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EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Thursday 17 December 2015

Session 4

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EUROPEAN AND EXTERNAL RELATIONS COMMITTEE
19th Meeting 2015, Session 4

CONVENER

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

DEPUTY CONVENER

*Hanzala Malik (Glasgow) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)
*Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP)
*Jamie McGrigor (Highlands and Islands) (Con)
*Anne McTaggart (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Catherine Barnard (University of Cambridge)
Michael Clancy (Law Society of Scotland)
Professor Sir David Edward (University of Edinburgh)
Professor Adam Lazowski (University of Westminster)
Dr Tobias Lock (University of Edinburgh)
Dr Cormac Mac Amhlaigh (University of Edinburgh)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

European and External Relations Committee

Thursday 17 December 2015

[The Convener opened the meeting at 09:20]

European Union Reform and Referendum

The Convener (Christina McKelvie): Good morning and welcome to the 19th meeting in 2015 of the European and External Relations Committee, which is our last meeting this year. I remind everyone to switch their mobile phones and electronic devices to airplane mode.

Agenda item 1 is continuation of our inquiry into European Union reform and the EU referendum, and its implications for Scotland. We will have a round-table discussion, for which we have a number of eminent people who I hope will give us detailed analysis of their thoughts and feelings on the implications for Scotland of the EU referendum. I thank you all for coming and I thank those who have provided written evidence, which has been gratefully received.

I am delighted to have with us this morning our adviser, Professor Sionaidh Douglas-Scott. We have Professor Catherine Barnard on a videoconference link, so we will have to be mindful of that. However, first, I ask people round the table to introduce themselves and give a short description of their background.

I am Christina McKelvie, the MSP for Larkhall, Hamilton and Stonehouse and the committee convener.

Hanzala Malik (Glasgow) (Lab): Good morning. I am the deputy convener of the committee and I represent the Glasgow region.

Professor Adam Lazowski (University of Westminster): I am the professor of European Union law at the University of Westminster in London.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): I am the MSP for Kilmarnock and Irvine Valley.

Professor Sir David Edward (University of Edinburgh): I am from the University of Edinburgh, and I am a former judge of the European Court.

Roderick Campbell (North East Fife) (SNP): I am the MSP for North East Fife.

Michael Clancy (Law Society of Scotland): I am the director of law reform at the Law Society of Scotland.

Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP): I am the MSP for Carrick, Cumnock and Doon Valley.

Dr Tobias Lock (University of Edinburgh): I am a lecturer in EU law at the University of Edinburgh.

Anne McTaggart (Glasgow) (Lab): I am an MSP for Glasgow.

Dr Cormac Mac Amhlaigh (University of Edinburgh): I am from the University of Edinburgh.

Jamie McGrigor (Highlands and Islands) (Con): I am an MSP for the Highlands and Islands.

The Convener: Professor Barnard, do you want to introduce yourself on the videoconference link?

Professor Catherine Barnard (University of Cambridge): I am from Trinity College at the University of Cambridge. Thank you for accommodating me in this way.

The Convener: We are delighted to have you with us. We always attempt to have as many voices as we can for round-table discussions, either in the room or outwith it. We will be mindful of coming back to you during the discussion.

For the round-table discussion, I ask people to channel questions or comments through me—you can give me a wave or a nod to let me know that you want to speak. Professor Barnard, I ask you to give us a wee wave to let us know when you want to come in on a particular topic. We will attempt to ensure that everyone gets to say their piece, because we are very interested in hearing what you have to say. We have an opening question from Jamie McGrigor.

Jamie McGrigor: On the question of reform and renegotiation, I heard Herman Van Rompuy on the radio this morning saying that he was optimistic about the issue in some ways but that, if the treaties needed changing, we would have a problem. Would the witnesses like to comment on that?

Professor Lazowski: I can start. I definitely think that we have a problem. It is going to be time consuming and quite difficult to persuade the other 27 member states to go ahead with treaty revision. I think that the EU has been suffering for a while from treaty-revision fatigue. Such a treaty change would potentially require, for instance, a referendum in Ireland or other countries, which would be time consuming. We must also bear it in mind that there are elections coming in France

and Germany, so I do not think that it would be a good idea to have treaty revision at that time.

Sir David Edward: I would just say that to have a treaty change within the time scale envisaged by Mr Cameron is impossible.

Professor Barnard: I also heard Mr Van Rompuy this morning on the "Today" programme and I think that maybe he was alluding to the fact that David Cameron has asked that there be a four-year moratorium on in-work benefits for EU migrants. That would probably require a treaty amendment, because it would restrict the free movement rights of those migrating under article 45 of the Treaty on the Functioning of the European Union.

The requirement to be resident for four years in a country prior to claiming in-work benefits such as tax credits would be indirectly discriminatory on the grounds of nationality. Although indirect discrimination can be objectively justified—on the basis that someone has to have some connection with the state to which they have gone and from which they would like to claim benefits—most people agree that the four-year requirement is disproportionate. That is why there would need to be a treaty amendment to make it clear that such discrimination is permitted by the treaty, which is the highest legal norm.

A treaty amendment would require the unanimous agreement of all the member states and it is very unlikely that a Polish Government or a Romanian Government would agree to such a reform. That is the nub of the problem.

Dr Lock: I agree that a treaty amendment before 2017 is unrealistic in terms of timing, but of course David Cameron, in his letter to Donald Tusk, said that he wanted binding assurances or something of the kind. We could envisage an agreement between the member states that they would agree to treaty revision or an amendment of that kind in the future. A possible precedent is the Irish protocol that was given to the Irish after they rejected the Lisbon treaty the first time. Some assurances were given to the Irish people and it then passed and the Irish protocol was woven in to the treaties a couple of years later.

Adam Ingram: What possibility is there to work round that particular issue if the United Kingdom Government decides to reform in-work benefits in the UK so that the notion does not become discriminatory? Is that a possibility? Would that be achievable?

Professor Barnard: I had wondered when the controversial reforms of tax credits were being proposed that, although those reforms might have been done partly for other political reasons, they might have had the ancillary benefit from the UK Government's perspective of addressing the problem that we have come up against.

Since the tax credit reforms were abandoned, we are back in the same situation. Part of the problem for the UK is that, unlike some member states, our system is based on presence in the country and financial need—whether someone's income is set at a certain level. Other systems are much more based on accretion of contributions and therefore getting benefits is much more closely tied to length of residence.

However, for us, because we just look at income levels and people get benefits if they are on a particular income level, that is what creates the risk of discrimination. If we say that British nationals get benefits when their income level is at X amount but migrants do not get benefits for four years, the risk is—at a minimum—indirect discrimination and even possibly direct discrimination. In the case of direct discrimination, there is not even the possibility of objectively justifying what is going on, so part of the problem goes to the very nature of our benefits system.

The Convener: Dr Mac Amhlaigh, you were nodding there. Would you like to share your thoughts?

Dr Mac Amhlaigh: The main principle under EU law, as I understand it, is discrimination. A state can, within parameters, do what it likes, provided that it does not discriminate on grounds of nationality. If it wanted to lower benefits for its own citizens in conjunction with those for citizens of other EU states, that would generally be acceptable under EU law.

09:30

Adam Ingram: I suppose that it is a political question of the extent to which the UK Prime Minister would want to change the rules of engagement, as it were, in seeking to achieve the objective that he is reaching for. From the reaction that we have had from other European countries, it seems unlikely that they would be willing to concede that. Professor Barnard said that the UK would have to move to a more contributory system for there to be any prospect of movement from other European countries. Do you agree with that?

Dr Mac Amhlaigh: I am not an expert on the politics of the issue, so I would not like to comment on that.

Adam Ingram: Okay.

The Convener: Has the Law Society done any analysis of or scenario planning on this issue?

Michael Clancy: Not until two minutes ago. [*Laughter*.]

I suspect that if one were to try to equalise in-work benefits, social housing or things like that in the UK with those in other EU member states, that would present enormous domestic difficulties. As things stand, it would certainly not be achievable at any time before 2017. Legislation would be required, and we all know the legislative process: policy formulation, consultation and getting legislation through Parliament. Equiparation would not be a starter.

The Convener: Some welfare powers are being devolved now, which adds another layer of complication. Where would you see tensions between UK law, Scots law and how this place legislates for social security? Would a legislative consent memorandum be needed in that process?

Michael Clancy: Of course, the Scotland Bill, which is passing through the House of Lords at the moment, still has to complete that process, and then any amendments that the House of Lords makes must be agreed to by the House of Commons. We are looking at that bill achieving royal assent, which is what everyone expects, before the end of March. We have the Scottish elections in May, and then implementation of what will be the Scotland Act 2016 will then take—well, you tell me how long it will take for the UK Parliament to put in place the implementing regulations to allow the Scottish Parliament to get to grips with the act. It will take some time, and 2017 will be on the horizon before we know it.

Even if there were to be a distinct Scottish welfare system within the terms of the benefits that are being devolved, that would probably not be in operation until 2018 or 2019.

Professor Lazowski: We need to remember that the letter that the Prime Minister sent to Donald Tusk is not only about in-work benefits. There is more to it, such as the opt-out from the ever closer union and the guarantees for the city. That kind of stuff would require a protocol to the treaties.

I return to the point about the potential revision of the treaties and the intergovernmental conference. There are two options. The first one, which the Government should push for, is a small treaty revision with an intergovernmental conference with a fixed mandate. The only thing that the intergovernmental conference would deal with would be a special protocol for the UK. That is doable, although I fully agree with other witnesses on the timescale. We would not get it done before 2017.

The other option, which in my opinion is much worse and far less realistic, is a fully fledged, big-scale treaty revision. That would present the risk of every member state throwing in something to the mix. We would then have a long and painful intergovernmental conference, with a long summit ending at 5 in the morning and everyone being half dead, followed by two years of ratification dramas, constitutional challenges in several member states and so on. If we go for treaty revision, the only option is a small treaty revision. The Prime Minister would have to persuade other member states that there will be a very quick intergovernmental conference that opens in the morning and closes in the afternoon, which means that a deal basically has to be ready when they sit down to it.

The Convener: You are ever the optimist.

Professor Lazowski: And on a Thursday morning, too.

Jamie McGrigor: Is the move to ever closer union considered to be a move towards a European welfare system, which might be seen as one solution to the migration problem?

The Convener: Ah! Professor Sir David?

Sir David Edward: I have two points. First, if we are merely talking about treaty revision that says, "Nothing in the treaties commits the United Kingdom to such-and-such," there is the precedent of what is called the Danish compromise. At the end of 1992, in the run-up to the end of the Maastricht treaty, the heads of state and Government met in Edinburgh. A Danish referendum had rejected the Maastricht treaty, but it was too late to amend the treaty as it then stood.

At the Edinburgh summit, there was an agreement called the Edinburgh agreement, which was a decision of the heads of state and Government. It begins:

"Decision of the heads of state and Government, meeting within the European Council, concerning certain problems raised by Denmark on the treaty".

It says that they

"Have agreed on the following decision",

and then goes on to say that Denmark was not committed to citizenship.

The Edinburgh agreement was registered with the United Nations as an international agreement. It was later incorporated into the Lisbon treaty as protocol 22, "On the position of Denmark". That is a route that could be used. I do not think that it could be used for the benefits issue but it could be used to say, for example, "Nothing in the treaty commits a member state to any greater measure of European political integration than it consents to," or words of that sort.

As regards Mr McGrigor's question, we should distinguish ever closer union and the migration problem. The ever closer union issue concerns the theory that has been there from the very beginning that there was some form of ratchet effect and that

the process of European integration would inevitably go forward. The French word is engrenage; in English, it is the ratchet effect. I think that what Mr Cameron is seeking there is an assurance that that is not inevitable for us. That could be done by a Danish-style compromise.

Dr Mac Amhlaigh: Realistically, as Tobias Lock said, the treaty revision question will be some sort of political declaration with a view to the next major revision, whatever it is. This will somehow be part and parcel of the next major revision because of the Pandora's box of opening up treaty revision.

As Sir David has pointed out, it is in the eye of the beholder exactly what "ever closer union" means. It is the kind of rhetorical statement that we see in many preambles to the treaties. The safest thing that we can say about it is that it is an allusion to political integration as opposed to purely economic or a pure free trade area. There is an aspiration to some level of political integration. That is probably the most concrete thing that we can read into it. Beyond that, it is very difficult to say precisely what its implications are.

On the migration issue or even that of the European welfare system, to my knowledge ever closer union has never prevented a state from opting out of parts of integration; nor has it served to trump any opt-outs or guarantees that have been secured by countries. It does not operate in that kind of hard way, or at least it has not done so to date.

Professor Barnard: On the ever closer union point, what has not been mentioned is that the reference is to ever closer union

"among the peoples of Europe",

not among the states of Europe. A more literal reading would suggest that there is some sort of communal objective of working together, but not ever deeper integration between the states.

The principle has been cited on a number of occasions by the European Court of Justice to buttress arguments, most recently in the case in which the court rejected the EU's accession to the European convention on human rights. However, most commentators take the view that it is not a deal breaker, in that it is not such a key principle of EU law that it is impossible to derogate from it. Non-discrimination, by contrast, is a key principle of EU law, from which no derogation is easily possible apart from those already provided for in the treaty.

For that reason, a deal on ever closer union, possibly through some form of post-dated cheque that says that, at the next treaty amendment there will be some special deal for the United Kingdom on that point, or that ever closer union does not mean ever deeper integration, is quite possible. I do not think that that is the real stumbling block in the negotiations.

Michael Clancy: It is interesting to see the development of the discussion on what Mr Cameron meant in his letter to Donald Tusk. Page 5 of the letter says:

"I hope that this letter can provide a clear basis for reaching an agreement that would, of course, need to be legally binding and irreversible—and where necessary have force in the Treaties."

That indicates a certain level of expectation on the part of the Prime Minister. I get the sense that he will be disappointed.

As Professor Sir David Edward has said, there could be some kind of agreement that is then recognised, but an agreement that is "legally binding and irreversible" sounds a bit more serious than a post-it note to do something in a later treaty.

The Convener: I agree.

Adam Ingram: I want to switch tack and ask about a withdrawal treaty or agreement. How easily could that be accomplished and what would be involved in taking a country out of the EU? Would that withdrawal treaty or agreement have to be concluded only with EC officials or would it be concluded also with other member states in a mixed agreement?

Professor Lazowski: Article 50 of the Treaty on the European Union says only that such an agreement will be between the EU and the departing country.

The dossiers that should be covered in the withdrawal agreement on the terms of withdrawal and future relations between the withdrawing country and the EU would cover matters in which the competences are shared between the EU and the member states. The agreement would therefore have to be a mixed agreement, with the EU and its member states on the one side and the departing country on the other.

Article 50 says that a withdrawal agreement deals with the conditions of withdrawal and takes account of future relations between the EU and the departing country. There are two ways to read that provision. One is that a withdrawal agreement will provide some sort of bridging agreement until a proper fully fleshed-out association agreement is concluded. The other option, which I very much prefer, is that the withdrawal agreement should provide the terms of withdrawal and a very comprehensive regime for future relations. The first option would undoubtedly lead to a great deal of legal uncertainty, and I think that that is unacceptable.

09:45

If we go for the second option, with the withdrawal agreement providing the terms of withdrawal and a fully fledged future regime, I think that we are talking about a number of years. From a procedural point of view, the EU will first have to have a negotiation mandate. Guidelines will come from the European Council. The question is how detailed they will be and to what extent the European Commission and the Council will be involved in designing the negotiation mandate for the European Union. Then, a little bit like accession negotiations, it will have to be divided into different chapters, where those dossiers will be separately negotiated. If it is a mixed agreement, it will have to be concluded by two decisions of the Council on the EU side, and we must take into account the fact that the legality of both can be challenged at the Court of Justice under article 263.

Then there would be a very long ratification process, which usually takes two to three years, as we see if we look at the most recent association agreements with Georgia, Ukraine and Moldova, so it will be a very long and painful process. That is my educated—or uneducated—guess.

The Convener: Professor Sir David, I remember you having something to say in the discussions during the Scottish referendum campaign on article 50, Greenland and how that process went. Could you share some of that wisdom with us today?

Sir David Edward: Article 50 says that the negotiations will complete within two years unless there is agreement to continue the negotiations, so there could be a rather odd situation in which negotiations were going on—let us assume that they were going rather badly for the UK—and the UK could simply say, "We are not prepared to agree to any further continuation. That's it." There would then be a bizarre situation in which the withdrawal takes place, because two years is up, but you would not have fully determined the future relationship. That is something that article 50 does not cope with.

Another problem is that the more enthusiastic Brexiteers say, "Well, we wouldn't use article 50 at all. We would simply repeal the European Communities Act 1972, and with one bound we would be free." I have heard that repeatedly from John Redwood. On the other hand, a minister of state in the House of Lords has expressly said that the UK Government would use article 50, so that is an uncertainty.

The other aspect of your question was about Greenland, was it not?

The Convener: Yes.

Sir David Edward: What we know about all previous negotiations is that they take a long time. Two years was what was put into the Lisbon treaty, and I suppose that, with good will, it could be concluded in that time, but that assumes that the other member states would be prepared to go some way towards accommodating a future British relationship, which I suspect they might not be if we say, "Right, we want to withdraw." Remember that article 50 makes no provision for having second thoughts. Once you have given notice, that is it—you are on the train. If Britain has said to the others, "Right, we want to leave," I am not by any means certain that the others would be enthusiastic about making generous concessions to the UK, so you could have a deadlock.

The Convener: I believe that some member states are saying that they will be flexible, but not at all costs. That is an interesting phrase to use.

I believe that Dr Lock wanted to comment.

Dr Lock: I have a few minor points to make. First, in terms of procedure, or how difficult it would be politically to agree on something, one dark horse in the equation is the European Parliament, which has to agree to the withdrawal agreement. It is much more difficult to predict where the European Parliament is going to go. It tends to be more integrationist than the member states' Governments that are represented in the Council.

In the European Council, only a qualified majority is needed, but if there is a mixed agreement, which Professor Lazowski has convincingly argued for, all member states have to agree to it, so the qualified majority, which normally makes agreement much easier, will in practice become unanimity—everybody will have to agree.

If there is an acrimonious divorce—if after two years we decide that we cannot agree, say, "Sod this," and go—the big question for the UK will be what relationship it will have not only with the EU but with the world. We would probably be restricted to World Trade Organization rules when it comes to trade, which means most favoured nation status, so we would get the best customs tariff that the EU offers, but that is about it and we would have to pay customs duties. There is dispute settlement under the WTO, but it is not as effective as the process in the EU—an individual cannot go to court and claim WTO rights.

Of course, you must not forget that the withdrawal process requires the withdrawing country to have negotiations not only with the EU and all the member states but with third countries that have trade relations and agreements with the EU and its member states. Those agreements would need to be renegotiated in the interests of

the UK as bilateral agreements. There is a host of other things that need to be negotiated.

Dr Mac Amhlaigh: Obviously, you can withdraw without renegotiating your future relationship—article 50 is clear on that. It depends on the politics of the situation, but if the UK wanted to withdraw, it could do so and put on a back burner what precise relationship it wanted to have. It would not be prudent to do so, but it is certainly possible.

There is the EU side, but there is also the domestic side after withdrawal, which would require a lot of legislative change in order to de-EU British law. EU law is embedded in many statutory provisions and I would envisage that that would probably take place over the long term. I would expect a parallel implementation of EU law; notwithstanding the fact that the UK would not be legally required to do it, the UK would probably comply with EU law for a considerable period.

I do not think that amending the European Communities Act 1972 would suffice. We would need to have a new act on relations with the EU, stipulating the details of a future relationship.

Professor Lazowski: I have a quite a number of things to say. I fully agree with the point about the European Communities Act 1972. In order to de-EU the legal orders of the United Kingdom, we would need to carry out a proper screening of everything to see where directives were implemented—it would be easier with framework decisions.

It will be quite complicated in relation to regulations. In textbooks, we see that regulations are directly applicable and that member states cannot copy them, but what member states frequently have to do is to adopt domestic provisions that fill in the gaps left by the EU legislator or make the regulations operational. If we repeal the European Communities Act 1972 and stop regulations from being directly applicable in that way, we would have a lot of obsolete legislation that would make very little sense. For example, the legislation on the European company—the societas Europaea—is a combination of regulation, directive and domestic law; the regulation on compensation for flight delays and cancellations has a self-contained regime in the regulation, but there are domestic provisions that fill the gaps; and so on and so forth.

We would have to do what candidate countries have to do, which is to screen the entire legislation to see exactly where EU law is. Then, in many areas of law, we would need to recreate the legislation, because, for example, if we get rid of all directives in employment law, we have huge gaps in the legislation. That will take years and will require an army of people, not to mention the fact that it will be quite expensive.

My second point is that my interpretation is that there is a two-year deadline in article 50. My interpretation may be wrong, of course. That is there to discipline the member states and the withdrawing country. It is in the interests of all sides to negotiate a proper withdrawal agreement, because a unilateral withdrawal would be a legal economic calamity.

I agree with Dr Lock that WTO rules are not enough, not to mention that some agreements that fall under the WTO umbrella were concluded by the member states and the EU together. That will make it very complicated.

Also, on external relations, I agree with what Dr Lock said. The United Kingdom will lose all agreements that the European Union has with third countries. Those will not be subject to withdrawal negotiations because they are negotiated with those third countries. We will lose 40-plus free trade agreements, for example. The procedural question, which is quite tricky, is when to renegotiate those agreements. Do we do that when we leave the European Union, which would mean that we would have a huge gap in legal terms after the withdrawal, or do we start renegotiating when we negotiate withdrawal, although there is no guarantee that we will actually withdraw at the end of the day?

I understand that the literal interpretation of article 50 of the Treaty on European Union says that, once we give notice, we are basically going with the pace of a puffin towards withdrawal. However, in political terms, it can be stopped. We can imagine that there is a change of Government and the new Government says, “Oh, sorry. We made a mistake. We will keep it as it is. We are deeply apologetic.” The third countries will probably ask why the UK is trying to negotiate with them if there is no guarantee that it will actually withdraw from the European Union.

We have a lot to lose. We need to remember that those agreements were negotiated by the European Union, which, after all, is a huge trade bloc in the world and therefore has a negotiating position that is completely different from that of a country that has left the European Union altogether.

Roderick Campbell: I am now a wee bit confused about where we are with article 50 and the John Redwood approach. Is there a middle way? Cormac Mac Amhlaigh talked about the member state choosing to withdraw and not negotiating. What do the other witnesses think? Is that in any way possible? Does anyone think that a withdrawal treaty would be anything other than a

mixed agreement? Are there three options or are there only two?

Dr Mac Amhlaigh: To clarify, my comment was just to suggest that article 50 allows the UK to effect withdrawal without renegotiation because of the two-year time period. It is not a case of saying that the UK could just walk away without any problems—John Redwood's suggestion. Obviously, under the domestic constitutional position, Parliament could repeal the European Communities Act 1972 if it wanted to. That would not necessarily effect withdrawal in the way that many people would wish. It would also leave the United Kingdom exposed to a host of actions against it under international law because it owes international obligations to EU member states and, in some cases, I think, even to the EU, all of which could be taken.

It is a little bit like the human rights position in that the international position would not be affected by the domestic measure of repealing the European Communities Act 1972. The UK would still be exposed to all the international obligations, including the EU treaties themselves, although it would be more difficult for litigants in Britain to take those actions before domestic courts because they would be deprived of that right with the repeal of the act.

Professor Barnard: I will say something about the practicalities of de-EU-ifying UK law. There are some practical points to take into account.

First, the EU is and will remain our principal trading partner because of its geographic proximity, so any of our goods that are to be sold into the EU and any of our services that will be provided into the EU will have to comply with EU technical standards. Therefore, simply repealing in one fell swoop all the EU rules would promptly make it extremely difficult for our traders to trade. They will have to comply with those rules and it would be sensible to keep them on the statute book in some form so that traders know with what they have to comply.

In other areas, there are distinct EU rules—for example, social policy. Take the case of equality legislation. We have long had equality legislation in the United Kingdom, most notably in sex and race discrimination—in respect of equal pay, that predated our membership of the EU—but the EU directives of 2000 extended the protection to sexual orientation, disability, age, and religion and belief. The question is whether the UK really wants to go back in time and repeal the Equality Act 2010 to deny protection to those groups. It would be possible to remove the protection and then have a British version of the equality act, but the time and energy involved in disentangling EU provisions, a lot of which have been inspired by elements of British law anyway, would be an extraordinary waste of time and energy for everyone involved.

10:00

However, that raises quite a nice legal question: if we were to leave but kept the Equality Act 2010 and other pieces of legislation on our statute book even though we were no longer in the EU, to what extent would we be bound by the decisions of the European Court of Justice when interpreting the directives on which the legislation was based? At the moment, those decisions have precedential value and the British courts are obliged to follow them. I think that what will happen is that they will end up having persuasive value rather than precedential value, and that a lot of attention will certainly be paid to what the European Court of Justice is doing.

In my experience of working in European Economic Area countries, particularly Norway—although, again, it is in a slightly different position—what is striking is that Norwegian law schools do not really teach the EEA agreement as such but teach EU law as if it was their own law; and they perhaps look much more at what the European Court of Justice says than at what might be said by the Court of Justice of the European Free Trade Association States, which is the relevant court for the EEA agreement.

If we leave, we will no longer be obliged, strictly speaking, to look at what the EU is doing, but in practice I think that we will be very much still bound by that, at least at the practical legal level.

Michael Clancy: There are, of course, two sides to this coin. Paragraph 3 of article 50 of the Treaty on European Union states:

> "The Treaties shall cease to apply to the State in question".

That is one thing to bear in mind. If you let the two years run, you will be in a position in which you do not really need to repeal anything, because the treaties will not apply any more. However, I can see why John Redwood MP might be desirous of having a repeal of the 1972 act, because it is totemic. That is part of the political vision that he and others who want the UK out of the EU have in mind.

I was really interested in what Professor Barnard had to say about keeping the corpus of EU law vibrant for the post-exit period. It reminded me of an interesting book that I read once upon a time called "Responsible Government in the Dominions". You can tell by the title how long ago I read it. One of the interesting features of post-colonial law was that the acts of Parliament that gave independence to former colonies invariably had in them something that said that the law of England or the law of Great Britain at a certain

date continued to apply in that colony. One could see that that would create the basic law on which future divergence could build.

One could see very easily that that could be a useful mechanism for those who do not want to have to cram a survey of EU law in UK law into a concertina-ed timeframe that would make it just a skim. It would be very attractive to say that the law relating to equalities, the law relating to intellectual property or, indeed, the existing regulations that apply as a result of the implementation of directives will continue to apply until such time as we get round to dealing with them in a more structured and thoughtful way. That is one of my reflections on that issue.

Dr Lock: To come back to Mr Campbell's question, we always need to distinguish the domestic law position from the EU law position—they are connected, but they are different. If we simply repealed the ECA 1972, that would not change the UK's membership of the EU as such—the UK would still need to hand in its notice and wait for at least two years before its membership would end.

Would it be possible to conclude a withdrawal agreement as a non-mixed agreement? That would depend on what was included in the withdrawal agreement. If a withdrawal agreement was concluded that was fairly nude in terms of content—an agreement that said that, from 1 January 2019, the UK would cease to be a member of the European Union, full stop—that could be agreed under the procedure that is laid down in article 50. It would not be a mixed agreement; it would be an agreement between the EU and the United Kingdom, and it would need the approval of the European Parliament and a qualified majority vote in the European Council.

However, future relations would probably require a mixed agreement. For various reasons, which are often political, free trade agreements between the EU and non-EU countries such as Korea have all been mixed agreements, because the member states want to have their say in those agreements, and I think that the member states would want to have their say in the UK's future relations with the EU.

The problem with simply repealing the European Communities Act 1972 is that, if I am not mistaken, section 2(4) gives a legal basis for implementing a whole lot of EU secondary legislation by way of statutory instrument. If that was repealed, it is arguable that the hook in primary legislation for the implementation of statutory instruments would be gone and they would no longer be applicable. That would be a super-effective way of purging UK law of EU law influence, but it would leave a lot of legal gaps in the law. For example, an awful lot of environmental law, including the law on environmental impact assessments, is influenced by EU law.

Also, as Professor Barnard mentioned, a huge political discussion would ensue if the Equality Act 2010 were up for repeal, and there would be a parallel situation as with the Human Rights Act 1998. It would not be easy. I did a "Ctrl+F" search of the Equality Act 2010 for "European" and "directive" and there were 22 hits—10 for "directive" and 12 for "European"—so even if you just wanted to make the act look more British, you would still have to change it. In other words, it would be a huge job.

Professor Lazowski: I have a number of comments. We have not yet mentioned that the UK's departure from the European Union would also lead to its departure from the European Economic Area unless the UK became an EFTA country. Membership of the EEA is open only to EU member states, for which it is compulsory, and EFTA countries, for which it is optional. We would have to negotiate that, too.

Whether the agreement was a mixed one would depend on its contents. As Professor Barnard mentioned, businesses in the UK would still want to export goods and services to the European Union. That means that we would like to participate in the internal market, or the Common Market, as it was called in the 1970s, when the UK became a member state.

The European Union has a policy of more for more vis-à-vis, for instance, European neighbourhood policy countries. We have the example of the European Economic Area and the example of Switzerland. The rule of thumb is that, the more integrated a country wants to be, the more it has to comply with. When it comes to the EEA, there are lists of EU legislation that in no way has to apply in Iceland and Liechtenstein. It is the same story for Switzerland, with the few agreements that it has. There is a simple, dynamic system for the EEA, and there is no way that Iceland and Liechtenstein have to accept whatever policy the EU adopts in the areas that are covered by the EEA without participating in the decision-making process.

I would expect a withdrawal agreement to have lists of legislation that the UK would be bound by after the exit to guarantee access to the internal market. Even the association agreements with Ukraine, Georgia and Moldova have lists of acquis that they have to comply with within five to 10 years plus. For example, Georgia has to comply with more than 300 legal acts. I would expect something similar to be in a withdrawal agreement, so I think that it would have to be a mixed agreement.

If the worst comes to the worst and, for instance, there is a political decision to make it an EU-UK agreement, that could be challenged under paragraph 11 of article 218 of the Treaty on the Functioning of the European Union. The Court of Justice would be asked for an opinion on whether the EU could conclude such an agreement. Dr Lock mentioned the European Parliament; it would be a good candidate to submit such a request.

Going back to the point about interpretation, there are two sides to the story. If we look at the European Economic Area agreement, the courts have an obligation to interpret, in the light of jurisprudence of the Court of Justice of the European Union, the jurisprudence predating the EEA but, in practice, as Professor Barnard mentioned, they do that anyhow—they take into account the jurisprudence of the Court of Justice; the EFTA court has a role to play here.

I would like to draw the committee's attention to one more thing. Regardless of whether it is a mixed agreement, it will be concluded by the European Union by means of a decision first on signing and then on conclusion of an agreement. If we look at most recent practice with trade agreements, but especially with the association agreements with Georgia, Ukraine and Moldova, we see that those decisions contain a trap: they contain provisions that say that the agreements cannot produce direct effect in the member states in the national courts. That would mean, for instance, that British businesses that were willing to challenge the legality of certain measures based on an attempt to invoke the withdrawal association agreement in the future would be deprived of such a right.

Therefore, we must be very careful during the negotiations and in relation to what happens when the EU signs a withdrawal agreement. Mind you, those are unilateral EU decisions, so they are not subject to negotiation, unless we have a guarantee in the withdrawal agreement that it can produce direct effect in measures that are based on it.

Sir David Edward: I will say two things. It is perfectly true that article 50 says what it says, but it is always possible politically to find another solution.

On the other hand, remember that there is an internal aspect as well. We must assume that all this will have been put in train because the British people have voted to leave the EU. Therefore, I am not clear that it would be possible to say in internal British politics, "Actually, it's not working out the way we thought, so we're not going any further without another referendum to say, 'Hang on a minute, we think we were wrong in deciding to leave.'" There is an internal problem.

There is also an external problem in relations with the other states, because if we put them through the test of going through the article 50 procedure, and one year, 18 months or 21 months later we say, "Hang on a minute, we don't really like the way this is going," I would suspect that they will say, "All right, we'll put an end to this, but there are no more British opt-outs. We will give you nothing other than the treaty. That's what you're opting back into." I think that they are pretty fed up already with Britain always wanting a special position, and that might be the crunch point.

The other thing about keeping EU law alive is that we have to remember that the treaty provisions imply reciprocity. It is all very well for us to say, "We will keep this alive," but we must remember that, in a great deal of these relationships, the others have to keep it alive, too. As one person from another member state said to me, "We will do everything possible to keep you in, but if you wish to go, we will give you nothing." I am not sure that that will not be the attitude of a great many other member states.

10:15

Michael Clancy: Sir David has put his finger on it, as he so often does. Under article 52, the withdrawal agreement has to be made while taking account of the future relationship with the EU. There is an anticipation that there is going to be some kind of relationship with the EU. When one considers the fact that, after withdrawal, the remaining EU members would have to amend treaties and so on to take out references to the UK, one sees that the process will affect other members of the EU for some time to come.

The implications of repeal of the European Communities Act 1972 would mean that there would also have to be amendments to the Scotland Act 2012 and other devolved legislation affecting Wales and Northern Ireland. That relationship that we have with the EU, particularly with the court—Professor Barnard talked about decisions of the ECJ being "persuasive" in the future—would be a feature. As we—to borrow a phrase—"keep alive" EU law as at, let us say, 31 December 2018, it will be alive only in the sense that a fly from the Jurassic period is alive in amber, whereas the EU will be vibrant and alive and continuing to make law. There will be a continuous divergence between any law that we keep and EU law, and between our case law and that of the ECJ and other member states. We have to bear those factors in mind.

Dr Mac Amhlaigh: I was going to make this point in relation to previous comments about a transitional provisions act, where all EU law that is in force in the UK at a specific date will remain in

force until a certain time in order to help with the transition. That is a simpler way of dealing with things than doing an inventory and repealing all the EU laws in the UK, but it is only a bit simpler because the transitional provisions act would still have to stipulate the role of EU institutions, in particular the ECJ. You would have to make decisions about the impact of the ECJ's interpretation of all the law that is in force in your country.

You would also have to make decisions about what role other institutions—for example the European Commission, which has a role in monitoring and is involved in all sorts of regulatory aspects of implementation and application of EU law—would have in the enforcement of law in the UK, notwithstanding the fact that the UK would no longer be part of the EU. A transitional provisions act would be a bit simpler, but only just.

Hanzala Malik: Good morning to all of you.

Listening to your evidence, I am beginning to realise how complicated and serious all this is. I want to emphasise how serious it is for us in the UK and, of course, Scotland.

Notwithstanding the differences of opinion between the Scots and those in other parts of the UK about membership of the European Union, if we were to opt out, it would have severe ramifications for legislation, taxation, trade and industry movement, as well as the movement of people across Europe and internationally. The European Union also has agreements with people outwith the European Union and we are tied into them as EU members. If we were no longer members of that union, we would no longer be tied into those agreements. The issue is not as straightforward as it seems, from what I have gathered so far.

I wonder whether there is a possibility of accommodating David Cameron through a temporary agreement to do what he is seeking, rather than a fully-fledged agreement about changing policy. The temporary agreement in Denmark was mentioned. Would such an agreement be an option? It might allow for a full revisiting of the policy at a later date, and it would get David Cameron and the UK Government out of a hole, because we would not be pushing on a wall that could collapse on us. Can someone give an opinion on that?

Sir David Edward: I think that the answer is, as Professor Barnard and others said, that there is no way the member states can offer a temporary derogation from the fixed rules of the treaty—one cannot just opt out of that—nor does any grouping of the heads of state and Government have the power to deal with the migration issue, which in some ways is the most acute political issue, by having a temporary derogation from the application of the rules of the treaty.

The Danish compromise system offers a possibility of something legally binding, because the Edinburgh agreement was registered as an international agreement with the United Nations. That can go some distance and might possibly provide a solution to the "ever closer union" issue, although not necessarily to all the other aspects that have been grouped together in David Cameron's letter under the heading "Sovereignty". It is certainly possible without treaty change to deal with "Competitiveness" and "Economic Governance", which are two of the other three headings.

However, the question then really becomes a matter of internal politics. If that is all that David Cameron comes back with, will it be sufficient to persuade people to stay in?

There are ways of accommodating David Cameron except on the four-year refusal of benefits, but whether they will be enough in relation to internal politics is entirely another matter.

Hanzala Malik: You have given a diplomatic and clear response, which I appreciate.

We have put ourselves in a position in which there is a strong possibility that we will not succeed. If we do not succeed, there is a danger that we will find ourselves on a slippery slope that we do not want to go down. We will be going down the mountain without steering or brakes. Things will snowball, because so much is connected with our membership of the European Union. As we roll down the hill we will, unfortunately, take ourselves out of a lot of other issues, which might not be strictly related to the European Union but are to do with our membership. That is my fear. There is a lot more to lose than just coming out of the European Union. I am hoping against hope that you can help us to find solutions.

The Convener: Are the transatlantic trade and investment partnership and the comprehensive economic and trade agreement examples of those other things?

Hanzala Malik: Yes.

Sir David Edward: Would you like an answer to your question?

Hanzala Malik: Please.

Sir David Edward: Let me give you an indiscreet answer. I suspect that the internal politics are such that whatever comes back on the four issues will not be enough for the real hard-line Brexiteers. It is conceivable that David Cameron's position as Prime Minister could be at risk if he does not come back with something. The difficulty

that we are all pointing to is that there are certain things in his letter to Donald Tusk that he cannot come back with. Yes—he can come back with a Danish-type compromise on "ever closer union" and so on, but is that sexy enough to appeal to the electorate? Does the message, "We have achieved an agreement, which is registered with the United Nations, on the issue of ever closer union" have electoral traction? I am not sure. The one thing that would have electoral traction is the one thing that he cannot get.

Hanzala Malik: Do you agree that membership of the European Union has been extremely beneficial to the United Kingdom, not only for trade but for stability in Europe, which we would risk losing if we left?

Sir David Edward: I will cite a speech that was given in Edinburgh by the director of Europol, who is a British policeman. Europol is seriously involved in tracking terrorism and uncovering plots on the dark net. When asked whether there are equivalent organisations in other parts of the world, the director said that there are—there is one in south-east Asia, one in South America and so on—but none of them has the strength that Europol has, because Europol has the institutional infrastructure that can give it political direction. He said that he does not mind what the politics are as long as he has clear political direction, and that that is what makes Europol the strongest organisation of its sort. Given the present state of the world, to be part of that system is more important than any discussion about migration, ever closer union or anything else. The world is in danger of collapsing in flames and we are faffing about over ever closer union. Give us a rest.

Anne McTaggart: Hear, hear. I have a question about the constitutional process for leaving the EU and the renegotiation of the UK's settlement. I thank Professor Barnard for giving the example of Norway. What steps would be necessary to bring to an end the impact of EU law in Scotland? Would the legislative consent of the Scottish Parliament be required?

Dr Mac Amhlaigh: Can I first make two brief comments in response to previous questions?

The Convener: Of course.

Dr Mac Amhlaigh: I hope that the fears that Mr Malik expressed feed into the discussions prior to the referendum, because we need a robust public debate about this. I hope that such concerns are clearly heard.

On whether something symbolic matters, I can offer a small anecdote. This strays beyond my legal expertise, but in our referendums in Ireland, the fact that something was brought back made a difference, because the big allegation was that we were voting again in a referendum on the same thing, which really resonated with the electorate. The fact that we had brought back a guarantee—even though it was largely symbolic—had traction. We should not underestimate the potential for having something tangible to point to to gain traction with the electorate, even if it is primarily symbolic, as it was in the Irish case, or if it just restates the status quo that the EU never had competence in certain areas.

10:30

On the impact of the EU and EU law, the main provision is of course the European Communities Act 1972: it is the portal through which EU law primarily has effect in the UK. There are other provisions, but it is the main catch-all provision. The biggest move affecting withdrawal from the EU would be repeal of that act. With it no longer on the statute books, the ECJ would no longer have any jurisdiction, thus courts would not need to make preliminary references and EU law would have no binding automatic effect in British law, and so on and so forth.

On whether that would require a legislative consent motion, you will see from my analysis that I think that it probably would in several different ways. It is a complex issue—we have had discussions about whether the convention governing LCMs includes modifying the powers of the Parliament, and not just legislating on powers that are already devolved.

We are moving to a position in which it is generally accepted that modifying the powers—up or down—of the Parliament would require an LCM. One of the biggest restrictions on the Parliament is that it cannot legislate in violation of EU law. On those grounds, if the 1972 act were to be repealed—if that encumbrance were removed so that EU law was no longer applicable—the powers of the Scottish Parliament would be massively expanded in the sense that it could freely legislate on matters of EU law that are within its competence. Other provisions would trigger an LCM, but that is probably the most obvious one.

Professor Lazowski: I have some reflections on what was discussed earlier, including some of Mr Malik's points.

The problem is that what is happening in Brussels today from the point of view of the UK is a fairly political exercise. The demands that David Cameron has put to the European Council in the letter to the President of the Council—apart from the potential revision of article 45—are, in the grand scheme of things, of minor importance. I agree with Sir David that that will probably not be sexy enough for the back benchers in the Commons and for some of the voters. That is reflected in today's cartoon in *The Daily Telegraph*, in which someone—we know who—is

looking down at the world from the space station saying,

"From up here the EU concessions to the UK look absolutely tiny".

That is true.

However, there are two things that I would like to draw your attention to. First, in the public discourse, we are talking about our relations with the union as if we were already out; we are not talking about our position as a country in the European Union. Secondly, the Government spent a lot of money, time and effort on the balance of competences review, which has been swept under the carpet because the review said that the balance is just fine, with a few minor bits and pieces to consider. Mr Malik has drawn a dramatic picture of the impact of withdrawal. My worry is that withdrawal is unnecessary, as Sir David said. There are bigger problems to deal with.

Michael Clancy: I am really interested in the idea about the impact of the Sewel convention and what it actually means. I was in the Opposition adviser's box in the House of Lords in 1998 when Lord Sewel got up to say those immortal words:

"we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament".—[Official Report, House of Lords, 21 July 1998; Vol 592, c 791.]

As you know, the Scotland Bill that is currently going through Westminster has a provision in clause 2 that seeks to implement what the Smith commission was talking about by putting the Sewel convention on a statutory footing, whatever that means. What we get in the Scotland Bill is, in effect, that quotation from Lord Sewel being put in statutory form.

I am not convinced that there is a debate about the second leg of devolution guidance note 10. The note tells us that it is not only legislation that is in the devolved arena that engages the Sewel convention but legislation that alters

"the legislative competence of the Parliament or the executive competence of the Scottish Ministers."

That is the basis on which civil servants in Government have proceeded for quite some time for any amendments of the Scotland Act 1998 that involve changes to the competence of the Parliament or ministers.

That is what is missing from the Scotland Bill provision: a provision that takes on board the second leg of devolution guidance note 10. The consequence is that the convention is not really being legislated for. It is true that part of the convention is being put into a statute, but it is simply the quotation from Lord Sewel and it is not being expressed in any deeper statutory formulation.

I do not know what the courts would say when they came to interpret that provision, because it includes the words "not normally legislate". In a situation where the UK had exited the European Union and there was legislation that needed to be dealt with that was abnormal, would that engage the convention? Would we see litigation on the meaning of "normal", "a new normal" and "abnormal"? There were very instructive exchanges between the Advocate General for Scotland and Lord Hope of Craighead in a debate in the House of Lords last week on the first day of committee for the Scotland Bill. I recommend that everybody read the *Hansard* report of that. It was a masterpiece of a debate, and we could all learn quite a lot from reading it.

My concern is that the Scotland Bill is not fully implementing the Sewel convention and not taking it into a statutory framework. Because the competence of the Parliament and ministers would be affected—there are also the areas Dr Mac Amhlaigh marked out in his paper—those are big issues for the Scottish Parliament and Scottish law in the future.

Willie Coffey: I hope to drag people briefly back from the exit door to the franchise itself. We did not get the chance to open with that; we rushed to the exit door, probably too quickly.

Do our witnesses feel that there is the likelihood of a challenge to the franchise? As we know, certain European citizens are not being permitted to vote in the referendum, although, curiously, citizens from Malta, Cyprus and Ireland can. UK citizens who have moved away and exercised their right under the principle of free movement within the European Union for 15 years or more cannot vote either. Do you think that that is likely to be the subject of a challenge? Do you think that such a challenge might be successful?

The Convener: We have had a very interesting paper from Aidan O'Neill, who explores the issue in some detail. We have a pertinent example in the Parliament, because we have a French national who made Scotland his home and is now an elected member of the Parliament, but he will not have a vote in an EU referendum. We therefore have an example of a legislator in this place not having the ability to comment on UK legislation. What are the witnesses' thoughts and feelings on the issue?

Dr Lock: I think that we need to distinguish the two groups of people: there are British citizens who have lived abroad for more than 15 years and who are disenfranchised; and there are EU citizens living here who are neither Irish, Cypriot nor Maltese, who have no vote.

As far as those Brits living abroad are concerned, there is a precedent from the English and Welsh Court of Appeal that says that EU law applies at least in theory because they have moved in order to exercise their free-movement rights.

Somebody brought a challenge in relation to another election, arguing that the fact that they would lose their right to vote after 15 years would be a deterrent against exercising free movement rights. The Court of Appeal said that EU law applied, but that there was no infringement, because that was too distant a deterrent, if at all, and that it could not have made any difference to him. That applies to the first group of people.

Depending on whether a court here in Scotland would agree with that—or perhaps the Court of Justice of the European Union, if a reference was made on the matter—we might get a different outcome. I am not 100 per cent convinced that such a challenge would be successful. As far as I know, there are precedents from the European Court of Human Rights suggesting that, after a long period of time, nationals not living in the country can be deprived of their right to vote.

One interesting question is whether the unequal treatment between different types of EU nationals would be a violation of the principle of non-discrimination under the EU treaties. Those people have all moved here, exercising their free movement rights, which is no problem. I would argue that the determination of who can vote goes to the heart of the sovereignty of a country. There is probably no problem with excluding foreigners from the franchise as such, but randomly—or seemingly randomly—picking a few who can and others who cannot might be a bit dodgy in terms of proportionality. Why should Cypriots, Maltese and Irish be allowed to vote when French are not? There is no clear, substantive reason for it.

That is my take on the issue.

The Convener: Professor Bernard, I know that your time is limited in the room you are in, which you have to vacate soon, so I will give you the opportunity to come back on any points that you wish to brush up. Then, we will return to the point about the franchise.

Professor Barnard: That is immensely kind. I wish to make a couple of points on the earlier discussion, starting with your colleague's concern about the implications of withdrawal.

The implications of withdrawal are obviously a political question but, on the legal side, which we can talk more comfortably more about, it will be a gargantuan exercise that will tie the civil service—both in Whitehall and in the devolved Administrations—up in knots for years to come. It will paralyse the operation of day-to-day government, because so much time will be devoted to unpicking some very complicated issues. The implications for governance and day-to-day government are absolutely horrendous. I do not think that that has come out in the public debate so far, which has focused on the easy hits. We could repeal the European Communities Act 1972, but that is a drop in the ocean in comparison with the logistical considerations that would follow on.

My second point, which we have not touched upon yet, is the position of the 2 million or so EU nationals who are already living in the United Kingdom and the 2 million or so British people who are living in other member states. If there was withdrawal, they would no longer be EU citizens. Thus, they would no longer enjoy the rights that are laid down by the treaties: free movement, residence and equal treatment. That would have serious implications for those with second homes, or indeed first homes, in Spain or France, because the protection that they enjoy at the moment is laid down by EU law.

That raises a question about the extent to which the rights of those people can be protected under the domestic law of the states in which they are living. They will still enjoy their rights under the European convention on human rights, which requires equal treatment and provides other protections. Furthermore, as your legal adviser has helpfully pointed out in her paper, there is some protection under the Vienna convention for acquired rights. The points that she makes about that are extremely helpful: once rights have been accumulated, it is difficult under international law to divest them.

10:45

On the practical reality, however, how would we go about enforcing those rights? One of the most accessible, comprehensible and important features of EU law is that I can go to my local court in Cambridge—or to your local court in Edinburgh—to get my EU rights enforced. If they become international law rights and the system does not allow for enforcement of international law rights at the local courts, we might be able to say that those people have acquired rights, but what can they do about it if those rights are infringed? At the moment, they enjoy the simple but effective protection of direct effect and remedies in the national systems. All of that would disappear. We would be making life much more difficult for the 2 million or so British people living abroad and, likewise, for the 2 million or so EU migrants living here.

The Convener: Thank you, Professor Barnard. If it suits you leave the room where you are whenever you want to, do not worry about having

to take your leave. I know that there will be an anxious PhD student pacing about in the corridor looking for use of the room, so if you have to go, do not worry about it. Thank you for your evidence this morning.

Professor Barnard: Thank you.

Professor Lazowski: I wish to add to what Professor Barnard has said. She has outlined the main reason why we should have a withdrawal agreement—a comprehensive agreement dealing with the terms of withdrawal and future relations in one go. One of the conditions for the United Kingdom, and also, I believe, for other member states, will be to have free movement of persons and their acquired rights regulated properly in that agreement, so that there are no such problems following withdrawal.

Of course, we have practice to rely on. As part of the European Economic Area agreement, the EEA countries are bound by directive 2004/38/EC. We have a free movement of persons agreement with Switzerland, which is in deep trouble, for different reasons, and which relies on old legislation—not directive 2004/38/EC. At least there is something to rely on there.

I fully share the points that Dr Lock made about the franchise. I will add one thing. An English judgment was mentioned, and I will add two judgments of the Court of Justice of the EU that deal with EU citizenship under article 21 of the Treaty on the Functioning of the European Union. This is far fetched, but they could be used mutatis mutandis.

There were two judgments in similar cases. One was Dutch, and there was also a Polish case. EU citizens exercised their fundamental rights to move and reside in another country and, for that reason, they were deprived of their rights to receive special benefits for victims of war in the Netherlands and Poland. The Court of Justice said that they were basically being punished for using their fundamental right to move and reside freely. Therefore, the domestic provisions, within domestic competence rather than EU competence, were in breach of article 21 of the TFEU. It would amount to legal acrobatics to apply those judgments to the franchise issue, but there is certainly something to rely on there.

Returning to the matter of EU citizens living in the United Kingdom, as the committee is probably aware, quite a number of them tried to become British citizens in order to have the right to reside in the United Kingdom and the right to vote.

I draw your attention to a statutory instrument, which was approved at the end of October with a very short vacatio legis, that requires EU citizens to present a permanent residence card before they apply for naturalisation. EU citizens do not need those cards, which are only declaratory—they confirm the rights that they have. The end result is that, if the referendum is in mid-2016, those EU citizens will not be able to vote as they will not have British citizenship. The usual turnaround of the Home Office is about six to seven months for getting permanent residence cards and then six to seven months to go through the naturalisation process.

Sir David Edward: I have a point to make about the potential argument on discrimination. The reason for giving Irish citizens the right to vote is the long-standing carryover of the relationships between Britain and Ireland. The citizens of Cyprus and Malta are given a right to vote because of a continuation of the Commonwealth right to vote.

I am not sure that the Court of Justice would be prepared to say that, because a country gives the right to vote to those people for long-standing historical reasons, that constitutes discrimination against the rest. My hunch is that that argument would not succeed. I think that the Court of Justice would be very reluctant to get involved in the details of national electoral law in that way, because many member states have special provisions in their electoral law as a result of history.

Roderick Campbell: I want to go back to some of the comments that have been made about the impact on Scotland, particularly with regard to the situation in which David Cameron comes back with a renegotiation on the "ever closer union" point that moves things in the direction of a Danish-style agreement. Would that require a legislative consent motion from this Parliament? I note that in his submission Dr Mac Amhlaigh talks about change to the objects of the EU, and I wonder what Sir David thinks about that argument.

Sir David Edward: If David Cameron came back with a declaration of heads of state and Government that was couched in terms that made it capable of being registered with the United Nations as an international agreement, I cannot see that it would require a legislative consent motion or indeed the consent of any national Parliament. It is simply a declaration of heads of state and Government.

The Convener: Dr Mac Amhlaigh, do you want to come back on that, but with the proviso that you say something about what David Cameron might mean by

"the role of national parliaments"?

Dr Mac Amhlaigh: Taking the first question first, the argument might be a bit of a speculative one, but when I wrote the submission I was trying to explore all the possible angles. It would depend

on how you understand the power that I refer to as having

"regard to the objects of the EU"

when implementing EU law and whether that can be considered as just an obligation or it actually empowers ministers in a certain way. If it is a power, it could be argued that a change to those objects reduced the power of ministers and would therefore require an LCM. In that case, we would also need to argue over whether the "ever closer union" is what is meant by "the objects of the EU". That is why it is all so speculative. Can the ideal of an "ever closer union" be brought under that rubric in the Scotland Act 1998? There are a number of counter-arguments to that position that I understand, but it is certainly something that we need to think about. If nothing else, it highlights the complexity of the Scottish situation with regard to this question.

The role of Parliaments is not so much my expertise. I can only reiterate the point made in Sionaidh Douglas-Scott's excellent briefing paper, which talks about the procedures that are already there and the fact that the EU is not going to be held hostage by a coalition of Parliaments saying, "We object to this and we are going to try and stop it." I do not think that that would work.

Roderick Campbell: If we assume that there will be nothing on the table with regard to migrant access to benefits or welfare, is there any likely role for an LCM for this Parliament?

The Convener: Would you know that, Michael?

Michael Clancy: Off the top of my head, I would say not. It would depend on what the agreements actually said.

The Convener: Perhaps it is a question that we should seek more evidence on.

Sir David Edward: With regard to David Cameron's letter to Donald Tusk, we have to distinguish between the issue of "ever closer union" and what has been described as giving a "red card" to national Parliaments.

In the protocol dealing with what has been called the yellow card on subsidiarity, there is provision—it is not clear whether it is an obligation—for national Parliaments, when considering using the yellow card procedure, to consult regional Parliaments that have legislative powers. I would say that, if there is a red card, there would a fortiori be an obligation to consult and to have perhaps not an LCM but some kind of consent from the Scottish Parliament and the Welsh and Northern Ireland Assemblies.

You have to remember that in some member states, the Executive does not control the Parliament; the Parliament is a totally separate institution. The British argument about the red card overlooks the possibility that the Government of the member state, in Council, could agree to something and the totally separate institution of the Parliament could say that it did not agree with that. Although it looks like a perfectly simple development of the yellow card procedure, the red card procedure has the most appalling implications, not particularly for us, but for other member states where the Government could find itself completely stymied by its own Parliament.

Jamie McGrigor: I have two questions, one on rights and one on derogations.

On rights, Professor Douglas-Scott says:

"These rights and obligations exist between member states, but also with regard to the nationals and companies of those states. The European Court of Justice (ECJ) stated as long ago as 1963 in the van Gend en Loos case that such rights are part of individuals' 'legal heritage'."

Which, if any, acquired rights would be retained under EU law, and how would that affect individual citizens?

Sir David Edward: I see that you are looking at me, Mr McGrigor.

Jamie McGrigor: I am. I thought that you might enjoy that question.

Sir David Edward: The answer is that what they are talking about in that judgment is rights that derive directly from the treaty, or what is called direct effect of treaty provisions. Rights that are derived directly from the treaty and do not depend on any EU or national legislation—for example, many aspects of the right of free movement—are justiciable before the courts, and no amount of UK legislation or repealed UK legislation can deprive people of them. Withdrawal means not only having to find a way of dealing with EU legislation but finding a way of extracting the UK and its nationals and the nationals of all the other member states, people, companies and institutions such as Iberdrola that are in both Scotland and Britain. They all have rights and you have to find some way of disconnecting them.

Jamie McGrigor: Could you specify any of those rights?

Sir David Edward: They began with the right not to have duties increased; in other words, not being subject to discriminatory taxation is a right derived directly from the treaty. Other such rights include the rights to free movement of goods, many aspects of the free movement of persons and services and the right to set up an office or company.

We must remember that British company law is easier to comply with than the company law of some other member states. There are examples of people in other member states incorporating

themselves as British companies, and they, too, are affected, as are certain—though not many—aspects of the free movement of capital.

11:00

Jamie McGrigor: My next question is more general. You mentioned derogation. The fishing industry, for example, has survived since the start of the EU on derogations. Every 10 or 20 years, the rules have to be re-established, but they allow for relative stability and subsidiarity in the North Sea and are based on derogations. Why can we not have derogations, rather than treaty change, to achieve the things that the Prime Minister asks for? That might be a naive question.

Sir David Edward: Not at all. The common fisheries policy is established by EU legislation. Certain aspects, such as the right of nationals of other EU states to buy Britain-registered fishing boats and therefore get in on the quota, are matters partly of direct effect and partly of legislation. The one thing that there is a serious problem about with derogation is denying EU nationals who are exercising their right of free movement to come and work in the United Kingdom the benefits that are given to British nationals in the same situation, because that is direct discrimination.

Jamie McGrigor: In the same way, Spanish vessels are not allowed into the North Sea in lots of cases.

Sir David Edward: But that is part of the negotiated system of fisheries, within the scope of the treaty.

Jamie McGrigor: I am making the point that the treaty refers to equal access to a common resource. The fishing industry works on a derogation from that.

Sir David Edward: That is not the same. The rules on fisheries are laid down in legislation. You are comparing apples and oranges, because different aspects of EU law are involved. Other witnesses can give you much more detail than I can, but we are not talking about the same thing.

Professor Lazowski: This is a question of the hierarchy of sources. In secondary legislation, it is not possible to derogate from a non-discrimination clause to such an extent. As Professor Barnard said, such a change would have to be made through a revision of article 45 of the Treaty on the Functioning of the European Union. Fisheries policy is largely regulated in regulations, which are acts adopted by the Council and the Parliament, so it is easier to have such opt-outs or derogations—whatever we call them—in that area.

I return to your earlier question about rights. We need to distinguish clearly between the rights of British citizens in the UK when the UK leaves and the rights of British citizens in EU member states when the UK leaves. The latter will largely depend on what is provided for in the withdrawal agreement. This goes back to one of the first things that I said. The withdrawal agreement will have to regulate comprehensively the terms of withdrawal and future relations. For instance, if the withdrawal agreement provides for the application of free-movement-of-persons rules and secondary legislation to UK citizens in the EU, they will not be as affected by withdrawal.

On the rights of UK citizens in the UK, the position will vary depending on the type of legal act and the particular right. For instance, if we repeal the European Communities Act 1972, we are no longer bound by the consumer protection directives. There will be changes, but UK citizens will still have some rights under the consumer protection legislation that gives effect to those directives. We will then have a legal transplant: a legal act based on an external source by which we are no longer bound.

The situation will be different with regulations. A good example is the regulation that I mentioned earlier, on compensation for denial of boarding, flight cancellations and delays. If a flight from Edinburgh to Paris is cancelled, the passengers are entitled under the regulation to compensation and the airline has an obligation to look after the passengers and provide them with a hotel, refreshments and so on. If the 1972 act is repealed and nothing is put in the place of the regulation, passengers will be deprived completely of those rights. I am pretty sure that Ryanair would be thrilled, but UK citizens would not be.

Dr Lock: I do not have much expertise in fishing, but on the rights issue, we could imagine a situation in which a German pensioner has moved to the Highlands and is living out his life there. At the moment, he can do that under the citizens' rights directive if he has sufficient resources to support himself and has health insurance.

If the UK leaves the EU on 1 January 2020 and there is no provision in the withdrawal agreement on how to deal with such people, the question will be whether he is allowed to stay as a matter of acquired rights—rights that he had once but would not have if he had moved after the UK's withdrawal. An argument could be made that he had such rights under EU law. I am not sure that international law provides for such comprehensive protection of those kinds of movement rights, although it provides for protection of property rights.

However, even if there was a right under EU law that was an acquired right, how would it be enforced after withdrawal if the UK no longer had access to the European Court of Justice? Let us

imagine that the person challenged a removal order from the UK Border Agency and went to the High Court for judicial review, where he said that he had an acquired right under EU law. Would the High Court have to respect that as a matter of UK law? If the 1972 act had been repealed, where would be the basis for the position? Would there be a basis at common law? There are lots of questions. It goes to show that, as Professor Lazowski has said, such points need to be dealt with in a withdrawal agreement.

The Convener: There are lots of questions and obviously lots of work for lawyers, too.

Dr Lock: Brilliant.

The Convener: Brilliant. I will give Dr Mac Amhlaigh the final word for the morning.

Dr Mac Amhlaigh: That is a big responsibility. The question about acquired rights is important. The British constitutional position is that there would be no direct effect of such international rights, because there is no general direct effect of international law rights in British courts. There is a lot of precedent with regard to other international agreements. They can have persuasive value, as can the dicta of international courts but—barring some law that allows this in transitional provisions—the argument certainly could not be made in court in the way that it could now with EU rights.

The fisheries question is really interesting. I do not know very much about that, but I am not sure that a derogation is what is at stake here. There is a framework in the treaties for a common fisheries policy, just as there is for the common agriculture policy. The CFP is renegotiated every so many years. I assume that you are referring to some agreement that has been reached that is cyclical and will be renegotiated and reagreed.

Jamie McGrigor: There seems to be flexibility in the treaty to allow different things.

Dr Mac Amhlaigh: In the sense that the CFP is a policy. The treaty says that there must be a CFP and stipulates general rules.

Jamie McGrigor: There is a policy; it is equal access to a common resource.

Dr Mac Amhlaigh: But there are parameters. Forms of discrimination would be precluded, for example, unless they were indirect discrimination and could be justified on legitimate grounds. If a sort of derogation, by analogy, was wanted in a broader sense, that would require a core treaty change that meant some opt-out or protocol. For fisheries, I do not think that there is an opt-out, because the basic constitutional norms of the treaty on non-discrimination and so on apply.

The Convener: We have quickly run out of our allotted time to do the subject justice this morning. Thank you so much for all your contributions, which have been extremely valuable, interesting and informative.

If, once you have left, you think that you should have said something else or given a piece of information, please do not hesitate to get in touch with the committee. We will continue the inquiry until dissolution or thereabouts, so we have a bit of time to think about the subject.

Thank you all for coming—we appreciate your time. I suspend the meeting briefly to allow the witnesses to leave.

11:10

Meeting suspended.

11:14

On resuming—

"Brussels Bulletin"

The Convener: Welcome back. We resume at agenda item 2, which is the "Brussels Bulletin". Do colleagues have any comments or questions on it or do they require clarifications?

Roderick Campbell: No.

Willie Coffey: No.

Jamie McGrigor: Not today.

The Convener: Will we ensure that the "Brussels Bulletin" goes to the relevant committees?

Members *indicated agreement.*

Refugee Crisis in the European Union

11:15

The Convener: Item 3 is on the refugee crisis in the European Union. We have a briefing paper and response letters from the relevant Government ministers and from Europe. Do members have any comments or questions on the responses?

Willie Coffey: I cannot say that I am particularly impressed with the response that we got from the European Union representative, whoever that is, on the rescue mission in the Mediterranean; it has a paragraph that is a bit waffly. As we know, the rescue mission is continuing, and it is good that an increasing number of member states' navies are assisting it.

At a round-table meeting, we expressed huge concern about how well co-ordinated the rescue effort is. I am a wee bit disappointed with the response from the EU about that co-ordination. However, I welcome the increase in the number of navies that seem to be participating in the mission in the Mediterranean.

The Convener: You point out a pertinent and topical issue in the letter. I know that there have been discussions in the past few days about having a type of coastguard service functioning as a rescue service, but I am concerned that that might be about putting up barriers rather than having a search-and-rescue service that supports people. That topic will be discussed at the European Council over the next few days. Willie Coffey is correct to highlight the issue, and we should ask for an update on it in light of the Council discussion in the next few days.

Adam Ingram: I was going to make a point about the notion of an EU border police or security operation that seems to have emerged over the past two or three days. We need to get some clarity about what is being proposed and how it relates to the issues that we raised with the EU.

The Convener: Yes—we can bring back a briefing to the committee on that. However, I am concerned about some of the language that has been used over the past few days—for example, it has been said that this is about prevention, borders and barriers. The issue is that people end up building up behind those barriers, and the question then is how we support that situation.

Adam Ingram: The refugee crisis is being conflated with security issues, particularly with regard to the Paris outrage. We need to tease out the separate elements.

The Convener: I agree. If there are no further comments, are members happy for us to chase up on the European Commission response?

Members *indicated agreement.*

The Convener: On the responses from the UK and Scottish Governments, should we ask for on-going updates?

Members *indicated agreement.*

The Convener: That concludes our business in public. Our next meeting will be in the new year. I wish you all a merry Christmas and a happy and peaceful new year.

11:18

Meeting continued in private until 11:26.

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