



Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Rights after Brexit

Tuesday 12 March 2019

10.50 am

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Members present: Baroness Kennedy of The Shaws (The Chairman); Lord Anderson of Swansea; Lord Cromwell; Lord Dholakia; Lord Judd; The Earl of Kinnoull; Baroness Ludford; Baroness Neuberger; Lord Wasserman.

Evidence Session No. 1

Heard in Public

Questions 1 - 10

Witnesses

[I](#): Mr Murray Hunt, Director, the Bingham Centre for the Rule of Law; Professor Colm O’Cinneide, Professor of Constitutional and Human Rights Law at University College London (UCL).

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Mr Murray Hunt and Professor Colm O’Cinneide.

Q1 The Chairman: Good morning. Thank you both for coming and joining us this morning. Professor, do I pronounce your surname “O’Kinnaidy”?

Professor Colm O’Cinneide: Yes, that is very good—unusually good, if I may say so.

The Chairman: I am a Kennedy, so I assume that it has some joint origin and that we are related some way back in time. It is very nice to see you. Mr Murray Hunt is very familiar to Parliament, because he was counsel to the Joint Committee on Human Rights for quite a number of years. It is very nice to see you, too.

Could each of you in turn introduce yourself and describe what you do? Then I will set out the rules of Committee hearings.

Professor Colm O’Cinneide: I am professor of constitutional and human rights law at University College London. I have acted previously as a specialist legal adviser to the Women and Equalities Committee on equalities legislation after Brexit and was a specialist legal adviser for a brief while for the Joint Committee on Human Rights in relation to the Equality Act 2010 when it was still a Bill.

Mr Murray Hunt: I am currently the director of the Bingham Centre for the Rule of Law. Prior to that, as Baroness Kennedy mentioned I was legal adviser to the Joint Committee on Human Rights. I am also legal adviser to the All-Party Parliamentary Group on the Rule of Law, for which the Bingham Centre provides the secretariat.

The Chairman: And I know that you were a practitioner barrister at the Bar.

Mr Murray Hunt: Before that, I was.

Q2 The Chairman: I know that both of you know the rules of these hearings. The session is open to the public. It is being broadcast or webcast, and it goes out live and is subsequently accessible via the parliamentary website. A verbatim transcript is created of the evidence that you will give and this will be put on the parliamentary website. A few days after this evidence session, you will be sent a copy of the transcript to check for accuracy. I would be grateful if you could advise us of any corrections as soon as possible after that. After this session, if you feel that there is anything that you want to clarify or that you can send to us by way of additional evidence, we would be grateful. It can be included as supplementary written evidence.

When the Government resisted incorporating the Charter of Fundamental Rights into the EU Withdrawal Act 2018, one reason given by them was that the rights were protected sufficiently under the European Convention on Human Rights. That was what we were repeatedly told in the House and in direct answer to questions by me, by Lord Cashman, by other members of this Committee and by many other Members of the House.

Given the Government's confirmation to us that they may still consider reforming the human rights framework by repealing or replacing the Human Rights Act, which incorporated the European Convention into English law in 1998—it impacts on the Scotland Act, too, because, by that, human rights from the European Convention were incorporated into Scotland, and there are implications for Northern Ireland—are you concerned that there is a threat to human rights and the rule of law once the process of EU exit has been completed?

Professor Colm O'Cinneide: Certainly, it is clear from the Minister's letter that the Government are still conscious of the Conservative manifesto commitment to do something about the Human Rights Act. Repeal or reform of the Human Rights Act is still on the policy table, so to speak. That of course means that the uncertainty that has persisted about human rights protection in the UK for the past decade is likely to continue for the time being.

In a political sense, there are some interesting dynamics. There will perhaps be a greater focus on the Human Rights Act as a guarantor of human rights in places such as Scotland, Northern Ireland and elsewhere than has been the case, with EU law falling away to some extent. Politically, the Human Rights Act's role as a guarantor of human rights and rule of law may become more prominent in the time ahead.

The Chairman: So might some of that litigation, which took place using the European Court of Justice, just be redirected to the European Court of Human Rights and the use of the Convention through the Human Rights Act and the other legislation in the UK?

Professor Colm O'Cinneide: You will certainly see more sustained attempts to invoke ECHR and HRA standards in certain areas that are now regulated by EU law.

The Chairman: What sort of areas?

Professor Colm O'Cinneide: Examples might be: immigration; issues involving free movement of EU citizens; equality and non-discrimination issues, which are currently heavily regulated by the supremacy effect of EU law; treatment of immigrants and asylum seekers; victims' rights; and issues related to the European arrest warrant. In all areas where lawyers might now reach automatically and in preference for EU standards because of supremacy and direct effect, they may in the future will fall back on ECHR/Human Rights Act standards.

The Chairman: Mr Hunt, what is your view? Are you concerned that there is a threat to human rights and the rule of law by virtue of our removing ourselves from the European Union and being reliant on a rather uncertain commitment to the European Convention on Human Rights?

Mr Murray Hunt: The short answer to your question is that the Bingham Centre has concerns about threats to the level of protection for human rights and the rule of law, but the jury is still out on the degree of the threat. It is quite difficult to assess how great that threat currently is. From the beginning of the Brexit process, the

Bingham Centre has been particularly concerned about legal uncertainty. That has been the Bingham Centre's particular focus of interest in the Brexit process.

The Chairman: For the listening public, legal uncertainty is one of the things that are of concern in the rule of law. It is central. We are a country that thinks of itself as being at the heart of the creation of the rule of law here and supporting it around the world. One thing about the rule of law, one of the keys in it, is that there should not be uncertainty about law.

Mr Murray Hunt: Absolutely. The very act of what we are going through, disentangling ourselves from a legal order that we have been a member of for 45 years, inevitably involves a huge amount of legal uncertainty and risk of massive legal discontinuity.

Within those notions of legal certainty are a number of more detailed, particular rule-of-law principles to do with predictability, foreseeability, accessibility of the law, access to effective remedies in relation to rights and continuity of legal protection for rights that already exist. These are all aspects of the rule of law and they are inevitably very much at risk when one is going through such a momentous constitutional upheaval as Brexit involves.

That has been the focus of the Bingham Centre's interest: to make sure that there is sufficient certainty in the process of EU withdrawal for all those affected—businesses, workers, consumers, citizens and EU citizens who are resident here. All individuals in the UK need sufficient legal certainty. We did a report on the EU withdrawal Bill that articulated the various rule-of-law values that are at stake and expressed first of all a warm welcome for the Government's approach in that Bill to provide continuity, but pointed out that in various respects it fell short because it did not provide for that legal continuity; there were too many risks of discontinuity, including in relation to the charter not being retained, general principles, the Francovich liability and so on.

There were various concerns about the withdrawal Bill. To some extent that is historical, as events have moved on so much since the Bill, but there is still a set of very real concerns about the extent of legal discontinuity even in the event of a deal and a transition period. One of the main focuses of our concern was the legal protection of human rights. They are obviously a set of very important rights, which the EU contributes to. It is not clear that there will be continuity of the legal protection of human rights in our legal framework post-Brexit.

To return to your question, Baroness Kennedy, the Government's position in their response to this Committee's letter simply adds to that uncertainty by reintroducing the question of the possibility of repealing or reforming the Human Rights Act. That throws into an already very uncertain mix the possibility that there will be changes to our human rights legal framework.

Q3 Lord Cromwell: Good morning. I would like to ask you about the difference between the draft and final versions of the political declaration. The draft version

on 14 November last year said that the future relationship between the UK and the EU would be underpinned by a “reaffirmation of the UK’s commitment to the European Convention on Human Rights”. The final draft on the 22 November states that we would agree to “respect the framework of the ECHR”. Do you think there is any significance in that difference? If so, what should we be reading into it and what should we be concerned about?

Professor Colm O’Cinneide: Any change of words is significant, in the sense that someone has initiated it. That is the simple answer. If there is a change, someone has changed it, which means that someone has changed it for a reason. The change is concerning, because the original wording was a straightforward commitment to the convention as a crucial human rights document which the UK signed, ratified and continues to adhere to.

Respecting the framework is—how would I put it?—a bit more distant from that. The concept of the “framework” is a reasonably vague notion. It could be quite comprehensive; the framework could be understood as meaning the convention, judgments of the court and the entire enforcement mechanism of the Council of Europe. That would be a charitable reading: that the UK was committing itself to respecting the entire implementation process of the ECHR.

There is, however, a perhaps less charitable reading, which would view “respecting the framework” as a commitment to respecting the general tenor, the general outline, of the convention system. That would be a substantial dilution of the commitment as set out in the original document and would represent a dilution of the UK’s existing commitments to the convention under international law.

Mr Murray Hunt: With my experience of advising the Joint Committee on Human Rights, normally I would be counselling a Committee to be cautious and not read too much into the changing of wording, certainly in responses in ministerial correspondence, but I agree with Professor O’Cinneide that in a political declaration it is clear that the words have much more import. I agree that it raises a question, and there is really an onus on the Government to explain the change in wording from the draft to the final political declaration.

For me, the essence of the significance is the message that it potentially sends about the Government’s intention towards possible future changes to the human rights legal framework, referring back to my first answer. It really comes down to sowing seeds of doubt about that framework and casting questions about its future, as opposed to the original formulation of a reaffirmation of the UK’s commitment to the ECHR, which suggested a leadership role. I think we are looking at doubt versus leadership. That leadership role is called for in the current uncertain climate that we are in.

I was going to refer briefly to a response that contrasts with the slightly weaselly words about respecting the framework: the Scottish Government’s response to the uncertainty, in the context of Brexit, regarding the human rights framework. The First Minister appointed a leadership group to advise on human rights leadership.

The premise of that group's report to the First Minister was that Brexit poses significant risks to legal protections of human rights, and that in the context there is a need to show some leadership in relation to the future framework for human rights. It makes various recommendations for possible improvements to the human rights framework in Scotland, taking the ECHR and the Human Rights Act as a base and looking at how to improve them. That is an example that we would look to as actual human rights leadership as opposed to sowing doubt, which I think is what the formulation does.

Lord Cromwell: So both of you are suggesting that the revised draft is essentially a dilution? Unusually perhaps in the legal world, I refer to "Pirates of the Caribbean" here: when something happens that they wish to do, they stick to the code, but when something comes up that they do not wish to do, they say it is more of a guideline. That seems to be where we are moving from and to in this.

Professor Colm O'Cinneide: It is certainly a source of concern, is how I would put it.

Q4 Baroness Ludford: Do you have any intelligence on what happened in the negotiations between 14 and 22 November? One would have expected the Barnier team to be a bit on the ball about this, considering particularly EU citizens' rights under the withdrawal agreement and so on. Maybe they said, "Well, on your head be it. If that means we won't be able to include you in the European arrest warrant, fine. That's your problem". It is a two-way street. I would be quite surprised if the EU did not express concern at that dilution of the wording. Do you happen to have any sources to suggest why that was allowed to happen? Was it just that the Brits insisted?

Professor Colm O'Cinneide: I have no particular sources. I have heard rumours and whispers, but nothing tangible. I would point out that the wording of anything relating to the convention is going to be a matter of considerable salience for the EU because of the value that the EU has traditionally placed on the convention, but, I should emphasise, also for the Irish Government, who I know are not directly part of the negotiations between London and Brussels on the withdrawal agreement and the political declaration, but obviously their concerns about the process have been regularly communicated to the EU negotiating team.

The ECHR, as the Committee will know, has a very strong significance in the context of the Good Friday/Belfast agreement, and compliance with the ECHR is expressed to be a safeguard of the Good Friday agreement, which contains very clear provisions about convention rights being part of Northern Irish law, so any language relating to the convention is likely to be a source of considerable sensitivity in both Brussels and Dublin. It would be interesting to see the views, for example, of the Irish Government on this particular matter, which we may never discover, of course—

Baroness Ludford: That is very wise advice.

Professor Colm O’Cinneide: —but it is an issue of considerable salience in Dublin as well as Brussels.

Mr Murray Hunt: I want to make one more point before we move on from the dilution in the letter.

In the context of my comments about human rights leadership, it is quite interesting to compare the tone of the diluted declaration with three or four recent speeches made by the Foreign Secretary in which he has spoken very persuasively about an important theme—the threats to the international rules-based legal order—and sketched out a view of the United Kingdom as what I think he calls the invisible chain of democracies around the world, which are united by a number of shared values. He articulates those values at more detailed levels in some of the speeches, and they include democracy, the rule of the law, respect for civil and political rights, free trade, freedom of expression, and other more detailed manifestations of these shared values.

In these speeches, the Foreign Secretary is clearly calling for human rights leadership by the United Kingdom and for the United Kingdom to act on this, if the nations with these shared values are to be brought together and it is not to be simply motherhood and apple pie rhetoric. The tone of those speeches and the substance of parts of them contrast quite a lot with the vaguer language of “commitment to the framework”. It is more in the vein of reaffirmation of the UK’s commitment to these various shared values, including human rights.

The Chairman: I am going to let my colleagues come in on all this, but, first, I want to make this point.

I sat on the commission that looked at whether there should be a British Bill of Rights. A report from Scotland, which I am very glad came into my hands yesterday, talks about taking the lead and about ECHR-plus, if you like—enhancing rights, doing even more than the ECHR, taking a leadership role in advancing human rights in the 21st century.

I am afraid that what came out of the British Bill of Rights commission was a sense that what was wanted was a human rights Act-minus rather than a human rights Act-plus, that we were going to see lesser rights if there was to be any revisiting of the framework, that our engagement with the framework of the ECHR was that, yes, we will generally agree to most of the stuff but we will make it British and in a way that might be less than what has happened in other places.

So I do think there is a risk in the opening up of that framework, but that is another discussion and others might want to come in on that.

Q5 Lord Anderson of Swansea: We know that if the Government proposals go through, the charter will not be retained as part of EU law. We know that the Government have used different wording in relation to the European convention, and presumably there must have been some motive in changing from “reaffirmation” to

“respect for the framework”.

Could you confirm that no other country that is signatory to the convention has moved towards a framework, whatever that may mean, and that if the UK were to withdraw from the convention it would mean withdrawing from the Council of Europe in just the same way as it will have removed itself into glorious isolation from the EU?

Given the question mark over the charter, the Human Rights Act, which may be removed, and indeed the convention, what fears do you have about the protection of human rights in this country in future? What specific matters will result?

Professor Colm O’Cinneide: That is an excellent question. If I may, I will deal with fears on the international plane and the domestic plane. Let me talk about the international, pan-European, plane to start with.

There is considerable concern about the UK’s stance towards the ECHR across Europe. The UK’s ambivalent stance—to put it politely—towards the ECHR in the last 10 years has been widely picked up across Europe and has caused considerable concern. It is seen as having weakened the status of the convention, or having put a question mark over it that had not previously existed, and there are concerns about how Brexit will affect that process.

Going to academic conferences, an assumption often exists that Brexit is the beginning of a wider process of UK withdrawal from inter-connected pan-European institutions. I am asked repeatedly whether the Council of Europe is next. That is the question I get asked all the time; I am speaking at a conference in Saarland in two weeks and have been asked to comment on this topic.

That, of course, puts a question mark over the convention. It also generates the uncertainty, mentioned by many across Europe, about the UK’s support for the convention, which historically has been very important.

The UK Government have so far been quite clear that they mean to stay part of the convention, but the question mark is there and the cloud of uncertainty has not been dispersed. That definitely, in my view, weakens the status of the convention on a pan-European basis.

Domestically, we come back to the issue of uncertainty about all this.

Lord Anderson of Swansea: What specific rights are imperilled?

The Chairman: The Charter of Fundamental Rights will have gone if we follow on through as we are doing. What do we lose by not being in the Charter of Fundamental Rights? Let us deal with that before we move on to what we lose if we come out of the Council of Europe and that whole framework.

Professor Colm O’Cinneide: What we lose from the charter not being carried over into UK laws as part of the withdrawal agreement is the clarity that it had introduced into what had been a very fuzzy area of EU law. We lose the certainty

and precision provided by the clearly defined list of rights set out in the charter which the Court of Justice of the EU and national courts have begun to apply to heighten human rights protection in areas such as the free movement context, equality and workers' rights.

The exact effect of removing the charter is not at all clear. In fact, going back to Murray's point, I would argue that it is an area of deep legal uncertainty, because, as the Committee will be aware, the charter to some extent drew upon and was supposed to reflect and give shape to the general principles of EU law, whose scope was never quite clear.

Now, the charter is not being carried over but the general principles are, so no one is quite sure what the effect of the deletion of the charter will be. This is an area, I would argue, of very strong legal uncertainty.

The Chairman: But will the answer given not be that we in the UK have our own law on immigration, asylum, protections for workers—the whole range of things that you mentioned which were covered by the charter—and that our own law will be totally adequate to the challenges there will be?

Professor Colm O'Cinneide: First, of course, EU law is carried over by the Withdrawal Act and is to be incorporated into UK law and become part of UK law, so the general principles will remain alive within UK law; they will become a fully domesticated part of UK law, so to speak.

So even though the charter has been expelled from carried-over EU law, so to speak—it will not be carried over into UK law—it will continue to have a shadowy existence in the form of general principles, meaning that you have this legal uncertainty within UK law. That will inevitably raise complicated issues about the attention that should be paid to the jurisprudence of the Court of Justice of the EU when it talks about general principles and, by extension, Charter rights.

Q6 Lord Judd: Can we be very specific about the impact of all this on Ireland? I am deeply concerned about our removal of the Charter. It seems to me that if you are building peace—not just a legal system but the whole process of building peace between two communities in Northern Ireland—confidence is terribly important. On the Protestant side there are all British institutions, but in the minority community there is not the same sense of security in that context.

History demonstrates the point. The Charter was immensely reassuring because it introduced equivalence into the situation. The minority population was able to think, "We have some other source that is shoring us up in which we have confidence".

Where are we now in all that? What is the implication? Some very brave and courageous work is being done in Northern Ireland at the community level. What will happen to all that?

Professor Colm O'Cinneide: I agree with every word you have said and have nothing to add. I simply agree. This is an aspect of the legal uncertainty point that has not

been sufficiently emphasised. The Charter plus the Convention on Human Rights together added up to provide a framework of reassurance in Northern Ireland and across the wider UK.

That framework of reassurance has now been radically undermined. The Charter is not going to be carried over and there is a question mark over the ECHR and the Human Rights Act. The framework of reassurance that has been very important is now undermined. That has legal consequences—it will generate a lot of legal uncertainty—and may also have quite troubling political consequences.

Mr Murray Hunt: I would like to return to two points in Lord Anderson's questions. As far as the Charter is concerned, if the Charter is to have no application whatever in UK law post Brexit, there is clearly a significant loss in the level of legal protection for rights in a number of ways. There are rights in the Charter that have no equivalent protection in domestic law.

In fact, one need only point to the legal challenge by Tom Watson and David Davis to the Data Retention and Investigatory Powers Act, which was based on Article 8 of the Charter, the right to the personal protection of data. That case demonstrates the value of the Charter, because the right itself has no direct analogue in UK law.

The Charter affords a direct cause of action and, if the challenge is successful, it affords a strong remedy—the disapplication of primary legislation. None of that is available in domestic law if the Charter is not a part of UK law. There are other rights in the Charter that do not have direct equivalents, but the importance of the direct cause of action and the strength of the remedies is not to be undervalued.

The qualification on what I say is that it remains to be seen whether the Charter will be completely irrelevant. If there is a deal then it will apply through the transition period, under the Withdrawal Agreement and Article 4 to that extent. We may come back to this, given the uncertainty about the future relationship and the UK's desire for that relationship to be very deep, there will be pressure there for more equivalence with the Charter in our domestic legal framework.

That is my first point. The second is to differ slightly on the question marks over the ECHR. I am not sure that there are signals from the Government that call into question their commitment to continued membership of the Council of Europe or of being a signatory to the European Convention on Human Rights. As we discussed before, uncertainty is being sown about the future of the Human Rights Act and our domestic legal framework for giving effect to Convention rights—that is undoubtedly the case—but I do not see coming anywhere from the Government anything that calls into question the Government's commitment to the ECHR.

There are of course individual Members of Parliament, and there may be individual members of the Government, who would question that, but I have not seen that anywhere from the Government themselves. That is quite significant and important, particularly in the context of what I was saying about the Foreign Secretary's recent speeches. The context there is that the rules-based international legal order was set

up straight after the Second World War and the UK had a very leading role in setting up those institutions.

The Chairman: We had a very significant role. It is often not understood by the general public that we have had a very important role in the development of law across Europe. UK lawyers have played a vital part in that development, which of course we will not do as we go forward.

I am sorry for that intervention. It is just a concern that I have about the development of law, because the UK has played a very important role in it.

Lord Judd: Not just you.

The Chairman: No, I know it is not just me. I just felt that I was exceeding my role as the Chair.

Lord Dholakia: May I come back on the issue of the supremacy of EU laws? How significant is this? Based on some of the past precedent, which political area of the law is likely to be affected most? What is your experience of that? You gave us an example in relation to the first question. Are there other examples in law that we should keep an eye on?

Professor Colm O'Cinneide: I am conscious that I am speaking first all the time, so apologies. The removal of supremacy is potentially very significant. Much depends on how UK law will develop, and of course we have to add the qualifier that supremacy is not going away during the transition period, so we will have to see how that unfolds. Eventually, supremacy will presumably drop away and then we will see how UK law develops.

I have a couple of points. First, there is a degree of legal uncertainty as to whether EU law that has been transplanted into UK law by the Withdrawal Act will remain supreme over other UK legislation until it is effectively overridden by future Acts of Parliament. There is a host of lurking legal issues there regarding when the historic supremacy of EU law will cease to exist. Presumably, it will get eroded over time and eaten away, and of course formally it will no longer be supreme, so Acts of Parliament will be able to revise it, overturn it and so on.

That will inevitably result in the insulation effect of EU law when it comes to rights protection in certain key areas being opened up to potential political changes. For example, in one of my areas of speciality—equality and anti-discrimination law—at the moment the core features of anti-discrimination law in the UK give effect to EU law and are therefore required to be respected because of the supremacy of EU law.

After supremacy falls away, that will be up for grabs. At the moment, every member state of the EU has to guarantee effective remedies against sex discrimination, race discrimination and so on. Included among those effective remedies—by way of a precise example—is that there cannot be a cap on damages in discrimination cases.

All that will become open for change and adjustment in the years ahead. It will no longer benefit from the protective cloak of EU supremacy.

Mr Murray Hunt: I have just one brief point to add. The doctrine of supremacy has forced our constitutional system to grapple with what constitutional entrenchment means in a way that can be reconciled with parliamentary democracy. We are used to debates about constitutional entrenchment in the context of a US-style constitution where there is a strike-down power in courts, but the doctrine of supremacy and direct effect and our membership of the EU for the past several decades have forced us to be more sophisticated about what constitutional entrenchment can be.

We have accommodated within our constitutional tradition the idea of degrees of entrenchment in order to cope with the doctrine of supremacy. Even though the extent to which it is going is still an open question, it has influenced our legal system quite significantly. The Section 3 Human Rights Act interpretive obligation in statute was a product of the Marleasing obligation, which was a spin-off from the supremacy doctrine. We have been influenced by this membership. It has been very significant. Losing it completely would be significant, including in particular in the devolved jurisdictions where it deeply constitutionalises the rights protected, but it will leave its influence.

Q7 The Earl of Kinnoull: Schedule 1 to the EU withdrawal Act is really a list of exceptions to things that are not travelling from EU law into the UK legal environment. Paragraph 1 states: “There is no right in domestic law on or after exit day to challenge any retained EU law on the basis that, immediately before exit day, an EU instrument was invalid”.

Paragraph 4 is the rule in the Francovich revocation. Do you feel that either of those provisions will have a lot of impact? Perhaps you might want to explain in a sentence or so what the Francovich rule is for those watching.

The Chairman: Who would like to come in first? I am mindful, as you were, Professor, about the order. Would you like to deal with this one?

Professor Colm O’Cinneide: I will lead with the EU matters, I think. The very simple answer is that these provisions of the Withdrawal Act are very important because they limit the extent to which you will be able to seek remedies in human rights-related matters that touch on EU law.

The Francovich rule makes states liable for a failure of implementation, so that an individual can seek damages against the UK for a failure adequately to implement EU law. That can be very important. I will give an example to illustrate this, again taken from equality and non-discrimination law. If the UK fails to implement a directive—let us say, the race equality Directive 2000/78—and a private employer discriminates against a private employee and there is a gap in UK law, at the moment the directive can still apply to the employer, but that is a bit of an unusual situation.

In other situations, because of EU law not having direct horizontal effect between private individuals, an individual would not be able to obtain damages from the private employer and would in effect be able to seek damages only against the state through Francovich liability. That will now be shut off. It means, for example, that where the elements of EU law that are retained within UK law by virtue of the Withdrawal Act cannot be applied directly to private relationships between, for example, private employers and private employees, it will leave a gap in protection. Put in very simple terms, there may be rights breaches, potentially quite serious, for which there will be no remedies.

Mr Murray Hunt: I agree. This and the non-retention of the Charter were the big examples of legal discontinuity which the Bingham Centre gave in its report on the Withdrawal Bill. The Bill said that it was providing essentially for copying over EU law but then carved out these exceptions.

The Bingham Centre's view was that it may in principle be possible to justify certain exceptions, but there would need to be some compelling rule-of-law justification for doing so, such as creating legal uncertainty as a result of bringing certain things over. It looked at the arguments on both sides of that and said that it was not satisfied that there was a greater justification and that, given that the purpose of the Bill was simply to copy everything into our law for legal certainty—quite rightly—these carve-outs should not be made.

It referred to an example given by the Chartered Institute of Taxation, which said that the general principles carve-out would cause quite a lot difficulty in their area of specialisation because of the “abuse of rights” principle that is part of the general principles of EU law. I am not a tax expert, but that apparently has had a significant influence on decision-making and judicial decisions in that context, particularly in relation to possible avoidance of VAT. Even public authorities would be affected by it in relation to that general principle. So the Institute gave a specific example, which we thought was very persuasive, of where removing the general principles or their enforceability in the Bill gave rise to legal discontinuity.

All that is not to say that legal certainty and stability require the legal framework never to change, but as we are in the process of withdrawal we need to make sure that we preserve legal certainty during that process. There may come a time later on when it is appropriate through proper democratic law-making processes to look at some of the laws that have been brought across, but now, in the withdrawal process, is not the time to do that.

Q8 Baroness Neuberger: I would like to say, Mr Hunt, how much I appreciated the Bingham Centre's report on the Withdrawal Bill; it was excellent.

Looking at it slightly the other way around, assuming that a deal with the EU can be agreed—who knows what is going to happen tonight?—how far and in what areas do you think the current draft of the Withdrawal Agreement and its accompanying political declaration might mitigate any weakening of human rights standards under the domestic law regime? I take your point, Mr Hunt, about this not necessarily

being the moment to have brought all this in. Do you want to start?

The Chairman: Let us do it the other way round.

Mr Murray Hunt: Professor O’Cinneide’s expertise on certain aspects of these questions is greater than mine. On this one, he will lead.

The Chairman: All right. You are going to bow to Professor O’Cinneide.

Professor Colm O’Cinneide: That is very kind, although I am not sure that it is accurate.

There are aspects of the Withdrawal Agreement that mitigate some of the loss of rights protection. The specific provisions relating to Northern Ireland, as controversial as they may be, have an extremely important rights-reinforcing dimension because of the way in which they provide for certain key elements of EU law relating to rights and safeguards, particularly in the equality field, to remain in force in Northern Ireland while the backstop is in effect.

That is an important issue. Frankly, this has been completely glossed over in the debate about the backstop. Northern Irish equality and anti-discrimination law does not have a single statutory basis. The Equality Act 2010 does not apply to Northern Ireland; its discrimination law is made up of a combination of legislation and government regulations issued under the European Communities Act. Northern Ireland equality law thus rests on a deeply uncertain basis, now that Brexit is happening. EU law has always previously provided its backbone, so to speak. The provisions of the backstop, in so far as they relate to Northern Ireland, will maintain that backbone. They therefore provide an important rights-reinforcing dimension that has been overlooked in the sound and fury surrounding the backstop issue.

More generally, citizens’ rights are protected by the Withdrawal Agreement. Aspects of the Withdrawal Agreement give reasonably good protection for citizens’ rights. In particular, the way in which it provides for EU law to remain in effect—the eight years’ transition period and so on—provides a certain level of enhanced protection for citizens’ rights. There are positive aspects of the Withdrawal Agreement when it comes to fundamental rights protection.

Mr Murray Hunt: The great uncertainty is what the nature of the future relationship is going to be. If the aspiration in the political declaration for a deep and close relationship is pursued very far, it inevitably brings with it pressure for equivalence. At the time of the passage of the withdrawal Bill, TechUK, a private sector consortium of tech companies, made the point in the context of data protection that if we lose Article 8 of the Charter but we want to be part of EU data sharing and want data flows to continue, with all the benefits they bring, we cannot expect to do that without an equivalent of Article 8 of the Charter being part of our law.

Professor Colm O’Cinneide: Perhaps I should also mention non-regression clauses in the backstop relating to labour and environmental rights, which are very important.

Q9

Baroness Ludford: Article 4 of the Withdrawal Agreement envisages that UK courts

could be given the power to disapply inconsistent or incompatible domestic provision. How contentious do you expect this to be? Do you see it as a future precedent to underpin other rights in future? The thesis was that we were getting rid of this pesky bit of EU law—supremacy and so on—and here it is popping up again in Article 4 of the Withdrawal Agreement. Is it going to be subversive?

Mr Murray Hunt: It surprised me personally that it has not been a bigger part of the discussion and debate on the Withdrawal Agreement because it is potentially controversial. I think we know how certain factions will line up on that question, which goes to the heart of our constitutional conundrum of whether Parliament can bind its successors in this way. That is what the Agreement commits the UK to doing: enacting legislation that actually does that.

I think it will be contentious and I cannot believe it has gone unnoticed. Although it is 600 pages long, the agreement has been scrutinised very carefully and in great detail. It is not necessarily going to subvert the whole thing, but there will undoubtedly be a lot of argument and debate about it when the Withdrawal Agreement Bill is introduced.

Baroness Ludford: So does it worry you that Parliament has not had the chance to see any draft of that Bill?

Mr Murray Hunt: Very much so. On that part of the question, it is inexcusable that there is a risk in theory that the Withdrawal Agreement Bill may have to be passed as emergency legislation when it contains such constitutional enormities as Article 4 requires to be passed. There really is no principled excuse for finding ourselves in that position when I imagine that the Bill must have been ready in November, when the Withdrawal Agreement was finalised, and Parliament could have been given the opportunity to look at parts of it in draft and start to scrutinise and get to grips with some of these difficult constitutional questions.

In fact, the Bingham Centre called for the Bill to be published in draft back in October, but there has been a deafening silence. As far as I am aware, the draft provisions of the Bill have not been shared with any parliamentary committee. I am not sure that there is a strong justification for that position, given that the Bill may need to be passed in a great hurry.

The Chairman: Some of the Committee may know this: have there been calls on the Floor of the House for the draft to be made available?

Baroness Ludford: I think there have, but I could not quote chapter and verse.

The Chairman: That may be something that this Committee should be seeking to do—asking for us at least to see a draft. Thank you for mentioning the importance of that and its constitutional implications, which are rather serious.

Q10 **Lord Wasserman:** I turn our attention to enforcement and dispute resolution. As you probably know, this Committee looked at that before the Withdrawal Agreement was produced. Now that it has been produced, are there issues that you

think it has not handled as it might have? Do you think there will be serious problems when we get to dispute resolution and arbitration?

Professor Colm O’Cinneide: On a point of principle, I think there is a serious issue with important matters involving fundamental rights, citizens’ rights and so on being dealt with through an arbitration process. There are international law comparators but, given the number of lives affected and the significance of some of the legal issues that the arbitration committee may have to deal with, there is a fundamental question mark over the appropriateness of using an arbitration mechanism.

Having said that, the arbitration mechanism as set out in the Withdrawal Agreement begins to look and smell like a court. It is supposed to be composed of legal experts of the highest standing from both sides, and there is a specific reference to “jurisconsults”, which in continental European legal language effectively means someone of great legal eminence. I have read the description of the arbitration committee, and it is looking and sounding like a court. We all know the political reasons why perhaps—

The Chairman: It is not being called a court.

Professor Colm O’Cinneide: Exactly—why the agreement does not want to call it a court. So the inherent objectionableness of having an arbitration mechanism dealing with these issues may be ameliorated if the arbitration committee, on issues such as citizens’ rights in particular, behaves and functions to all intents and purposes like a court.

But there is a grey area here as to whether it is an arbitration body or a judicial body. My own personal view is that for rule-of-law reasons, and given the fundamental rights at issue, the existence of that grey area is less than desirable, to put it mildly.

The Chairman: That is what they often say about ducks: if it walks like a duck and quacks like a duck, it is likely to be a duck. We may know before very long whether in fact we have a court replacing a court.

I think we have covered the ground. Is there anything else that either of you would like to raise or say at this point about the whole discussion of rights in the post-Brexit era?

Professor Colm O’Cinneide: I would like to mention the point about legal uncertainty as it relates to the Charter and general principles of EU law.

My reading of the current provisions of the Withdrawal Act— which deletes the Charter from the carryover process, retains the general principles but prevents litigants being able to rely directly on the general principles to found a case—is that it creates a legal wonderland. It raises deep issues of legal uncertainty and will probably result in lawyers constructing all sorts of interesting arguments based on passing references to general principles in different Court of Justice decisions over

40 years. I think it will result in big arguments as to whether a case has been founded on the general principles as a separate cause of action, which will be precluded by the Withdrawal Act, or whether the claim is based on an interpretation of an existing instrument, in which case the general principles can be taken into account.

In other words, to summarise, in that specific area—leaving aside the wider issues—in my opinion, the provisions of the Withdrawal Act create a legal morass. I thought I would highlight that.

Baroness Ludford: Brexit means Brexit.

The Chairman: That will obviously be a source of concern as we go forward. Is there anything that you would like to add, Mr Hunt?

Mr Murray Hunt: I have one very brief point. I referred earlier to what the Scottish Government are doing.

The Chairman: That is very interesting. Perhaps you could tell us a little more, as we have a few more minutes.

Mr Murray Hunt: I encourage members of the Committee to look at the First Minister's advisory group's report.

The Chairman: Is it available online?

Mr Murray Hunt: It is. There is also a report by the Equality and Human Rights Committee of the Scottish Parliament, and I should declare that I advise the committee in connection with its inquiry into how the parliament can become a better guarantor of human rights under Scotland's constitutional arrangements.

The Scottish experience is quite interesting, because it demonstrates that Brexit creates a space—I hesitate to say an opportunity—for human rights leadership. All challenges and crises also bring opportunities, and what is happening in Scotland is a very positive and constructive engagement with the question of how the human rights framework in Scotland can be improved—not reopened in an open-ended way but improved, supplemented and built on—in order to deal with the risks that Brexit involves to the continuity of legal protections. That space is being filled in Scotland and it is a space that could also be filled at Westminster.

The Chairman: You are absolutely right that there are issues confronting societies now—such as the whole business of big data, its invasion into all our lives, and the impact of that in terms of privacy and surveillance, not just by the state but by corporations and so on—that engage with rights. Some thinking has to be done on that. I know that some was being done across Europe, but perhaps we should be taking a lead in doing some of that here ourselves in the UK.

You are right that, recognising that that space may be created, we should actively look at it with a view to what could be done in that area. I thank you for directing our attention to what is happening in Scotland.

I thank both of you. It has been really important and valuable to have you here today. You have illuminated certain areas that we were probably not absolutely sure about and your expertise has been invaluable. I am really grateful. As I say, if you want to add any supplementary evidence that could be included in any report that we do, we would be grateful to receive it. Thank you so much.