The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Thursday 4 February 2016

Session 4

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EUROPEAN AND EXTERNAL RELATIONS COMMITTEE
3rd Meeting 2016, 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:

Renita Bhaskar (European Commission)
Colin Brown (European Commission)
Paul Brown (Campaign for Housing and Social Welfare Law)
Michael Clancy (Law Society of Scotland)
Simon Di Rollo QC (Faculty of Advocates)
Dr Tobias Lock (University of Edinburgh)
Naomi McAuliffe (Amnesty International)
Professor David Mead (University of East Anglia)
Professor Alan Miller (Scottish Human Rights Commission)
Benjamin van Zeveren (European Commission)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

European and External Relations Committee

Thursday 4 February 2016

[The Convener opened the meeting at 09:09]

Decision on Taking Business in Private

The Convener (Christina McKelvie): Good morning, everyone, and welcome to the third meeting in 2016 of the European and External Relations Committee. I ask everyone to ensure that their mobile phones are switched to airplane mode.

We have received apologies from our colleague Jamie McGrigor.

I move swiftly to agenda item 1, which is a decision on taking business in private. Does the committee agree to take agenda item 5 in private?

Members *indicated agreement.*

Comprehensive Economic and Trade Agreement

09:09

The Convener: Agenda item 2 is a discussion on the European Union-Canada comprehensive economic and trade agreement. This is our first evidence session this morning that involves videoconferencing. Joining us from the European Commission directorate-general for trade are Renita Bhaskar, who is deputy head of unit, USA and Canada; Colin Brown, who is deputy head of unit, legal aspects of trade policy; and Benjamin van Zeveren, who is co-ordinator for bilateral trade relations with Canada.

Good morning, panel. It is good to have a videoconference with you. You will realise that there is a slight delay, so we will ensure that we build time into our questioning to allow for that delay and your response. We have had a wee bit of trouble with the equipment this morning, but I hope that that has now been resolved and we can continue. Can you let us know that you can hear us okay?

Renita Bhaskar (European Commission): Yes. We can hear you perfectly.

The Convener: We will go straight to questions, as we have lost a bit of time and we have a very tight agenda. Our colleague Rod Campbell has a number of questions on CETA.

Roderick Campbell (North East Fife) (SNP): I will start with a rather important question. Is the agreement a mixed agreement—that is, one that contains elements of EU and member state competence—or is it not a mixed agreement? What is your view?

Renita Bhaskar: Colin Brown will complement what I say, because it is clear that he can come in on that matter. He has a lot more overall experience of the agreement.

On where we are, we have concluded the agreement and are in the process of scrubbing its text. Once that is done, we will send the agreement as it stands for translation into all the official EU languages. At the end of that process, we will prepare a proposal for a Council decision. At that point in time—and during the legal scrubbing—the European Commission will take a view on whether the agreement qualifies as a mixed agreement or is an agreement that deals only with issues of EU competence.

Colin Brown (European Commission): That was very clear. I will add only that members may be aware that an opinion was requested from the European Court of Justice on competence for

trade matters in relation to the Singapore free trade agreement. We expect that opinion to be delivered during the course of this year—probably in the second part of the year. That will clarify further all the issues of EU competence and member state competence.

Roderick Campbell: Okay. We are talking about this year being the timescale for that decision on the Singapore agreement. Where are we with the legal scrubbing? Obviously, that has been on-going for some time. Is there a timetable for its likely completion?

Renita Bhaskar: As I said, we are not in the final stages, although we are in the last stages of legal scrubbing. After that, the translations will take some time. We expect to be ready with a proposal for a decision to go to the Council by summer this year. We should be ready in the early summer. At that point, we will give a very clear opinion on whether CETA qualifies as a mixed agreement.

Roderick Campbell: Okay. Does anybody else want to add to that, or is that the last word on that aspect?

Colin Brown: I think that that is the last word on it.

Renita Bhaskar: The timeline is early summer.

Roderick Campbell: Okay. We have a particular issue with investor-state dispute settlement clauses and events that have moved on, at least in relation to the transatlantic trade and investment partnership, since the terms of CETA were agreed. Can you outline where we are now with ISDS and investor courts, and how that affects CETA?

Colin Brown: I will try to respond to that question. The first thing that it is important to underline is that CETA, as negotiated, is already the most modern and most progressive agreement that deals with investment protection and investor dispute settlements. There is already full transparency with the agreement. There are already far-reaching provisions to deal with potential conflicts of interest—the system for the appointment of judges is very different from the existing system and was designed to avoid concerns around conflicts of interest. That was all negotiated before the European Union decided to further develop its investment policy and an investor court system.

09:15

As you were hinting, Mr Campbell, we significantly updated the approach in the context of TTIP. We are currently talking to the Canadians to see to what extent the EU's TTIP proposal can be brought into CETA. Those discussions are still on-going. They have to be carefully calibrated because the rest of CETA brings a huge number of benefits to the EU economy. We need to be careful not to get into a situation in which we re-open other parts of the agreement. Those discussions with the Canadians are on-going, but we do not have a clear timeline around when we will be able to make their results public.

Roderick Campbell: I appreciate the limitations of your mandate, which, effectively, comes from the 28 member states. However, the terms of ISDS do not include an appellate mechanism. What discussions are taking place at a member state level on the ISDS issue, and why would you want to have what I might describe as an inferior mechanism to that which is currently being proposed in relation to TTIP?

Colin Brown: You are right that CETA, as initially drafted, does not have an appellant mechanism. The EU and the Commission have been pushing for that since 2010. Frankly, we had limited support from the member states when we started on this project. The original CETA text reflects that, in the sense that it has a clause whereby the EU and Canada can consider setting up an appellant mechanism, but it does not specifically provide for it.

As you will have seen, in the TTIP text, the EU goes further, and has put in place an appellant mechanism. You might also have seen that we have just released the text of the Vietnam free trade agreement, which is the first agreement that has the full new system, and it includes an appellant mechanism. Our policy, which is accepted by the member states, is to include an appellant mechanism in our bilateral agreements. It is among the issues that we are discussing currently with Canada. It is still too early to say where we will come out on that particular issue, but one of the issues that we are examining is whether we can upgrade the clause that talks about establishing an appellant mechanism so that we can go further.

Roderick Campbell: I have read comments that suggest that the United States is not entirely happy with the proposals for an investor court. Quite what the outcome might be of those discussions in relation to TTIP is as yet uncertain. Can you give us any further information about the Canadian attitude to the general idea of an investor court? To what extent do you believe that the Canadians will be happy to incorporate an appellant mechanism, at the very least, in ISDS?

Renita Bhaskar: As Colin Brown has just said, discussions are on-going. The Canadians have seen the text of the proposal that we have presented in the TTIP negotiations, so they are aware of how far we want to go and what the EU's new approach is.

We are in the process of going through each provision to see how adjustments can be made within the scope of the legal review without upsetting the entire balance of the full agreement, including the market access dimension. The message about the importance of trying to go as far as possible in upgrading the already reformed investment provisions in CETA has been made very clearly from a political standpoint. Commissioner Malmström has discussed the matter with her new counterpart, minister Freeland. Commissioner Malmström has explained to her that the EU's new approach is—[*Interruption*.]

Roderick Campbell: Can you hear me?

Renita Bhaskar: Hello.

Roderick Campbell: You are able to hear us.

Renita Bhaskar: Yes. Can you hear us?

Roderick Campbell: I can hear you but I cannot see you.

Renita Bhaskar: You have lost the video.

Roderick Campbell: Yes.

The Convener: We still have audio, so we can still hear you. We will try to deal with the problem with the video link, but we can continue with questions as we can still hear you.

Roderick Campbell: Okay. I will carry on.

Renita Bhaskar: Shall we carry on?

Roderick Campbell: Yes.

Renita Bhaskar: As I was saying, at a political level, the message has been explained very clearly to the Canadians. The new Canadian Government is aware of the political importance of our request and that new guidance has been given at a technical level. It is now up to the negotiators—the experts—to see how far we can go in making adjustments. We will know the answer to that question very shortly, but we do not have a precise timeline that we can share with you at this stage. I ask Colin Brown to give some details.

Colin Brown: Among our partners, Canada is very open to changes and to reform of ISDS in general. As I said, the CETA agreement—even before we started to look at it again—was already the most advanced form of ISDS that has been negotiated. In general terms, because Canada has a lot of experience of dealing with investment cases, it is very much open to looking at potential reform. We think that we are on fertile ground in that sense, but we are speaking in the context of a negotiation and we are at a late and delicate stage in that negotiation.

Roderick Campbell: I move on to the impact that ISDS might have on the ability of member states to legislate in areas such as public services, environmental regulations and food standards. Can you comment on that?

Renita Bhaskar: We should maybe start with the text. At the beginning, in the preamble, there is a clear commitment from both sides in the text of the agreement that nothing in the agreement raises any obstacles to legitimate public policy objectives that either side may wish to pursue. There is a list of sectors, notably health services and the environment. From the beginning, the concern has been recognised on both sides, and both sides have affirmed their commitment in the preamble to the principle that I have outlined.

Beyond that, we would say that nothing in the free trade agreements that we negotiate—this applies to CETA and other on-going negotiations—prevents member states or Governments, at national or local level, from privatising or regulating a public service or from taking a decision to deliver public services or to change the delivery of a public service. For example, if a Government wanted to bring back into the public domain a public service that has been privatised, there is nothing in our trade agreements that would impede that.

We would deal with such things through the use of what is called a reservation. In the first instance, there is a broad reservation for public utilities, which, notably, means that it is possible for Governments, at either national or local level, to limit the delivery of public services to public monopolies, for example, or through the use of exclusive rights.

As I said, beyond that are specific carve-outs for areas such as health and social services or water supply—the EU maintains a full reservation on the delivery of those services. Any decision on them would not be impacted by commitments taken under the services chapter in the trade agreement. Colin Brown may want to comment further.

Colin Brown: I will be more specific on the question of investment in ISDS. To be 100 per cent clear, it is not possible for an investor to bring a case simply because a piece of regulation or an action by a Government might have an impact on the company's profits. It is important to note that that is not enough to start an ISDS case. In order to bring a case, and in order for that case to be successful, an investor must prove that they have been discriminated against in relation to foreign or domestic investors, that they have been expropriated without compensation, or without adequate compensation—you will find such protection in the European convention on human rights, for example, or, very often, in domestic

law—or that they have been treated unfairly or inequitably.

That last ground has, historically, been left open in the drafting of the treaties. In that regard, CETA is again progressive, because it clarifies what actions fall foul of that provision. Actions that might trigger a case and damages under ISDS include acting in a manifestly arbitrary manner, targeted discrimination and a denial of justice. We are strongly of the view that any regulation or legislation—providing that it is done on a non-discriminatory basis—would survive challenge under ISDS. We also think that the procedures that we have put in place are such that they disincentivise investors from bringing a case simply to try to put pressure on a Government. They make it clear, for example, that if an investor brings a case that is unsuccessful, they must bear all the costs and all the charges that a Government might incur in defending the case.

To further elaborate in legal terms, the answer to your question is that the modern, clear system of investment protection that we have in CETA is on the table for TTIP, and it responds to any concern that there might be an interference in the right to regulate.

09:30

Renita Bhaskar: I think that the question was broader and went beyond public services; it was about the overall right to regulate. The same principle applies to food products and other goods that we might import under CETA or which benefit from preferential treatment. Nothing in CETA or in other our trade agreements in any way reduces, amends or eliminates certain standards that we have. The imports from Canada have to meet all the rules and regulations that are in place, whether they are technical, relate to food safety or deal with issues such as genetically modified organisms. There is a broader perspective that goes beyond just public services.

Roderick Campbell: I will touch on some special positions, particularly that of Scottish Water. There is an exemption that deals with drinking water, which is a public service, but can you comment on the position of waste water?

Renita Bhaskar: I mentioned that there are specific reservations at EU level; you mentioned the one on water supply, and I raised the point that there are others for social services and health services. However, I also mentioned the very broad reservation that relates to public utilities, and we believe that the issue of waste water would be covered by that. That reservation includes all services with the exception of, I think, computer services and telecommunications, so waste water clearly falls under that reservation. There is scope for Governments to have reservations under that category.

Roderick Campbell: What about the position of former public services? For example, what would be the position if it was decided to bring privatised postal services back into public hands?

Renita Bhaskar: Again, the overall principle would apply because a postal service could be characterised as a public monopoly. I reiterate the initial statement that we made: Governments can decide who delivers public services and can change who does so. If a Government decides to bring back into the public domain or renationalise a public service that was previously privatised, the Government has the full rights and freedom to do so.

Roderick Campbell: Okay. I think that in civic society, not only in Scotland and the United Kingdom but elsewhere in Europe, there are still concerns that the impact of ISDS in TTIP and, presumably, in CETA could lead to a regulatory chill effect. What is your comment on that?

Colin Brown: I will respond to that. It probably goes back to what I was saying previously in that we have been conscious in negotiating CETA and in developing the approach on TTIP of the concerns that have arisen about the current system as regards regulatory chill.

As I think you are aware, there are already 3,000 agreements of this nature in existence, and the UK is party to just under 100 of them. We have looked at the existing system and have made a number of changes in CETA and TTIP that are designed precisely to deal with the issue of regulatory chill—to make sure that there is no risk of regulatory chill coming via those agreements.

That is done to a large extent through the clarifications of the standards, which I mentioned before. As I said, it is only expropriation, unfair or inequitable treatment, or discrimination in two different forms that can form the basis for an ISDS claim. By clarifying in detail the standards for how those rules will apply, we believe that we have removed the risk of any challenge that could have a regulatory chill effect.

In addition, we believe that, through our work on the creation of the court system and the improved procedures and provisions to ensure that the losing party pays all of the Government's costs, we will disincentivise claims that are not solid or well founded. We will discourage claims that have as their objective the aim of putting pressure on the Government or Parliament to legislate in a particular manner. We believe that the collective system that was put in place will be effective in dealing with any risk of regulatory chill.

Anne McTaggart (Glasgow) (Lab): Good morning. I will move on to the economic benefits of CETA. The Commission suggested in evidence that the agreement is expected to increase trade in goods and services between the EU and Canada by a quarter. The UK Government has suggested that the agreement will benefit the UK economy and businesses by more than £1.3 billion a year.

Are the panel members still there?

Renita Bhaskar: The sound is very faint—we heard the point about the overall benefits for the EU and then we lost your voice.

Anne McTaggart: Can I hear your reply on that point?

Renita Bhaskar: I am sorry—we did not hear the question. Can you repeat the second part of the question?

Anne McTaggart: I am asking about the economic benefits that would be realised from CETA.

Renita Bhaskar: At this point in time, I can give you an overall picture and some qualitative assessments of where the UK and Scotland could benefit economically from CETA. We do not have a breakdown by member state of the precise numbers, but I will start with the classical part of the trade agreement.

CETA brings new and improved market access for EU goods and services suppliers. Let us start with the tariff lines and the duties. CETA is an ambitious agreement that goes well beyond the past work that we have done—[*Interruption*.]

The Convener: We can still hear you.

Renita Bhaskar: Shall I continue? Okay. We have the images now too.

We have agreed that 100 per cent of the tariff lines for industrial products will be fully eliminated. Another important part is that a little over 99 per cent of duties will be eliminated for entry into ports. There will be liberalisation on agricultural goods and processed goods, which is also significant, as more than 93 per cent of tariff duties are being liberalised in that area. Given Scotland's export profile, liberalisation in the area of processed foods could be a particular area of interest as it includes processed drink, notably Scotch whisky.

Another important area in which we have made significant progress that will bring benefits for EU producers is the protection of geographical indication. In CETA we have achieved extensive protection for a long list of EU agricultural products, and Scotch whisky is part of that. This is the first time that we have achieved such a high degree of protection: the highest that Canada can offer for a developed country. The agreement sets down a very important template in that regard.

Beyond the classical part of the agreement concerning goods, we have achieved important market access in the area of services. One example is maritime services. We have also established in CETA a framework for mutual recognition of professional qualifications, which allows professional organisations and members in the EU and in Canada to negotiate with their counterparts for the recognition of professional qualifications. We know that lack of such recognition is an obstacle to the mobility of professionals such as architects, accountants and engineers.

CETA also includes provision for easier mobility for intracorporate transfers and allows companies to bring in their professionals in a facilitated manner. It will be easier for EU professionals to travel to Canada and vice versa, which is another advantage in terms of economic benefit.

On public procurement, which represents roughly 7 per cent of Canadian gross domestic product, we have achieved important progress in CETA. Canada has offered us market access to public procurement contracts, which has not previously been offered to any other country in any other such agreement. We have achieved that new market access not only at national level but at provincial level. Canada has also made commitments on transparency. As you will recognise, it is very important to know about public procurement contracts that are available for bidding. In some respects, that allows us to create a level playing field, given that the EU market is very open.

Beyond the market access dimensions and the classical elements, we recognise that a lot of our trade with Canada is already established. Some of the tariffs are at peak levels, but most of them are quite low, so we have worked on non-profit-distributing models and established a separate protocol on conformity assessment, which allows certification agencies on either side to create and facilitate a path by which certification bodies can certify for goods being exported to Canada to avoid the duplication and higher costs of double testing and so on.

Benjamin van Zeveren may want to add more detail on other aspects. Those are just some examples of the things that are included in the agreement.

Benjamin van Zeveren (European Commission): Those are the main benefits. There are plenty more, but I do not want to dominate the conversation. Are there specific fields in which you are more interested?

Anne McTaggart: No, that is fine—it was great to get the overall picture that you have given.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): I wonder whether you can clarify one point for me, and possibly for the other 500 million people in the European Union. Does the agreement include access to member state health services, or does it not?

Renita Bhaskar: I assume that you refer to publicly funded health services.

Willie Coffey: Yes.

09:45

Renita Bhaskar: Starting with the preamble to the agreement, both parties have made a clear commitment that nothing in the agreement will impede or act as an obstacle to legitimate public policy pursuits, which include health services. Going beyond that, there are provisions in the services section of the agreement.

CETA is like any other trade agreement that the EU has negotiated or is in the process of negotiating. There is nothing in those trade agreements that forces member states at national or local level to open public health services to competition from private providers. They are not forced to outsource those services to private providers. Further, they can decide who delivers such services and decide about changes to their delivery. In other words, if a member state has decided to privatise certain services and, at a later date, wishes to bring them back into the public domain—renationalise them—it is free to do so. Nothing in CETA or any other trade agreement that we have negotiated would impede that approach.

We achieve that technically via reservations in trade agreements or in the schedules of the services. I highlight the fact that there is a very broad reservation on public utilities that enables member states to continue services that they deem public utilities. They have every possibility to protect them. They reserve the right to protect them and do not need to make commitments on them.

Beside that broad reservation on public utilities, there are specific reservations at EU level on health services. The EU has taken a broad reservation on health services that applies to all member states. There is also a third level of reservation that each member state can choose to take. I understand that the UK has taken particular reservations that relate to health services, notably ambulance services and residential health services.

There are three layers of reservation, which try to ensure the principles that I mentioned at the outset: that nothing in the trade agreement forces a Government to open public health services to competition, privatise them or outsource them, and that nothing impedes its decision to bring back into the public domain a service that has been privatised.

Willie Coffey: Okay. I think that that was a no. I must ask you to clarify why, if access to national health service services is not included in the principles of the agreement, it needs to be excluded in a set of reservation lists.

Renita Bhaskar: I would turn to the lawyers for the answer because, at the end of the day, CETA is a legal treaty, so what we do needs to be defined in legal language and needs to cover all aspects of the issues to ensure that the protection is complete. Perhaps Colin Brown might elaborate on why trade agreements require such complicated sets of reservations.

Colin Brown: In some senses, the answer is relatively simple. This part of CETA looks like the World Trade Organization agreement of trade and services. CETA is modelled on the 1994-95 WTO agreement, part of which deals with access to services. All services, in potential terms at least, are covered by those agreements. Then exemptions are built in—they are carved out through different layers of the agreement—to ensure that, for example, public health services are not covered, and that nobody can use the agreement to access to them.

I do not know whether that answers your question. The point is that we come from the very general scope of the agreements, from which the exemptions and reservations can be carved out.

Willie Coffey: Actually, I do not think that answers my question. I will try again in another way. Has the United Kingdom not specified its list of reservations or exclusions in relation to access to its health service?

Renita Bhaskar: There is an EU-wide reservation on health services, which applies to all member states. I can refer you to page 1633 of the text, where there is a list of the United Kingdom reservations. There is a reservation on health services in the UK. It goes into further detail and you can find the sub-sectors of the health services there. Once again, there is a reservation on health services at the UK level.

Willie Coffey: After this meeting, I will immediately get the document and turn to page one thousand six hundred and whatever it was.

I am still unclear on the point. If an agreement specifically excludes access to a public service such as the NHS, why does it need to be further defined by an exclusion list? In my view, those two points are contradictory, but I think that I will have

to leave it there and hope and pray that you are able to clarify this matter for the public in some other forum.

Renita Bhaskar: Bound is not the right word but, as Colin Brown said, there is a certain format of trade agreement, and you want to ensure that all aspects of services that you want to protect—such as health services—are covered.

The United Kingdom has a general reservation on health services, and then goes on to define the sub-sectors. You want to be sure that everything that you want to protect is completely protected. That is why the agreement includes

"Health-related professional services, including medical and dental services as well as services by psychologists; midwives services; services by nurses, physiotherapists and paramedical personnel; retail sales of pharmaceuticals and of medical and orthopaedical goods, and other services supplied by pharmacists".

There is then an industry classification of those services.

I am sorry to be so technical, but I just want to tell you that there is a very clear reservation on the part of the UK on health services, which is over and above the EU-wide reservation on health services.

Willie Coffey: Okay—but if, for example, some aspect of the health service is not included in the reservation list because somebody forgot about it, access to that service will be granted and available within the health service.

Renita Bhaskar: I will come back to the broad reservation that I mentioned. At EU level, there is a reservation that covers publicly-funded healthcare and social services, including hospitals, ambulances, residential health facilities and so on. There is therefore a broad reservation at EU level that covers health services. Over and above that, as I have said, there is a broad reservation of public utilities, which covers all services, with the exceptions of computer and telecommunication services. The possibilities for Governments to reserve policy space are extremely wide in our trade agreement.

Roderick Campbell: Convener, can I just ask—

The Convener: We are quickly running out of time and we have another videolink to set up, for which we need some time. Adam Ingram indicated a while ago that he wanted to speak. Do you still want to come in, Adam, or have your questions been covered?

Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP): They have not been covered.

The Convener: Well, we have literally about two minutes left.

Adam Ingram: Okay. I will try to make my questions brief.

What impact will CETA have on regulatory standards in the EU? Will there be a levelling up or a levelling down in areas such as food standards or chemicals?

Renita Bhaskar: CETA does not allow any of the standards, regulations, import conditions, requirements for food safety or technical standards to be changed or amended. The legislative framework for those at EU level remains unchanged, and the same applies for Canada.

Within our legislative frameworks, we are talking about what is possible to do in order to facilitate, for example, the flow of goods and services. In that respect, we have the CETA regulatory co-operation forum. It is important to say that the regulatory forum is a voluntary mechanism that allows regulators the opportunity to exchange best practice and information on regulatory development and that the discussions that take place are in no way binding. Neither party has to go home and make changes in its regulatory system. That is even the case for food safety.

If, as a result of discussions in the forum, the parties agreed to go down a certain path and consider making changes to the legislative framework, those changes would have to go through whatever is the prescribed domestic path for amending legislation or making new legislation. Nothing in CETA changes the food safety standards, whether on GMOs, hormones or any other food safety issue—the standards do not change. CETA provides a forum for exchange for regulators.

Adam Ingram: There are also emerging areas for regulation. In particular, we have issues around unconventional oil and gas extraction, which is otherwise known as fracking. Will CETA have any impact on regulation forming in that particular area?

Renita Bhaskar: There are a few things that I would like to highlight.

Overall, nothing in CETA has an impact on the policies that either party might wish to pursue in that respect. In the "Trade and Environment" chapter, there is specific provision on the parties' right to regulate. Nothing in CETA should impede or set up obstacles should either party wish to make changes to their regulation or have certain environment protection standards. Over and above that, the chapter includes references to the respect of key multilateral environmental agreements, and it allows each party to establish its own levels of environment protection and to regulate in the area.

On fracking, I would like to say clearly that the EU's fuel quality directive has not been part of the CETA negotiations and is not affected in any way by CETA. There is complete freedom at EU level to regulate on the issue of shale gas. The regulatory aspects are governed by the EU's fuel quality directive and the decisions are then for each member state. Nothing in CETA has any impact on it.

Adam Ingram: That is clear.

The Convener: We are running over time and we have another panel to come in. We have had many questions from members of the public and we have attempted to ask some of them. We might use some of them to ask further questions of the Commission should we need clarity.

I thank all our witnesses for being with us, helping us to understand, taking our questions and answering in some detail. Thank you so much for taking part in our meeting and for helping to inform our procedures and ideas.

I suspend the meeting for about 10 minutes to allow the room to be set up for the next panel.

10:01

Meeting suspended.

10:09

On resuming—

Human Rights

The Convener: Welcome back to this meeting of the European and External Relations Committee. Because of the earlier evidence sessions, we are running a wee bit over time.

As you can see, we are taking a round-table approach for agenda item 3, which addresses our continued interest in any proposed changes to the Human Rights Act 1998. I ask those around the table to quickly introduce themselves—I am the committee convener.

Hanzala Malik (Glasgow) (Lab): I am the deputy convener.

Dr Tobias Lock (University of Edinburgh): I am from the University of Edinburgh law school.

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

Simon Di Rollo QC (Faculty of Advocates): I am from the Faculty of Advocates.

Roderick Campbell: I am an MSP for North East Fife and I refer to my register of interests, which declares that I am a member of the Faculty of Advocates.

Professor Alan Miller (Scottish Human Rights Commission): I am the outgoing chair of the Scottish Human Rights Commission.

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

Paul Brown (Campaign for Housing and Social Welfare Law): I am from the Legal Services Agency, but I am here representing the campaign for housing and social welfare law.

Naomi McAuliffe (Amnesty International): I am from Amnesty International.

Anne McTaggart: I am an MSP for Glasgow.

Michael Clancy (Law Society of Scotland): Good morning. I am from the Law Society of Scotland.

The Convener: Professor David Mead joins us for this evidence session via a very strong videolink—nice to have you here, Professor Mead.

The etiquette for the round-table discussion is that you just catch my eye and then I will let you in. If you have things to say, we are happy to hear them. Professor Mead, if you give me just a wee wave or some sort of sign that you want to come in and say something, then I will make sure that you get your time to say what you need to say.

The committee has been doing a bit of work over the past few months on the proposal to repeal the Human Rights Act 1998 that now, after some evidence in the House of Lords the other

day, seems to be less of a proposal to repeal the act and more one to bring forward a British bill of rights—I think that Mr Gove described it as a "gloss". I am looking for some input from you on what your thoughts are for any consequences in Scotland from that proposal.

The committee is interested in some clear issues with regard to the function of the Scottish Parliament, given that human rights and the ECHR are embedded in how we do business. We are also interested in whether you think that a legislative consent motion would be required with regard to any UK proposal on human rights legislation. There are also the tensions between reserved and devolved areas, where we have devolved responsibility for maintaining and extending human rights. Those are the sorts of issues that we are working on.

Given that this might be Alan Miller's last official engagement as chair of the Scottish Human Rights Commission—I personally think that you have been a superb commissioner—I wonder whether he would like to kick off the discussion with some of his thoughts and feelings on the matters that I referred to. We can then have questions from members.

Professor Miller: Sure. Thank you, convener. I took part in an evidence session with the committee on human rights a few weeks ago, so I do not think that anything that I will say will be particularly surprising, because my view has not changed over the past few weeks.

The commission has published a paper, which it will renew once any consultation comes out, on the repeal of the Human Rights Act 1998 and its replacement by a British bill. The paper has a simple test: would those proposals take us forwards or backwards? Beneath that, we have set out tests, and objective criteria by which a judgment should be made. First, will what is proposed ensure that everyone has the same human rights and that we do not begin to get a hierarchy of human rights for different individuals? Will it reduce in any way the accountability of those in power? Will it improve the lives of people? Will it demonstrate international leadership? Those are objective tests that we would encourage the committee and others to take account of.

I think that Scotland has to ensure that its voice is heard during that debate and that the committee should explore issues such as the timing of the possible release of the consultation paper vis-à-vis the pre-election period. It is very important that Scotland's voice is heard, partly because Scotland should defend the act—I am confident that it will—but also because Scotland should not be restrained in its own onward journey in improving human rights protection in Scotland and, through Scotland's national action plan for human rights, exploring the public benefits of incorporating the wider range of United Nations human rights treaties on economic and social rights, and the rights of disabled persons, women, children, and so on.

In a sense there are two debates. There is the debate to maintain the status quo of the act, and Scotland should try to influence the rest of the UK to do that. However, at the same time, Scotland's onward journey to be more forward looking and outward looking should continue and I think that Scotland's national action plan is a vehicle for that. We very much welcomed the First Minister's commitments on 9 December to an innovation forum to explore the incorporation of UN treaties as part of Scotland's future journey and to hardwire Scotland's national action plan for human rights into the national performance framework for Scotland.

Those are pointers to where Scotland needs to go and what the debate should be about; it should not be restricted and have parameters imposed such that it is either the status quo or some form of regression in terms of human rights.

10:15

The Convener: Thank you very much. Professor Mead, obviously we in this room have a keen interest in the Human Rights Act 1998 and its impact on Scotland. Perhaps you have a more overarching UK view from East Anglia, which we would also be very interested in. Will you give us some of your thoughts on that?

Professor David Mead (University of East Anglia): Yes. I am certainly not qualified to speak about anything Scottish, but I have a couple of general points to make about the Human Rights Act 1998.

The act is largely misunderstood by the public and perhaps mischievously understood by politicians in respect of the way that it operates or the effect that it has had on great swathes of life. It seems to me that cases that involve criminals, terrorists and suchlike tend to make the headlines, but if we bear down—I cannot speak for Scotland; I am thinking about generally across the UK and specifically about England—there is the general day-to-day good that it has done for people in relation to social care and discrimination, even to the extent of protecting people who are not criminals, but are victims of crime. My evidence touches on a couple of cases and I would be happy to explore that issue a bit further if members thought that appropriate.

A whole host of areas of live have been made better for people—for want of a better phrase—with the act in place. I know that the Government's plans, even at the extreme, are not to lose it in its

entirety. I do not know what it would be replaced with. If there was any shadow of losing what we have so far, I would be very worried. I echo what Professor Miller said. If the act can be used as a base to expand and extend in certain areas, that would be for the better.

As I said, there is a misunderstanding about the way that the act operates and perhaps about the way that UK law interacts with Strasbourg law. It is fairly well documented that there is a general tendency—perhaps less among politicians, but certainly in the media and among some politicians—to lump the ECHR and the European Union together as being rather bad European things. From that starting point, we get a whole spread of misunderstandings about how Europe works and our relationship more generally with it. I think that that is behind whatever clamour there is to repeal the act: it has probably been led by that.

The Convener: Okay. Thank you very much.

I know that Amnesty International has raised particular issues. Does Naomi McAuliffe want to come in?

Naomi McAuliffe: I thank the committee again for the invite to expand on our written evidence. It is certainly timely for us to look at the issue, given the House of Lords committee meeting just the other day and our feeling that we will get the consultation paper quite soon.

Amnesty is very clear in its support for the Human Rights Act 1998 and that there should be no repeal of it. That position is based on our analysis and advocacy at Westminster. We simply are not looking at there being any progressive approach to human rights as a result of the repeal of the act or the institution of a new British bill of human rights. It would be great if those were the terms of the debate, but we simply do not think that that is on the cards.

We certainly welcome what looks like a roll-back from the Lord Chancellor, who is saying that there will be very minor changes and that it will simply be a different gloss. For that movement, we think that we can thank the organisations and institutions across the country that have campaigned on that in the past few years. Amnesty activists throughout the country have written to their representatives and signed petitions about this. With this campaign, we are trying not only to save the act from any attempts to roll back or lower human rights standards, but to address the toxic debate around human rights, particularly at Westminster, where there is misinformation about and misinterpretation of the act.

We also want people to realise that human rights apply to everyone; they are not just the preserve of terror suspects or prisoners. Those are the stories that make the headlines and get to the front pages but we are collecting a lot of case studies about the human rights act being used by ordinary people and the impact that such cases have had on ordinary people in Scotland and throughout the UK. We are keen to use this opportunity to progress the understanding of human rights and the Human Rights Act 1998 amongst the whole UK population.

One other main area of concern is not only the implications that any potential repeal will have—the potential disruption to the relationship between the UK and the Council of Europe and the European Court of Human Rights—but the ripple effect that the legislation and the debate that we are having at the moment is having throughout Europe and further afield. In our written submission, we referred to some of the international comments that are being made about the debate. It is impacting on those who are taking human rights cases to Strasbourg from other countries within the Council of Europe. It is quite important for this committee to consider the impact that the debate and the proposals are having further afield, throughout Europe—the impact on our external relations and on the international standing of Scotland and the whole of the UK.

Adam Ingram: You made a point about misinterpretation and misunderstanding of what the act is all about. Some of what we are hearing from Westminster in particular is that there has been a mission creep as regards human rights in European courts and the like. The argument is that the European courts are imposing on our own legal system and affecting judgments in our courts. Can you give us some counterarguments? Is there any evidence to support those statements about mission creep?

Professor Miller: I would be happy to try to answer that question. It is quite clear from the press and media campaign over the past few weeks on the armed forces issue and from Michael Gove's statement in the House of Lords earlier this week that doing something about mission creep and the armed forces is one of the justifications for the repeal of the act.

I will try to unpack that. The European Court of Human Rights has said that it needs to look at how life in society has developed since the court was established in the middle of the last century. The court cannot be a fossil; it has to relate to developments in the world and in the region.

The court is saying that where troops of any country, including the UK, are engaged in military action outwith their territory, not when they are in combat but when they have somebody in custody who is in effect being detained under the control of that state—the UK in this instance—the European convention on human rights should apply.

Why should it apply? So that if there are any credible allegations that a person who is in custody is being tortured or killed, there should be an investigation by the home state. Is that sacrilegious? Is that something that is completely beyond the pale?

The flip side of that decision by the European Court of Human Rights is that any soldier who is in combat—including any Scottish soldier or any soldier from anywhere in the UK in the armed forces—and who is given inadequate equipment for protecting his life and is therefore at an unnecessary risk of losing his life has the protection of the European convention on human rights.

There is an obligation and an accountability on the Ministry of Defence to ensure that, when it equips soldiers to go into combat, they are properly equipped and, as far as possible, their lives can be protected. That means that the victims in the UK—the families whose sons, brothers and fathers have been killed in combat unnecessarily as a result of the UK Ministry of Defence's negligence—have protection; they can demand an inquiry and measures can be taken to ensure that no one's life is lost unnecessarily.

It is not that difficult to dispel some of the mythology that is created. The armed forces is clearly a hot issue and I would welcome public debate on that to raise the level of understanding of the vitality of the convention in intervening in that area.

The Convener: Simon di Rollo, I think that the Faculty of Advocates has produced evidence, which perhaps backs up or gives a different insight into the issue.

Simon Di Rollo: I agree with Alan Miller. As far as the faculty is concerned, we see no justification for the proposition that the court is guilty of mission creep, if that is the question. All that the court has done since it was founded has been to develop the law, which is what you would expect it to do. The examples in our submission relate to the protection of homosexual relationships or children born out of wedlock. Those are examples where the court has perhaps developed the law of human rights beyond what might have been thought would have happened when it was founded. However, you would expect the court—indeed, any court—to keep up with modern society.

As far as the faculty is concerned, I am unable to point to any example, particularly one affecting Scotland, where one could say that the court has been guilty of mission creep.

Roderick Campbell: The other side of the coin is the concept of the margin of appreciation. Will Simon di Rollo—or any of the other witnesses—comment on how that concept has been developed in the European court?

The Convener: Tobias Lock, do you want to come in on that?

Dr Lock: I will try, because the issues are related. The allegation of mission creep comes from interpretations of the convention through a modern understanding. For example, on children born out of wedlock, perhaps in the 1950s it would have been perfectly acceptable to disadvantage them compared with children who were born to married parents. That is no longer acceptable in society. That is not to say that the European Court of Human Rights does not pass judgments that are sometimes wrong or that we might not agree with, but every court does that. As a highest court, it is in the very nature of things that it must decide difficult cases. The cases must be decided, one way or another, and somebody will always disagree with the outcome.

The European Court of Human Rights, through its methodology, tries to justify its interpretation. It does not just say, "We here in Strasbourg think that things have changed and we have to give certain rights to groups that wouldn't have had rights before." The court looks at what it calls the consensus method—it looks at how the law in the 47 countries that make up the Council of Europe has evolved, including internationally, and at how society on the ground has moved on. It might say, "We can see that there's a European consensus on this." For example, in Turkey, it was not allowed for Turkish women to keep their maiden name after getting married. Turkey was the only country in the Council of Europe that did not allow that right to women. The court said, "Look, guys, you have to move with the times. We can justifiably say this is a violation of article 8 of the right to family life." It could say that because everyone else has moved on in that sense.

The flip side to that is the margin of appreciation, where there is no such consensus and where European countries do not agree. A current example is same sex marriage. In Austria and other countries, cases have been brought to the European Court of Human Rights where same-sex couples have said that they are being denied same-sex marriage and that they want to be given that as part of their human rights. The court has said—and a lot of people have criticised it for doing so—that society has not moved on that far yet. In some parts of Europe that is true, but in other parts it is not true. Therefore, member states have a margin of appreciation, and they can still deny same-sex couples the right to get married and to have equal status to different-sex couples.

10:30

The Convener: Paul Brown will have another perspective on the issue.

Paul Brown: To go back to the question of the armed forces, it is important to bear it in mind that the European convention on human rights legal committee was chaired by Maxwell Fyfe, who was a major and one of the prosecutors in Nuremberg. It is not even conceivable that he would have contemplated British troops being able to torture or kill people under their control without there being recourse to law. I do not accept that there has been any mission creep, so we need to get that over.

That leads to a more general point, which is that there is a real need for public education. I do not think that people in Scotland fully appreciate that the debate about changing or abridging the Human Rights Act 1998 is a debate about changing Scotland's constitution. We have a written constitution in a way that England does not and there is a debate about changing it. People need to engage in that in a much more vital way.

It is important to bear in mind and tell people about the ways in which the act has been used very generally. For instance, public authorities are required, in the context of their duties, to act in a way that is compliant with human rights and, when they make decisions and weigh up factors in a proportionate way, to give reasons to people. What person in any context thinks that that is wrong? Everyone surely must agree that it is correct. That is a human rights principle. If we tell people about all those issues, they might be able to better appreciate the extensive change of culture that has resulted from the act, not just through the courts but in the way that organisations operate. That is important.

If you like, we have to become more populist. We lawyers have possibly been seen as the people who talk about human rights, but that is wrong—human rights are there for everybody, and we really need to propagandise about that.

The Convener: That is an important issue. I will go back to Professor Mead and then ask Michael Clancy to pick up on some of those points.

Professor Mead, in your written evidence, you describe something called the "worthy victim". Some of the evidence that we have had is about separating out the more alarmist and red-top-headline stuff from the reality of what the Human Rights Act 1998 does for ordinary people. In your analysis, you extend the argument that we are going down the route of the worthy victim. Will you give us your thoughts on that and on how we can halt going down that route of determining certain people as worthy victims?

Professor Mead: The term "worthy victims" is not mine; it is used in media studies to denote people who are portrayed so as to gain sympathy. The problem that I have tried to identify and set out in brief is that the people who are in the headline news, and thus the people whom the public think the Human Rights Act 1998 is about, tend not to be the people whom the act actually helps.

I will give examples from slightly different spheres. The case of Steven Neary is probably not well known to anybody. As a 21-year-old autistic man, he was taken away from his father, ostensibly for a few days to give him some respite, but that turned into a year's worth of being away from the home. His father used the right to liberty in article 5 to ensure that his son was brought back to the family home. Several of the witnesses have touched on the narrative around criminals and terrorists, but it is important that we take account of the fact that the Human Rights Act 1998 is as capable of being a victims charter as it is of being a criminals charter.

Last year, the Court of Appeal made what in my view was a monumental decision that established for the first time that, where the police fail to investigate allegations of crime and people then suffer from that crime, those people are entitled to compensation. The case involved the Metropolitan Police and John Worboys, who is usually known as the black cab rapist. Several of his victims were able to sue the Met. In a sense, that is an adjustment of the usual narrative about criminals.

We should take account of that more widely and, as has just been said, have public education on what the act does for people. That has started in the past year, with the act seemingly about to go. There are several campaigns, some of which have been led by Amnesty. It is about giving people an idea of what the act can do for them in their everyday lives. We need to point out that it is not something for nasty criminals or suspected terrorists but something that can help to redress the balance between the individual and the state and make the state more accountable. It can allow people to claim things that are there. Human rights are ours from the day we are born, but sometimes we need to claim them and go to court. Any adjustment of the narrative that we have talked about would be incredibly welcome.

The Convener: That leads on to the points that Paul Brown made about the understanding of the impact of the proposals on things such as a Scottish constitution. We obviously have a keen interest in how we legislate in this place, given that the ECHR and human rights are intrinsic to the Scotland Act 1998. That brings us on to that argument, which Michael Clancy has been talking about for a while now. Mr Clancy, how do we

understand the impact on the Scottish Parliament and the impact more generally on people's understanding of their rights?

Michael Clancy: The Law Society has for a long time been supportive of the Human Rights Act 1998 and human rights in general. Indeed, in our priorities for the upcoming Scottish elections, we are calling on politicians to protect human rights, support convention rights and ensure that we stay within the jurisdiction of the European court in Strasbourg. That sets the framework for how the Law Society approaches its work in the area.

The discussion has been interesting. Any of us could be accused of committing a crime today—it could happen. When I go back to the office, I could say, "Why wasn't I told about this?" and, in a fit of rage, punch one of my colleagues. I might then find myself taken into custody. The case of Salduz, which related to Turkey, had implications for Scotland in the case of Cadder. Very directly, something that happened at the other end of Europe, as Europe merges into Asia, can have an impact here in Glasgow or Edinburgh, or even in Cambuslang.

We need to recognise that we are all in this together and that rights are not some kind of theoretical jurisprudential discussion between people of eminence such as Tobias Lock and his colleagues, Simon Di Rollo and others. The issue is real and concrete and affects us all. I am sorry that Alan Miller is not in the room at the moment to hear this, but it was significant that he highlighted the two sides of the coin in respect of human rights in the armed forces. The MOD has paid significant sums of money to many hundreds of people because of defalcations in connection with their human rights while in contact with the armed forces. If there was not a case to be answered, the MOD would not have paid.

On the question of mission creep, the court can deal only with the cases that come before it. I have not seen any judges from the European Court of Human Rights wandering the Edinburgh streets and saying, "Do you have a problem with human rights? Why don't you come to Strasbourg?" That just does not happen. So how do we find the cases? We find them because human rights are being infringed by public authorities. In our paper, we discuss the question of what a public authority is, and we can go into that later. We can see that the need to have an effective remedy, another point that we raise in our paper, is extremely important.

You focused on the idea of education, convener. Paul Brown is quite right in that regard, and I know that the work that Naomi McAuliffe does with Amnesty and other organisations to promote education about human rights is significant. We all have a kind of responsibility for that. The confusion around and conflation between the European convention on human rights and the European Union is something that I have tried to deflate on numerous occasions in discussions with politicians, who make up one of the groups of people who are guilty of promoting that conflation, and also with members of the media. However, it suits some people to have confusion in this area, because they can then paint it all as a vast European conspiracy against the stout-hearted yeomen and yeowomen who live in this country. That is where I stand on that.

I do not know whether you want to go into constitutional issues at this moment—you might want to park that issue and come back to it later. However, I think that the issue is extremely important, especially at this point. The Lord Chancellor said that the paper will be coming out soon. I was told that it was coming out in spring but, as I was saying to Paul Brown, Naomi McAuliffe and Anne McTaggart earlier, spring goes right up to 21 June in this country. That means that we might have time to elaborate the arguments further.

The Convener: We expected it last autumn.

Michael Clancy: Events, dear lady, events.

Hanzala Malik: You referred to the armed forces and what happens in that regard. Do you have an opinion from the point of view of European human rights or so-called British human rights about the clandestine flights from Scotland carrying passengers to countries where we know that their human rights would have been infringed? How does that place us? Did we breach anyone's human rights? If so, who was responsible for that?

The Convener: Are you talking about the extraordinary rendition flights?

Hanzala Malik: Yes.

Michael Clancy: That is an issue that I have not prepared for this morning. However, off the top of my head, I can say that there is a general proposition that the courts have held to, which is that you cannot put someone into a position in which they might find their rights infringed. That applies not only in terms of membership of political groups; it can relate to religious affiliation, sexuality, gender and a number of other categories that we would recognise as protected characteristics under the Equality Act 2010. If someone is put into a particular situation by being returned to a war zone or even to a town where it is known that that person will be the subject of assaults or imprisonment because of who they are or what they believe, that would be an infringement of that person's rights. The difficulty is that we might not be in a position to know that extraordinary rendition has taken place, because it

is difficult to prove. There is a lot of case law on that. If you want, we can take that away, along with other views from around the table, and come back to you on it.

10:45

The Convener: Yes. That discussion has taken us slightly off topic this morning. Professor Mead, do you want to take us back to a point that was being discussed before we got to extraordinary rendition?

Professor Mead: I have point on the armed forces, which is an issue that we have touched on several times. It seems to be a small matter, but it is indicative of the whole problem.

The Human Rights Act 1998 is being blamed for the possible risk to British servicemen and servicewomen overseas. However, none of the cases that have been decided in the United Kingdom or before the European Court of Human Rights has involved claims against service personnel for deaths that they have caused—they have all been, as Professor Miller was saying, about the failure to investigate the death or torture, or the failure to supply proper equipment.

On the latter case, which was decided by the Supreme Court, what is usually forgotten is that there were two limbs to the challenge by the parents of the various personnel who were killed in the Snatch Land Rovers. The first was under article 2, in that there was a failure to take proper measures to keep them alive, and the second was a claim in ordinary negligence, which was also allowed to proceed. It was allowed to proceed because the law was changed in 1987, specifically to allow the MOD to be sued. Therefore, the issue is not solely about the Human Rights Act 1998 but is about the ordinary common law. There have not been any discussions, as far as I am aware, about seeking to change that position and render the armed forces immune from suit in negligence, which is as much a problem as the Human Rights Act 1998, which is being blamed for everything.

Roderick Campbell: I want to move on to a different theme. Whatever the proposals for a British bill of rights are, we still have the European charter of fundamental rights. What is the panel's view of the impact of that in the perception of rights generally, particularly in relation to Scotland?

Dr Lock: The charter of fundamental rights contains all the rights in the convention, as well as a good few more. The charter of fundamental rights is binding on the UK. Protocol 30 of the Lisbon treaty was perhaps sold to the public as being an update to the charter but, as far as civil and political rights are concerned, the European Court of Justice has decided that it does not mean that there is an opt-out, so Britain is bound by most parts of the charter.

However, the charter is of limited applicability within the member states because it is mainly designed to bind the European Union's institutions to human rights. The member states are bound by the charter only when they are implementing European Union law. That is a somewhat vague term and it is not entirely clear what the exact circumstances of implementation would be, so it is currently being determined by case law in the European Court of Justice. A clear example would be that, if a court in Scotland were to decide about claims under the working time directive or discrimination law, it would be acting within the scope of EU law because it would be applying those pieces of legislation—the same would be true for authorities.

In those cases where it applies, the charter is fairly strong. It does not make a huge difference in Scotland, because section 29 of the Scotland Act 1998 says that the Scottish Parliament must not legislate contrary to EU law, of which the charter is a part, so any legislation that conflicted with the charter would be ultra vires. Westminster legislation is immune to being struck down on human rights grounds under the Human Rights Act 1998, so the best that a claimant can get is a declaration of incompatibility. However, if you can base your claim on the charter as well as the Human Rights Act 1998, you are on to a winner, because European Union law is stronger and takes primacy over national law—including Westminster legislation—so it could force national courts to disapply, rather than to declare invalid, a particular provision in a concrete case. The charter cannot supplement the Human Rights Act 1998, because it is of only limited applicability, but where it applies, it applies very strongly.

Michael Clancy: Article 52 of the charter of fundamental rights applies the charter to the European institutions and member states. There was some discussion in the House of Lords committee sub-earlier this week about where the charter stood in the hierarchy in relation to the European convention on human rights. The charter contains most of the articles of the convention, so one could say that the charter subsumes the convention.

The interesting debate in the Lords between Baroness Kennedy and the Lord Chancellor about which law trumps which is the lead to considering the issue from a Scottish point of view. As Tobias Lock has explained, because the charter is part of EU law, it has primacy. In that sense, the charter trumps the convention. The charter can provide a better set of remedies, and could, following the Factortame decision, result in UK legislation being struck down—within the confines of the reach of

the Factortame decision, of course. However, the charter cannot be used independently to assess national law but must be invoked on the back of some other engagement with or violation of EU law.

The Convener: Paul Brown gave the committee additional evidence on the gaps that he had highlighted. Will he expand on that?

Paul Brown: The whole post-war human rights tradition was based on the Universal Declaration of Human Rights, which has inspired a lot. I see the charter as being another source of ideas and inspiration as to how we can develop. The charter includes environmental obligations, obligations in respect of refugees and children's rights, which are three areas that are not specifically addressed in the ECHR. It is a useful exercise to compare and contrast the documents because, when we read the charter's provisions, the principles seem eminently sensible and we wonder why they are not in our human rights legislation.

I argue for an expansion of the scope of the Human Rights Act 1998, rather than a reduction. That would not happen overnight, but we have flirted with the idea of incorporating broader, chewier international agreements, as Alan Miller mentioned, so perhaps a step in that direction would be to consider incorporating in the act the provisions that I mentioned. When you read them, you will see no reason why they should not be incorporated in the act.

The Convener: In gathering evidence, the committee has heard few, if any, dissenting voices when it comes to supporting the Human Rights Act 1998, but it has heard lots of evidence as to how the act should and could be extended. That is an interesting debate, although I fear that the same debate might not be happening in the House of Commons or the House of Lords. Perhaps it is part of our role to inform such debate.

Another question that we have touched on, which Michael Clancy has also raised, concerns the constitutional challenges that we will face in the future. A few weeks ago, we met the Joint Committee on Human Rights, which Harriet Harman chairs. We as a committee were asked whether, if the consultation period started soon, it would be likely to run while we were in dissolution—when this committee would no longer exist—so, from a parliamentary point of view, a voice from Scotland would not be heard. That is a concern for us.

Part of our role is to ensure that organisations and individuals such as today's witnesses take the opportunity to ensure that that voice is heard. We have a serious constitutional challenge in the fact that we go into dissolution in a few weeks' time and the committee will no longer exist—we will no longer be MSPs. In the period of purdah, how much opportunity would the Scottish Government have to impact on the consultation?

That preamble takes me to submissions that we have received before from Michael Clancy on the constitutional challenge that that creates for us in this place. Will you extend some of your arguments on how that would play out and the issues that we fear in relation to there being or not being an LCM, if that be the question?

Michael Clancy: It is nice that you are celebrating Shakespeare this morning in his anniversary year.

Before Christmas, we touched on whether there requires to be a Sewel motion—that was in another context, in relation to EU law. The considerations are similar but not the same, and there are a couple of reasons for that.

If you have watched the committee proceedings in London over the past couple of days, you will have seen a discussion about whether the Human Rights Act 1998 is devolved or reserved—or neither. I think that it is neither, because schedule 4 to the Scotland Act 1998 calls the Human Rights Act 1998 "protected". If we look at the Human Rights Act 1998 in that context, through the prism of competence, section 29 of the Scotland Act 1998 talks about the competence of the Parliament, while section 53 talks about the executive competence of the Scottish ministers, which revolves around convention rights as defined in the Human Rights Act 1998.

Where does that take us? If the UK Government's proposal is to repeal the Human Rights Act 1998, that will necessitate a change to schedule 4 to the Scotland Act 1998, which is where we find the protected areas. They are mentioned in section 29—I will quote from my old and worn copy of the Scotland Act 1998—which states that a provision is outside the competence of the Parliament if

"it is in breach of the restrictions in Schedule 4".

If the Human Rights Act 1998 is taken out of schedule 4 and not replaced, that will extend the competence of the Scottish Parliament. If the Human Rights Act 1998 is taken out of schedule 4 but is replaced, that will create a different restriction on the competence of the Scottish Parliament.

Let us consider what that means. The Sewel convention is being legislated on in the Scotland Bill that is being debated in committee in the House of Lords, although I note that that committee's consideration has been put off for two weeks—I wonder why that is. In putting the Sewel convention on a statutory footing, the bill says:

"But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

If my analysis is right and the provisions in the Human Rights Act 1998—not the convention rights—are not a devolved matter but a protected matter, the Sewel convention as expressed in the Scotland Bill will not apply.

11:00

However, that is not the whole story, is it? Devolution guidance note 10 tells us that the practice has been for legislative consent to be required if there is a change to

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

It is clear in paragraphs 4(III) and 9 of that note that one would expect an LCM to be lodged if there were to be a change to those fundamental competences. That is why it is necessary for the argument to be put. It could be put—indeed, it has been put—to the Ministry of Justice by the Law Society of Scotland and other bodies.

If the committee agrees with that perspective, it is essential for it to send the message to the Ministry of Justice that it should reflect on such considerations, if the consultation is published when the committee is not in existence. Of course, if the consultation does not come until after the election and the new parliamentary session has begun, that will be another matter and you will get a second bite at the cherry. However, I would say something now.

The Convener: We will have a very clear message in our legacy paper if what you say is indeed the case.

Roderick Campbell: Without usurping the convener's authority, I think that it would be helpful for the committee to hear any thoughts that Michael Clancy has on the issue beyond those in his submission. Would it be possible for you to give us a supplementary paper?

Michael Clancy: Yes—we can do that.

The Convener: That would be helpful. It would guide us or give us a road map through the whole issue.

Michael Clancy: Someone will remind us about it—probably Jenny Goldsmith, the clerk.

The Convener: Simon Di Rollo from the Faculty of Advocates has a comment.

Simon Di Rollo: I will pick up on what Michael Clancy said about the repeal of the Human Rights Act 1998 not being the whole story. If we leave aside the political issues, which I do not particularly want to get into, one of the difficulties could be the legal problem of a fragmented system arising. The Scottish Parliament, which has the ability to legislate over a range of areas in any way it chooses, could use and apply convention matters, which it would be entitled to do irrespective of whether the act was in force. That could produce a fragmented position in relation to rights that would be confusing for those of us who are involved in trying to understand what the law actually is.

The Convener: When we met Irish colleagues recently to discuss other matters, they brought up the issue of human rights with regard to the Good Friday agreement and Northern Ireland Assembly legislation as a very strong concern, given some of the issues that are outstanding and still to be resolved in Northern Ireland. It is not only Scotland that has challenges from and concerns about the UK proposal; a much more sensitive issue would arise in another part of the United Kingdom should there be any repeal of, or change to, the act.

Naomi McAuliffe: Simon Di Rollo said that he did not want to get into the political issues, but I am happy to do so. Aside from the issue of the legal competency of the Scottish Parliament, it is important for the Scottish Parliament to express a very strong view on the proposed repeal of the act—we already have the Scottish Government's view. To push the proposal through Westminster against the wishes of all the devolved nations—all of them have spoken out against it—would be politically very damaging.

It is also key to note that there is cross-party support for rejecting the repeal. In his evidence, the Lord Chancellor tried to make this into a party-political issue between the Scottish Government and his department, but it has been shown regularly that there is cross-party support in the Scottish Parliament. We know that many members of the Conservative Party also reject a repeal of the act. We have been working closely with Dominic Grieve MP, and we hope that members of the Scottish Conservative Party will also go public on the issue.

One of our main aims in our campaigning is to mobilise and support civil society to contribute to consultations. Before this inquiry, Amnesty International—together with the Glasgow human rights network—held a seminar for civil society organisations, academics and legal experts to share information so that civil society organisations would feel empowered to make submissions to such consultations or inquiries.

It is a case of the usual suspects when Amnesty takes its position and campaigns hard on such an issue, but we have been working across organisations in Scotland to make sure that they know the ramifications of a repeal of the act for the people they work with. For example, we have had

Children in Scotland, Enable Scotland and the Scottish Council for Voluntary Organisations on panels. All those organisations work with a variety of people, including vulnerable people, and they know well the impacts that a repeal of the act would have on their client groups. A strong message coming from the Scottish Parliament and Scottish civil society will be pivotal, as will considering whatever the legal situation might be if the act was repealed or a new bill of human rights was brought in.

Paul Brown: We do not know what the UK Government will propose, but Mr Gove suggested that one of the areas that are in its sights is section 2 of the act. We could speculate that the Government might try to salami slice rather than repeal the whole thing. I am concerned about that process because section 2 basically says that, when a body looks at a convention right, it must look at the European law on the subject. That does not mean that that law must be applied.

I find it difficult to understand many of the objections from politicians, including those from Michael Gove, who seems like a subtle speaker—I saw him at committee. I do not understand what possible objection there can be to such a provision. We need to make sure that the politicians are pressed on what their real objection is, because that is often unclear. The focus seems to be very much tabloid led, and that needs to be exposed.

I will go back, briefly, to the political issue. We had a referendum not very long ago in which it was decided that Scotland would remain part of the UK. Politically, there is an issue that many of the people who voted no to independence might have done so on the basis that Scotland has a human rights constitution. It is of considerable political concern that it appears that that is being changed without proper regard to the issues involved.

That is not quite the same as the issue with the Good Friday agreement, but it is related. The Good Friday agreement was a fundamental thing, and some people had a great deal of difficulty making up their minds about it. It is of considerable concern to suddenly discover that the constitution is being changed because some tabloid journalists have decided that it should be.

The Convener: I am not going to stray down some of those avenues. I have very clear and strong views on that, but I will remain impartial as the convener of the committee.

I think that that tacks on to something that Professor Mead said at the beginning of his evidence, as well as some of Michael Clancy's evidence about the conflation of issues. The debates about workers' rights and the Trade Union Bill, the gagging of charities and their ability to lobby, and repeal of the Human Rights Act all seem to be conflated, so that the argument is that it is the big, bad Europeans who are doing this to us. I wonder whether you want to extend your arguments on that point.

We see a lot of tabloid headlines in Scotland, but when we compare them with tabloid headlines in England, we see that we have a quite supportive attitude to the Human Rights Act 1998, Europe, trade union rights and the rights of individuals per se. That approach has probably been part of common law in Scotland for centuries—it has not just been taken since the Human Rights Act 1998.

Do you have a different perspective from your lovely part of East Anglia? How are things seen there? There seemed to be almost a misunderstanding in the House of Lords committee the other day. It was suggested that objections had been received from Scotland. We have not seen them; I wonder whether you have.

Professor Mead: I can try to take on some of those points.

There is certainly a conflation of the European convention on human rights and the European Union. I have documented that in my research. I am currently working on media portrayals of human rights cases and of the Human Rights Act 1998. There is a conflation of the two Europes—that they are both bad. I did an empirical study that shows a quite shocking misrepresentation of some of the case law that is before the domestic courts. That was very heavily skewed towards our not being able to deport criminals but, as far as I can tell, the statistics from the Home Office show almost exactly the opposite. There is a massive disjuncture in two or three specific newspapers. I did a study of the *Daily Mail*, but others fall into that trap as well.

My research has identified another problem that we have. There is a misunderstanding of Strasbourg because of a misunderstanding of its case law. Several submissions point to the statistics that show that, broadly, the UK loses around 1 per cent of the cases that are lodged. I think that, in 2014, there were just under 2,000 applications, 14 judgments and four violations. With my very basic maths, that makes a 0.2 loss rate, for want of a better term.

I have also done some work on the types of cases that are reported. The ones that are reported include the case of Vinter, which was the life sentences decision, but several losses were not reported. The newspapers are skewed so that we see that the UK is always in the court and always losing cases about criminals, paedophiles and terrorists, for example, but the reality is

massively different if we drill down into the statistics.

A second point that I did not really go into relates something that has come up in a couple of the points in the discussion. I do not think that those who are trying to move towards a different position—those who advocate the repeal and replacement of the Human Rights Act 1998—fully understand or properly convey the very different relationship that the UK and most member states now have with the European Court of Human Rights.

I have not done a trawl of every single case for a period of time, but I flicked through some cases yesterday and, with my general knowledge, I know that the thrust of the European Court of Human Rights is to try to accommodate member states. It very much sees itself as a subsidiary, supervisory jurisdiction where there is no other alternative. My evidence looks at a few cases, but in most areas of law, we could probably look at cases that have gone from the UK and reached the Strasbourg court, which has effectively held that there has not been a violation, much to the surprise of most people involved in the area. In the past four or five years, it has perhaps done more accommodating than it has ever done, although I am not a historical expert on the ECHR.

One case in particular that I mention in my evidence is the Animal Defenders case of three, four or five years ago, which was about the ban on political advertising in the media. The view of almost everybody was that the UK would lose that case when it got to Strasbourg, because all the cases that had previously been decided on exactly the same issue had held that there had been a violation of article 10. However, the court decided that there was no violation, and an absolute ban in UK law was perfectly compatible with article 10 because it had been discussed by Parliament and a position had been reached.

11:15

The rapprochement and dialogue between the UK courts and Strasbourg are quite well documented, and the idea that the Strasbourg court just bosses us is very far from the truth. As Tobias Lock said, there are of course cases that we lose and cases that we think are bad, but that is what a legal system is. Having a few bad apples in the barrel does not justify wiping the whole system and removing ourselves from that pan-European supervision.

The Convener: That leads us nicely on to a final question from Rod Campbell, on constitutional courts.

Roderick Campbell: I ask the panel for their comments on the suggestion that the Supreme Court might function as a constitutional court in the UK and the rationale behind that, and for their general thoughts on the implications that that would have for Scotland in particular.

Dr Lock: As a native German, I will try to elucidate a little. There is a German constitutional court that has a lot of power and is often paraphrased as saying, “We do not want this bit of EU law because it is unconstitutional and therefore we are not going to apply it in our legal system”, so people ask why the UK Supreme Court should not have the same power.

The first problem is that that exaggerates the legal position of the German constitutional court. That court has so far never exercised the power that it has—indeed, it has very limited power in that respect. It will review EU legislation only with regard to whether it is ultra vires, and only then in extreme circumstances and after having asked the European Court of Justice, by way of a preliminary reference, whether that court thinks that the legislation would be ultra vires and therefore whether it would have the power to declare it void. It will also review whether German national constitutional identity has been violated, which relates to fundamental concepts such as human dignity, democracy and the existence of the German state.

There are two problems. First, should a UK Supreme Court be given a similar power? Arguably, it already has a similar power: if we look at the high-speed 2 case and the Pham case, we see from the obiter dicta issued by Lord Mance that, in those extreme circumstances, the European Communities Act 1972 does not force us to apply European Union law. For instance, if an act adopted by the EU is clearly ultra vires—for example, if it says that we should abolish the monarchy in Britain, or something ridiculous—that would not be applicable. That is a fairly sensible solution.

The second question is how we provide for such express power in the absence of a written or codified constitution that takes precedence over acts of Parliament. That is the clue, and that is why the German constitutional court has the power: because the constitution is higher than acts of Parliament. Something like retaining the sovereignty of Parliament is very difficult to legislate for. It is probably best just to leave it to the Supreme Court.

Roderick Campbell: Does anyone else want to chip in on that?

Michael Clancy: When the Scotland Bill 1998 was wending its way through Parliament, the ultimate court for dealing with devolution issues was the Judicial Committee of the Privy Council. As those who remember those days will be aware,

it was unusual for that committee to have been picked as the body to deal with devolution issues, because until then it had effectively had a colonial jurisdiction and a jurisdiction over some professional bodies.

The Law Society proposed that we should not adopt the Judicial Committee; rather, it proposed that we should think about having a constitutional court. Of course, that was a long time ago. The next time that the idea of a constitutional court came up was in 2004 or 2005 when the Supreme Court was announced as being the next progression in our constitution. At the same time, the office of Lord Chancellor was abolished and, on one day, the Scotland, Wales and Northern Ireland Offices were all abolished—until Peter Hain said, "What? I've been abolished?" That tells us something about making policy decisions on the hoof.

A proposal to create a constitutional court system in the United Kingdom should not just be a sideline to solve a perceived problem; it should be a carefully thought-out proposition that is carefully consulted on, deeply thought about and then moved ahead only if there is clear consensus, because such a proposal would involve significant constitutional change. If we were to have a Bundesverfassungsgericht-type federal court arrangement in the UK, we might have to go federal. If there are different laws in different parts of the UK, you may have to have different arrangements for the judges who hear the cases.

It is an interesting proposition, and a constitutional convention would be extremely well suited to the consideration of the concept. However, the proposition is not one that should be considered simply for the purposes of fixing something that looks like it might be a problem to some people who think that coming up with a grand plan is the clearest answer. Of course, the Supreme Court does not have universal jurisdiction, because criminal law appeals stop here in Scotland. That is one issue that would have to be thought about if we were to deal with a constitutional court. It also does not take cases in criminal areas other than through the route of devolution issues under the Scotland Act 1998. There is a lot to be thought about before we immediately jump to creating a constitutional court.

The Convener: We have, again, run out of time this morning.

Michael Clancy: I think that Professor Mead wants to come in.

The Convener: Do you have a very quick final remark to make, Professor Mead?

Professor Mead: I just had a follow-up point that is almost certainly repetitive, so I am happy to leave it.

The Convener: Thank you for that. Given that we see how complicated this whole matter could be, it seems an awful lot of business for a bit of gloss, to use someone else's term. I thank Michael Clancy and everyone else who has helped us this morning. You have advised us on the need for careful thought and consideration, and that is certainly how we will proceed. I thank you all very much for your written and oral evidence. If there are any matters that you think we should be considering, please do not hesitate to get back in touch with us.

From Scotland to East Anglia, which is a lovely part of the world, I thank Professor Mead for joining us this morning. I followed with great interest his analysis of the newspapers that he mentioned. That was very interesting work indeed.

“Brussels Bulletin”

11:23

The Convener: Agenda item 4 is the “Brussels Bulletin”, which we will consider quickly. It is pretty lightweight this week.

Anne McTaggart: I just want to highlight page 6 of the bulletin, which says that Glasgow is on a shortlist of nine EU cities for the European capital of innovation award 2016, and to say that people make Glasgow.

The Convener: People do, indeed, make Glasgow. Are members happy to share the “Brussels Bulletin” with the other committees in the Parliament?

Members *indicated agreement.*

The Convener: Thank you very much. We will have a quick discussion in private about this morning’s evidence.

11:24

Meeting continued in private until 11:30.

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