OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 1 November 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 1 November 2017

CONTENTS

FINANCE AND CONSTITUTION COMMITTEE
25th Meeting 2017, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Neil Bibby (West Scotland) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)
*Ash Denham (Edinburgh Eastern) (SNP)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Patrick Harvie (Glasgow) (Green)
*James Kelly (Glasgow) (Lab)
*Ivan McKee (Glasgow Provan) (SNP)
*Maree Todd (Highlands and Islands) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Clancy (Law Society of Scotland)
Professor Laura Cram (University of Edinburgh)
Professor Jim Gallagher (University of Oxford)
Professor Michael Keating (University of Aberdeen)
Professor Aileen McHarg (University of Strathclyde)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 1 November 2017

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

The Convener (Bruce Crawford): Good morning and welcome to the 25th meeting in 2017 of the Finance and Constitution Committee. It is the usual story regarding members' mobile phones and other such equipment.

Under agenda item 1, does the committee agree to take item 3 in private?

Members *indicated agreement.*

European Union (Withdrawal) Bill

10:02

The Convener: Item 2 is evidence on the European Union (Withdrawal) Bill. With us are Michael Clancy, director of law reform at the Law Society of Scotland; Professor Jim Gallagher, research fellow at Nuffield College at the University of Oxford; Professor Michael Keating, professor of politics at the University of Aberdeen; and Professor Aileen McHarg, professor of public law at the University of Strathclyde.

Members will note that Professor Laura Cram is included in the papers that were issued. Professor Cram was due to join us, but unfortunately she has had to send her apologies as she cannot be with us today.

I am conscious that Michael Clancy will need to leave at about 11.30 as he has a flight to catch. We will try to remember that. I am sure that we will.

Michael Clancy (Law Society of Scotland): That is very understanding of you. Thank you.

The Convener: If we do not, we will understand that you have to go.

Michael Clancy: Thank you.

The Convener: Members have received written briefings from this morning's participants. Without further ado, let us move to questions.

I begin by asking what I think is a simple question. I think that most people agree that, to all intents and purposes, the European Union (Withdrawal) Bill is a continuity bill. Is clause 11 necessary in order for the United Kingdom Government to achieve the objectives that it seeks to achieve in the bill? You have all written about that, so if your answers could be as close as possible to just yes or no, that would be helpful.

Professor Jim Gallagher (University of Oxford): Something like clause 11 is necessary because as powers are repatriated—wisely or unwisely—from Brussels to the UK, there needs to be a mechanism for allocating those powers to the different levels of Government inside the UK. As you know, convener, I do not think that the mechanism that has been chosen in clause 11 is absolutely right. I think that it is wrong in some respects, but there is one defensible point in it.

At a time when there is very deep uncertainty about precisely which powers will come back, which will remain, what the transitional arrangements will be and the extent to which European Union law will continue to apply directly or not—all those questions remain unanswered—there is an argument for having a holding pattern

for a period until things become a little clearer. My view is that it is defensible to have clause 11 as it stands, provided that the approach of reserving everything until it is actively devolved lasts for a defined period of time rather than permanently.

Professor Michael Keating (University of Aberdeen): No is my answer. There is general agreement that something needs to be done about powers that might have to be exercised across the UK—there might have to be some common framework for market issues, competition and external trade treaties, for instance—but clause 11 does not do the trick because it merely refers to a bundle of things that just happen to have been legislated on by the EU. We now have the list of 111 competences, which—to be frank—is a right bag of bits and pieces.

I think that that is to start at the wrong end. If there are some principles that must underpin what the UK Government used to call the UK single market but now calls the internal market, which is a better term altogether, those principles should be laid down and the division of competences and the machinery should flow from that. Therefore, the UK Government has gone about it the wrong way round. As Jim Gallagher said, there might have to be something to deal with the transition period, but clause 11 is not a solution to the broad problem.

Professor Aileen McHarg (University of Strathclyde): I agree with Michael Keating. It is necessary to remove the obligation to comply with EU law that is currently in the Scotland Act 1998. There are arguments that that might fall away anyway but, for the avoidance of doubt, it is best to take the obligation out of the act.

On what happens in the future, the approach that has been taken in clause 11 is clearly not the only way in which necessary co-ordination post-Brexit could be achieved. It may be justifiable as a transitional measure but, as Michael Keating says, it is not, in fact, a transitional measure. Unlike many of the other provisions of the European Union (Withdrawal) Bill, it has no sunset clause so it is conceived as, or presents as, an indefinite solution and it is not an appropriate indefinite solution.

Michael Clancy: We have had two noes and a yes, so it is for me to say that it depends.

The Convener: I will not let you away with that, though.

Michael Clancy: No, I know. Thank you, convener. Keep me on a short leash.

It depends on your perspective. Clearly, the United Kingdom Government believes clause 11 to be necessary—otherwise, it would not have put it in the bill—but there are other views, some of which you have already heard.

The Law Society looked at the provision that takes the EU competence away from the Scottish Parliament. In our view, it is likely to engage the Sewel convention. We also believe that the provision should be time limited and we have promoted amendments in the House of Commons to that effect.

There are alternatives to be employed in connection with clause 11: for example, adopting it only on a transitional basis; repealing the EU constraint completely and leaving the EU competences to fall as determined according to schedule 5 to the Scotland Act 1998 once they are repatriated; replacing the cross-cutting EU constraint with new constraints; and repealing the EU constraint and amending schedule 5 to re-reserve the provisions that come back from Europe. Depending on your perspective, you could pick one of those options—they are not the only ones—and amend the bill accordingly. No doubt we will discuss that further.

The Convener: You must have known what my second question would be, because you just answered it.

To be fair to Jim Gallagher, his was a conditional yes.

Professor Gallagher: It is pretty conditional.

Michael Clancy: Well, okay.

Professor Gallagher: One aspect of clause 11 is justifiable but, in other respects, it is not.

The Convener: Clause 11 exists. The Scottish Government and the Welsh Government have proposed amendments. There is general agreement that some sort of framework arrangements will be required. At this stage, from what I can see, there is no majority in the Scottish Parliament for passing a legislative consent motion if clause 11 is in the bill. Therefore, the ball is firmly in the UK Government's court. I am trying not to make this a political question because we have to find some solutions. If you were in that situation, what would you suggest to both Governments about what should happen to break that deadlock?

Professor Keating: I think that the two Governments in that case should go back and negotiate. We all know that the Sewel convention is not enforceable as a matter of law, but it is part of the constitutional understandings that underpin the devolution settlement. It would be a very unfortunate precedent for Westminster simply to override the refusal of legislative consent.

Since I have argued in my submission and elsewhere that there are four or five different ways

of dealing with the issue of the need for frameworks, I think that the UK Government could dispense with this particular one and start somewhere else. There is a time limit, of course, but that applies to the whole of Brexit. Things will have to be done very quickly, but I do not think that the world would come to an end if we dispensed with clause 11.

Professor McHarg: Again, I agree. I do not think that this is a situation in which the UK Parliament would be justified in overriding a refusal of devolved consent, so I do not think that it should get to that point. Negotiation is required.

To take account of the uncertainty, it is clear that some kind of relatively open-ended mechanism is required that is flexible in its operation, whether it is an institutional solution that provides a forum for negotiation over future common frameworks or a writing into the bill of flexible principles. An example—although I do not like this—would be an obligation not to legislate in a way that threatens the UK's internal market. That kind of flexible principle that allows for the taking into account of unforeseen situations would be an appropriate way ahead.

Michael Clancy: We have said from the beginning of this process that this is a whole of governance project. It does not belong simply to the United Kingdom Government but should engage properly the devolved Administrations, and it should go wider and engage civic society generally.

The disappointment that some committees have expressed—both in the Scottish Parliament and at Westminster—about the joint ministerial committee process highlights where things need to change. The communiqué that was issued from the meeting between the UK ministers and the devolved Administration ministers points the way for establishing common frameworks that could create the environment for agreement on how clause 11 might change.

Of course, given that the bill is about to begin its committee stage in the House of Commons on 14 November, time is a-wasting. Therefore this is a time for focus and for attention to be paid to making the measure work properly, within the concept of how we approach our constitutional arrangements.

Professor Gallagher: It is significant that the UK Government has said that it will seek devolved consent. It went out of its way to do that, and in the circumstances of the Brexit bill, which are anything but normal, I think that that is quite important. Therefore, the process of negotiation that is under way needs to work and I think that it probably will.

The right thing to do would be to amend the bill to put a sunset clause on clause 11, which would secure the short-term position and put equality of arms between the Governments in the negotiation that they are about to have.

10:15

The general principle that matters should be devolved unless there is good reason for them to be reserved seems to be the right principle on which to operate. However, there are things that are currently uniform across the UK solely because they are the subject of EU law that will require to continue to be uniform across the UK. As Michael Clancy's submission says, there are a number of mechanisms that one might use to secure that. That might involve adding some issues to the list of reserved matters in schedule 5 and making them uniform across the UK, because the UK Parliament will legislate on them. Other issues might be addressed by having an agreed common framework on matters that relate to things that are still devolved. That agreed framework could involve legislating in parallel here, in Cardiff, in Belfast and in London or legislating in London with Sewel consent on issues such as agriculture.

My impression is that negotiations between the Governments have begun in earnest now in a way in which they had not done previously. That is partly because, as the convener said, we have to put aside some of the politics and find a solution to what is a difficult operational situation for many people. The negotiations will succeed if and only if each side is not obsessed by the notion of sovereignty and the gaining of power but is actually looking for things that will work in the real world. That long list that Michael Keating referred to mostly concerns odds and ends. There are a few big things that matter in relation to the internal or domestic market, including things such as state aid, agriculture and fisheries and things relating to the environment. Most of the rest of the issues are just bits and pieces.

The Convener: You introduced the issue of the sunset clause. Neil Bibby wanted to ask about that.

Neil Bibby (West Scotland) (Lab): Professor Gallagher mentioned the possibility that a sunset clause might make clause 11 more acceptable. I would like to hear more about how that would work and how its effects could be guaranteed.

Professor Gallagher: That is a reasonable question. It is one thing to talk about sunset; it is another thing to talk about when British summertime begins and ends.

At the minimum, there is a transition or implementation period that is currently under

discussion. Since we do not have a clue what that will be, it is quite hard to legislate for it. Therefore, I think that the best proposition would be to set a reasonably long drop-dead date—five years away, say—with the capacity to deal with individual issues before then. If that period were three years, I would not object, but you might have to say that, in certain circumstances and areas, that period might be extended.

Michael Clancy: As I mentioned, we have framed an amendment, which we have promoted to Opposition and back-bench members in the House of Commons, that considers having a period of two years from the exit day, which takes us from now through to 29 March 2021. Of course, that could be amended further if that period were seen to be too short. Jim Gallagher has suggested a period of five years from exit day—I assume that you mean from exit day, Jim.

Professor Gallagher: Yes, I think so. One can imagine having a two-year transition period that might run into a three-year transition period, with a couple of years to tidy things up afterwards.

The Convener: I am sorry, but could we avoid having conversations among our witnesses?

Professor Gallagher: I was just helping out my friend, convener.

The Convener: We are all friends here.

Michael Clancy: It was my fault for leading him on.

That suggested timescale takes us some way into the post-exit period. One of the issues around having a short period is that that will concentrate the minds of those who are deciding on this process.

Professor Keating: One problem with this notion of a transition period, especially if it is up to five years, is that a lot of decisions will be made about policies in that time—we will probably have a completely new agricultural policy, for example. If that is set unilaterally by the UK, there will be no point in giving the powers back to Scotland later, because all those decisions will have been taken. Presumably, during the transitional period, there needs to be at least a mechanism for the devolved Governments to feed in to whatever the new policy will be.

Professor McHarg: I was going to make a similar point. We must not think that the withdrawal bill is the only game in town. We know that there are other pieces of Brexit legislation to come, which means that the Parliament's input into that process is important.

How might the sunset clause work, and how could it be guaranteed? It could not be guaranteed, because the period could always be extended. There might be a case for a sunset clause in principle. Personally, I would have much more sunsetting in the withdrawal bill—I would sunset the whole concept of retained EU law itself, as that causes many problems for the legal system. If we were to sunset the concept of retained EU law, clause 11 would necessarily be subject to a sunset provision.

Adam Tomkins (Glasgow) (Con): I will try to drag you back from sunsets into clause 11. It is fair to say that the three Governments—there is not one in Northern Ireland at the moment—want the proposed legislation to be passed with consent; nobody wants it to be passed without consent. As the convener said, we are interested in finding a solution to the clause 11 problem in particular.

Last week in the House of Commons, the Secretary of State for Scotland, David Mundell, said that all 111 powers to which Professor Keating referred would either be exercised by the Scottish Parliament or be subject to a common framework to which the Scottish Government will be a party. He added that the common framework will be agreed between the Governments of either Great Britain or the United Kingdom, and will not be imposed on the devolved Administrations by Whitehall. Is that approach likely to achieve the solution that I think we are all looking for, so that the legislation can be passed with consent?

Professor Gallagher: It takes two to tango. If the approach of the two devolved Governments that are currently in operation is broadly similar, an agreement can be reached. The necessary condition is that neither side is a hedger and ditcher on retaining sovereignty or grabbing power and that they are willing to focus on what needs to be done. In the context of the almost impossible project of leaving the EU, I will say that that is certainly achievable.

The interesting thing for me—Michael Keating said this earlier—is that we get a clear understanding of the nature of, and policy objective for, each of the common frameworks, and of the external constraints on them. I will offer two examples.

One factor to consider is the extent to which European law currently underpins the UK internal market—an obvious example being the law on public procurement. Before the UK joined the EU, public procurement simply happened across the UK. There was a domestic market, and that was the market in which it happened. Since we have joined the EU, there has been a comprehensive, complex, detailed and at times difficult-to-follow set of rules on public procurement. The world has moved on, and we cannot go back to where we were in 1972, so a common UK framework on public procurement seems to be sensible and

desirable. Whether that is done by agreement or is legislated for at Westminster as a reserved matter does not seem to be all that important, to tell you the truth, provided that there is agreement that it should become a reserved matter.

The second obvious example has already been mentioned: agriculture. We will need a UK agriculture policy because there will continue to be a UK internal market in food products. That policy will have to take account of the fact that the UK will enter into international obligations that are as yet unknown relating to trade in agriculture products. Until we know the answer to that second question, we cannot decide what the common UK framework on agriculture will be. Similar issues will arise in relation to fishing.

Professor Keating: If those powers are going to be exercised by the Scottish Parliament or under a common framework, and if the framework is agreed, that is an argument against clause 11, which becomes increasingly redundant. The issue of the broader UK internal market and the level playing fields goes well beyond those powers. The relationship between that list of powers and the concept of a UK internal market is contingent: they slightly overlap in some things but not in others. The important thing is—

Adam Tomkins: I am sorry to interrupt, but will you give a couple of examples? That will really help the committee to understand what you mean by your comment about things overlapping and not overlapping.

Professor Keating: If we consider the example of minimum unit pricing of alcohol, that was proposed as a public health measure, but it fell foul—according to its opponents—of the single market regulations and the competition regulations. That had not been anticipated.

The UK Government used to call it the UK single market, but that was really misleading because it was analogous with the European single market, which is not about particular competences. There is a broad set of principles that can come up in just about any policy sphere. It would be more appropriate to start at that point and to ask what the issues are about free trade, free movement of trade, exercise of professions and so on, and then to reason from that, rather than to look at the powers that are devolved and that fall into areas on which the EU happens to have legislated. This is the point that I made earlier. The UK Government is starting at the wrong end.

It is all very well to talk about frameworks, but the EU single market, if it is to be the analogy, has specific mechanisms. In particular, it has legal mechanisms for enforcement—it is not just a political mechanism—and it is subject to the principles of subsidiarity and proportionality. We could learn a lot from that in terms of how those principles might be applied within the UK, which would probably point us in a different direction from what seems to me to be a rather quick fix, which is to take the powers back then devolve the ones that do not contravene the notion of a UK internal market.

Professor Gallagher: May I offer you an example, Professor Tomkins?

The Convener: I will let Aileen McHarg respond first.

Professor McHarg: To answer Adam Tomkins's question, which was about whether the devolved Governments ought to be satisfied with the commitment that the secretary of state has made, I say that it is understandable that they might want more guarantees. If we go back to the immediate aftermath of the EU referendum, there was a promise that article 50 would not be invoked without a common line being agreed between the UK and devolved Governments, but that is what happened. Given that context, it is unsurprising that the devolved Governments want more guarantees than simply a promise that powers will be devolved and common frameworks operated. A guarantee could come through removal of clause 11 from the bill, because that would give the devolved Governments concrete powers in negotiation of common frameworks.

On the wider point that we have reached in the conversation, it is really important that we understand the complexity and controversy of the concept of a UK single market. Because the idea of a single market has been constitutionalised at EU level, we have perhaps lost sight of the fact that it is a politically contentious notion. How far markets extend, how much harmonisation they need and how much they extend, as Michael Keating said, into issues of social as well as economic regulation, are all contestable issues.

Jim Gallagher mentioned public procurement. Pre-devolution, public procurement at UK level would have been done on a common basis, perhaps, but public procurement also applies to local government, and the application of detailed contracting frameworks to local government was not simply a matter of EU law: initially, that was a policy of the Thatcher Governments to constrain the powers of local government. At the time, it was politically highly contentious.

We need to recognise what is at stake. This is not some kind of technocratic process to maintain something that is unproblematically understood to be the UK single market. They are intensely political matters about which there is likely to be disagreement—and legitimately so.

Michael Clancy: Schedule 4 to the Scotland Act 1998 preserves or protects legislation including the treaty of union in so far as it creates a system for freedom of trade within the UK—or the United Kingdom of Great Britain, as it then was—so this is not a new issue. There is a tendency to label such things as being new.

When one looks at the list of 111 powers, which the Cabinet Office provided to the Scottish Government, we can see that there are things that would clearly fall into that concept of freedom of trade—animal health and traceability of movement, carbon capture and storage, data sharing, and so on. Those could be viewed through a strategic United Kingdom lens when coming to decide how to deal with them.

10:30

Essentially, it is a matter of political agreement. The UK Government and Scotland, Wales and Northern Ireland Governments, however we get Northern Ireland to sit at the table, have to talk with one another, create a system of debate and a ground of mutual trust.

Last Friday, the UK Government responded to the Public Administration and Constitutional Affairs Committee report on the matter. In its response, it used very warm words to describe how trust should be re-established. It is incumbent on those who are participating in the discussions to make sure that those warms words become reality.

The Convener: Adam Tomkins has a quick supplementary.

Adam Tomkins: My supplementary question is specifically about something that Professor Gallagher said in the context of agriculture and future trade agreements. One of the darker corners of the Scotland Act 1998, in section 58, is the power that enables UK ministers to require ministers of the Scottish Government—there is an analogue in the Wales Act 2017—to change law so that it is compatible with UK law and international treaty obligations. Is that power likely to be robust enough in the post-Brexit world, or are we likely to see more statutory interventions along those lines?

Professor Gallagher: There is an argument that clause 11 is completely unnecessary because that power exists. One of the slightly better arguments for a clause 11 style of approach is that it would avoid the use of that power. As you know, there is such a power in each of the devolution settlements. It was put in as a back-up in 1999 when the majority of international obligations were with the EU and were dealt with by the EU approach.

The power has never, to my knowledge, been exercised. There are many areas in which it might, in principle, have been exercised, but agreement proved to be sufficient, either in the knowledge that the power existed or, in the case of climate change, when people simply agreed without referring to it.

I would prefer that we did not get into the world of having to use that power. First, it is by definition confrontational, and secondly, it would be an administrative nightmare. Who knows what it would be like? We have never done it and we should not start learning in the context of Brexit.

Adam Tomkins: Fair enough.

Professor McHarg: I have a small but important correction to make. The section 58 power allows direction to be given to require Scottish ministers to introduce a bill in Parliament. It does not require Parliament to pass the bill. That is an important distinction in principle, if not necessarily in practice. If the Scottish Parliament were, as I presume it would, to refuse to enact such a bill, we would be into the provisions of section 28(7): Westminster would legislate, and it would be arguable that that would be a circumstance in which Sewel would not apply. If the UK Government could make the argument that that would be necessary in order to fulfil international obligations, that would be a circumstance in which overriding Holyrood would be justified.

However, you can well imagine circumstances in which, for instance, the Scottish Parliament would refuse to legislate because it thinks that doing so is not necessary or because it takes a particular view of the meaning of “international obligations”.

Once you are into Westminster legislation to impose a solution, there is no way of questioning that; there is no challenge to the UK Parliament. I agree with Jim Gallagher: that mechanism is inappropriately confrontational and probably allows insufficient input by Scottish institutions to argue for how they think the Scottish legal system ought to respond to international obligations.

The Convener: I thank Adam Tomkins for taking us into some of those dark places in the Scotland Act 1998. At least some light has now been shone into them.

Patrick Harvie (Glasgow) (Green): Good morning. Professor Gallagher offered the principle that something should not be done because we have not done it before and it is a nightmare of complexity. That is how I feel about the whole situation.

Professor Gallagher: You and me both.

Patrick Harvie: People have mentioned the secretary of state's commitment that common frameworks will be by agreement and not imposition. I welcome that reassurance, although I am not clear how other ministers and secretaries of state can be held accountable to that verbal commitment in future, or how future ministers can be held accountable to it. However, even if we accept that the UK Government's intention is to achieve those things only by agreement and negotiation, I am still struggling to find a more generous interpretation of what it wants from clause 11.

A few moments ago, Professor Gallagher said that there needs to be "equality of arms" during the negotiation process. Is there anything in the bill that I should interpret more generously, other than the ability of the UK Government during the period of negotiation to say, "If you don't like it, we'll do it anyway"? Does it give the UK Government anything other than the inequality of arms that Professor Gallagher said that we should try to avoid?

Professor Keating: That exposes a weakness in the whole devolution settlement that we have been aware of all along. This is just another illustration that the system is not a federal system in which the devolved level has constitutionally entrenched parts, which is problematic. It is problematic again in respect of the bill because we are talking about shifting competences. This may be an opportunity to rethink that model of devolution, particularly if we see the UK Government proposing to take back powers for what appears merely to be reasons of convenience rather than of principle.

We will see a lot of those challenges during the negotiation process. It is important to think through the consequences of what we are doing here and ensure that we do not move by default back to the old understanding of devolution, which is that Westminster merely lends powers that it can take back at any time it likes. The Sewel convention was supposed to deal with that. The Supreme Court made an unfortunate move, not in saying that the convention was not legally enforceable, because we already knew that, but in merely dismissing it as something political rather than saying it is part of the constitution.

We are going to get a lot of those challenges, so it is important to identify that there are matters of principle here that ought to be faced up to. Precedents are being set. The situation should not be seen merely as a matter of short-term convenience.

Professor Gallagher: I agree with a bit of that. The important thing here—of course, the proof of this pudding will be in the eating—is that the UK Government has said that it will observe the Sewel convention in respect of the bill. Provided that it does that, I agree with Michael Keating that there is no legal entrenchment of the Parliament's powers, but if the Parliament has the capacity to say no to something that it does not want and the UK Government and UK Parliament respect that, that would be a reasonable outcome.

If clause 11 was sunsetted, the default position on an issue would be that it would fall where the Scotland Act 1998 makes it fall. That would give the Scottish Government and, indeed, the Welsh Administration a degree of leverage in the negotiations that they do not currently have. That is what I meant by equality of arms.

The Convener: I do not want to lose that point, but I will come back to Aileen McHarg, because I have a follow-up question. Jim Gallagher—rightly—mentioned principles. Even if there was a sunset clause, we would still have a situation where the bill as currently drafted would result in a significant shift in the structure of devolution from the reserved powers model to a conferred powers model. We would be shifting significantly on the principles of devolution that Donald Dewar did so well to establish. With a sunset clause, we would in effect be agreeing that we were prepared for a short time to change that process.

Professor Gallagher: I am afraid that I do not find that to be a very persuasive argument. If there was a sunset provision on clause 11—I have not drafted one, although Michael Clancy has; no doubt such a provision could be drafted in various ways—meaning that retained EU law would not automatically be reserved and the reservation would cease after a certain period of time, the principles in schedule 5 to the Scotland Act 1998 and elsewhere, which determine where powers fall, would apply. Those are the same principles under the settlement of 1999 to which the convener referred.

The Convener: I just wanted to get that stuff on the record, in case anyone else intends to refer to it. I will come back to Patrick Harvie in a moment. Professor McHarg can go next.

Professor McHarg: Patrick Harvie asked whether there is anything in clause 11 that gives any guarantees—I think that there is not. Jim Gallagher referred to the Sewel convention. The UK Government has committed to seek consent, but of course that does not tell us what happens if consent is not forthcoming. We know, post the Miller judgment, that if the issue comes down to a dispute about whether it is legitimate to override a refusal of consent, we have no mechanism for neutral arbitration or adjudication. There are no guarantees.

The sunsetting approach is one way of trying to achieve some kind of guarantee. One could

perhaps give the devolved Governments power over the order-in-council procedure. At present, the power to make an order in council, which is then subject to consent by the devolved legislatures, would be a power for the UK Government. However, one could envisage a mechanism whereby that power could be invoked by one of the devolved Administrations, subject to Westminster consent. That might work.

My problem with that would be the leaving in place of the horrible concept of retained EU law as a constraint on devolved competence more generally, because it is really complicated. It messes up what is already a complicated boundary between devolved and reserved powers. It would involve throwing additional multi-stage complexity into any attempt to understand where the boundaries of devolved competence lie in future. To my mind, there are additional reasons for getting rid of that approach to setting the boundaries of devolved competence in future, which would involve a more technical objection.

Patrick Harvie: It simply seems that we still accept that we should work under the assumption that EU competencies should default in the first instance to the UK, without there being a clear reason for them to do so. I can understand why the UK Government might naturally work in that way, but I do not see why we should.

Is there any advantage to either Scotland or the UK if we work in that way, or any particular reason why we ought to, rather than saying that schedule 5 to the Scotland Act 1998 determines these matters and that, if we need to work on a common approach, we can do so by negotiation? If there is a reason why we should be more generous to the UK Government's position, I am willing to be persuaded.

Michael Clancy: You would have to have a UK minister here to persuade you. [*Laughter*.]

It is important for us to acknowledge that this is a political process, and that both the UK Government and the Scottish Government have to make their own cases in the context of the negotiations. An amendment has been tabled in the House of Commons to put the joint ministerial committee (European Union negotiations) on a statutory footing. Along with that might come some objectives that that committee might seek to achieve, but what those objectives might be would have to be a matter for negotiation between the respective Governments of the devolved Administrations and the UK Government.

10:45

Patrick Harvie: Such negotiation would have to take place without a clearly defined process for parliamentary scrutiny of those shared governmental functions.

Michael Clancy: The lack of adequate parliamentary scrutiny is a theme that will provide a rich seam for questions later in the bill's consideration.

The Convener: We will put that directly to the UK ministers from whom we will take evidence next week.

Ash Denham will ask about intergovernmental relations and common frameworks.

Ash Denham (Edinburgh Eastern) (SNP): Good morning. We are thinking about the idea of agreed frameworks and the process of achieving them. Do you have confidence that the existing intergovernmental processes will allow us to reach agreement on the establishment of such frameworks?

Professor Gallagher: I had the unfortunate experience of being involved in intergovernmental relations for a long time. It is hard going for two reasons. First—bizarrely—it is hard going because, hitherto, the devolution settlements have produced remarkably clear boundaries between Governments. That is because they were built on pre-existing administrative structures. In that sense, one of the struggles that there have been with intergovernmental relations has been with finding things to talk about. It is said that good fences make good neighbours. It is in that context that our approach to IGR has grown up. I speak from experience. I do not think that I am breaching any confidences when I say that, in the conversations that we would have before the intergovernmental meetings that I attended as a civil servant, we would say, "Crikey! What have we got to talk about?" That is part of the context, and it is one of the reasons why our approach to IGR is relatively weak. There are other reasons, too.

In principle, there is no reason why intergovernmental relations cannot be made to work for the major tasks that lie ahead, but that will require a change of gear on the part of ministers and officials when they have got something to chew on. I am afraid that it will also require—we face this challenge across the board—greater certainty about what is involved in the external environment. In other words, if ministers in Edinburgh, London and Cardiff sit down to talk about, say, agriculture, we need to have some understanding of how the UK's agricultural system fits into its trade and its other international relations. At the moment, we do not know that, which is deeply problematic.

Professor Keating: It is true to say that, compared with other systems, we have not had a lot of intergovernmental policy making, except—as it happens—in relation to European matters.

In thinking about mechanisms, we must think seriously about institutions. It is no good deciding to have an intergovernmental meeting, a joint ministerial committee or whatever, and talking vaguely about having good will on all sides. Institutions and procedures are what really matter. That is the lesson that we have learned from other systems. We must have a non-hierarchical mechanism, but that is extremely difficult to introduce, given the disparity in size between the nations of the United Kingdom. We must think about how England would fit into such a mechanism and separate the interests of England from those of the UK, which at the moment is not done. We should also think about the capacity of such institutions to be able to produce an evidence base that is shared by all parties, the mechanisms for arbitrating conflicts and the legal basis of such a system.

Under our constitution, we do not have federalism. We do not have a written constitution that would allow us to entrench the powers of the devolved Administrations, but successive Governments have said that they want to get there and that they want to have the greatest degree of equivalence. Therefore, we must understand the role of conventions, which are so important in the UK constitution. Generally, they apply in relation to devolution and the devolution settlement.

There is also the whole area of foreign policy and, in particular, trade negotiations, which will drive a lot of domestic policy on what were formerly European matters. It is important to think about how the devolved Administrations would fit into those, which are undeniably a reserved matter, but in which the devolved Administrations have a particular interest.

The Convener: Is Aileen McHarg thinking about what she wants to say?

Professor McHarg: I am. I agree with Michael Keating's final point about the need to have mechanisms for the devolved Governments to feed into international trade negotiations. It is interesting that, for all the criticisms that have been made of intergovernmental relations, they have worked best in relation to Europe where there has been recognition of the need for co-operation not just for implementation but in the establishment of UK negotiating lines. The reservation of issues to the UK level has not been and should not be a barrier to co-operation, including intergovernmental co-operation.

What that should look like is a very difficult question. There are a number of difficult questions to be determined. The Welsh Government has made a stab at suggesting some new arrangements and a UK council of ministers has made a stab at suggesting some principles for decision making. It suggested that the UK Government should always have to consent to any decision, but that would also need the consent of at least one devolved Administration. Whether that is fair is, of course, a matter for dispute. We have an inherently problematic situation, given the disparity of the population sizes and given the lack of a clear distinction between the interests of the UK Government and the interests of English departments, as Michael Keating said. It is inherently difficult to propose a set of quasi-federal decision-making arrangements in that context.

Michael Clancy: I agree. As Jim Gallagher said, intergovernmental relations are difficult, but what evidence do we have on the surface and not through dipping into Jim Gallagher's private diaries of years gone by? The Sewel convention has worked pretty well as an intergovernmental relations tool. It has enabled legislation to pass that might have caused difficulties in other circumstances or that might have required the invoking of provisions of the Scotland Act 1998 that are nearly as dark as the provisions that Professor Tomkins directed us to. We have to look at the evidence for good intergovernmental relations and, over the period from 1999 to the present day, the Sewel convention has worked pretty well.

I hesitate to use the word "framework" because it seems to be used as a noun, as an adjective and possibly as a verb. I would employ the word "mechanisms". When we responded to the UK Government's white paper on Brexit, we talked about creating a new structure that would include Scottish, UK, Northern Irish and Welsh ministers with experts and other stakeholders as one conglomeration and mechanism that would enable ministers not to be unduly closeted, but to be exposed to the fresh air and scrutiny of those who are not involved in the political process in that way.

The JMC is another route. Perhaps there could even be something that is akin to the Smith commission or the Calman commission, but enhanced.

Finally, the House of Commons Political and Constitutional Reform Committee talked about a constitutional convention because it is inevitable that that is where we are going if we start to unpick all of those kinds of mechanisms and try to think about how we get to a point of change. That is not going to happen in the context of the bill. By force of circumstance, we probably do not have the luxury of time to devote to those discussions.

Ash Denham: Presumably, once we get to a point where the frameworks are agreed—if we get to that point—the on-going management of the frameworks will need some form of dispute resolution system. Professor McHarg said that a quasi-federal sort of machinery might not be a

good fit in that scenario, but we would still need some way to resolve disputes. In his written submission, Professor Keating talked about some international comparisons, particularly Canada, where disagreements are handled by what is called the Regulatory Reconciliation and Cooperation Table. Could you speak a little bit about that and about how you think we might operate?

Professor Keating: The difference between the UK and almost any other system is the partial devolution that there is for three of the parts of the UK but not for the remaining big part. That makes applying the foreign comparisons very difficult, but what is important in the Canadian case is that the federal Government cannot encroach on the powers of the provinces. The Supreme Court there makes sure that it cannot do that, so people have to work around it.

There have been good experiences and bad; there have been constitutional deadlocks, but most of the time it works. A lot of effort requires to be put into it, but it works—there is a commitment on all sides to make it work because that is in all their interests. I think that that would be true in the UK; we have high-profile differences about big constitutional issues, but on most policy issues the big differences are not between the component parts of the UK—they are on other lines.

I do not want to exaggerate the extent to which you would get huge differences but, to take one example, there are significant differences between the Governments and stakeholders in the different parts of the UK as to what a new agricultural policy should look like. It is important that that should be negotiated; the common principles should be agreed and the various parts of the UK should then be given as much discretion as possible to work it out. That is the kind of thing that they do fairly well in Canada. It is time consuming, but that is the price that they pay for having a federal system.

There are negative examples in European countries where they have framework laws that are laid down by the central Government. The constitution says that the Government should only lay down the basic principles, but it inevitably goes beyond that, and massive conflicts have been caused. I would go for the Canadian model in which the powers are clearly divided and then you have to agree about the policies.

Professor Gallagher: It is important to realise that we talk very vaguely about the UK frameworks because we are not at all clear what we will have to replace. We will, of course, have to replace existing sets of EU rules, which are usually reasonably well-defined legal rules.

Let me offer you two examples. Michael Keating referred to agriculture. In the agricultural space, we have EU legislation and domestic secondary legislation. That has permitted, for example, something for which I do not know the current jargon, but we used to talk about the modulation of agricultural subsidies. That is to say, in some parts of the UK subsidies are more produce related and in other parts they are more land use management related. That has been possible inside a single set of EU laws and there is no reason why it should not continue to be possible inside an analogous set of UK laws.

A second example, however, might be that those frameworks are less concerned with the day-to-day administration of agricultural subsidies, or even fish quotas, but are legal frameworks that constrain the actions of Government. The most obvious example of that for new things would be the state-aid rules, which responds to a question that Professor Tomkins asked earlier. In the pre-EU days of the 1970s, we had no state-aid rules and we were able to subsidise industry in ways we thought fit, which brought car plants to Linwood and suchlike. We will need a legal framework to replace those EU rules, which might be more permissive but cannot be a free-for-all. That needs to be negotiated and, in the end, legislated for and enforced by the courts.

11:00

Professor McHarg: We need to be clear about what we might mean by “frameworks”. They could mean lots of different things, and how those are resolved would be different.

We may mean an agreement to implement parallel legislation, or UK legislation subject to devolved consent, or parallel or UK legislation with decentralised administration—that takes us into questions about how much policy freedom that decentralised administration would bring with it—or centralised administration, such as the establishment of new UK-wide regulatory agencies. In that case, we would need to think about who appoints those bodies, to whom they report and what powers to hold them to account this Parliament and other Parliaments have.

We may mean the general cross-cutting frameworks that Jim Gallagher spoke about, such as new state-aid rules, beefing up UK competition law and other general frameworks. We have some of those at the moment; the ways in which the UK laws on competition and data protection operate are quite interesting and different from other reservations. The Data Protection Act 1998 came up in the Christian Institute case recently, which made clear that, although this Parliament cannot legislate to change that act, it can, within the framework established by that act, legislate on

issues relating to data protection. The legislation allows it to do that. Similarly for competition, this Parliament can protect certain industries, such as the water industry, from the impact of UK competition law if it wishes to do so, because UK competition law allows for that.

We have to ask a complex, technical set of questions about how best we can achieve common frameworks. The issue of constraining the devolved Parliaments and Governments will become very different, depending on what solution is chosen.

Murdo Fraser (Mid Scotland and Fife) (Con): What Professor McHarg has just said leads neatly to my question, which takes this issue down from a theoretical level to a more practical one. We have talked a lot about common frameworks. What exactly should the common frameworks look like? How many will there be? Who is going to decide all this, and how quickly? Could I have very short answers, please.

Professor McHarg: Do I have to go first?

Professor Gallagher: Yes.

Professor McHarg: I am a constitutional lawyer, not a lawyer for agriculture or fisheries or any of those things.

Common frameworks are needed urgently in any circumstances where there is currently EU-level administration, such as emissions trading. Something has to happen urgently to replace that arrangement, whether that is a continuation of being part of the EU emissions trading scheme or a UK-based substitute.

Where we are subject merely to regulation at the EU level, there is more time. We have to comply with laws set at the EU level—as in various environmental laws, such as the directives for habitats or birds—but we have more time to sort out common frameworks. I will not answer any questions about the substance of those frameworks, because I do not know the answers.

Professor Keating: It all depends on the pace of change. If we are going to be completely out of the EU by March 2019, we do not have very much time, but that will probably not happen. We are talking about transition periods, so it depends on how long the transition period is. The understanding at the moment is that it will be two years, which gives us two more years to put things in place. That should be time enough.

Frameworks do various things, as Aileen McHarg said. They can be just frameworks of law or regulation within which we have to work, or they can be about joint policy making. They will have to be a bit of both. In the environmental field, it might be a lot about setting the frameworks; in agricultural policy, it will be more about joint policy making and a lot of technical work.

The format that we have of the joint ministerial committees is a starting point, but the problem is that, as Jim Gallagher said, they often do not have much to do because they are about making policy but do not do that and are about arbitrating disputes but do not do that either. However, both of those tasks will have to be accomplished after Brexit, because there will be more arguments about the pace of change.

As to the details of that, there would be ministerial meetings and, as the Welsh Government has suggested, there would have to be some kind of voting procedure, because it could not just be the UK Government having the last word. There would also have to be a lot of civil service back-up. A lot of the detailed work would be done in those official, civil service formats and only the major issues would come to ministers. There are enough examples around the world of such systems to show that that would be possible.

Professor Gallagher: The question is hard to answer for two reasons. The first and most important reason is that we are still, in many respects, substantially blind to what life outside the EU will be like. We do not know the long-term relationship between the UK and the EU or the extent to which it will import obligations of one sort or another directly or indirectly. Nor do we know what the transitional period will be like or the extent to which, during it, we might continue to be a member of the single market and customs union—I know what ministers have said on that, but we will see what actually happens. Until those questions are answered, a comprehensive answer on the common framework is not possible to give, but I will have a stab at it.

The first and most obvious point is that, in practical terms, we have to aim for maximum continuity. In other words, if there is no absolute reason for something to change on exit day or exit day plus 2, then it must not change, because so many other things will have to change.

I agree with Michael Keating that we should not invent new kinds of legislative arrangements. We must fall back on the things that we know how to do. Therefore, I suggest that the common frameworks will take the form of primary legislation either here and in Cardiff or in Westminster, with or without consent depending on the content. They may also involve decentralised secondary legislative powers. The content depends on the subject and the external constraint. Agriculture is the most obvious example of that.

Murdo Fraser: Do you have any view on how many common frameworks we would require?

Professor Gallagher: I do not think that there will be many major ones. There will be a great number of bits and pieces that might be described as common frameworks—the long list to which Michael Clancy referred. Most of them will probably deal with themselves in small ways. I think that we are looking at fewer than 10.

Michael Clancy: The communiqué that the UK and devolved Administrations issued talks of the common frameworks being established

"where they are necessary in order to:

- enable the functioning of the UK internal market ...
- ensure compliance with international obligations;
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK."

Many of those functions, of course, are ones that are carried out now. If we were to trace those functions over to the 111 policy areas and then deconstruct them to fit with the relative powers that are located in Scotland, Wales, Northern Ireland and England, we could see that this could be quite a growth industry.

As something of particular interest, let us take as an example administering and providing

"access to justice in cases with a cross-border element".

There are things such as the European arrest warrant that have a resonance in England that is different from that in Scotland, because of the different approaches to the justice system, the different police forces, the different systems of prosecution and the different court structures. That is mirrored in Northern Ireland. Is that one framework? Is it two? Is there any advance on two?

The Convener: Jim Gallagher said 10.

Michael Clancy: It is perhaps as long as a framework might be.

Ivan McKee (Glasgow Provan) (SNP): Good morning, panel. You have done so well at answering our questions up till now that I am going to throw in another layer of complexity. It is on a topic that has been mentioned, which is international trade.

One of the reasons listed for having common frameworks in the UK context is to enable the UK Government to do international trade deals. A big part of the UK Government's narrative in the post-Brexit environment is how wonderful and successful all its international trade deals are going to be. Obviously to some extent there will need to be deals with the EU, but those might be the easiest part, because a lot of that is understood within the current relationships.

I would like the panel to comment on the implications of international trade deals for the common frameworks. The frameworks will be set up at the beginning, but they will clearly be dynamic and will need to evolve, because when the UK Government discusses international trade deals with third-party countries, part of those negotiations will be about what product standards we need to conform to—whether in agriculture, fisheries, environment or whatever—in order to do a deal with those particular countries. Clearly, at that point the UK Government will be coming back and saying, "We are going to have to change the way we do this within the UK in order to do this deal with country X, and so we have to make some changes to what we have agreed in the common framework". How do you see that mechanism working when it comes to what the devolved Parliaments will be able to do in those situations?

In theory, I suppose that that could extend beyond areas that are currently reserved. We can envision a situation where the UK Government is doing a deal with the US and part of it involves liberalising part of the national health service, which might be easier to do down south than it is here. How does a common framework play into that scenario?

I suppose that section 58 of the Scotland Act 1998, which Professor Gallagher mentioned earlier, raises its ugly head as well, because in that situation there could technically be foreign obligations—that card could be played.

There is quite a bit there, but I would like the panel to comment on how they see that layer of complexity evolving.

Professor McHarg: One could make the argument that it makes no difference. One could make the argument that the UK Government already enters into a range of international agreements on behalf of the UK that affect devolved competences and we already have mechanisms—that is, we already agree—on the internal changes that are necessary to achieve compliance with those international arrangements.

One could also make the important point that international law, including international trade law, has a different constitutional status from EU law. EU law is part of a supranational organisation that affects the internal sovereignty of its member states in a way that international law does not. One could make the argument—and I would go quite a long way to making the argument—that international trade law makes no difference in principle.

The difference that it makes, of course, is in practice. International trade agreements will take on a much greater significance in future, because they will replace things that are currently done by EU law.

11:15

The important thing is to ensure that the peculiar mechanisms that have existed from the word go under the devolution settlement to allow the devolved Governments to influence EU policy making are replicated in relation to international trade policy, because that will become so much more important an issue.

I would want to insist on the principle that international law is different from EU law and deserves a different constitutional response.

Professor Keating: International trade agreements have expanded in scope in recent years and, as Aileen McHarg says, they will expand even more when they replace the EU. Even outside the context of the EU, there are things to do with product standards and their harmonisation, environmental standards, rules about subsidy, rules about competition, a tendency to put in regulations about social protection and labour standards and clauses about investor protection. All those things were not in trade agreements 30 or 40 years ago, but they are there now. Some of those have impinged on devolved competences, so that will become an important issue. It has become an important issue in all federal countries. We saw the case of the comprehensive economic and trade agreement or CETA—the Canadian deal—which was held up for a while by the region of Wallonia in Belgium because it impinged upon the competences of that region. I was going to say "devolved region", but Belgium is a federal country. That will become important. It will therefore be important to have some kind of input into that from the devolved Administrations and Parliaments.

International trade is clearly a reserved matter—nobody is going to devolve it. This is an instance not of getting the competences but of having input into reserved competences. It is not going to happen in relation to everything, but almost any international trade deal will now have elements in it that cover devolved matters.

Professor Gallagher: I do not have much to add to that. I agree in particular with the analysis by Aileen McHarg.

We will see to what extent we have new international trade deals. That seems to be deeply uncertain or unpredictable at this time. If we do have them, the deal is that they are dealt with at Westminster and, if need be, Westminster has the capacity to use the dark arts to which Professor Tomkins referred, to ensure—

Adam Tomkins: I meant "dark" as in "obscure"—because the power has not yet been used.

The Convener: I think you protest too much.

Professor Gallagher: Quite so. As the dark lord said earlier, we have section 58 of the Scotland Act 1998.

The deal is that the international trade effects can be carried through into devolved arrangements. Therefore it is wise of the devolved Governments to seek not to have those things done to them but to get to the table and agree some kind of internal legislative framework that will constrain them but also constrain the UK Government to a degree.

As Michael Keating says, international trade seems to touch on all sorts of things these days. There are two big ones. First, there is protection—industries that you are seeking to keep out of trade. Traditionally, most places try to keep their agriculture protected. The second is subsidy—that is, state aids. The UK will need an approach to both those issues. Once we know what that approach is, it will undoubtedly impact on devolved matters: protection, perhaps in relation to agriculture or to other industries; and subsidy, which takes us back to the issue of state aids.

Michael Clancy: There is no doubt that the EU relationship has a different character from other international relationships that the UK gets into. It is a supranational system, not a public international relationship. However, when we leave the EU, we will be entering into a public international relationship with the EU, rather than being part of the supranational relationship that we have had before. The withdrawal agreement and the continuing relationship that is envisaged between the UK and the EU would, I think, be of the latter rather than the former character.

We have some experience in public international relationships, not in trade but in other areas such as the International Criminal Court legislation. There were two acts of Parliament for the court: one for the United Kingdom, which adopted the Rome statute, and one for the Scottish Parliament, which tailored aspects of the procedure for the arrest of international criminals to the Scottish context. It is not impossible for us to devise mechanisms to deal with things in the context of devolution even when they emanate from international treaties.

The Convener: I am conscious of the time—Michael Clancy has to leave in about 10 minutes. I am also conscious of the fact that the Law Society has a lot of things to say about delegated powers.

I am sorry, but I must bring us back to some of the nuts and bolts of the legislative reality. I apologise to Ivan McKee if he has another question, but we need to get some of that on the record.

Ivan McKee: No, it is fine—I am done.

The Convener: Maree Todd can go next.

Maree Todd (Highlands and Islands) (SNP): The Law Society, among others, highlighted a concern about the broad scope of the delegated powers that the European Union (Withdrawal) Bill confers on ministers. Perhaps Michael Clancy could bring that to life a little by giving us an example of a situation in which, in using the power to correct deficiencies, ministers might stray into the area of policy choices, which would normally be reserved to the devolved Parliaments—or to the UK Parliament, given that neither Parliament has scrutiny of delegated powers.

Michael Clancy: Thank you for that question. The Law Society's concerns relate to some of the uncertainties around clause 7 and the analogous provisions for Scotland in schedule 2. There are two questions. First, how does one define "deficiency"? Secondly, should a minister be able to enact subordinate legislation if he or she considers it

"appropriate to prevent, remedy or mitigate"

a deficiency? The issue hinges on the word "appropriate". We have promoted amendments, many of which have been tabled in the House of Commons at the committee stage, to change the standard from "appropriate" to "necessary", so that subordinate legislation is enacted only if it is "necessary to prevent, remedy or mitigate" a deficiency.

That is because what Maree Todd, for instance, might consider to be appropriate might differ from what the convener thinks is appropriate, and they both might consider it in a different context from any member of the panel. The introduction of necessity might require greater evidence of what is necessary to be done

"to prevent, remedy or mitigate".

That is the primary problem with that provision and the others.

The other aspect, of course, is the way in which these and other orders under the bill become law. The bill offers only two choices: negative or affirmative resolution procedure. Neither of those has significant scrutiny elements attached to it, particularly given the context of—as the UK Government estimates—up to 1,000 orders coming before the Parliament. I do not know how many orders the Scottish Parliament might have to deal with, but let us say that it will be a lot. The process has to be completed with a rapidly decreasing time in which that can be done, especially if we wait until the bill becomes law before consulting on the orders. That is why we have promoted the idea that the departments that are framing those orders should consult on those that they have ready just now and expose them to fresh air.

Maree Todd: Does anyone have anything to add?

Professor McHarg: I have heard a couple of suggestions from people about ways in which those powers might be abused—for example, that correcting the statute book might be used to dilute employment protections that the Government does not like. I have also heard suggestions about the choice of regulatory regimes and that those who are subject to the regulatory regimes are getting to choose which regulator they want as opposed to an open policy choice being made.

There are, of course, no protections for the Scotland Act 1998. Clause 7 cannot be used to amend the Northern Ireland Act 1998 but, for some reason, the other devolved legislation is not listed.

Clause 17 can be used to amend the European Union (Withdrawal) Bill, so it is conceivable that amendments that are made to that bill in the course of parliamentary enactment could be taken out through ministerial powers at a later stage.

Therefore, there are lots of different ways in which the powers could be abused. As Michael Clancy said, the real issue is the procedural control. The issue is a combination of the weakness of the controls that are there, the time for scrutiny, and the burden that that imposes on Parliaments, as he said.

Michael Clancy: There is a coda to that on the Northern Ireland Act 1998 provisions. The explanatory notes to the bill tell us that regulations under clause 7 cannot affect the Northern Ireland Act 1998 because it comprises an international agreement between the United Kingdom and the Republic of Ireland. That is the explanation but, nevertheless, it should still be acknowledged that, if that is the case, that is potentially in the wrong place because it could be in clause 8, which is on "Complying with international obligations". That might suit it better. We have promoted amendments to include the Scotland Act 1998 and the Government of Wales Act 1998 in the exemption from being affected by those orders.

The Convener: If I have got it right, no consent mechanism—that is, a Sewel convention-type mechanism—is available if subordinate legislation that changes Scottish primary legislation is passed at the UK level.

Michael Clancy: All subordinate legislation is not subject to the Sewel convention. The Sewel convention affects only bills.

The Convener: But on this occasion, the subordinate legislation could change primary legislation in Scotland.

Michael Clancy: Indeed. That is true.

The Convener: Do you think that that is right? If not, what do we need to do to change that? I hope that that is not James Kelly's question.

James Kelly (Glasgow) (Lab): No.

Michael Clancy: That happens all the time. Powers are taken where order-making powers allow ministers to change primary legislation.

The Convener: In Scotland?

Michael Clancy: Yes, indeed. I think so.

The Convener: Can you give an example of that?

Michael Clancy: Not off the top of my head. Let me take that back and I will investigate it for you.

Professor Gallagher: The regulatory reform legislation of the 1980s is an example.

Michael Clancy: I think that the Scotland Act 2016 allowed order-making powers that would change primary legislation in some respects.

Adam Tomkins: There are procedures for that already.

The Convener: Yes. As Adam Tomkins said, procedures are built into those pieces of legislation that allow a form of consultation and a form of consent, but the process in question does not allow for that.

Michael Clancy: That is true.

Professor McHarg: There is an imbalance, in that the devolution analogue of those powers has provisions for UK ministerial consent or veto, depending on how we want to look at it, that are not reproduced the other way round. I think that we have discussed that issue when I have been in the Parliament before. We talked about the importance of getting a consent mechanism or at least a consultation mechanism in the bill because, as Michael Clancy said, the Sewel convention does not apply. It never has. At least ministerial consultation would be appropriate. The argument could be made for that by saying that it is in schedule 2 for when Scottish ministers might start to encroach on reserved matters, so we could mirror that in relation to clause 7, for when UK ministers might start to encroach on devolved matters.

11:30

Professor Gallagher: I agree in general that some Sewel-like procedure would be sensible, but we have to think about the scale of the task, which is pretty overwhelming. Some kind of Henry VIII power—which is the power to amend primary legislation—is, I think, inevitable. All such powers are potentially subject to the risk of abuse, as are all powers. People might not do the right thing with them, although one cannot assume that because potential abuses can be identified they are a real risk in practice.

I would like to throw this back at you, convener, and ask how the legislatures are going to change their way of doing business to make it possible for them to engage with all the stuff that they must, given the scale of the task of leaving the EU and all the legislative changes that that will involve.

The Convener: That is a fair question, but I am not a witness so I am not going to answer it.

James Kelly: Interestingly, convener, that is the point that I was going to raise. Professor McHarg pointed out earlier that there will be a lot of additional Brexit legislation, and that point was raised in a number of the submissions. What do the witnesses think that we will have to do to update our procedures in the Scottish Parliament, specifically, in order to properly scrutinise all that additional legislation?

Michael Clancy: The Delegated Powers and Law Reform Committee is conducting an inquiry into that very topic. It is not for me to second guess what conclusions the committee might come to, but if one is dealing with an increase of 300 or 400 per cent, let us say, in the number of orders that might be laid in a relatively short period of time, there has to be some way of separating the wheat from chaff—the aspects that are controversial from those that simply alter phrases or words and are completely non-controversial. That would be the first task.

Dealing with the controversial measures, depending on their subject matter, may involve the Scottish Parliament's provisions in respect of super-affirmative orders, which require additional consultation, but I do not think that they can provide for the order to be amended. Changes to standing orders might be needed to provide for that. That is the sort of territory into which we might stray, but we will have to wait to see what the Delegated Powers and Law Reform Committee decides to recommend.

The Convener: I am conscious of the time and that Michael Clancy has an appointment. Would you like to leave?

Michael Clancy: No. I will stay, if you do not mind, convener.

The Convener: In that case, just go when you feel you need to.

Michael Clancy: Thank you.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): We know that clause 5 of the bill intends to bring the general principles of EU law into domestic law, apart from the charter of fundamental rights. However, as I understand it, it does not define or identify what those general principles are to be. That is worrying enough, but the bill then intends that there will be no right of action by citizens or anybody else if it is felt that there has been a failure to comply with any of those as-yet undefined principles. Can you help us and, hopefully, the public to understand the significance of that and what the practical effects for the public might be?

Professor McHarg: You go first, Michael.

Michael Clancy: We had significant concerns about clause 5, which we have made known to the UK Government and to people at Westminster. The question is what those general principles are—those fundamental rights or principles that exist irrespective of the charter. The principle of subsidiarity might be one; the principle of equal treatment might be another. We would want to see greater definition of such areas. Of course, the greater difficulty might come were we to restrict it simply to decisions of the Court of Justice of the European Union and what the court has identified as a fundamental right or principle. There might be fuzziness around the edges if we do that. What Mr Coffey might think to be a general or fundamental right or principle might be different from what other people legitimately might think to be a general or fundamental right or principle.

The other aspect is that we have asked the UK Government to reconsider the removal of the European charter of fundamental rights. If the courts are going to be asked to interpret retained EU law, it would be helpful to be able to have the charter to hand, in so far as it might be an aid to interpretation as to what is meant. That is where we are at the moment. We have tabled an amendment to remove clause 5(4) from the bill.

Professor McHarg: You asked what the general principles are. Michael Clancy mentioned fundamental rights, although we are not entirely sure which fundamental rights—as he said, that depends on decisions that are made by the court. There are principles of equality, proportionality, subsidiarity, transparency and legal certainty. I think that that is about it.

There will be no independent right of action if schedule 1 is not amended. A person will not be able to challenge a decision by a Government minister or a public body on the basis of a breach of those principles, but they will be able to draw upon those principles as an aid to interpretation of retained EU law. However, a further complication is that neither the pre-Brexit nor the post-Brexit case law of the European Court of Justice will be binding on the domestic courts, so the UK Government will be able to decide whether to depart from, for example, the interpretation that has been given to legal certainty or the meaning that is being given to fundamental rights. Therefore, there are a number of layers of uncertainty.

The other potential uncertainty relates to the devolved Parliaments. I am not entirely sure what the relationship will be between, on the one hand, schedule 1, which says that you cannot rely on general principles to challenge the acts of a public body and, on the other hand, sections 29 and 54 of the Scotland Act 1998 as amended, which will bind the Scottish Parliament and the Scottish Government to comply with retained EU law, which includes the general principles. There is a problem about understanding the interrelationship between the two pieces of legislation. Overall, we have a number of points of unclarity about how it will operate in future.

Willie Coffey: Will citizens' rights be diminished or enhanced by that measure in the bill? Is there a simple answer to that?

Professor McHarg: Citizens' rights will be diminished—there is no doubt about it. Enforcement is the key issue.

Last week, we had a nice illustration of the importance of EU fundamental rights in the Supreme Court. The Benkharbouche case was brought by a woman who had been employed at the Sudanese embassy in London, which she wanted to sue for various breaches of her employment rights. She was able to rely on the European charter of fundamental rights in relation to employment rights that are derived from EU law, but she could rely on the Human Rights Act 1998 only in relation to domestic employment rights. As a consequence, she got a stronger remedy in relation to her EU-derived employment rights, because the State Immunity Act 1998, which says that foreign embassies cannot be sued, had to be disapplied so that she could pursue her claim. On the purely domestic employment rights, all that the Supreme Court could do was to give a declaration of incompatibility, which does not disapply the State Immunity Act 1998.

In so far as fundamental rights are protected by EU law, there is stronger protection for people, albeit it is only in a narrow area governed by EU law.

Michael Clancy: I agree.

The Convener: That brings our session to a close. We have covered a lot of ground in our evidence taking. Some of it was dry—at times, we might have wished that we were sitting watching a nice sunset somewhere. Nevertheless, the detail has been important and will help us to come to conclusions in our report, which we will have to draw together sometime towards the end of the year, particularly on clause 11 and our attitude to a legislative consent motion.

I thank the witnesses—I am very grateful that they came along today.

11:40

Meeting continued in private until 11:47.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba