OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities and Human Rights Committee

Thursday 8 March 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 8 March 2018

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EQUALITIES AND HUMAN RIGHTS COMMITTEE
7th Meeting 2018, Session 5

CONVENER

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

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Mary Fee (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Gail Ross (Caithness, Sutherland and Ross) (SNP)
*David Torrance (Kirkcaldy) (SNP)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dr Tobias Lock (University of Edinburgh)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 8 March 2018

[The Convener opened the meeting at 09:00]

Decision on Taking Business in Private

The Convener (Christina McKelvie): Good morning, and welcome to the seventh meeting in 2018 of the Equalities and Human Rights Committee. I make the usual request that electronic devices be set to silent and taken off the desk.

Agenda item 1 is a decision on whether to take item 3 in private. Do we agree to take item 3 in private?

Members *indicated agreement.*

UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

09:00

The Convener: Item 2 is scrutiny of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. As you know, the Scottish Government introduced the bill to Parliament last week and Parliament agreed to treat the bill as an emergency bill. Yesterday, stage 1 consideration of the bill was completed in the chamber. Stage 2 amendments to the bill will be considered next week by the Finance and Constitution Committee, and members should note that the deadline for lodging amendments is 2 pm tomorrow, Friday 9 March.

Section 5 of the bill seeks to save the Charter of Fundamental Rights of the European Union into Scots law as it applies to all devolved matters. That is an area of interest for the committee this morning. As members know, since late 2016 the committee has been keeping a watching brief on the implications of leaving the EU for equalities and human rights, and we have held a number of evidence sessions to that end. We held an evidence session last year on the European Union (Withdrawal) Bill. The aim of this morning's session is to inform members about the detail of the continuity bill before tomorrow's deadline for submitting stage 2 amendments.

The introduction of the continuity bill was a significant development in terms of the committee's remit and, as members know, all committees intend to take evidence on the implications of the bill. As the Brexit process moves forward, we expect the committee to continue to inform itself, the Parliament and the wider public debate with further evidence sessions on the implications for equalities and human rights.

At our very first session on the topic in 2016, we heard from Dr Tobias Lock of the University of Edinburgh on the implications of Brexit, and we are very happy to have Tobias back at the committee today. We know that your time is very tight this morning because you are going from this committee to the Culture, Tourism, Europe and External Relations Committee. We are very grateful that you could find some time for us this morning.

Next week, we will hear from the minister, Michael Russell, and we should direct some of our political questions to him then. We are delighted to have Tobias here this morning, and I hope that he has a very brief opening statement.

Dr Tobias Lock (University of Edinburgh): Thank you for inviting me. I thought that I would briefly run through what the charter does at the moment, what it will do if the withdrawal bill is adopted, and what the differences will be under the Scottish continuity bill that we are discussing here today.

At the moment, the charter protects a host of rights, including all the rights that we have in the Human Rights Act 1998. It is primarily binding on the EU and its institutions, and on member states when they are implementing European Union law. That means that EU legislation can be challenged on the basis of the charter and it can be declared invalid by the European Court of Justice. Such a challenge can be brought in a Scottish court, which would then refer the case up to the ECJ for a decision.

The fact that the charter is binding on member states when they are implementing EU law means that, whenever a member state applies EU law such as an EU directive or regulation, or whenever it deviates from EU law by saying that it would like to invoke a public policy exception, it has to exercise its discretion in accordance with the charter on fundamental rights. It also has to ensure that the procedures that it applies are compliant with the charter; in particular, they must be compliant with the right to an effective remedy under article 47 of the charter, which is broader than the right to an effective remedy under the Human Rights Act 1998 because it does not exclude administrative disputes, broadly speaking.

The charter also offers slightly different remedies from those under domestic law. The charter comes with the primacy of EU law and, in an extreme case, it can be used to lead to the disapplication or non-application of an act of the Westminster Parliament, which is a remedy that does not exist under domestic UK law. The best that someone can get under the Human Rights Act 1998 is a declaration of incompatibility, which does not have any immediate legal effect on a case.

In the Scottish context, we have section 29 of the Scotland Act 1998, under which the Parliament cannot act in a way that is contrary to the charter, provided that it is acting within the scope of EU law or implementing EU law. So, whenever there is a connection with EU law, the Scottish Parliament cannot violate the charter, and the same goes for the Scottish Government.

The European Union (Withdrawal) Bill expressly does not make the charter part of retained EU law, which is the new category of law that that bill creates. Instead, it says that the general principles of EU law continue to be applicable in the UK legal order, and part of those general principles are unwritten human rights. As members probably know, the charter was made binding only in 2009 and, before that, the EU legal order relied on unwritten fundamental rights that had been developed by the Court of Justice, which largely had the same effect as charter rights.

The withdrawal bill incorporates those, but it does not incorporate the charter, which is slightly problematic. The first reason for that is that we do not know whether the charter and the general principles are identical, although they probably are not, as the charter develops fundamental rights at least a little. Secondly, it leads to a degree of legal uncertainty if we rely on unwritten rights rather than written ones, if those are available.

The withdrawal bill also excludes the possibility of challenging EU legislation that has been retained on the basis of the charter of fundamental rights. For example, if the European Court of Justice said that an EU regulation that is in force now and that had been transformed into domestic law by virtue of the withdrawal bill actually was not valid because it was incompatible with charter rights, that would be unchallengeable in the UK legal order. The withdrawal bill does that as a general rule—those laws cannot be challenged.

A more important point is that the withdrawal bill expressly says that there cannot be a right of action on the basis of the general principles of EU law, which means on the basis of any EU fundamental rights. Therefore, the role of the fundamental rights will be confined to helping with the interpretation of EU regulations and directives that have been made part of domestic law by virtue of the withdrawal bill—that is, the retained EU law. That is a much narrower role for the fundamental rights.

The continuity bill takes a different approach on many of those issues. Obviously, it expressly incorporates the charter, and it says that the charter can give a right of action, which is important because that makes a material difference. Somebody could go to court and say that they believed that a Scottish authority was acting within the scope of EU law and was implementing retained EU law and, in doing so, had violated that person's fundamental rights under the charter. That person would have a case whereas, under the withdrawal bill, that would not be possible. The person would have to find some other hook, such as the Human Rights Act 1998 or something else, to go ahead.

I will leave it there for now.

The Convener: Thank you very much. There were some very technical aspects in that, but we hope that we can interrogate some of them as we proceed.

Jamie Greene (West Scotland) (Con): Good morning, Tobias, and thank you for that opening statement, which was helpful. As you say, we are

dealing with hugely technical and legal matters, and your expertise is appreciated. I get the impression from your comments, your tone and the way that you present the information that you are not overly positive about the UK's withdrawal bill. Is it adequate in terms of protecting equalities and human rights in any part of the UK?

Dr Lock: The withdrawal bill could do better by doing two things. It should ideally incorporate the charter simply to create greater legal certainty. Legal uncertainty is good news for lawyers, of course, but it is probably not so good for the rest of the population. Otherwise, we will see endless argument in court as to whether a specific right was accepted as a general principle of EU law at the time of exit day, which is the crucial point in time under the withdrawal bill. It is not that easy to determine that, because the ECJ stopped referring to the general principles of EU law when the charter came into force because it had a written document.

More than anything else, there is a legal certainty point. However, excluding the right of action means that, in certain situations, people who would have a remedy now will not have one in the future. That is a political choice. There is no obligation to continue to guarantee those rights and I do not think that there will be such an obligation under any agreement with the EU. However, from a human rights perspective, it is not optimal.

Jamie Greene: Okay. I appreciate that answer. Given that the policy in the withdrawal bill is unlikely to change, we could be in a position in which the withdrawal bill at Westminster is passed without adopting the charter of fundamental rights and the Scottish continuity bill is passed with the adoption of the charter. Where would that leave the constitutional situation if we had two parallel legal systems in a single sovereign state, one of which had adopted the charter while the other had not? What sort of conflict might arise from that?

Dr Lock: That is, of course, a possibility. If the two bills are adopted as they stand, that will be the consequence. The problem with that, which is probably a problem with the continuity bill as such, is that it adds another layer of complexity to the post-Brexit legal landscape.

What I mean by that from a human rights perspective is that, in Scotland, the Human Rights Act 1998 will continue to exist. We will also have general principles of EU law as incorporated by the withdrawal bill. Those general principles will be applicable to reserved matters, broadly speaking. However, we do not know exactly what the content of those general principles is, although we can make a good guess, and they do not give a right of action. Then, as far as "retained (devolved) EU law" is concerned under the continuity bill, we will have the charter as well as the general principles, which can give a right of action.

The problem is that individual cases—real-life scenarios—do not align themselves with the division of competences between the Scottish Parliament and the Westminster Parliament. We could have an individual who has a human rights problem with part of the claim based on reserved law and part of it based on devolved law, so the case would split. Therefore, we might have a court say that it cannot give a remedy as far as a certain part of the claim is concerned because it relates to a reserved matter, but that it can apply the charter and grant a right of action.

That is already happening in the UK legal order simply because the charter does not apply in every circumstance; it applies only when the member state is implementing EU law. We already have that situation in theory, and there are cases in which it has happened. However, with the continuity bill, we would add a third layer, so to speak, which would make it more complex.

09:15

Jamie Greene: Are there any precedents for other non-EU countries adopting the EU charter?

Dr Lock: Not that I am aware of.

Jamie Greene: So is it the case that, if Scotland passes the bill in two weeks' time, when the UK leaves the EU it will be a non-EU country that has incorporated the EU charter of fundamental rights into its domestic law?

Dr Lock: It will have incorporated the charter in so far as retained EU law is concerned. I suppose that the idea is that that body of retained EU law will shrink over time, because you will have new measures on environmental and agricultural matters and so on. Those measures will no longer be retained EU law, so the charter will not apply to them. Whatever is changed or repealed will be outwith the scope of the charter—the charter will preside over a shrinking body of law.

However, as you know, with the way that Parliaments and politics work, even in 20 or 30 years' time some measures will still be part of that category of law and the charter will still apply to them. Whether there will be a charter case is a completely different matter, because most of the measures that I mentioned are rather technical and do not raise human rights issues, but it could happen.

Jamie Greene: But that is based on the assumption that this Parliament repeals laws or introduces domestic law that would supersede EU laws.

Dr Lock: That is right.

Jamie Greene: In a sense, it is an unknown, because those would be decisions made by the Parliament in future years.

Dr Lock: Exactly. Obviously, this Parliament could decide just to sit still and not change anything.

Jamie Greene: I will not keep you much longer—there are lots of other members on the committee and we are tight for time—but if the continuity bill comes into force in Scotland, do you see any difficulties arising from the fact that there will be two parallel systems, for example on right of action? Might any legal uncertainties or other problems arise? Today we are probing all aspects of the bill—the positive aspects and the potential negative aspects. Do you have any views on that?

Dr Lock: I think that there will be an issue if the withdrawal bill—the Westminster bill—extends to devolved matters. If the Westminster bill were amended to say, "This does not apply to Scotland", or something like that—if it were to take out whatever bits the continuity bill covers—at least that would create better legal certainties than if you had two acts claiming to regulate the same aspects, in which case there would be a degree of legal uncertainty.

Jamie Greene: Thank you. I have further questions, but I will have to come back to them later.

The Convener: Gail, did you want come in with a quick supplementary?

Gail Ross (Caithness, Sutherland and Ross) (SNP): Yes. Jamie Greene asked about countries that are not in the EU adopting the European charter. What about countries that are in the European Free Trade Association?

Dr Lock: The agreements covering EFTA and European Economic Area countries do not contain a human rights charter. That is simply for historical reasons, because the agreements predate even early attempts at putting together a charter. Those countries protect fundamental rights in accordance with their own systems—they have not incorporated the charter.

Of course, we have got the other European system—the European convention on human rights—and there is a tendency for the European Court of Human Rights to look at the charter for inspiration, simply because the areas of the convention that are mirrored in the charter have been a little bit updated. I mentioned the right to an effective remedy. In article 6 of the convention, that right is confined to private law disputes and criminal matters, so it does not cover purely administrative issues. Article 47 of the charter gets rid of that anomaly, if you like.

Another example is that the convention does not protect the right to conscientious objection—that is a historic issue, as the convention was drafted in the early 50s—whereas the charter recognises that expressly. It is a slightly more updated understanding of convention rights. Whenever the European Court of Human Rights has adopted a relatively progressive interpretation of the convention, it has looked at the charter to see what it thinks is the proper reading of the provision in order to move the law forward. In that sense, there are countries outside the EU that are covered by certain aspects of the charter, but very indirectly, through an interpretation of the European convention on human rights, in light of the charter.

Gail Ross: If the UK was to bring forward its own bill of human rights when we leave the EU, do you think that it would mirror the charter? Are there any aspects that should be updated?

Dr Lock: I imagine that it will mirror, or update, certain aspects of the convention on civil and political rights. I am not sure whether the UK would adopt a chapter on socioeconomic rights, for instance, as the charter has. It might have stronger protections than are in the charter on procedural rights, but that is just a guess.

Gail Ross: I appreciate that. Thank you.

The Convener: I will bring in Mary Fee, who wants to focus on a different area of rights.

Mary Fee (West Scotland) (Lab): Good morning. I want to follow up the question that Gail Ross just asked about the UK Government introducing its own bill of rights. If the continuity bill passes in this Parliament in a couple of weeks' time and we sign up to the charters, and the UK introduces a bill of rights after Brexit, where will that leave us?

Dr Lock: That is a good question. A bill of rights for the whole of the UK would probably cover the devolved authorities and Parliaments, and those at the UK level. I assume that the Scotland Act 1998 would be amended—the bit on the Human Rights Act 1998 would be replaced by a bit on the UK bill of rights, or whatever it would be called. Would that make a difference to the continuity bill? It would not do so immediately, of course. As I said before, the charter will apply only to those bits of EU law that have been retained. It would not wreck the bill, in other words. The other thing that it might add is an additional layer of rights that would have to be complied with if Scottish ministers amended retained EU law as a result of the Scottish Parliament deciding that it wanted to change bits of it. In that sense, there might be an overlap, but I do not think that there would be a problem.

Mary Fee: That is helpful.

Much of our employment legislation has come from Europe. If the continuity bill passes, will the current employment legislation that comes from Europe be part of our law in Scotland?

Dr Lock: I am not so sure about that, because the test is that the continuity bill saves only the bits of EU law that would be devolved, or that the Scottish Parliament would have competence to legislate on, were it not for section 29. Most employment legislation would not be covered because it is reserved.

Mary Fee: I appreciate that the Scottish Parliament information centre paper that we have and the research that has been done say that any changes to employment law are likely to be slow and incremental.

If there was any slippage in employment law—if the UK Government decided to do something that would fundamentally change a right or protection that we currently have—could we do anything in Scotland to protect those rights and stop them being taken away?

Dr Lock: As far as I can tell, no. Under the current devolution settlement, that would be outwith the competence of the Scottish Parliament.

Mary Fee: Would no one in Scotland have a right of challenge?

Dr Lock: Ministers could bring a judicial review. All the powers exercised under the withdrawal bill will be open to challenge, as they will require secondary legislation.

If the change was made by an act of the Westminster Parliament, there would not be much that anyone could do.

Jamie Greene: It is a fascinating subject.

I think that you said that it would be outwith the competence of the Scottish Parliament, according to the devolution settlement, to stop the reduction or withdrawal of any human rights by the UK Government in any future bill. Will you confirm that that is what you said?

Dr Lock: The Scottish Parliament would not be able to reintroduce employment rights. For example, the right to annual leave under the Working Time Regulations 1998 is a reserved matter and will be retained EU law under the withdrawal bill. The UK Government might want to loosen the right or make it subject to additional qualifications and might introduce legislation to that effect. The Scottish Parliament could not introduce legislation to counter that.

Jamie Greene: That is helpful.

That leads nicely to my next question. Part 2 of the continuity bill, specifically in sections 2 and 3, refers to a number of types of legislation. Four different terms are used in part 2: "devolved EU-derived domestic legislation", "EU-derived domestic legislation", "devolved direct EU legislation" and "direct EU legislation".

Would you help the committee to understand the differences between those four terms? I am struggling to understand.

Dr Lock: I can try.

Section 2 addresses "EU-derived domestic legislation", which is the same term that is used in the withdrawal bill. Sections 2, 3 and 4 are largely copy-and-paste exercises. The only difference is that "devolved" as an adjective has been put in front of terms, to make it clear that the provisions relate to Scottish matters only.

In section 2, the term "EU-derived domestic legislation" is supposed to mean mainly legislation that is derived from EU directives. When an EU directive is made, a member state has a couple of months to change its law to make it compliant. The UK's adopted approach is that that is done by ministers by way of secondary legislation. The basis for that is in the European Communities Act 1972.

There are tonnes of statutory instruments, both Scottish statutory instruments and ones from Westminster, that have implemented EU directives. I have just mentioned the Working Time Regulations 1998, and there are the Environmental Impact Assessment (Scotland) Regulations 1999, which relate to a devolved matter, and so on. There are thousands of them.

The reason that section 2 is needed after Brexit is that the European Communities Act 1972 will be repealed by the withdrawal bill. The European Communities Act is the legislative hook on which all the statutory instruments are hanging. If the hook is cut off, they will disappear, legally speaking, so we need a new hook. That new hook is provided by clause 2 of the withdrawal bill, and for our purposes—for devolved statutory instruments—it will be provided by section 2 of the continuity bill.

09:30

Jamie Greene: How does section 2 of the continuity bill differ from clause 2 of the withdrawal bill? Is it just a case of copy and paste?

Dr Lock: They do not differ greatly. The only difference is in that section 2 of the continuity bill says:

> "EU-derived domestic legislation is devolved if and to the extent that it makes provision that is ... within the legislative competence of the Scottish Parliament."

In other words, section 2 of the continuity bill deals with an aspect of clause 2 of the withdrawal bill—the devolved powers bit.

Jamie Greene: The word "devolved" is the key, because it relates specifically to the approach that the continuity bill takes. Who defines what is and what is not devolved? Is it defined only by reference to the Scotland Act 1998? Are there other definitions that can be used to decide what is devolved?

Dr Lock: The definition in section 2 of the continuity bill includes an implied reference to the competence of the Scottish Parliament. The test that would have to be applied to every instrument is whether, if the instrument were to be adopted now from scratch, it would be within the competence of the Scottish Parliament. In conducting that test, the limitations arising from EU law would have to be ignored, of course.

Jamie Greene: So, the way to define whether something is devolved or reserved is to determine whether it falls within the legislative competence of the Scottish Parliament, in whichever way that competence is generally assured.

Dr Lock: Yes.

Jamie Greene: Thank you.

The Convener: Before Jamie Greene moves on, there is an issue on which I want clarification. Schedule 5 to the Scotland Act 1998 lists reserved powers. My interpretation is that the normal way of determining whether a power is reserved or devolved is that if it is not on the reserved powers list, it is devolved. Is that your interpretation?

Dr Lock: Yes.

Jamie Greene: That is helpful.

Section 8 is a very short section with two subsections. Could you walk us through what it says about what Francovich means?

Dr Lock: The provision in section 8(1) is also in the withdrawal bill—in schedule 1, I believe. Section 8(1) says:

"There is no right in Scots law on or after exit day to damages in accordance with the rule in *Francovich*",

which is cryptic if you do not know what the rule in Francovich is. The European Court of Justice introduced a new remedy in EU law—a remedy to state liability—in the early 1990s, whereby a member state must pay damages if it has violated or breached EU law, and that breach has caused somebody loss. The test is quite a high hurdle—the member state must have committed a sufficiently serious breach of EU law, which is very difficult to show. In any event, section 8 says that, after Brexit, no claim shall be made under that rule.

The approach in section 8 of the continuity bill differs slightly from the approach in the withdrawal bill, in that section 8(2) says that Francovich damages can still be claimed

"in relation to any right of action accruing before exit day",

whereas no more such actions will be admitted after exit day under the withdrawal bill. However, generally speaking, the right to state liability—which belongs to the law of delict; it is a private law remedy—will no longer be available after Brexit.

Jamie Greene: Under both bills, after exit day, there will be no right to damages, but the continuity bill differs in that, under it, if the action were to take place before exit day, there would still be potential liability after exit day, whereas that is not the case under the withdrawal bill. Is that correct?

Dr Lock: That is right; that is my understanding.

Jamie Greene: What does section 8(2) mean in relation to transition periods? It is less obvious what will happen after exit day during a transition period. "Exit day" is defined in the continuity bill, too.

Dr Lock: The continuity bill gives powers to the Scottish ministers to define "exit day", because we still do not know when that will be. Section 8(2) makes reference to section 32, which contains quite a broad power for ministers to make regulations that

"they consider appropriate for the purposes of, in connection with or for giving full effect to this Act or any provision made under it."

That is an extremely broad power to amend, which includes a right to amend the eventual act.

That power is also found in the withdrawal bill. I suppose that its main purpose is to allow ministers to react to political developments between passage of the bill and whatever happens in the relationships between the EU and the UK, the EU and Scotland, and the UK and Scotland, in order that they can make the act work so that it does not have to go back to Parliament. However, I believe that if the act is to be amended, that will be done under affirmative procedure here, so Parliament will have something to say.

Jamie Greene: Okay. For clarification, if there is, after exit day, a so-called transition period or an interim period—a defined period that is agreed between the UK and the EU—would there be any right to damages in Scots law during that period? That is unclear.

Dr Lock: Yes, but—

Jamie Greene: When would that liability end?

Dr Lock: There are two points to make. The first is that I think that the continuity bill does not make provision for a transition period at all. I think that the intention—certainly at Westminster—is to introduce a separate bill that will provide for that. We do not know what the exact ramifications will be, so there will probably be a separate bill to deal with the transition period. The continuity bill will probably either not come into force—and exit day will be defined to mean some time after transition or when transition ends—or be enacted only partly. During transition, ministers will not be able to use the powers to amend the law, because that would probably be contrary to what the transition agreement will say. That also means that, during transition, all the remedies that we currently have under EU law will continue as they are now, so section 8 of the continuity bill will properly kick in only after transition.

The Convener: We will move on, because a few other members want to come in and we are running out of time.

Mary Fee: I have a tiny supplementary question on the question that Jamie Greene asked about Francovich. We need to be very clear about the inclusion of the Francovich rule in the continuity bill and in the withdrawal bill. Is the bar in Francovich set so high that it would be highly unlikely that there would be any impact on anyone living in the UK?

Dr Lock: There would be an impact—a handful might lose out, but most would be big companies and not individuals.

I did a little study on case law since Francovich. From what I can tell, the success rate in such cases is very low because an applicant has to show not only that there has been a sufficiently serious breach of EU law—not just a breach; it has to be an obvious serious breach, which does not happen often—but that the right in the relevant provision is aimed at them. They then also have to show loss. Those three elements combined are relatively difficult to show.

There have been cases: I believe that in most the winners have been corporations, so I do not think that it would be a human rights catastrophe if Francovich was not used. However, I do not fully understand why it is being excluded after exit day. I do not see an objective reason for the damages remedy not continuing to be present in Scots law for cases in which a public authority breaches rights under EU law in the future.

Mary Fee: That is helpful, because we can explore the issue further.

The Convener: I have a quick question, and then Alex Cole-Hamilton will have the final question. I know that you need to get to the other committee, Tobias.

It is my understanding that losing the charter of fundamental rights will create significant gaps in human rights law, because it goes further than the Human Rights Act 1998. We do not have direct equivalence in some parts of UK human rights law. The equalities aspects of human rights law, as they apply to devolved matters, are devolved to the Scottish Parliament, but the actual legislation is reserved to Westminster. The issues include the right to non-discriminatory practice, protection of children and human trafficking; we have discrete law on all those things. If we do not enshrine the charter in Scots law, will there be huge gaps, and will the rights that people currently have, and enjoy, be lost?

Dr Lock: Loss of the charter would create a gap. There are rights that are not found in the Human Rights Act 1998, but there is an expressed reference to children's rights there. I know that there is a separate effort in Scotland to incorporate the United Nations Convention on the Rights of the Child, but there is a potential gap. We do not really know yet how the European Court of Justice will interpret all the social rights in the charter.

It is a bit more difficult to say what the position on equalities rights will be. There is no general principle of equality under the Human Rights Act 1998, but the Equality Act 2010 is based on, and goes beyond, EU directives. However, it is not in the Scottish Parliament's hands to do anything about the Equality Act 2010.

I stress, however, that the charter applies only to implementation of EU law, which limits the effects quite dramatically. The charter does not apply to human-rights sensitive issues for this Parliament such as housing and the national health service, because they are nothing to do with EU law.

Alex Cole-Hamilton (Edinburgh Western) (LD): First, I apologise for my late arrival.

Thank you for coming to see us today, Tobias. You have given us a very comprehensive view of the impact of sections 2 and 5 on the reading across of EU law into Scots law, and on enshrining the principles of the charter of fundamental rights.

Are you in a position to give a view on section 13? That section explains what will happen after Scotland and the UK leave the EU, with respect to keeping pace. Scottish ministers will be able, over a period of 15 years by extension, to adopt changes in EU law and, potentially, to bring changes to the charter into Scots law by regulation, without recourse to Parliament. My concern is that we will lose the scrutiny that we afford to primary legislation. With that, we might lose things such as children's rights impact assessments and equality impact assessments. In effect, that tier might be removed. I am not

suggesting for a minute that the EU would act counter to those things, but there might be a divergence in views in terms of people's moral compasses. Should section 13 be changed to allow Parliament more scrutiny of those issues?

Dr Lock: The first thing to note is that section 13 of the continuity bill does not have an equivalent in the European Union (Withdrawal) Bill: no provision is being made at UK level for ministers to keep step with EU law in that manner. In a way, section 13 mirrors what there is in the European Communities Act 1972, in which ministers are given powers to implement EU directives and to keep the UK legal system in step. In the future, there will be no legal obligation on them to do so, which is what section 2 of the European Communities Act 1972 is for. In the continuity bill there is a voluntary measure, if I have read it correctly; ministers will have discretion to decide whether to adopt EU legislation. That is one issue.

Scrutiny is indeed an issue, but there is a difficult balance to strike. If the intention is to adopt EU legislation regularly, Parliament might, for example, be swamped with bills that change tiny technical details in relation to agriculture. Parliament should probably spend its time better. However, because there will be a lot of ministerial discretion to omit bits of EU legislation, there could be little democratic scrutiny of such measures. That is something that Parliament might want to rethink; it might want to tighten the requirements more.

Alex Cole-Hamilton: Thank you. That chimes with what I am thinking.

The Convener: We know that you are keen to get to another committee, Tobias. We are very grateful for your time this morning. You have been very helpful in allowing us to understand the issues, which will be very important as we scrutinise the bill further. We hope to hear from you again soon.

Dr Lock: Thank you very much.

09:46

Meeting continued in private until 11:07.

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