good example around tribunal fees.

***Karon Monaghan*:** That is in the Supreme Court. It may act as a safeguard. That has not been finally decided. That is being heard in March in the Supreme Court.

Q24 **Maria Caulfield:** That mechanism is being used.

***Karon Monaghan*:** It is being used. Obviously, one does not know what the Supreme Court will say. I can tell you what we hope they will say. Certainly, that is a framework for addressing that, and it has operated in other areas where subordinate legislation has introduced measures that have disproportionately affected women, for example. Qualifying periods in unfair dismissal was one example. That guarantee and threshold will be lost. If there were something in the Equality Act or some other piece of legislation that said, "Any subordinate legislation must be compliant with the principle of equality", then that operates as a safeguard against subordinate legislation-making powers undermining rights that we already have.

Q25 **Chair:** Do you want to comment particularly on religious belief in this respect, in terms of the way the changes might affect that? You started off by talking about the importance of recognising that the EU was not necessarily that strong in this area. Is that something you would want to comment on?

***Professor Juss*:** This is really into the realms of European human rights law proper, in that there have been a number of cases involving particularly religious symbols and religious headwear. There was a burka case before the Grand Chamber two years ago, S.A.S. *v.* France. The position, interestingly enough, throughout Europe had been that, "This is something we dare not touch; it is highly sensitive and if we, the Government, challenge it, we are going to get our fingers burned." When they go to Strasbourg, what the Strasbourg Court does is introduce a brand new condition, which is that in the interest of living together, in common with other people, one has an interest in being able to see each other's faces and so on and so forth. That is a brand new impediment that prevents people from living truly to their beliefs in terms of religious headwear, symbols and so on. There are two strong dissenting judgments there which talk about selective pluralism, and that certain things are acceptable where others are not.

Having said that, there have been cases like the Eweida case, which was a case concerning visible wearing of the Christian cross, which was lost here but won, eventually, in the Strasbourg Court. That is still not to overlook the fact that practically every case in Strasbourg on the wearing of an Islamic headdress and the like has been lost, including the wearing of a turban by a Sikh man. The Human Rights Committee in the States has upheld precisely those cases, like that of Mann Singh, on exactly the same facts. There is that difficulty there, which is why I say that the problem in terms of law is not really article 14, which is parasitic upon other rights, but there being no free-standing protection. Panos is absolutely right that what we ought to have is an entrenchment of this

freestanding anti-discrimination provision in our constitutional law. The human rights Bill could be one place to have it.

Q26 **Chair:** I want to bring Jess in, but I just want to ask one other question for real clarity. I could imagine that there might be a situation where Parliament does not feel that it is appropriate to have regard for the CJEU. If that was the case, would it be sufficient to have a freestanding statement of equality as being a fundamental principle, and what might be the consequences of Parliament rejecting that idea of having that regard to the European Court of Justice?

***Karon Monaghan*:** It is difficult to say. Sorry; I know that is not very helpful. A provision in a statute that said, "The courts must not have regard to the CJEU", which is extremely unlikely as that would be like saying, "The courts must not take account of what happens in South Africa". It is part of the traditions for interpreting law. Were that to happen but we had a free-standing guarantee, or an interpretative provision of the sort Sandra was alluding to whereby you must take account of the fundamental right of equality, then we would develop our own equality values.

If we had an interpretative provision such that you must take account of the fundamental right to equality in interpreting any laws, and we had a freestanding equality guarantee such that the state must not discriminate on any of the protected characteristics irrespective of whether any other right was engaged, that would go a long way to providing the sorts of protections that we have had from the EU, albeit in a more limited sphere. I say the EU in a limited sphere, because it only covered those areas covered by EU law. Do you have anything to add, Sandra?

***Professor Fredman*:** Yes, I would entirely agree with that. It would be very difficult for Parliament to say straight up, "You cannot take into account the Court of Justice." The whole reason that I put forward these points is so that courts can develop the jurisprudence in that direction. Of course, there are also other international obligations that the UK is bound by.

Q27 **Chair:** We are going to come on to those later. Are there any other comments?

***Dr Kapotas*:** Very quickly, the idea of a gap in protection being created by Brexit may or may not be exaggerated. However, there is nothing to say that this gap will be static, regardless of how big it is and regardless of whether it exists or not. There is nothing to say that this gap will be static. The problem with not introducing some form of safeguard that will enable national courts to ensure every time that when they interpret national equality law they will take into account of what is going on in Europe is that this gap will start widening bit by bit. I said it at the beginning. The key concepts in equality and discrimination law are not static. The European Court of Justice, the CJEU, has recently delivered a judgment, Nikolova *v.* CEZ Electricity, where it re-clarifies the concept of

direct and indirect discrimination that we thought for quite some time were quite settled. I am not necessarily suggesting that we should continue to automatically bring such an interpretative development into the domestic legal order, but I am suggesting that taking account of that development surely cannot be a bad thing, or something that will restrain judicial authority—or parliamentary authority, for that matter—unnecessarily, or to a significant extent.

***Professor Juss*:** I have just two points. The concern that has been raised is a genuine concern, because one thing one needs to consider is that these things called human rights are very troublesome; they are very costly. The financial costs of it and the extent to which it is burdensome on businesses and so on are going to be factors. If we even take things like the pregnant workers directive, or the working time directive, for example, which give a parent as much as four months' leave and provide protection against detrimental treatment if you have done so, that will not be widely popular with businesses. They are, to that extent, rather fragile and vulnerable. Having said that, there is an obligation under the Paris principles upon national human rights institutions, which states that national institutions shall examine bills, proposals and so forth to ensure that they are compliant with human rights obligations. That does stand as an obligation.

Q28 **Jess Phillips:** You have largely answered some of the questions that I was going to ask. I just want to drill down a little bit more into this idea of it being Parliament's choice. I am overtly aware that Donald Trump just became President of the United States. Parliamentary choice and a sovereign choice without protection is not something that I find particularly heart-warming at the moment, around the theme of equality at least. Is there something in the moment of Brexit, whatever it looks like, that the current Government could do or should do that will mean that, at the very least, it is static? Is there something that you would suggest that is very simple?

***Karon Monaghan*:** What you could do very simply is include what we call a non-regression clause, which has already been touched upon. In other words, nothing that we already have slips through the net. You have a very simple clause in the Bill that says, "In relation to the areas of equality and non-discrimination, nothing set out in this Act will reduce the protection already provided by domestic law". It could be something of that sort.

Q29 **Jess Phillips:** That would only be for that Act. The next Government or the next Parliament—

***Karon Monaghan*:** Parliament is sovereign, so it can do whatever it likes. If we have a non-regression clause in the Bill, it cannot go backwards on equality. What we have is preserved. Nothing can slip through the net. That operates as a protection. If we then have the Equality Act with the interpretative principle and the free-standing

equality guarantee, yes, Parliament can repeal it. Parliament could repeal it.

Q30 **Jess Phillips:** Do you think that is unlikely? You seem to think that is unlikely.

***Karon Monaghan*:** I do not want to descend into who could become Prime Minister and what Government we could get in. Some of these values and rights are so entrenched here, domestically, that I really would be surprised if any mainstream political party would suggest that it is okay to dismiss women when they are pregnant, it is okay to pay women less money, it is okay to say, "We do not want black people coming into this pub", or it is okay to have black people imprisoned more for longer sentences. I am just thinking of the Lammy report, which is out today.

Yes, Parliament can do whatever it likes, unless we decide to restructure our whole political system and have a written constitution and completely revise our whole constitutional model, which we do not have time to discuss in 15 minutes or whatever it is. There are means by which there can be certain guarantees. I would certainly urge upon whoever will be responsible for drafting the Bill to include a non-regression clause in the area of equality and non-discrimination, and introduce the sort of threshold protections that Sandra was talking about. I can draft the clause for you, if you like.

Q31 **Jess Phillips:** It is not me who is running it, alas, but that does sound good. Does anyone else have any comment on the specifics of what we can do to protect?

***Professor Fredman*:** I absolutely agree with the non-regression clause; that is crucial. The point, of course, is that in any system of parliamentary sovereignty, it is going to be a challenge to maintain certain values in the light of changing majorities, particularly in relation to what could be less popular, less vocal and less politically effective minorities. However, I do think that there is a movement now towards regarding some statutes as having greater constitutional weight, with the devolution statutes being some of them. It could be that by formulating the Equality Act in a weighty way, which gives a strong impression that it is of constitutional weight, it does mean that if Parliament wants to repeal it they would have to come out expressly and say, "We do not think equality is a good thing." Politically, that might, hopefully, be a difficult thing to do. That is the only thing we could hope for: that politically there is a strong enough adherence that you would have to be absolutely explicit about saying, "We do not want all these values anymore," before you can undermine them.

In a practical way, there probably are some very explicit things, as I said, that should go into the statute, which are at the moment in regulation, to protect precarious workers and to protect against lack of proper remedies. That could be put on a statutory basis so that at least those

are difficult to come back on. We will then talk about international obligations.

Q32 **Jess Phillips:** Alas, I think it is becoming popular to say that you do not believe in equalities. Unfortunately, while we sit here in this room and say, "Of course, that could never happen because Theresa May is never going to stand up and say, 'Sod equalities,'" and that sort of thing, the world we are living in at the moment is one that says that and wins votes because of it.

***Karon Monaghan*:** Parliament, as the custodian of fundamental rights, has an absolute obligation to ensure that minorities, who they are also responsible for protecting, are protected.

***Professor Fredman*:** Can I just say one more thing about costs, because that is something that Satvinder raised? That is a reason that is often used for displacing equalities legislation: that it puts burdens on business, it is not good for our economy and that businesses should be free to move forward and employ and dismiss pregnant women, and so on. It is something, too, that Parliament, and this Committee particularly as the custodian of equalities, should be able to say that cost does not go away if it does not fall on the employer; it falls on the woman. The cost of not protecting pregnant women will fall on the pregnant women. There are ways of spreading costs. The costs of rights should not be some good reason to displace rights. It should be a way of thinking about how to spread those costs between the state, the individual rights-holder, the employer and other people. One of the things that could also possibly be brought up, and it is something that both the European Court of Human Rights and the Court of Justice of the European Union, and indeed our domestic courts sometimes, have said, is that in justifying limiting rights we cannot just toll the bell that it is too costly. This needs to come into the discourse of Parliament when thinking about equality. These are rights, and if you do not give a person a right they pay the price, and they are often the most vulnerable of people.

***Karon Monaghan*:** Just to endorse that, if I can, as Sandra said, our courts already recognise that. One cannot say, "It is too expensive to protect a fundamental right; therefore we will not." They already recognise that for certain rights—I can see your expression. I appreciate that, but we all have to get out and vote.

Q33 **Jess Phillips:** To the two people who have not answered that particular question, as briefly as possible could you say what you think the improvement could actually be? What would you like to see that we do not have currently, which would improve equalities legislation as we come out and taking Brexit as being a good thing?

***Professor Juss*:** First, equality is not just a fundamental value, but, I would wager, widely endorsed by the public at large. It is accepted by society. We are not the Midwest; we are not the Rust Belt territories and so on. There is a long history, and as I say the United Kingdom has

been a world leader. There ought to be an explicit commitment to continue to remain so. What will happen now with Brexit is that as the charter looks ever more vulnerable so that it goes, this will enhance the status of international human rights treaties. Already, for example, the Convention on the Rights of the Child has been implemented in a very systematic way in Scotland, where you have, for example, the Children and Young Persons Act. In Wales you have the Rights of Children Act, which is modelled on the same thing. It is possible to do all those things.

Q34 **Jess Phillips:** Why have we not done it in England?

***Karon Monaghan*:** Can I make one very short point? You asked what we could do in terms of entrenching rights and protecting ourselves to some degree against Parliament and so on. We do have a model for that in the Human Rights Act. The courts are able to say, "This piece of legislation is incompatible with certain fundamental rights." It still preserves parliamentary sovereignty, because the courts cannot overturn it, but they can give a statement of incompatibility that is almost always complied with. They can also require Parliament to state, when it passes legislation, as with the Human Rights Act, that it is compliant with those fundamental rights. There is a model, even within a system of parliamentary sovereignty, where those safeguards can be introduced.

***Dr Kapotas*:** In addition to a regression clause, a possibility would be to introduce qualified majorities for lowering standards of protection when attempting to lower the standards of protection. Obviously, Satvinder and Sandra have already mentioned that. There can be some form of constitutionalisation of equality as a self-standing principle and as a foundational democratic value in the law itself.

Q35 **Angela Crawley:** This is the last section and obviously the best section. It is on international treaties and obligations. I am keen to know how effective you think the international standards, treaties and obligations have been in providing equalities protections in the UK, and are there any good examples of this?

***Professor Fredman*:** International law differs from EU law in that the way it works in this country, and in lots of countries actually, is that the UK is bound at an international level by its international obligations but it does not become part of domestic law until Parliament passes a statute, which then makes it binding in domestic law. EU law is unusual in that through the European Communities Act it does that automatically. What you need for international law to actually make an impact on domestic law is for Parliament to take that extra step, which in many cases, unfortunately, it has not. That means that compliance with the Convention on the Elimination of all Forms of Discrimination against Women—CEDAW—or the race convention, disability convention and so on are really things that the state has to show other states that it has complied with. It is very difficult for individuals in the country itself to go to court or anywhere and say, "My right under this international convention has been breached."

The very first step would be, again, to make some kind of connection between the equalities legislation and the international obligation. That can perhaps, again, be by courts being required to take into account international obligations. At the moment, they can. If it is put to them that there is an ambiguity in legislation, they can say it has to be interpreted in order to comply. The reality is that the women's convention is almost unknown in this country. For a lot of people if you say, "CEDAW", they will say, "What?" In Scotland, the Convention on the Rights of the Child is taken very serious. It would be very important, going forward, for a much bigger commitment to be to respond to the committees, to submit reports to the committees and so on.

One very concrete thing that could be done, which is already in train, is about the definition of "disability" in the Convention on the Rights of Persons with Disabilities. It has what is called a social model of disability, which says that instead of defining disability only as a physical attribute, it is about how society impedes your use. The Court of Justice of the European Union has recently included that definition as part of EU law, so it can be domesticated in that way. One really concrete thing that could be done quite immediately is to say that the definition of "disability" in the disability convention should now be seen as the meaning of "disability" for equalities legislation.

***Karon Monaghan*:** I was just going to say that in some more recent decisions by the courts, they have used the international conventions, including the Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities to inform the way that they have interpreted legislation. They have always done that notionally, but they have done that much more robustly in some recent cases. It only has indirect effect in that way. It is only through the courts deciding that they are going to take it into account.

Q36 **Angela Crawley:** We can now maybe move on to what enforcement mechanisms you think would be relevant or necessary, and the potential for the obligations to be effective in the future. What would be required to make the international obligations effective in the future? You touched on that briefly, Sandra, but does anyone else have anything they want to come in on there.

***Dr Kapotas*:** I was just going to reiterate what Satvinder has already said on the effective remedies that are enshrined in article 13 of the European Convention on Human Rights, which has been omitted when the convention was incorporated through the Human Rights Act.

***Karon Monaghan*:** In terms of what we could do, we could have a very simple clause indicating that the rights in the conventions are incorporated or form part of domestic law, and so form part of the law of England and Wales, or England, Wales and Scotland—however it was done. You asked the question about enforcement. Bringing them into law would be relatively easy to do, but there has to be access to courts and tribunals if these rights are going to be meaningful. I know that is a

subject for different Select Committees' discussions, but those are very closely intertwined. They have to be real and not illusory.

***Professor Juss*:** Karon is absolutely right that one easy way of doing things is to simply adopt the model in the European convention, which is that we are able to make a declaration of compatibility. That system fits in very nicely with our constitutional structure, because in this country Parliament is supreme. We cannot, like the Americans do, strike down legislation because legislation coming out of Parliament remains supreme until it is changed again. Having said that, if you compare that system to what we have under EU law where, in any case where national parties and EU institutions were applying EU law, you could actually dis-apply that law. That is the first thing. The second thing is that it was far easier to get compensation under that system than it is under the European Convention on Human Rights and the Human Rights Act.

Q37 **Angela Crawley:** That is interesting. What can the UK learn from countries—we spoke briefly about Norway—that are not in the EU and have effective domestic models of equality law and protection? I would be interested to hear if you have any practical example models.

***Karon Monaghan*:** South Africa has many problems but it has beautiful laws.

***Professor Fredman*:** South Africa has a constitutional protection for equality. Obviously the history of South Africa, which is my country, is one of institutionalised racism, and so at the time the constitution was adopted, equality was central. Similarly to what I have suggested, the first part of the constitution entrenches equality and dignity as fundamental values, which permeate the whole of the constitution. It also has, in Section 9 of the constitution, a right to equality, which is both a right to equality before the law and a right to non-discrimination on a very long list of grounds, which is non-exhaustive, meaning that they can be added to. It also has a presumption that discrimination is unfair, which means that there is an express provision for affirmative action. You could put it into the constitution.

Q38 **Angela Crawley:** Chair, I have one final question. Anecdotally, would any of you be willing to advocate for a written constitution, which would enshrine these rights and protections in the UK? I am just curious.

***Karon Monaghan*:** It could not be done under our parliamentary model. We could have it in a domestic Bill of Rights. We could have the Human Rights Act: "Parliament must declare positively that any legislation is compliant with the Bill of Rights," which would include a freestanding equality guarantee. You could have the interpretative principle that Sandra talked about, such that all law made by Parliament must be read in a way that is compliant. Even within the context of a parliamentary democracy, assuming we are not going to have a revolution within the next year or so, there are ways that equality could become more

entrenched, and we have models for it already. They would be capable of being drafted if Parliament decided that is what it wanted.

***Professor Juss*:** This is an interesting observation. There is old case called Thoburn involving a greengrocer living in Sunderland who, under the Weights and Measures Act 1963, was intent upon selling his fruit at his grocery shop on the basis of pounds and ounces. The inspectors came around and said, "You have to do this under the metric system." He would not listen and eventually he was prosecuted. In that case, Lord Justice Laws, in the Court of Appeal, looking at EU law, said that actually EU law had effectively become entrenched into our system through sheer force of it being a superior system. In doing so, he also talks for the first time about the fact that you have entrenched statutes like Magna Carta, the Petition of Right 1629, the Coronation Oath Act, the Statute of Westminster and including the European Communities Act 1972, right down to the Human Rights Act. You can have that kind of entrenchment, of which the courts are rather more respectful. That is a possibility.

***Professor Fredman*:** Can I just add one more thing? There is also a limit of what law can do. One of the issues around when the Human Rights Act was brought in was to create a culture of human rights. It is very important that there is a way of talking about equality and internalising that this is a value that permeates the kind of political discussion that we have. Underpinning all of this and underpinning legal mechanisms is still an adherence to a culture of equality, which is enormously important.

Chair: Thank you very much. I hope you do not feel that we have left anything out. If you do, please speak now. I can only apologise that we have overrun so much, but it was incredibly helpful to get your insight into this. On behalf of the whole Committee I would really like to thank you for your time this morning.