OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Tuesday 13 March 2018

Session 5

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FINANCE AND CONSTITUTION COMMITTEE
9th Meeting 2018, 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)
*Emma Harper (South Scotland) (SNP)
*Patrick Harvie (Glasgow) (Green)
*James Kelly (Glasgow) (Lab)
*Ivan McKee (Glasgow Provan) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Claudia Beamish (South Scotland) (Lab)
Donald Cameron (Highlands and Islands) (Con)
Jackson Carlaw (Eastwood) (Con)
Maurice Golden (West Scotland) (Con)
Jamie Greene (West Scotland) (Con)
Liam Kerr (North East Scotland) (Con)
Gordon Lindhurst (Lothian) (Con)
Dean Lockhart (Mid Scotland and Fife) (Con)
Mark Ruskell (Mid Scotland and Fife) (Green)
Michael Russell (Minister for UK Negotiations on Scotland’s Place in Europe)
Tavish Scott (Shetland Islands) (LD)
Graham Simpson (Central Scotland) (Con)
Colin Smyth (South Scotland) (Lab)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Chamber

Scottish Parliament

Finance and Constitution Committee

Tuesday 13 March 2018

[The Convener opened the meeting at 17:45]

UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill: Stage 2

The Convener (Bruce Crawford): Good evening and welcome to the ninth meeting in 2018 of the Finance and Constitution Committee. I ask all members who are in attendance, as well as officials and so on, to make sure that their phones will not interfere with proceedings.

The only item of business on our agenda is scrutiny of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill at stage 2. I welcome to the meeting the Minister for UK Negotiations on Scotland's Place in Europe, Mike Russell, and his officials, as well as non-members of the Finance and Constitution Committee.

Members will be aware that we have a substantial number of groups of amendments to consider. Although, at this stage, I do not intend to impose time limits on contributions, I am mindful of the need to ensure that sufficient time is allowed for consideration of all the amendments, including those in the later groups, so members and the minister are asked to keep their contributions as concise as possible. In addition, I am aware of the demands on members and the minister, and I am particularly aware of the duty of care towards parliamentary staff and Government officials, so I propose that we aim to finish the meeting at around 10 o'clock. However, I will allow the meeting to go beyond that time if it is judged that that is required.

Members will also be aware that the Parliament has agreed to extend the deadline for consideration of stage 2 so that, if needed, we will have the opportunity to continue stage 2 proceedings tomorrow morning. The clerks have issued a revised agenda and we will meet tomorrow morning at 8 am. The stage 2 proceedings will be the only item on the agenda and we will consider the scheduled legislation at our meeting on 21 March. All of that means that we have at least eight hours at our disposal to consider amendments.

Members should not put their identification cards into the consoles. I have already seen some members doing that—I know that it is a habit that they will want to continue. Members should not press the request-to-speak buttons, either. Instead, the microphones will become active as they would normally do in a committee meeting. In other words, members should behave as if this was a committee meeting.

Section 1—Purpose and effect of this Act

The Convener: Amendment 58, in the name of Liam Kerr, is grouped with the other amendments that are shown on the groupings paper.

Liam Kerr (North East Scotland) (Con): Thank you for allowing me to attend the meeting, convener.

My three amendments in this group are entirely a function of the need for clarity. It is imperative that the bill expresses precisely what it is for, what it intends to do and how it intends to go about it.

The concept of legal certainty is not merely promoted by me; it is one of the fundamental principles of European Union law. According to the European Court of Justice, the law must be certain, clear and precise, and the implications of each law must be foreseeable. Legislation must be worded so that it is clearly understandable by those who are subject to it. It is with that guiding principle in mind that I lodged amendments 58, 60 and 65—and, indeed, all the amendments that I will speak to tonight.

Amendment 58 proposes that the word "prospective" in section 1, page 1, line 7 be deleted. That would clarify that withdrawal from the European Union is not prospective and that the United Kingdom is withdrawing from the EU. That is important. It is about being specific, right at the top of the bill. We need to recognise that the UK is leaving the EU, and section 1(1) needs to make that explicit.

There is good legal reason for such an approach in so far as the bill will have effect only once we leave the EU. It cannot be acceptable that the very first section in the bill should countenance any doubt on that. Let me be clear: the word "prospective" countenances doubt. It does not mean "has not happened yet but will do so". According to the "Oxford English Dictionary", it means "likely to happen at a future date", which is not the same. The word "prospective" should be deleted.

Amendment 60 is also intended to provide clarity of expression. As currently drafted, section 1 speaks in hypotheticals, whereas my view is that it should be clear. Is a provision made under the bill enforced before the relevant date? I presume that the draftsman will consider that at the time. It

is surely far preferable to talk in absolutes when an absolute truth exists. A provision made under the bill either is or is not incompatible with EU law. Amendment 60 seeks to make that clear.

Amendment 65 follows the same logic. I do not understand—and worse, I do not think that those who are subject to it will understand—why the caveat is necessary. Something either is or is not within the legislative competence of the Scottish Parliament. That is the test against which it should be judged, and it is not helpful to set up a hypothetical whereby someone must hypothesise that it would be legislatively competent if it were contained in a particular place.

Besides that, there is a question over whether the bill is legislatively competent. If the Scottish Parliament passes the bill, it will become an act of the Scottish Parliament. Anything that could be hypothesised to be contained in it or made under it would become part of devolved legislative competence, even though the act's devolved legislative competence could be challenged. Clarity is required, and amendment 65 would achieve that.

I move amendment 58.

Murdo Fraser (Mid Scotland and Fife) (Con): I have lodged two amendments in the group—amendments 59 and 64—and I will talk to them in turn.

Amendment 59 would insert at section 1, page 1, line 11 the declaratory statement:

"A decision by the Supreme Court that any or all provision of this Act is outside the legislative competence of the Scottish Parliament must be complied with."

The amendment is largely self-explanatory and would simply provide clarity in relation to the Supreme Court's role. As members are aware, the Presiding Officer of this Parliament has expressed his opinion that the bill does not fall within this Parliament's competence, but that view is disputed by the Lord Advocate, acting on behalf of the Scottish ministers. It is therefore possible—indeed, likely—that the dispute will end up in the Supreme Court, which will have the responsibility for ruling on the matter.

Amendment 59 would make clear beyond any doubt that, should the Supreme Court rule that the act is outwith the competence of this Parliament, that ruling must be complied with. That would apply to the act as a whole or any part of it that was so affected by a ruling of the Supreme Court.

Some members might argue that amendment 59 states the obvious. Nevertheless, it is important that there is in the bill an acceptance of any decision that is made by the Supreme Court, so that there are no subsequent disputes—legal or political—about the legality of the legislation.

I move amendment 59.

I lodged amendment 64 to try to bring clarity to the operation of the bill. I follow a similar line of argument about how the bill is drafted to the one that Liam Kerr put forward. Section 1(3) says:

"'the relevant time', in relation to any provision of this Act or any provision made under it"—

in other words, the date on which any provision of the act will come into effect—will be the date when the EU law in question

"ceases to have effect in Scots law as a consequence of UK withdrawal."

That seems to be an unnecessarily complex way of addressing a fairly simple issue. The European Union (Withdrawal) Bill at Westminster provides that the date on which we are leaving the EU is 29 March 2019, at 11 pm. It is clear that it is at that point that EU law will cease to have effect across the UK, including in Scotland. That, therefore, is the date that should be referred to in section 1(3).

Another date may be agreed—for example, because of transitional arrangements that are put in place. In that case, there is provision in the withdrawal bill for a minister to amend the date of 29 March 2019, and that right of amendment is reflected in my amendment 64. Not to agree to the amendment would potentially create some uncertainty as to the date on which the provisions in the bill that is before us will come into effect. My view is that it is simpler and more accurate to tie the effective date in the bill to the date in the withdrawal bill to ensure that there is complementarity between the two bills, and that is the reason behind amendment 64.

The Convener: It is not necessary for members other than the member who speaks to the lead amendment in the group—in this case, Liam Kerr—to move amendments during the debate on the group. I will ask members to move other amendments at the relevant time.

Alexander Burnett (Aberdeenshire West) (Con): My amendment 61 replaces the words "relevant time" with the words "exit day". That is identical to amendment 62, and amendment 63 is required following those two amendments. The effect of the three amendments is to clarify that the bill will apply from exit day.

The bill has a slightly curious structure for defining when its provisions will begin. Section 1(2) says that the bill will have no effect

"until the relevant time",

but then section 1(3) defines

"the relevant time"

as whenever a provision of the bill is no longer incompatible with EU law

"as a consequence of UK withdrawal."

There is, therefore, some ambiguity. A provision no longer being incompatible with EU law as a consequence of the UK leaving the EU is not quite the same thing as the UK actually leaving the EU. In theory, those could be two separate times. We could leave the EU but leaving EU law as a consequence of leaving the EU might be pegged to a different date.

In other words, at present, the moment at which the bill kicks in is not the exit date. Instead, we are left with the vaguer definition of the moment at which a provision ceases to be incompatible with EU law. That sounds theoretical, but there is a much tighter definition elsewhere—for example, in section 2—and the equivalent sections of the withdrawal bill are significantly tighter in linking all its provisions to exit day. There is a reason for that, which is that it is far clearer. The continuity bill should be clear that its provisions begin on exit day. Amendments 61 and 62 clarify that up front, and amendment 63 removes section 1(3), which becomes redundant.

My next amendment in the group is amendment 203, which seeks to define exit day as 29 March 2019, which is when the UK will leave the EU. Section 28 provides a definition of "exit day", but it is open to interpretation, saying only that exit day is whenever the Scottish ministers say. That is completely divorced from any legal, political or constitutional reality, and there is no case for it whatsoever.

Because the entire bill follows from that definition, any number of questions could follow if it is not changed. Could ministers define exit day as being after the UK has actually left? Could ministers define it differently from the definition in the rest of the UK? I hope that the minister will address those questions in his comments. My amendment 203 therefore brings the definition that is used in the bill into line with that which is used in the withdrawal bill. As a consequence of amendment 203, I support Donald Cameron's later amendment to delete section 28 in its entirety.

My amendment 229 seeks to insert a number of lines:

"The Scottish Ministers must by regulations repeal any provision of this Act which is incompatible with—

(a) the European Union (Withdrawal) Act 2018, or

(b) the Scotland Act 1998."

As a consequence, I propose in my amendment 230 that, in section 37 on page 24, line 29, we leave out "subsection (1)" and insert "subsections (1) and (1A)". The intent of those two amendments is to place on ministers a duty to repeal any part of the future act that is incompatible with either the withdrawal bill or the Scotland Act 1998.

The courts are the ultimate arbiter of what is compatible between acts, and they are the only mechanism for deciding on conflicts. However, any court action is time consuming and expensive. We would directly put into the bill a process for establishing what would happen if the bill conflicted with the existing legislation, particularly the withdrawal bill, because we still consider that to be the right mechanism to prepare the Scots statute book for exit. The SNP claims that it still wants a deal to do so shortly, and it supports that, too. The Scotland Act 1998 defines the Parliament's rights, and the amendment would ensure that ministers would repeal any part of the bill that was incompatible with the two acts.

18:00

Gordon Lindhurst (Lothian) (Con): I refer to my entry in the register of members' interests as a practising advocate.

My amendments 66, 67, 72 and 74 relate to the position of the Scottish Parliament bill that we are considering in relation to the Scotland Act 1998, which is an act of the United Kingdom Parliament. The 1998 act established the Scottish Parliament and prescribed its powers. In particular, section 29 of that act sets out the Parliament's legislative competence. I need not go into the detail of that section save to mention subsection (1), which provides that any act of the Scottish Parliament that is outside its legislative competence "is not law".

The purpose of amendment 66 is not to alter the meaning of the particular subsection that it relates to; rather, its purpose is simply to modify the wording to make it entirely clear by express definition rather than by reference.

Amendments 67, 72 and 74 must be read in the context of the whole bill. If amendment 68, which was lodged by my colleague Adam Tomkins, were to be accepted and section 1 were to be left out altogether, that would deal with the issue that is raised by section 1, which is addressed by my amendment 67. However, in the event of section 1 being passed as part of the act, it is vital that its grand title—"Purpose and effect of this Act"—should be clearly set in the legal context that it finds itself in: namely, the Scotland Act 1998. My amendment 67 makes it clear that the bill is to be read and given effect subject to the 1998 act. Only if it is so read and given effect to could the bill ever be within the competence of the Scottish Parliament—although I make no concession that it would be even then.

The whole of section 29 of the 1998 act—not just the provisions about EU law—applies to the

bill. In that context, it is important, by way of explanation, to note the limited extent of the Lord Advocate's statement on the competence of the bill in dealing, as it does, with very limited issues of EU law. In his answer to a parliamentary question, the Lord Advocate said:

"The legislative competence of any Bill is determined by applying the relevant legal tests. The principal question in relation to the competence of the Bill arises under section 29(2)(d) of the Scotland Act 1998—namely, whether the Bill is incompatible with EU law."—[*Written Answers*, 27 February 2018; S5W-14945.]

As the Lord Advocate said, in his view, that is the "principal question". Even in that statement, he did not say that it was the only question. I am sure that he would concede that, if his comments were to be widened out to cover all relevant options, the whole of section 29 of the 1998 act applies, not just that specific part. Indeed, there are many other sections of the 1998 act that are relevant in the context of the bill.

The prospective nature of the bill, the Presiding Officer's comments on it and its failure to meet the test for legislative competence will be familiar to the committee. My colleague Liam Kerr has touched on the need for law to be precise, clear and certain. I would add to his comment that that is a requirement not only in EU law but in human rights law, which the Scottish Parliament will still be subject to after UK withdrawal from the EU.

There is a whiff of anarchy and lawlessness about how the bill is drafted. Indeed, as drafted, the bill might be considered questionable on an objective reading when measured against the standard of the rule of law itself. It is, of course, the rule of law that underpins our civilisation.

My amendment 67 would deal both with the undesirable reality and also with any appearance of that, as would, in particular, amendment 214, in the name of Adam Tomkins, which would leave out section 33.

I associate myself, in particular, with the other amendments of like nature in this group, which are amendments 78, 80, 82, 88, 97, 104, 105, 112, 114, 143 and 161 to 163. I do not need to go into those amendments.

My final amendments in the group—amendments 72 and 74—likewise seek to remove any shadow of doubt that the provisions of the bill operate, and are intended to operate, in the legal framework within which we operate as a civilised society under the rule of law.

Adam Tomkins (Glasgow) (Con): I associate myself with Gordon Lindhurst's remark that there is a whiff of anarchy and lawlessness around the provision that we are debating. It is incompatible with the rule of law, which is one of the fundamental building blocks on which the United Kingdom constitution is based, including the devolution settlement. For that reason, if for no other, section 1 should be deleted from this bill.

I have 13 amendments in this group. In the interests of time, I propose to discuss them in three sub-groups rather than going through all 13 separately. I will first consider amendment 68, then amendment 214, and then amendments 215 to 225.

Amendment 68 seeks to omit section 1 from the bill. In a series of powerful and well put together contributions this evening, we have already heard a whole list of reasons why section 1 is not fit for purpose. There are two approaches that one could take to the problem. One could go through the section line by line and seek to delete individual words, as Liam Kerr's amendment 58 seeks to delete the word "prospective", or one could take a holistic view and say that the section as a whole is not fit for purpose. That is the view that I took when lodging amendment 68.

Section 1 is titled "Purpose and effect of this Act". The problem with section 1 is that it does not accurately capture either the purpose or the effect of the legislation. The true purpose of the legislation is, if not to obstruct Brexit, then at least to make the course of Brexit manifestly more complicated and difficult. That is the purpose of the legislation, and that is not reflected in section 1.

The effect of the legislation is to create unnecessary legal complexity and confusion, to complicate the statute book and to make the operation of the statute book manifestly more complex post-Brexit than it is now. Section 1 should be removed because it fails accurately to record either the true purpose or the true effect of the legislation that we are considering this evening.

Paragraph 5 of the explanatory notes that accompany the bill says that the legislation seeks to ensure

"certainty, stability and predictability for the people who live and work in Scotland".

However, the true purpose and effect of the legislation is the opposite of that. This bill will ensure uncertainty, instability and unpredictability for the people who live and work in Scotland.

At paragraph 4 of the policy memorandum that accompanied the publication of the bill a fortnight ago, there is a quotation from the Scottish Government's comments about legislative consent with regard to the UK Government's European Union (Withdrawal) Bill:

"the Scottish Government accepts that proper, responsible preparations should be made for withdrawal, including preserving a functioning legal system."

I welcome those comments by the Scottish Government and I agree with them, but the bill does no such thing. In fact, it does the opposite. The bill does not provide for responsible preparations; it provides for irresponsible whatever the opposite of preparations is. It does not preserve a functioning legal system; it goes out of its way to make the legal system more difficult to function after Brexit than it is now.

At paragraph 7 of the policy memorandum accompanying the bill, the Scottish Government talks about

"maintaining a functioning system of devolved laws"

and

"ensuring that laws operate effectively".

I agree that we need to maintain

"a functioning system of devolved laws"

and I agree that we should ensure so far as we are able that

"laws operate effectively once the UK has left the EU",

but the bill will do the opposite. It will sow the seeds of confusion and complexity. For that reason, if we are to have a provision at the beginning of the bill that seeks to record the bill's purpose and effect, it should do so accurately.

There are some things in the policy memorandum that I agree with. The policy memorandum states at paragraph 12:

"The Scottish Government has always accepted that there are advantages to being able to prepare for UK withdrawal across the UK's legal jurisdictions using a single statute."

I agree with that; the whole of the Conservative Party agrees with that. That is why we think that the bill is unnecessary and why section 1 should be removed.

I move to amendment 214, which seeks to remove section 33 from the bill. The concerns here are rather different. This is an issue that goes directly to the question of legislative competence.

We know that the Presiding Officer has given an opinion that the bill is outwith legislative competence because, in his opinion, it violates the requirement in section 29(2)(d) of the Scotland Act 1998 that this Parliament may not legislate incompatibly with EU law. I should say that we know that there are two views on that point, and that the Lord Advocate and the Scottish Government have taken a different view about the compatibility of the legislation with EU law. I do not intend to rehearse those arguments at the moment.

There are other constraints on our legislative competence, including that we may not legislate on reserved matters provided for in schedule 5 to the Scotland Act 1998 and that we may not modify certain protected enactments listed in schedule 4. Included in those protected enactments that we may not legislate to modify is the Scotland Act 1998. There are some exceptions—there are some provisions of the Scotland Act 1998 that we do have the legislative competence to modify—but we do not have the legislative competence to modify either section 29 or section 57. Section 33 of this bill provides that section 29 and section 57 of the 1998 act are to be amended. Those provisions are manifestly outwith legislative competence.

Members may know that that matter was debated in the chamber this afternoon. In response to the point I put to him, the minister cited paragraph 7 of schedule 4 to the Scotland Act 1998, which, in his view, means that section 33 is within legislative competence and not outwith legislative competence. Paragraph 7 provides that

"this schedule does not prevent an act of the Scottish Parliament ... repealing any spent enactment".

My view is that that exception does not apply to section 33 for two reasons. The first is that we are not talking about an enactment: we are talking about provisions. The second is that the provisions—section 29 and section 57 of the Scotland Act 1998—will not be spent. That is a core point. It goes to the heart of the issue on which the Scottish Government rests its case for the continuity bill.

18:15

The Scottish Government rests its case for the continuity bill on the assumption that section 29(2)(d) of the Scotland Act 1998 will empty itself of all content and meaning once the United Kingdom leaves the European Union, and that it will no longer mean anything in language or in law to say that the Scottish Parliament may not enact legislation that is incompatible with EU law.

The mistake that the Scottish Government has made—I am sure that it is an honest mistake—is to assume that that is correct and that it follows that any enactment that refers to EU law and the legislative competence of this Parliament will be spent on exit day. I think that that is a wildly optimistic reading of the word "spent" and is an issue that the courts—if the matter ever came before the courts—would take a very different view on. My view is therefore clearly and unambiguously that section 33 of this bill is outwith the competence of the Scottish Parliament not for the reasons that are identified in the Presiding Officer's statement but for other reasons—that section 33 of the bill is incompatible with schedule 4 to the Scotland Act 1998.

The final sub-group of amendments in my name in this grouping—amendments 215 to 225—concern various paragraphs of schedule 1 to the bill that, again, fall foul of the requirement in schedule 4 to the Scotland Act 1998 that the Scottish Parliament may not legislate to modify certain provisions of that act.

Paragraph 4(2) of schedule 4 to the Scotland Act 1998 lists the various provisions of that act that the Scottish Parliament may modify, by way of exemption to the general rule that we may not modify any provision of the Scotland Act 1998. My amendments seek to save all of the provisions that are listed in schedule 1 to the bill that fall within the list of exceptions. However, paragraphs 4, 5, 7 to 9 and 11 to 16 of schedule 1 to the bill do not fall within the list of excepted provisions and are therefore provisions of the Scotland Act 1998 that the Scottish Parliament has no legislative competence to amend. They are all incompetent.

The Scottish Government might not see them this way, but with my amendments I am seeking to help the Scottish Government by making the bill compatible, rather than incompatible, with the restrictions on legislative competence with which any Parliament that respects the rule of law—which Gordon Lindhurst spoke about so eloquently a few moments ago—must surely respect.

Jamie Greene (West Scotland) (Con): I start by thanking the parliamentary staff who are attending the meeting this evening, and all those who have assisted in getting us to this stage in very tight timescales. I am very concerned about the manner in which we are debating a considerable number of amendments to such an important bill, which will have a far-reaching constitutional effect. I will speak to amendments 73, 204 and 231 and others in the group.

Amendment 73 would amend section 3. It seems like a very minor wording change from "if" to "and only if", but the amendment is about adding clarity to the incorporation of devolved direct EU legislation, which is perhaps a new term for us. The current phrasing describes direct EU legislation as devolved

"if it were contained in an Act of the Scottish Parliament ... within the legislative competence of the Scottish Parliament."

That phrasing allows for ambiguous reading of what could be categorised under it because of the word "if", alone. In order to avoid any legal misinterpretation, I propose to insert the words "and only if". That would specify that functional implementation of retained devolved EU law, as contained within a Scottish act of Parliament, falls within the competence of the Scottish Parliament, as outlined in the Scotland Act 1998 and the agreed devolution settlement.

Amendment 204 would amend section 28. I propose to leave out subsection (1), which relates to the meaning of "exit day".

There should be a definitive point at which the UK is no longer part of the European Union but, by transitive property, that should mean that there is only one date, on which Scotland also will no longer be a member of the European Union. That date is not for Scottish ministers to decide, nor should it be open to any ambiguity. The definition of the date of our exit should be in keeping with the date for which the European Union and the UK Government legislate, and to which the UK Government agrees, but the aim and language of section 28(1) will allow the date on which Scottish ministers perceive Scotland to leave the European Union—if at all—to be different from that on which the other parts of the UK leave.

The definition of "exit day" should be removed in favour of the one in Alexander Burnett's amendment 203, which I support and which would tie Scotland's departure from the EU to that of the rest of the UK, as accepted by the EU. As it stands, that date is defined as 29 March 2019 at 11 pm. That might seem to be a small point, but we seek to tidy up the language in the bill, so I hope that members agree that that is sensible.

Amendment 231 would amend section 37, and says:

"This Act or provisions of this Act must be repealed if deemed to be unlawful by a relevant court."

That is a very important point that is related to the wording of Murdo Fraser's amendment 59.

We are all aware that there is discussion about the legal competence of the bill; the Presiding Officer does not believe that we have the remit to legislate in this way. Therefore, it is entirely uncontroversial and, indeed, sensible to suggest that should "a relevant court" decide that the bill is outside Parliament's competencies, or that its entirety or any part thereof is in any way illegal, the bill—or, at least, the parts of it that are deemed to be unlawful—should be repealed. I like to think that Parliament would repeal any law that was deemed to be unlawful, but in the interest of certainty, it would be best that we ensure that we do not keep on the statute book legislation that a court has deemed to be unlawful.

I turn to comments that my colleague Adam Tomkins made. On amendment 68, I echo his comments on removal of section 1. In the few bills that we have passed in my experience of legislating in Parliament, ministers have sought to avoid including purpose and effect in the great level of detail that there is in this bill. I point to my experiences with the Islands (Scotland) Bill in the Rural Economy and Connectivity Committee. We argued strongly for purpose to be added to the bill

for two reasons: to set expectations among people outside Parliament as to what we seek to achieve through the bill, and to provide clarity on the purpose of the law.

Section 1(1)(b) implies that one of the primary purposes of the bill is to ensure

"the effective operation of Scots law … upon and after UK withdrawal."

The implication of that is that Brexit somehow poses a risk to the ability of Scots law to continue effectively after withdrawal. Nowhere does the policy memorandum indicate what risks there are to Scots law after withdrawal. Indeed, none is clearly defined and in no debate or discussion has anyone been able to explain what the risks are. I would be interested to hear the minister address that matter, which is why I strongly support Adam Tomkins's amendment 68.

Amendment 214 would remove section 33. Any references to changes to the Scotland Act 1998 cause me concern. Taking into account that there are different views about why section 1 might not be competent—the Presiding Officer's and my learned colleague Adam Tomkins's—I am minded to strongly agree with its removal. Those are all my comments on the amendments in the group.

Jackson Carlaw (Eastwood) (Con): I am resisting the temptation to refer to the convener as "Presiding Officer", given our surroundings. That might just be a premature mistake on my part. Who can tell?

My amendments are lodged in the spirit of a champagne glass of constructive reflection for the minister to dwell upon, and I know that he will seek to embrace them in that spirit. The committee will regret the fact that, unlike Professor Tomkins, I am not a professor of law, so my exposition on my amendments might be slightly less erudite in its delivery and—to use a word that is favoured by the minister—I might prospectively end up being slightly briefer. We will see.

The effect of amendments 78, 80 and 82 would be to ensure that the devolved rights that exist as a consequence of the European Communities Act 1972 are secured in Scots law in a way that also respects the devolution settlement and the Scotland Act 1998.

Section 4 sets out what will be secured and saved after exit day in devolved rights, liabilities, restrictions, and so forth, and amendment 78 would make it clear that all those rights are subject to the Scotland Act 1998. The reason for that is simple. The way in which the bill has been introduced is a challenge to the assumptions and conventions that underpin devolution. A bill has, for the first time ever, been introduced despite the opinion of the Presiding Officer, as was referred to by Professor Tomkins. The bill contains many provisions that store up questions about what is, or what might not be, devolved. Amendment 78 would make it clear that the specific devolved rights that are recognised in Scots law by virtue of the European Communities Act 1972 are all subject to the Scotland Act 1998.

Amendments 112 and 114 are not wholly dissimilar. They make it clear that the definition of "retained (devolved) law" is in line with the Scotland Act 1998. Colleagues will note that section 10 sets out how it is to be interpreted. Section 10(8) defines "devolved jurisdiction" further as

"jurisdiction in relation to matters that are within the legislative competence of the Scottish Parliament".

Section 10(9) sets out what "retained (devolved) case law" means. In both cases, the committee, the minister and the Government should be far more specific. Amendments 112 and 114 would define the legislative competence of the Scottish Parliament as outlined in the 1998 act, and nothing beyond that.

As I said, my amendments have been lodged in a spirit of constructive reflection for the minister, and I can see that he, like everybody else who is watching the proceedings, is riveted by the prospect.

The Convener: That might have been the shortest discussion so far.

Jackson Carlaw: I might lose support because of that, but we shall see.

Donald Cameron (Highlands and Islands) (Con): I also record my thanks to you and your committee, convener, as well as to the legislation team for their Herculean efforts in getting to where we are tonight.

I will speak to amendments in three sub-groups: I will speak first to amendments 88 and 97. They are amendments to section 5, which deals with general principles of EU law. My amendments seek to refer explicitly to the legislative competence of Parliament, as set out in the Scotland Act 1998, for the very real reason that we have already seen severe difficulties with the concept of legislative competence, given that the Presiding Officer has taken the view that the bill is outwith competence and the Lord Advocate has taken a different view.

Given those difficulties, it is important that we place explicitly in the bill the concept of legislative competence. It is a vital principle that sits at the heart of the devolution settlement, and we ignore it at our peril.

18:30

As members will know well, the Scotland Act 1998, which established this Parliament, sets out that concept in section 29. I will not waste time by going through it, but it is useful to make an observation on Adam Tomkins's point about modifying certain enactments that are set out in schedule 4 of the act, which appears in section 33 of the continuity bill. With the greatest respect to the Government, I say that it has a serious problem in relation to competence. I do not think that its get-out—that those are spent enactments—will work for it. Section 33 is entitled "Repeal of spent references to EU law etc", and there is much to be said for Adam Tomkins's points in that regard.

That said, I have lodged amendments 88 and 97 because, ultimately, no area of the continuity bill should attempt to supersede the Scotland Act 1998 and the concept of legislative competence. Therefore, it is imperative that we include references to legislative competence in relation to the general principles of EU law, so that that is explicit in the bill.

I turn to amendments 143 and 161 to 163, which would amend section 12 and section 13. In effect, they seek to enshrine a different element of the Scotland Act 1998—what I have previously referred to as the delicate balance that that legislation creates between reserved and devolved matters. Amendment 143 makes explicit

"provision in relation to matters that are reserved under schedule 5 of the Scotland Act 1998."

Amendment 161 again makes explicit

"provision in relation to devolved and reserved matters."

Amendment 162 makes explicit the relation to reserved matters, and amendment 163 refers to

"matters not devolved to the Scottish Parliament".

I observe that it is imperative that those points, too, be made explicit in the bill.

Amendment 205 refers to the exit-day provision in section 28. If the committee agrees to Alexander Burnett's amendments to tie the phrase "exit day" to the meaning that appears in the UK withdrawal bill, section 28 would become obsolete and could be deleted. Alexander Burnett gave several reasons for that approach. I submit that if the UK Government can determine exit day, that day should be used. It would be a recipe for chaos if we were to have two exit days, or if there were to be the ability to define a different exit day. I suggest that my amendment 205 be accepted by the committee for that reason.

Maurice Golden (West Scotland) (Con): In the interests of time, I will speak to my amendments 104 and 105 together, because the arguments for—ideally—the committee accepting them can be combined.

Amendment 104 would add

"as provided for in the Scotland Act 1998"

to section 6, on "Principle of the supremacy of EU law", at line 10 of page 5. I will shortly come on to why that extra line is distinctly important.

Amendment 105 deals with section 7, on "Challenges to validity of retained (devolved) EU law". It seeks to insert, in line 17 of page 5:

"where the regulations are—

(i) within the legislative competence of the Scottish Parliament, and

(ii) exercisable by the Scottish Ministers within devolved competence,

in accordance with the Scotland Act 1998."

I believe that those two amendments should be accepted by the committee based on two main arguments. The first is the critical importance of the Scotland Act 1998—I will go on to explain that—and the second is the issue of timing with respect to the purpose and the effect of the bill. I will be making those arguments not as a result of my own legal competence, which is—unfortunately, on this occasion—limited to international law and the supranational jurisdiction, but I urge the committee not only to read the law but listen to experts in reading the law.

On the critical importance of the 1998 act, as we will all be aware, the UK Supreme Court has made it clear that section 29 of the 1998 act, which lays out the principle of legislative competence, is at the heart of the scheme of devolution to which the act gives effect. In other words, it goes to the very core of the devolution settlement that founded this Parliament. I believe that we cannot allow a bill that trespasses on such a vital element of Scottish devolution to pass.

In the interests of time, I will not give the full quotation, but Tobias Lock, who is a senior lecturer at the University of Edinburgh law school, told the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee:

"In contrast, section 29 of the Scotland Act 1998 limits the powers of this Parliament. The question of compatibility with EU law is one that must be asked in relation to legislation that is introduced in the Scottish Parliament but it does not have to be asked in relation to legislation that is introduced in the Westminster Parliament."—[*Official Report*, *Culture, Tourism, Europe and External Relations Committee*, 8 March 2018; c 27.]

That demonstrates the fundamental importance of section 29 and the fundamental importance of legislative competence to the bill that we are considering. I would hope that the committee is convinced that the Scotland Act 1998 is critical to

ensuring that the bill is acting in accordance with current legal and legislative competence.

The issue of timing is important in terms of the amendments that I have highlighted. It will clarify—should it need to be clarified in the future—any challenge to the competence of the bill.

As we are aware, the Presiding Officer and legal experts have suggested several reasons why the bill could be contrary to the 1998 act. Two of the foremost individuals in this area—Christopher McCorkindale, who is lecturer in law at the University of Strathclyde, and Aileen McHarg, who is professor of public law at the University of Strathclyde—wrote about the issue for the UK Constitutional Law Association. They have analysed the Presiding Officer's legal argument; in the interests of time, I will abridge their views. In essence, they say that the delayed effect of the bill is irrelevant to its legal validity, and that that undermines the core argument for the bill. Their point is supported by the Supreme Court's judgment in the famous 2012 case of Imperial Tobacco Ltd v The Lord Advocate, which I will abridge. It acknowledged that

"the exercise to be undertaken was in essence no different from that which was applicable in the case of any other United Kingdom statute."

Therefore, the description of the 1998 act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other statute. Therefore, we have to ensure that the bill is within competence and is acting within the framework of the Scotland Act 1998. My amendments would ensure that this attempt at legislation does not contravene the 1998 act. I urge the committee to support the amendments.

James Kelly (Glasgow) (Lab): Amendment 55, in the name of my colleague Neil Findlay, relates to the definition of "exit day" in section 28. The section seeks—perhaps it is an unintended consequence—to place the power for defining "exit day" in the hands of Scottish ministers. That does not seem to be a logical or correct thing to do in the sense that the power for defining "exit day" obviously lies at UK level, so we seek to take that reference out and make it clear that the date should be when the UK leaves the EU.

We have not set exit day to be a specific date, as we want to give some flexibility on that. We do so on the basis that there might well be transitional arrangements in place for the period after the original date. We hope that there will be, as transitional arrangements would give the advantage of access to the single market and customs union before the leave date. Amendment 55 avoids any confusion and is a sensible way forward.

I indicate support for amendments 58 and 60, in Liam Kerr's name. As Liam Kerr said, they bring some clarity to the proposed legislation. However, I oppose all other amendments in the group, because they are not necessary and do not add anything to the sum of the legislation.

Patrick Harvie (Glasgow) (Green): I thank members for their various efforts. I do not intend to talk about the amendments that seem to me to be wrecking amendments, or those that come from a mischievous motivation, but there are some that deserve brief comment.

In particular, we have just heard some quotes from the evidence of committee witnesses, which Mr Golden called "abridged". However, I suggest that some of those witnesses might feel that they have been quoted heavily out of context. The committee has access to the full written submissions, as well as the oral evidence that we heard. [*Interruption*.]

The Convener: Please let the member continue.

Patrick Harvie: Members of the committee have access to the full written and oral evidence from those witnesses.

I have a couple of brief points. Some of the proposals on the issue of competence and Murdo Fraser's suggestion of an additional line referring to decisions of the Supreme Court seem to raise some possible unintended consequences. In particular, Murdo Fraser's amendment would risk creating a separate status for decisions of the Supreme Court in relation to different categories of Scottish legislation. I am not sure whether that is the intention but, if that amendment has any purchase, that would be its meaning. It seems more likely that it will have no effect; therefore, it is not needed.

In relation to Liam Kerr's objection to the word "prospective", it is clearly the case that the UK Government is fully committed to its current reckless and destructive course of action, but that does not require the rest of us, whether members of this Parliament or those who we represent, to abandon hope that rational thought will resume. The suggestion that that word be removed from the bill is a matter of political posturing, rather than anything else.

18:45

Liam Kerr: Will Mr Harvie take an intervention?

The Convener: There are no interventions, Mr Kerr. You will have a chance to wind up in a moment. Please continue, Mr Harvie.

Patrick Harvie: Finally, in relation to the suggestion that there is "a whiff of anarchy" about this—

Adam Tomkins: On a point of order, convener.

The Convener: There are no such things as points of order at committee, Mr Tomkins.

Patrick Harvie: My final comment, convener, is that in relation to the suggestion that there is "a whiff of anarchy" about this situation, I simply reflect on the fact that there are more toxic odours about the political landscape of this country at present, and I am not troubled by this one.

The Convener: There are no points of order, and I wanted Patrick Harvie to finish his point. There are points of clarification, and I understand that Mr Tomkins wants to raise one.

Adam Tomkins: Thank you, convener. What is the position with regard to whether we may intervene on each other's speeches, including the minister's, in these debates?

The Convener: This is not a meeting of the Parliament; it is a meeting of the committee and I am going through a normal committee process. Those who have spoken to amendments, such as Liam Kerr, will have a chance to wind up, but there are no interventions in a committee process at this stage.

Ash Denham (Edinburgh Eastern) (SNP): While there may be some constructive amendments this evening, amendment 68 is not one of them. Section 1 is clearly important in setting the overall purpose, context and intended effect of the bill. Taking it out is simply an attempt to wreck the bill.

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): Thank you, convener, and members of the committee. This is clearly going to be a long evening, but I am grateful to every member who is here. I am, in a sense, pleased to be here and I make that point. I hope that it will prove to be a constructive evening's work and I say at the outset that that is the approach that I will be taking for the Scottish Government. I pay particular thanks to the committee and Parliament staff for their work. This has been a taxing time.

People who have sat through the past hour—we have been going for an hour now—would be surprised if they were to see a caption that said that there was

"a whiff of anarchy and lawlessness"

about the process in which we are engaged, or that what we are trying to do is

"incompatible with the rule of law".

I repeat the point that I made several times in the chamber earlier: we should endeavour to use accurate language that helps us to go forward, rather than language that makes things difficult and more awkward. I also endorse Patrick Harvie's point about members quoting evidence in such a way that I, certainly, did not recognise the burden of the evidence that was given by the individuals spoken about. No doubt members will wish to reflect on that.

The bill can be improved, and during the evening there will be many opportunities to improve it. I will be looking for opportunities to do so and I will consider all suggestions seriously. Although I have said from the start that we want to see agreement reached over the withdrawal bill, we are realistic. We may ultimately have to rely on this continuity bill for our preparations. We are realistic, too, about the complexity and importance of those preparations. We, and the Scottish Parliament, must get them right. Continuity of law on EU exit is essential if we are to rescue anything at all from the chaos of Brexit.

Let me turn to the amendments that address the definition in the bill of "exit day". The members of both the Delegated Powers and Law Reform Committee and the Finance and Constitution Committee expressed concerns about the potential use of the power in section 28, and I made a commitment to address those concerns.

I should be clear about the Scottish Government's position, because I think that there have been misapprehensions—to say the least—about our reasons for seeking that power. We have never claimed that either the Scottish Parliament or the Scottish Government would be able to influence or effect in law the date on which the UK leaves the EU. Would that that were so, but it is a reserved matter—one with the most profound devolved consequences but a reserved matter nonetheless. We cannot, alas, prevent Brexit by this bill and we cannot delay it by this bill. We have never claimed that a different day for Brexit could apply in law in Scotland compared with the rest of the UK, despite a number of speakers making that point. The power for the Scottish ministers to appoint an exit day for the purpose of the bill could only ever be exercised with reference to the purpose of the bill, which is to deal with EU withdrawal.

However, the date of Brexit, as things stand, is not yet set in stone. The UK Government accepts that, which is why it has taken a power in its own withdrawal bill to alter the date to reflect any agreement that might be reached between the UK Government and the European Council about a different time or date of withdrawal. That flexibility is required.

The Scottish Government therefore cannot accept the amendments in the name of Alexander Burnett, Murdo Fraser and Donald Cameron, as they would tie us to a definition that is contained in a bill that has not passed the UK Parliament and which has already been subject to repeated amendment. To do so would be to renounce this Parliament's ability to legislate for itself rather than to assert that power. The bill has to work within its own terms.

Similarly, amendment 204, in the name of Jamie Greene, would remove the ability to set exit day at all, without replacing it. It is not clear to the Scottish Government why he has removed section 28(1) and left in place subsections (2) and (3), which rely on subsection (1). It is therefore technically deficient.

We are, however, happy to accept amendment 55, in the name of Neil Findlay. I am sorry that Mr Findlay is not here to hear that—he would be as surprised as Mr Kelly looks at this stage. Amendment 55 preserves the necessary flexibility. It makes it clear to the members concerned that exit day will mean the actual day of exit, whenever that might take place. My officials are considering whether any adjustment is needed to the wording of that amendment to ensure that it properly reflects the legal arrangements for the UK's prospective withdrawal from the EU, so as to ensure that it would operate clearly and effectively across the various provisions of the bill that depend on the term. If any such further minor adjustments are required to the provision, I commit to discussing them with Mr Findlay, Mr Kelly and other members in advance and lodging the appropriate amendments at stage 3.

The rest of the amendments in this group relate to the question of the legislative competence of the bill. That is clearly an important issue for the Parliament to consider, so I welcome the opportunity that these amendments provide to further discuss some of the factors that the Government believes make the bill within competence.

I propose to start with Adam Tomkins's proposal, in amendment 68, to remove section 1 from the bill entirely. Let me say at the outset that we do not consider that the competence of the bill is dependent on section 1. As the Lord Advocate has set out, the competence of the bill will be assessed according to its overall purpose and the relevant legal context. I will not repeat the Lord Advocate's reasons for concluding that the bill is within the competence of the Parliament, including, crucially, that it is not incompatible with EU law. However, we think that section 1 is important in setting the overall purpose and context as well as the intended effect of the bill, which will guide the courts in interpreting its effect.

Amendment 58, in the name of Liam Kerr, seeks to remove the word "prospective" from the provision that says that the purpose of the bill

> "is to make provision—
>
> (a) in connection with the prospective withdrawal of the United Kingdom from the EU".

The word "prospective" simply acknowledges the overall context of the bill, which is that we are required to make preparations for continuity of law prior to withdrawal, rather than when withdrawal has happened. I therefore think that the word "prospective" is right here in the description of the purpose of the bill. The definition in the online edition of the "OED" is:

> "Characterized by looking into the future; forward-looking, anticipatory; having foresight or regard for the future".

We think that the word "prospective" is accurate in this regard.

Of Liam Kerr's other amendments, amendment 60 seeks to amend section 1(2) so that it refers to any provision of the bill that "is" incompatible with EU law, rather than, as the wording now is, any provision that "would . . . be" incompatible with EU law if it were in effect before the relevant time. Our view is that no provision of the bill is incompatible with EU law. The conditional language is correct in acknowledging the risk of incompatibility were the provisions to be in effect before the relevant time. That is why their effect is postponed to the relevant time—so they could never be incompatible.

On amendment 65, a number of provisions throughout the bill contain provisions that are intended explicitly to confine the operation of the bill's provisions to Scots law on devolved matters, although that would have been implicit anyway under the Scotland Act 1998. The words that amendment 65 seeks to remove in this one instance are intended simply to reflect the fact that not all of the devolved Scots law that we are dealing with is contained in an act of the Scottish Parliament. Some of it might be in Westminster acts, subordinate legislation or rules of law. It is correct to say that whether that law is devolved should be judged by reference to whether it could have been included in an act of this Parliament. That is why we have those words.

Amendment 66, in the name of Gordon Lindhurst, on the definition of EU law has exactly the same effect as the current wording in the bill. The amendment defines EU law with reference to section 126(9) of the Scotland Act 1998, and the current wording already does that. With respect, I do not see how his suggestion improves it.

Amendment 59, in the name of Murdo Fraser, seeks to ensure that the Scottish Government

complies with any decision of the Supreme Court that the continuity bill as enacted is outside competence. One of Alexander Burnett's amendments seeks to require the Scottish ministers to repeal any provision of the bill as enacted that is incompatible with the UK bill or the Scotland Act 1998. Jamie Greene has a similar amendment that would require repeal of the bill as enacted.

We have discussed the competence issue at length. The Scottish Government is confident that the bill is within the legislative competence of the Scottish Parliament, but in the event that it was referred to the Supreme Court and found to be unlawful, which we believe is unlikely, the Scotland Act 1998 is clear on the effect of that. Section 29 of the 1998 act says that any act that is outside the competence of the Parliament is not law, so we could not repeal it, because it would not be law anyway. I recommend that the members who have made the proposal look at what section 29 says. There is no need to put in statute a provision that requires ministers to comply with the law or to repeal legislation that is found not to be lawful.

The other amendments that have been lodged seek to insert provision throughout the bill to specify that its effect must be read with reference to the Scotland Act 1998. Those amendments are also unnecessary. All the legislation that goes through the Scottish Parliament must be read with reference to that act—it tells us what is and what is not within competence. That is how the question should be answered. We could not support littering the statute book with duplication or irrelevant provisions of that nature.

Adam Tomkins seeks to remove the consequential amendments to the Scotland Act 1998 in section 33 and schedule 1 that remove spent references in EU law. Those amendments are included in the bill because, although the majority of the provisions that are repealed are enactments that are protected from modification by paragraph 4 of schedule 4 to the Scotland Act 1998, the repeals do not—as I said earlier today—fall foul of section 29(2)(c) because paragraph 7(1)(b) of schedule 4 expressly allows the repeal of spent enactments, and the provisions in question will all become spent following EU exit. Adam Tomkins might not agree with that, but that is the legal position as we see it. The bill does not need to make the amendments in question, because they will have no effect following EU exit, but it is responsible superintendence of the statute book to do so. This is a tidying-up exercise.

I therefore encourage members to resist amendments 58 to 68, 72 to 74, 78, 80, 82, 88, 97, 104, 105, 112, 114, 143, 161 to 163, 203 and 204, 214 to 225 and 229 to 231, but I encourage them to vote for amendment 55.

The Convener: I invite Liam Kerr to wind up.

Liam Kerr: In winding up, I simply say that clarity, certainty and understandability must be our guiding principle. With my amendments 58, 60 and 65, I seek nothing other than such clarity. Maurice Golden said that it was unfortunate that he had a grounding only in international law. I start from the premise that says that law should be understandable by those who are governed by it. The lawyers among us have had it drilled into us for years that we must always dispense with legalese, obfuscation and confusion. Therefore, we must seek to achieve clarity, and Maurice Golden should not be embarrassed to have a grounding only in international law.

With regard to amendment 58, Patrick Harvie talked about the word "prospective". I am delighted to hear that Patrick Harvie accepts my point. In his view, through the use of that word, the bill seeks to import the uncertainty that I seek to remove. There is not uncertainty about whether the UK will leave the EU. Whether we like it or not, there is to be a withdrawal. As Mr Russell quite rightly says, we must have accurate language. He is right.

Mr Russell went on to talk about amendment 60. He talked about postponing things to the relevant time so that there is never any incompatibility in the first place. I assume that he is correct, but his approach is utterly confusing, which is my point. We must clear up that sort of thing.

My amendments would not prejudice the meaning of the bill—far from it; they seek to clarify and improve it. That is why I intend to press amendment 58 and to move amendments 60 and 65.

The Convener: I did not want to interrupt proceedings when we were in the middle of a discussion. Further to the point that Adam Tomkins raised, I will ask the clerk to clarify why I made the ruling that I made so that everyone is fully aware of what the situation is.

James Johnston (Clerk): The debate on a group is the only opportunity that members have to comment on any of the amendments in it. The guidance on public bills, which is an aide-mémoire to the standing orders, states that members should therefore ensure that their speeches relate to all the amendments in the group on which they wish to comment. While the calling of speakers in a debate is at the discretion of the convener, members should generally assume that they will be called only once in each debate.

19:00

The Convener: I hope that that makes that position clear. We will now move on to the voting process for that group.

The question is, that amendment 58 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 58 disagreed to.

Amendment 59 moved—[Murdo Fraser].

The Convener: The question is, that amendment 59 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 59 disagreed to.

The Convener: If amendment 60 is agreed to, I will not call amendment 61 because it will have been pre-empted.

Amendment 60 moved—[Liam Kerr].

The Convener: The question is, that amendment 60 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 60 disagreed to.

Amendment 61 moved—[Alexander Burnett].

The Convener: The question is, that amendment 61 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 61 disagreed to.

Amendment 62 moved—[Alexander Burnett].

The Convener: The question is, that amendment 62 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 62 disagreed to.

The Convener: If amendment 63 is agreed to, I will not call amendment 64 because it will have been pre-empted.

Amendment 63 moved—[Alexander Burnett].

The Convener: The question is, that amendment 63 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 63 disagreed to.

Amendment 64 moved—[Murdo Fraser].

The Convener: The question is, that amendment 64 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 64 disagreed to.

Amendment 65 moved—[Liam Kerr].

The Convener: The question is, that amendment 65 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 65 disagreed to.

Amendment 66 moved—[Gordon Lindhurst].

The Convener: The question is, that amendment 66 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 66 disagreed to.

Amendment 67 moved—[Gordon Lindhurst].

The Convener: The question is, that amendment 67 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 67 disagreed to.

Amendment 68 moved—[Adam Tomkins].

The Convener: The question is, that amendment 68 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 68 disagreed to.

Section 1 agreed to.

Section 2—Saving for devolved EU-derived domestic legislation

The Convener: Amendment 69, in the name of Neil Bibby, is grouped with amendments 70, 75, 79, 81 and 83.

Neil Bibby (West Scotland) (Lab): I echo what other members have said and put on record my thanks to all the Parliament and committee staff, as well as our own MSP and party staff, who have supported us in this process.

I will speak to amendments 69, 70 and 79 in my name and refer to the other amendments in the group. As we know, the bill is complex and far-reaching. It is therefore important that the content of the bill is tested and, where necessary, clarified. That is what I hope to achieve with my amendments, which, as members may be aware, were proposed by the Law Society of Scotland.

Amendments 69 and 70 are probing amendments at this stage. Their purpose is to clarify the meaning of the word “passed” as used in section 2. The definition of “devolved EU-derived domestic legislation” in section 2 appears to include any enactment that has effect immediately before exit day. However, it is not clear that the definition extends to a bill that is passed by the Scottish Parliament but which has yet to receive royal assent; nor is it clear that an enactment that is in force before exit day but which applies afterwards is included, or that an enactment that is yet to be commenced is included. I therefore invite the minister to clarify whether the relevant section should apply to enactments that are passed or to enactments that have passed and commenced, and to explain whether the Government believes that there is a case for an amendment.

Amendment 79 is also a probing amendment, which seeks to clarify that the enforcement of rights that is referred to in section 4(1) is subject to section 7. Section 7 deals with the challenges to the validity of retained EU law. Again, I invite the minister to address those points and to explain that issue.

I note the Conservative amendments in the group. Clearly, across the chamber, members recognise the need for greater clarity in the bill. However, we all have to be satisfied that that is the intention and effect of the Conservative amendments 75, 81 and 83, and we must all be satisfied that amendments 75, 81 and 83 are necessary. In that regard, we will consider what Alexander Burnett and Liam Kerr say on those amendments.

I reiterate that the Labour amendments in my name in this group are constructive probing amendments that have been lodged to seek or provide clarity. I ask the Scottish Government and other members to give those amendments full consideration.

I move amendment 69.

Alexander Burnett: Amendment 75 would insert the words “in writing” after “notified” in section 3, page 3, line 9. The effect of the amendment would be to ensure that, where the bill wants to save EU law in the form that it was in immediately before exit day, it covers only decisions that are notified in writing. As the bill is drafted, people need only be informed.

Across the public sector, there are different definitions of what being informed means. There are some aspects of the public contracting of companies in relation to which the publication of information in an official journal, such as the *Official Journal of the European Union* or *The Gazette*, is deemed to be enough for the Government to have informed people about what is happening. However, elsewhere, and in this bill, there is more specific provision, particularly around consultation and regulations, which ensures that ministers take certain actions to inform Parliament or the subjects of law what is going on. Some of that information is passed on in an oral form, particularly where the Parliament is involved.

My amendment seeks to clarify exactly what is being saved from EU law. As the bill is drafted,

devolved direct EU legislation that is operative immediately before exit day is saved after exit day, and section 3(4)(b) spells out what that means for people named in decisions. It says that the law is saved if

"it has been notified to that person before exit day".

Again, that is too vague. The word "notified" could mean almost anything and, in theory, there might be situations in which somebody has been notified informally of a decision before exit day. After exit day, the legitimacy of that decision will clearly be called into question, and amendment 75 simply seeks to end that ambiguity. It would mean that any person or organisation that is specified in any decision will be subject to that after exit day only if they have been notified in writing before exit day.

Liam Kerr: Amendment 81 asks that we leave out from "any" to "jurisdiction" in line 35 and insert

"a court or tribunal administered by the Scottish Courts and Tribunals Service".

Again, the amendment is simply about clarity and the ability to understand. It is presumably not beyond the ability of any draftsman to set out clearly what is meant by

"any court or tribunal in the United Kingdom exercising devolved jurisdiction".

That is an objective category but, as drafted, it is complicated and difficult to isolate. Furthermore, section 4(5) seeks to define "devolved jurisdiction", or what the specific court or tribunal would be exercising, as

"matters that are within the legislative competence of the Scottish Parliament."

As the bill process is demonstrating, the question of legislative competence is not a fixed absolute. That means that the cross-reference at section 4(3)(b), which is phrased as an absolute, is not an absolute. Accordingly, in order to be clear about which body must be the judge of that to which section 4(1) applies, I have lodged amendment 81 to introduce objectivity in this provision.

19:15

Amendment 83 is also about clarity. Section 4(1) sets out various things that are recognised immediately prior to exit day and which are expected to apply and be followed after exit day. Again, that is quantifiable. Either something applies after exit day or it does not. It is not appropriate that there is such a degree of ambiguity that any litigator, pursuer, defender or suchlike must trawl through, at great cost to themselves or to the taxpayer, reams of legislation and/or case law to establish whether it applies. No doubt, if it were appropriate, the other side or the opposition would contend for a different interpretation. If it is identifiable, identify it.

While we are there, let us look at section 4(1)(b), which demands that, to be applicable post-act, the provisions should be "enforced, allowed and followed" immediately before exit day. That begs the question whether that is a conjunctive construction and whether the provisions are enforced. To go off at a slight tangent, what happens if a provision has never been litigated to be enforced? Does it mean "enforced and allowed", in which case we have to ask, "Allowed by whom?" and "What is allowed?" Does it mean "and followed"? If so, what happens if a decision was a one-off and the ratio decidendi was never used again? Alternatively, is the phrase a disjunctive phrase? The use of the word "and" suggests the former, but which is it?

Amendment 83 simply seeks to remove the ambiguity and room for doubt. If section 4(1) wants provisions to continue, let them be identified. If section 4(1) is argued to be sufficiently clear to identify an exhaustive list, let us have that exhaustive list. Members might wish to note that my authority for this amendment derives from the Law Society's briefing note, which asks specifically that ministers explain exactly what the rights in section 4 relate to.

Michael Russell: I thank members for their amendments. I am conscious that, as Neil Bibby said, his amendments are probing amendments, which were suggested by the Law Society. I want to be clear in my answers to Neil Bibby and I will endeavour to do so.

I am happy to confirm that the effect of the bill is to save EU-derived domestic legislation whether or not that legislation is in force on exit day. As long as it has been enacted and falls within the categories that are described in section 4(2), it is saved with whatever effect it has at the point of exit day. The bill takes the same approach on this as the UK bill. That is appropriate, because EU-derived domestic legislation has been enacted or made by the domestic authorities having gone through a domestic scrutiny process. In contrast, section 3, which incorporates direct EU legislation, brings that legislation into the domestic legal system only if it is actually enforced. I know that that is a complex set of issues, but there is a difference there. In relation to acts of the Scottish Parliament, the bill defines what is meant by "passed" in section 27(2); it means when the bill is enacted by receiving royal assent. That makes the position clear.

Alexander Burnett's amendments raise the question of when an EU decision that is directed to a particular person would be brought into domestic law. The bill provides that that happens only when the decision is notified to the person to whom it is

addressed. That is because the drafting is the same as the equivalent provision in the UK bill. The bills reflect EU law, which provides that such decisions take effect only when notified. The notification specified consists of the sending of a registered letter with acknowledgement; that makes Alexander Burnett's amendment unnecessary, as the point is already dealt with.

I note that Neil Bibby's amendment 79 is trying to probe how effective the remedies will be under the bill, given the terms of section 7. Section 4 is already subject to section 7. The answer is that the rights of action that section 7 prevents will generally not be appropriate after EU exit, because at present only the Court of Justice can declare an EU instrument to be invalid. I set out more detail on that in my letter to the Delegated Powers and Law Reform Committee last week. The remedies that we are bringing forward are still effective, as individuals will be able to take action against Scottish ministers and public authorities for action that they take while acting within the scope of retained EU law.

I was not entirely clear what lay behind amendment 81. Liam Kerr has given some indication. It appears to provide, as a result of his drafting of the amendment, that the only rights that would be saved would be those recognised by courts administered by the Scottish Courts and Tribunals Service. That does not take account of the role of the Supreme Court in the Scottish legal system, which is the reason why section 4 refers to

"any court or tribunal in the United Kingdom exercising devolved jurisdiction".

In essence, Liam Kerr's amendment makes that less clear.

I turn to amendment 83. It would not be appropriate for the saving of legal rights and so on to be dependent on whether they appear in the list published by ministers. It is a question of law and the continuity of law. Once again, section 4 takes the same approach as the UK bill. We have stressed this because we are trying to ensure that the bills do not diverge too far, so that they are complementary.

I recognise the general uncertainty about exactly which "rights, powers, liabilities" are saved under the bill. That is a feature of the exercise that the UK Government is engaged in here, in having to transplant a whole legal system. Ultimately it will be a matter for the courts to determine what the rights and powers were at exit day, as it is presently a matter for them to determine what they are now. That is inherent in the exercise of providing for continuity of law. It is how both the UK and the Scottish bills operate. That is the reality of where we are.

I hope that I have provided some clarity on the probing amendments. There is clarity on what is meant by "passed", and there is clarity on the differences that apply between section 3 and section 4(2). I hope that I have made clear how amendment 79 is addressed, and there is further information on that in my letter to the DPLR Committee.

In those circumstances, I hope that Neil Bibby is satisfied with those explanations and will not press his amendments to a division. I hope that Liam Kerr and the other members recognise that his proposals would make the bill more complex and less easy to understand.

Neil Bibby: As I said, my amendments 69, 70 and 79 are probing amendments that the Law Society of Scotland encouraged the Parliament to consider. The minister's response to those amendments is now a matter of record. In advance of stage 3, we will consider the minister's remarks and whether sufficient clarity has been provided.

I share the minister's view that amendment 75, in the name of Alexander Burnett, is not necessary. I also share some concerns about the potential unintended consequences of Liam Kerr's amendments at this stage.

I will not press the amendments in my name.

Amendment 69, by agreement, withdrawn.

Amendment 70 not moved.

The Convener: Amendment 71, in the name of Adam Tomkins, is grouped with the other amendments as shown on the groupings paper.

Adam Tomkins: Thank you, convener. I apologise if I called you "Presiding Officer" earlier. That was an inadvertent promotion on my part and one that I am not yet permitted to make.

There are 12 amendments in this group, all of them from members of the Scottish Conservative Party and 10 of them in my name. Collectively, the amendments in the group seek to make the bill subject to the withdrawal bill that is, as we know, currently going through the House of Lords, having already been passed by the House of Commons.

In each of my 10 amendments in the group, I seek to do that with a provision that "corresponds"—the word that is used in the Scottish Government's explanatory notes, which accompany the bill—to the provisions in the withdrawal bill. The purpose and, I hope, the effect of my amendments in the group is to ensure that that correspondence is watertight.

Partly in defence of the indefensible way in which this Parliament has been invited to scrutinise the bill, the minister, Mr Russell, said to

the Finance and Constitution Committee on 7 March:

"A great deal of work has gone into ensuring that the bills complement each other"—

that is to say, the continuity bill and the withdrawal bill—

"so that there is a workable solution."—[*Official Report*, *Finance and Constitution Committee*, 7 March 2018; c 43.]

On 27 February, in the chamber, Mr Russell said:

"In drafting the bill, we have had to mirror the European Union (Withdrawal) Bill as closely as possible to make them fit together."—[*Official Report*, 27 February 2018; c 66.]

I am taking Mr Russell at his word in this instance. I am accepting that there is a desire on the part of the Scottish Government to mirror the provisions of the European Union (Withdrawal) Bill and to make sure that the withdrawal bill and the continuity bill work together as closely as possible. I am accepting that there is good will on the part of the Scottish Government to make the two pieces of legislation fit together as closely as possible and that there is a desire on the part of the Scottish Government to ensure that the bills complement each other so that there is a workable solution to the undoubted problem of fixing the statute book—both the reserved and the devolved—so that it coheres, hangs together and makes sense after exit day.

The force of each of my amendments in the group is to help the Government to achieve what it has said—in its explanatory notes, in evidence to the committee and in the chamber—is its policy ambition. I will explain what each of my amendments does.

Amendment 71 is an amendment to section 2, which is on

"Saving"

in Scots law of

"devolved EU-derived domestic legislation".

That is a mouthful, but it is not my mouthful. That provision in the bill corresponds to clause 2 of the withdrawal bill. Amendment 71 seeks to ensure that the operation of section 2 of the continuity bill is subject to the withdrawal bill so that there is full and complete correspondence between the two, which is the Government's stated policy ambition.

Amendment 77 is an amendment in like terms to section 3, which provides for the incorporation of devolved direct EU legislation. It corresponds to clause 3 of the withdrawal bill. Again, my amendment 77 seeks to ensure that the operation of section 3 of the continuity bill is subject to the withdrawal bill so that there is full and complete correspondence between the two pieces of legislation, which is what the Government says its policy intention is.

Likewise, amendment 84 is an amendment in identical terms to section 4 of the bill, which is concerned with the saving for devolved rights under section 2(1) of the European Communities Act 1972. It corresponds to clause 4 of the withdrawal bill, and my amendment 84 seeks to ensure that the operation of section 4 of the continuity bill is to be read and given effect subject to the withdrawal bill to ensure, again, full and complete correspondence. This is all designed to make the bill more workable than it would otherwise be.

19:30

My amendment 106 is an amendment to section 7. That section contains provision on future legal changes to the validity of retained devolved EU law, and it corresponds to paragraph 1 of schedule 1 to the withdrawal bill. Amendment 106 seeks to ensure that the operation of section 7 should

"be read and given effect subject to"

paragraph 1 of schedule 1 to the withdrawal bill—again, in order to give effect to the Government's stated policy ambition of ensuring that the two pieces of legislation correspond exactly with one another.

Amendments 132 and 133, which I will deal with together, would amend section 11 of the continuity bill, which corresponds to clause 7 of the withdrawal bill and provides for a whole suite of ministerial powers, which we will discuss in substance later, that would enable Scottish ministers to deal with deficiencies in the statute book arising from UK withdrawal. Again, my amendments seek to ensure that both section 11 of the continuity bill and any future regulations made under it should

"be read and given effect subject to the European Union (Withdrawal) Act 2018"—

as it soon will be—and to any competent regulations made by UK ministers under that legislation.

Amendments 146 and 147, which are also in my name, relate to section 12 of the continuity bill—clause 8 is the corresponding clause in the withdrawal bill—which is the power of Scottish ministers to comply with international obligations. Given that international obligations and relations are reserved to the UK Parliament, it is particularly important that any provision in the continuity bill that gives effect to the power of Scottish ministers to comply with international obligations is subject to and read compatibly with the equivalent power in the withdrawal bill, which is what my amendments 146 and 147 seek to ensure.

Amendment 201, which is in my name, is an amendment to section 19: "Power to provide for

fees and charges". It is the equivalent of paragraph 1 of schedule 4 to the withdrawal bill. Again, the amendment seeks to ensure that there would be no incompatibility between the two bills by sewing them up together.

In case that is not enough and, in my desire to help the Government to ensure that the legislation is compatible and not incompatible with the withdrawal bill, I have inadvertently overlooked a provision in the bill, I have proposed the addition of a new section through amendment 226. It provides:

> "This Act and any regulations made under it are to be read and given effect subject to the European Union (Withdrawal) Act 2018 and any regulations made under that Act."

You might describe that as a belt-and-braces approach. The minister might accept amendment 226, in which case we could consider whether we would need to press amendments 71, 77, 84, 106, 132, 133, 146, 147 and 201, although I make no commitment in that regard.

My final point in support of the amendments in my name in this group is, again, a quote from the Government's policy memorandum, which, in some respects, is a very helpful document. Paragraph 12 states:

> "The scale of the task that is required to ensure a functioning statute book means that governments across the UK need to work closely together to ensure effective withdrawal arrangements that reflect the interests of all."

Again, I find myself in complete agreement with the Scottish Government. The amendments in my name in this group seek to ensure that that is done in law and not just claimed as a matter of political rhetoric.

I move amendment 71.

The Convener: I call Jackson Carlaw to speak to amendment 76 and the other amendments in the group. I hope that you can keep up your good record.

Jackson Carlaw: Thank you, convener—I am doing my best to remain optimistic and cheerful. I keep looking to the minister in the hope that he will crack a smile on his savage visage at some point during the proceedings, as he absorbs all the good advice that is being received.

I potentially accept that amendment 76 is a niche amendment but, in the limited circumstances in which it might apply, it is nonetheless important and worth considering.

The effect of the amendment would be to ensure that, if the UK Parliament allows non-English case law to be part of the interpretation of EU law and English law, Scots law will do, too.

Section 3 sets out how devolved law will be saved into Scots law. Section 3(5) notes that that applies to law

> "only in the form of the English language version of that legislation, and ... does not apply to any such legislation for which there is no such version".

It is clear that that covers the vast majority of EU law, because all primary and secondary law and all directives up to the exit date will have been published in English. However, other languages are sometimes used for the interpretation of EU law. The Court of Justice of the European Union is the ultimate arbiter of what EU norms are, but it does not, as a matter of course, compare languages to see what meaning they might suggest in interpreting law and in creating case law. Different languages can furnish different interpretations—I have been caught out by that myself on a number of occasions—and that is not reflected in the bill as it stands.

Even if those occasions are relatively rare, as I said at the outset, it is important that, as we save existing EU law into Scots law, the bill makes provision for that flexibility. That is why the withdrawal bill, in its current drafting, has added into the equivalent section the phrase

> "does not affect the use of the other language versions of that legislation for the purposes of interpreting it."

The simplest way of making similar provision here is to say that the bill will match any provision that is made by the UK Parliament. That is for the simple reason that, if it makes sense for both Scots and English law to take the English language version of EU law to save, it makes sense to have the same ground rules on interpretation.

I listened with care to Adam Tomkins's contribution in support of the other amendments in the group. All of that seemed to be very erudite and convincing, and I am happy to add my support to his profound contribution in that regard.

The Convener: He will be absolutely delighted by that.

I invite Graham Simpson to speak to amendment 113 and the other amendments in the group.

Graham Simpson (Central Scotland) (Con): I do not think that I can be quite as cheery as Jackson Carlaw.

Jackson Carlaw: Ever.

Graham Simpson: That is true. However, I will do my best.

The intent of amendment 113 is to ensure that the bill reflects the final agreement between the UK and the EU. Section 10, which is about the "Interpretation of retained (devolved) EU law", sets

out what applies and what no longer applies. Courts would no longer be bound by EU law and would no longer be able to send cases to the European Court of Justice, but they could

“have regard to anything done”

by the EU or at an EU level. The section also sets out how that would be decided in accordance with devolved case law and mentions

“having regard ... to the limits ... of EU competences”,

as just before exit day. Therefore, there is a principle for what is retained and a mechanism for judging it.

We know a lot about what the UK and the EU want, and we have seen successive phases of negotiations starting to give some clarity about what the future relationship will be, but there are still questions and matters to agree. That is only to be expected when the negotiations still have to run their course.

The bill, as drafted, takes no account of that, and the consequences could be quite serious. As a hypothetical example, let us say that a transition period was agreed in the negotiations and that there was an agreement on which EU rules the UK would follow and which we would not follow in that transition period. I presume that there would have to be some agreement on how that was policed. That, in turn, would affect what body of EU law was respected, how it was interpreted and whether a court or tribunal could factor in EU decisions.

In the text of the December agreement, there is a good example of a reserved matter with clear importance for devolved courts. It says:

“the Agreement establishes rights for citizens following on from those established in Union law during the UK’s membership of the European Union; the CJEU is the ultimate arbiter of the interpretation of Union law. In the context of the application or interpretation of those rights, UK courts shall therefore have due regard to relevant decisions of the CJEU after the specified date. The Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens’ rights”.

That is quite a long quotation and there is not much punctuation.

The reason for amendment 113 is that, at this stage of the negotiations, there is a lot that we do not know about how we will interpret retained EU law. That is a completely natural consequence of the negotiations, but the bill tries to pre-empt that, so we need to be cautious. Amendment 113 would counter that by ensuring that section 10 was subject to the negotiations.

James Kelly: I oppose all the amendments in the group. The thrust of most of them is to seek to give undue legal effect to the withdrawal bill. As Mr Tomkins pointed out, it is right that the continuity bill mirror the appropriate parts of that bill, but I am not convinced about the arguments that he makes about giving legal effect to it. There has been a breakdown in the political position and it is clear that legislative consent for the EU withdrawal bill would not be supported, so it would not be correct to give legal effect to parts of that bill.

Patrick Harvie: I also oppose the amendments in the group. Rather than comment on each of them individually, I will reflect on the broad thrust of Adam Tomkins’s argument that the group is about the need for compatibility between the Scottish and UK legislation and his reference to the quotation about the value of Governments working closely together on the process.

It is worth while simply putting on the record for members who might not be aware of it that the Secretary of State for Scotland has decided to leave it until we are in the midst of this stage 2 process—in fact, just about half an hour ago—to bother sending to the Presiding Officer, committee conveners and party leaders in the Parliament the text of his amendments and a letter setting out his reasons. That is the context: the interest that the UK Government is showing in achieving compatibility with devolution or a respectful working together throughout the Brexit crisis.

Michael Russell: There is no doubt that the amendments in this group largely cut across the bill and its intention by making it subject to provisions in the UK bill. As Mr Kelly and Mr Harvie indicated, that would defeat the object of the bill, which is to ensure that we have stand-alone provision to deal with devolved law in the event that the Parliament is unable to give legislative consent to the relevant parts of the UK bill. It makes no sense to tie the continuity bill to the UK bill in that way.

Mr Harvie indicated that compatibility is addressed by ensuring that the two bills can do the same thing in different spheres, sometimes in the same way. That is entirely different from what Professor Tomkins’s amendments would do. They would make the continuity bill subject to the withdrawal bill. Even if we were to accept at face value his earnest and, he claims, helpful ambition, his amendments would not achieve any greater compatibility than we already have; they would, however, achieve subservience.

It will be a matter for the UK Government and the UK Parliament to table appropriate amendments to their bill, to reflect the outcome of

the legislative consent process. It remains our preference to deal with the exercise of ensuring continuity in the statute book in the UK bill. We are working to achieve agreement with the UK and Welsh Governments to allow that, and to enable the Scottish Parliament to agree that the continuity bill is no longer necessary.

19:45

Let me deal quickly with Jackson Carlaw's amendment 76. I am afraid that Mr Carlaw has not read the continuity bill in enough detail, because the last line of section 3(5) does what he claims he wants to do in amendment 76. Section 3(5) states:

"but paragraph (a) does not affect the use of the other language versions of that legislation for the purpose of interpreting it."

If the committee agrees to Jackson Carlaw's amendment, it would simply be adding, again, to what the bill already does.

Graham Simpson's amendment 113 makes the interpretation provision in the bill subject to the terms of the withdrawal agreement. We have, of course, been pressing for EU citizens to have certainty in relation to their position. The agreement that was reached on EU citizens' rights in phase 1 of the negotiations was long overdue. We do not have the same aversion to a continuing role for the European courts as the UK Government, which has held up agreement on the matter.

However, the continuity bill is intended to deal with the immediate issues around the continuity of law. There will be—because the UK Government has said so—a separate UK bill to implement the withdrawal agreement when that is achieved. Mr Simpson is wrong to claim that it is within the gift of the Scottish Government to enable references from the Scottish courts to be made to the European courts after exit day. As the Advocate General for Scotland indicated when the House of Lords debated similar amendments last week, those matters are to be dealt with as part of the implementation of the withdrawal agreement. We accept that provision is to be made in the withdrawal bill, in accordance with the Scotland Act 1998, to enable us to implement the withdrawal agreement in devolved areas, including further legislative consent, as required. Let us hope that, when we consider that withdrawal agreement and transition bill, we do not end up going through the same process that we have gone through with the withdrawal bill. There needs to be respect for proper processes and the devolution settlement.

I hope that the committee will reject the amendments in the group. They neither meet the stated intention of their proposers, nor do anything to assist the continuity bill to operate effectively.

Adam Tomkins: I thank all the members who have spoken in the debate on what is an important group of amendments. I want to respond to two of the more extraordinary comments that the minister made.

The first was that amendments in the group cut across the continuity bill. They do not cut across the continuity bill in any way; they support it and help make it more likely to be upheld in the courts in any future legal challenge than is currently the case, given that it is badly drafted. What the amendments in the group avowedly do is cut across the claims that are made for the bill in paragraph 20 of the Scottish Government's policy memorandum, which says that, as drafted, the bill will

"add to the complexity of the post-exit position"

and will

"present serious logistical challenges."

The amendments in the group are designed to reduce the complexity that the bill adds to the post-exit position and dilute the serious logistical challenges that the bill has been designed to present.

What an extraordinary thing for the minister—such an ardent remainer—to have said on subservience. The read-and-give-effect formulation that is used in the majority of the amendments in my name in the group is lifted directly from section 2(4) of the European Communities Act 1972, which, as the minister might recall, provides that even acts of the sovereign United Kingdom Parliament must be read and given effect subject to the obligations of EU membership. If we are talking about subservience, what we have here is an ardent remainer claiming that the United Kingdom is subservient to the European Union, as the law of this country currently states. The idea that we should have legal provisions that require legislation to be read and given effect subject to other legislation is not subservience; it is legal continuity and legal certainty, and it is compatible with the British constitution and the rule of law.

The Convener: The question is, that amendment 71 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 71 disagreed to.

The Convener: The question is, that section 2 be agreed to. Are we agreed?

Members: No.

The Convener: This is a procedural issue. As far as this process is concerned, when we reach the question on a section, opposition may be noted but there can be no vote. Conservative members' opposition is therefore noted.

Section 2 agreed to.

Section 3—Incorporation of devolved direct EU legislation

Amendment 72 moved—[Gordon Lindhurst].

The Convener: The question is, that amendment 72 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 72 disagreed to.

Amendment 73 moved—[Jamie Greene].

The Convener: The question is, that amendment 73 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 73 disagreed to.

Amendment 74 moved—[Gordon Lindhurst].

The Convener: The question is, that amendment 74 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 74 disagreed to.

Amendment 75 moved—[Alexander Burnett].

The Convener: The question is, that amendment 75 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 75 disagreed to.

Amendment 76 moved—[Jackson Carlaw].

The Convener: The question is, that amendment 76 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 76 disagreed to.

Amendment 77 moved—[Adam Tomkins].

The Convener: The question is, that amendment 77 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 77 disagreed to.

The Convener: The question is, that section 3 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 3 agreed to.

Section 4—Saving for devolved rights etc under section 2(1) of the 1972 Act

Amendment 78 moved—[Jackson Carlaw].

The Convener: The question is, that amendment 78 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 78 disagreed to.

Amendment 79 not moved.

Amendment 80 moved—[Jackson Carlaw].

The Convener: The question is, that amendment 80 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 80 disagreed to.

The Convener: Amendment 81, in the name of Liam Kerr, has already been debated with amendment 69. I ask Liam Kerr whether he wishes to move amendment 81.

Liam Kerr: Before I answer, convener, am I able to make a winding-up statement?

The Convener: No.

Liam Kerr: The minister provided some interesting food for thought on the issue and, on that basis, I will not move the amendment.

Amendment 81 not moved.

Amendment 82 moved—[Jackson Carlaw].

The Convener: The question is, that amendment 82 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 82 disagreed to.

Amendment 83 moved—[Liam Kerr].

The Convener: The question is, that amendment 83 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 83 disagreed to.

Amendment 84 moved—[Adam Tomkins].

The Convener: The question is, that amendment 84 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 84 disagreed to.

The Convener: The question is, that section 4 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted, but there will be no division.

Section 4 agreed to.

The Convener: At this juncture, we will have a 10-minute suspension.

19:57

Meeting suspended.

20:12

On resuming—

Section 5—General principles of EU law and Charter of Fundamental Rights

The Convener: Amendment 85, in the name of Adam Tomkins, is grouped with the amendments that are shown on the groupings paper. Members will note that there are a number of possible pre-emptions in the group. I will remind members of a pre-emption when I call the relevant amendment.

Adam Tomkins: The group that we now turn to is concerned largely with section 5, which makes provision for the continuing effect in Scots law, after exit day, of the general principles of EU law and the Charter of Fundamental Rights of the European Union. They are dealt with in the continuity bill differently from how the UK Government proposes to deal with them under the withdrawal bill.

The fourth of the amendments in my name—amendment 85—seeks to divorce the bill's treatment of the general principles from its treatment of the charter. That is because

"the general principles of EU law"

is a term of art that is understood very widely and clearly by EU lawyers, although it has generated significant confusion among people who are not schooled in EU law. The general principles of EU law are a concept: they are an unwritten and uncodified source of law in the EU. They are enforced by the European Court of Justice and have in EU law's legal order an effect that is equivalent to the provisions of treaties.

The general principles are a concept, whereas the charter of fundamental rights is a legal instrument: it is a document. In our view, it is much cleaner and neater to make separate provision in the bill for the general principles and the charter of fundamental rights. The UK withdrawal bill does that—it treats the general principles in one way and the charter in another. The merging or blending of the two is an innovation in the continuity bill that we think is untidy and incoherent, for the reason that I have just outlined—namely, that the general principles are a concept and the charter is an instrument or document.

20:15

We see no reason why the legal position with regard to general principles in Scots law after exit day should be any different from the legal position with regard to reserved law or UK law after exit day. Therefore, the force of my amendments with regard to the general principles—that is to say, amendments 85, 89 and 91—would be to amend the continuity bill so that it reflects what the withdrawal bill already says will be the legal position of the general principles in domestic law.

I understand that there is a policy difference between the UK Government and the Scottish Government on that score, and I understand that the amendments would reverse the policy of the Scottish Government, but that is because—I say respectfully—I disagree with the policy of the Scottish Government about what the legal position should be with regard to the general principles of EU law in Scots law after exit day.

Where I agree with the Scottish Government is with regard to treatment of the charter of fundamental rights. Therefore, in addition to amendments 85, 89 and 91, which deal with the general principles, I have lodged amendment 98, which would provide that the charter of fundamental rights would continue

"to have the same legal authority in Scots law on and after exit day as it had on the day before exit day."

As a Parliament, we are free to legislate on human rights differently from how the United Kingdom legislates on human rights. We are not free to modify the Human Rights Act 1998, because that is a protected act under schedule 4 to the Scotland Act 1998—a provision that we have already had cause to debate this evening. However, we are free to legislate for additional human rights protections that will pertain in Scotland and in Scots law in addition to those that are already provided for in the Human Rights Act 1998.

We see the force of the argument that there is good reason to maintain the position of the charter of fundamental rights in Scots law after exit day. Therefore, my amendment 98 would introduce a new section that would sever treatment of fundamental rights from treatment of the general principles, and would ensure that section 5, on the general principles, was compatible with the withdrawal bill and that a new section on the charter of fundamental rights would maintain the current position and legal authority in Scots law of the charter of fundamental rights on and after exit day. We think that that is the right balance for the bill to adopt.

Such would be the force of my amendments in the group.

I move amendment 85.

Jackson Carlaw: I have listened to my colleague Adam Tomkins and can say that my amendment 86 builds on his in the sense that it would clarify which general principles of EU law would be saved into domestic legislation. Section 5 sets out that the general principles of EU law and the charter of fundamental rights will be saved into Scots law after exit day.

I understand that "general principles" has a widely accepted meaning—there is a specific set of principles that are described by that phrase—but it is not spelled out what those general principles are.

In section 5(4), there is a right to change

"those principles ... by or under this Act or by any other provision of Scots law from time to time".

As the Law Society of Scotland has said, and as we believe, it would be helpful if the Government could identify what general principles it considers will be retained in Scots law.

There is, I understand, some debate about how the charter of fundamental rights fits into the general principles of EU law, with the charter sometimes being seen as written law and the general principles as unwritten law. However, as amendment 85 would not change the wording of the rest of section 5(4), that should not be an issue.

Amendment 86 would tidy up the bill and make the principles specific. The phrasing of the amendment would do exactly that, and makes clear that Scots law would include the following principles: subsidiarity, which states that national Parliaments can do things better than or equal to the European Union; equality before the law; proportionality, which involves regulating the powers of EU institutions to ensure that they are limited to those that are necessary to achieve the goal; and legal certainty.

Amendment 86 seeks to offer clarity and to give a concise definition of the principles that we will be saving into domestic legislation.

Liam Kerr: My amendment 87 seeks to remove yet more ambiguity by deleting section 5(1)(b). Section 5(1) seeks to ensure that the general principles of EU law and the charter are part of Scots law after exit day. The first qualification that is put on that is that those things

"have effect in EU law immediately before exit day"—

which, presumably, is answerable one way or the other.

The second qualification is that the general principles that are being retained—which, as Jackson Carlaw has just said, are unclear at present—

"relate to anything to which section 2, 3 or 4 applies".

The first question is what "relate" means. How strong does an association have to be for it to be a relationship? We are talking about porting an entire principle of EU law into our body of law, and we are doing it based on a subjective term such as whether or not it relates. I have just looked up the "Oxford English Dictionary", in which "relate" is said to be about whether something is causally connected. Do we prefer that definition, the lesser one that says "have reference to", or perhaps the midway one of "concern"? There is a difficulty with the word "relate".

Moreover, we are then asking whether the general principles and the charter relate to sections 2 to 4, which, in turn, do not define anything particularly clearly or state what they refer to, but are themselves full of ambiguities, caveats and cross-references. Where there is ambiguity there is uncertainty, litigation and cost. It is therefore my view that the prudent draftsperson would simply state the intent that the general principles of EU law and the charter will be part of Scots law after exit day if they were effective immediately before that. That is what I understand the intent of the legislation to be, so let us say so.

Dean Lockhart (Mid Scotland and Fife) (Con): I have lodged amendment 90 in order to address what may be an oversight regarding the application and operation of section 5, which, as we have heard, deals with the circumstances in which the general principles of EU law and the Charter of Fundamental Rights of the European Union will continue to have effect in Scots law after exit day.

Section 5(2) relates to a right of action continuing and provides that

"to the extent that there is a right of action in Scots law immediately before exit day based on a failure to comply with any of the general principles of EU law or the Charter, there is, on and after exit day, an equivalent right based on a failure to comply with any of the retained (devolved) general principles of EU law or the retained (devolved) Charter".

My amendment 90 seeks to extend that principle to ensure that any pre-existing defences that are available in Scots law as a result of general principles of EU law or the charter will remain available after exit day. If we make such a provision in respect of a right of action, it is important to extend it to defences that should remain part of Scots law after exit day.

If I can, I will provide important examples to give some details of the defences to which amendment 90 would apply and which would continue to exist in Scots law after exit day.

Article 48 of the charter deals with the presumption of innocence and the right to a defence. It provides that

"Everyone who has been charged shall be presumed innocent until proved guilty according to law"

and that

"Respect for the rights of the defence of anyone who has been charged shall be guaranteed"

under the charter.

Article 47 relates to providing everyone with

"a fair and public hearing"

and provides that

"Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

Those are just some examples of where it will be important to extend the provisions on the general principles of EU law and the charter, where applicable, after exit day.

Under section 5(2), the bill retains pre-existing rights of action. My amendment 90 would extend the provision to the defences and the other rights that I have mentioned.

Jamie Greene: Section 5 is important. It has been prominent to me, as I sit on the Equalities and Human Rights Committee, which is one of the committees that took evidence on that part of the bill, and I hope that its evidence taking will help to inform the Finance and Constitution Committee in its voting on the amendments.

I will speak to amendments 92 and 95, which are in my name, and perhaps comment on some of the other pertinent amendments that have been discussed and that are coming up.

I add my support to Adam Tomkins's comments on the approach to the separation of the general principles and the charter. My understanding—I bow to his superior legal knowledge—is that there is no framework in the United Kingdom that deems

a separation of the general principles and the charter to be unlawful.

Our framework came into effect as a result of the 2007 treaty of Lisbon, which included an opt-out for two member states—the United Kingdom and the Republic of Poland. The treaty was ratified by the UK Parliament in 2008. That is important because protocol 30 of the Treaty on the Functioning of the European Union, which is, in effect, a modern-day version of the treaty of Rome, states, in article 1(1):

"The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms."

Article 2 of that protocol reaffirms that the charter does not create legislation in the UK unless our domestic legal systems account for it. That is a key point, because amendment 92, which I lodged because of evidence taken by the Equalities and Human Rights Committee, seeks to remove section 5(2)(b)(ii).

The Equalities and Human Rights Committee had only one evidence-taking session on the continuity bill and only one witness: Dr Tobias Lock. I do not want to be accused of misquoting or paraphrasing, so I will read out his comments that are relevant to this issue, not his entire contribution. He said:

"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."—[*Official Report*, *Equalities and Human Rights Committee*, 8 March 2018; c 3.]

Dr Lock noted that it could be problematic if the two Governments took parallel approaches. That being said, Adam Tomkins seeks to address that issue in his amendment, which I support.

My amendment aims to bring across existing devolved retained powers to Scotland but, under our current framework, we could not bring over the parts of the charter that do not apply, as per the treaty of Lisbon. If the Scottish Government wants to formally and legally apply the charter in Scotland, that should be dealt with by the methodology outlined by Adam Tomkins.

I turn to amendment 95, which is pertinent to section 5. It provides that Scottish ministers must

"within 6 months of the day of Royal Assent make a statement setting out the general principles of EU law that they consider are part of Scots law by virtue of subsection (1)."

20:30

I will explain two points in relation to the timing of the provision and its rationale. The timing is important because, if the minister must come to Parliament within six months of royal assent, it is very likely that that will be before exit day. Although there is disagreement on the definition of exit day, we can assume that he will have to do that before exit day.

That is important because, as Adam Tomkins mentioned, "general principles of EU law" is an ambiguous term in many ways. It is a concept. When we look at how to decide which of the laws of the 40 years of the EU that we want to transpose into Scots law in our domestic legal system, it seems that there is a need to use in the bill a term that has a wider meaning. My worry is that, as an unintended consequence of using the current term, we run the risk of allowing for quite a wide-spanning interpretation of what the general principles of EU law are and which EU laws we seek to transpose. The Scottish Government needs to define beyond reasonable doubt what can and cannot be extrapolated from EU law and brought into Scots law.

My amendment 95 will put a legal duty on the Scottish Government to outline, within six months of the passing of this bill, what it considers to be applicable general principles of EU law. That can be done in a ministerial statement, at which questions can be taken from MSPs, or by another process that the Parliament deems fit for the minister to present those principles.

I hope that the amendment is helpful. It takes no power away from the Scottish ministers but will help them to come to Parliament to answer some of the many questions that will undoubtedly be raised by members during the six months after the bill passes, which will be before exit day.

It also allows MSPs to hold the minister to account on which of the retained devolved EU laws the Government wishes to bring forward and, more importantly, on how the general principles will be impacted by the passing of any further EU legislation or the ratification of any treaties after exit from the EU, which the Government also wants to deal with in the bill. The minister will know that I am not trying to change his approach but am merely asking that the legislation be allowed proper scrutiny.

Adam Tomkins seeks to decouple general principles of EU law and the charter, and I add my support to that.

In the interest of brevity, I will move on to some of the other amendments.

The Convener: You have had seven minutes.

Jamie Greene: I will be very brief. I would like to add my support to amendments 85 and 86. With regard to amendment 85, in my view it should not be the Scottish ministers' prerogative to decide those factors. There is a grey area between devolved and reserved matters, and the symmetry between the UK and Scottish Governments is very important.

Finally, I have no doubt that there is much good intention behind Neil Bibby's amendment 199, but I am concerned about its wording. It lists five areas that he wishes to make provision for. It would, in effect, stop the Scottish Parliament from removing or weakening any rights related to employment, equality, health and safety, and so on.

The amendment says that those protections arise from devolved retained EU law. Is it entirely clear that each of the elements in the proposed subsections are devolved retained law, or are some of them reserved matters? Because of that question, I have concerns around the wording of the amendment. I hope that finance committee members will look carefully at the wording of the amendment to make sure that it will have no unintended consequences that give the Scottish Parliament the ability to change matters that are not within the competence of this Parliament.

Claudia Beamish (South Scotland) (Lab): I will speak to my amendments 1 and 2. As introduced, the continuity bill retains general principles of EU law on the basis of European Court of Justice rulings. However, it does not, in my understanding, explicitly reference the status of EU environmental principles. I welcome the minister's sympathy for those principles, as stated to this committee previously.

Committee members and others present know well the significant role that EU law has played in influencing our domestic environmental law, and there is certainly concern that those principles should be preserved. I believe that amendments 1 and 2 are robust amendments. Other amendments that are relevant in this context are those of Tavish Scott on public duties and those of Mark Ruskell, all of which are in the next group. Labour will support those amendments. I appreciate that they are in the next group, but I am unable to speak on that group.

Amendment 1 clarifies that all the existing principles of EU law will be retained within Scots law, whether they originate in case law of the European Court, in EU treaties, directly in EU legislation or in directives. Amendment 2 makes clear that the key environmental law principles in article 191 of the Treaty on the Functioning of the European Union are retained.

The cabinet secretary will be aware that the SNP's Westminster counterparts supported amendments that sought to replicate the functions of EU environmental principles in the context of the withdrawal bill in the House of Commons. My amendment seeks to ensure alignment in Scotland, preserving the positive influence that the EU has had.

There seems to be no comprehensive list of general EU principles. The cabinet secretary will be aware that some of these principles, such as the precautionary principle, are already considered to be general principles of EU law. That is in the charter of fundamental rights. It would be helpful if the cabinet secretary could clarify which EU case law is relevant here.

Other principles—the guiding ones such as on preventative action—are not guaranteed in the same way by existing case judgments. It is not enough to have those in the explanatory notes, as highlighted this morning in the Environment, Climate Change and Land Reform Committee.

I understand that the Scottish Government argues that the guiding principles guide only EU policy and legislation, not that of member states. However, I would argue that, as at least 80 per cent of our own environmental law has been guided by those important principles, any definition of continuity—and I stress that word, as it is in the name of the bill—should mean that they continue to have a guiding role in Scots law.

Colin Smyth (South Scotland) (Lab): Amendment 3, in my name, aims to ensure that the principle of animal sentience is retained as part of the continuity bill, complementing amendments 1 and 2 from my colleague Claudia Beamish. Animal sentience recognises that animals are aware of their own feelings and emotions, and that policies should be developed to respect that. Evidence for animal sentience has been available for over 60 years and the topic now has over 2,000 studies to its name. Those studies outline the economic, social and environmental benefits of treating animals as sentient beings.

I do not believe that existing legislation in Scotland enshrines the principle of animal sentience. There is no explicit reference in the Animal Health and Welfare (Scotland) Act 2006. There is only a mention at section 48 of physical and mental suffering. There is no mention of it in the explanatory notes for the act. The act applies to individuals who are responsible for protected animals in Scotland, whereas article 13 of the Treaty on the Functioning of the European Union applies to Government policy. The 2006 act also does not cover free-living wild animals or animals that are used in scientific procedures, even though the animals in those categories are demonstrably sentient.

It is well established that the protection of animals as sentient beings is a matter of considerable public concern, as we saw with the public outcry following the rejection of the initial amendment on article 13 that was tabled at Westminster. I therefore argue that there is a strong case and public support for recognising sentience and a requirement to have regard to animal welfare.

Graham Simpson: Amendment 94 is a probing amendment that is designed to test the assumptions underpinning section 5, based on evidence taken on the bill and comparison with the withdrawal bill.

There are three parts to it. The first is an understanding of the charter. The UK Government says that it did not include the charter because it applies only to EU law, so it is implicit in all EU law, and because it reaffirms existing rights and principles of EU case law and does not create any new rights. It therefore did not need to be explicitly mentioned in the withdrawal bill. Though it applies to EU law, it does not apply to every circumstance.

At the moment, we therefore already have a split as to what law the charter applies to. The continuity bill would be adding a third—devolved law. Tobias Lock, who was a witness to the Finance and Constitution Committee last week, covered that in his evidence. I do not intend to quote him out of deference to the convener. Everyone was there and heard what he said.

My second point is on exactly what is kept or not kept. Section 5(3) says that a general principle counts only if it is in case law before exit day. Section 5(4) says that retained general principles in the charter can be modified "from time to time". The principles are frozen at the moment of exit unless we decide not to and, presumably, the right to action changes with that. It presumably follows from sections 5(1) and 5(2), but it is not explicit.

The final point is that schedules to the European Union (Withdrawal) Bill state:

> "There is no right of action ... after exit day".

They say that a "court or tribunal" may not "quash" any law on the basis that

> "it is incompatible with any of the general principles of EU law."

I understand that that is to do with the design of the EUWB and which EU law it saves and where. The continuity bill clearly states the opposite. The amendment would bring the two bills back into line and is aimed at teasing out the minister's position on that, so that we can understand it.

Although I completely respect the Government's wish to save EU law and to retain the general principles in the charter, it all prompts a number of questions that the minister might wish to address later. Does he recognise the depiction of legal complexity that witnesses gave and the different abilities to pursue cases in different jurisdictions of the UK? If so, has he made any assessment of whether that would leave the Scottish Government more liable for claims than the UK Government and create a perverse incentive to pursue cases in Scotland or, even, sudden extra liabilities? Has that specific interaction been part of his discussions with the UK Government? What are the areas of EU law that section 5 saves that explain the difference from the withdrawal bill? Can the minister confirm that the right to action would change in line with any modifications to the general principles? If so, should that be made explicit?

Donald Cameron: Amendment 96 is the mirror image of amendment 86, in the name of Jackson Carlaw, which he spoke to earlier. I lodged the amendment in order to clarify which general principles are to be included in the bill. The amendment addresses a point that was made by the Law Society of Scotland, which identified the issue and said:

> "it would be helpful if the Government could identify what general principles it considers are retained in Scots law."

Given that there are several legal principles at stake, I submit that the Law Society's point is a good one and it is important that that is duly clarified in the bill. It is vitally important that a specific and unequivocal list of general principles is included. The principles outlined are identical to those that Jackson Carlaw spoke to earlier, so I do not intend to go through each of them. However, I suggest to members that it is important that the principles are outlined explicitly in the bill.

Patrick Harvie: I have a couple of brief comments on other amendments before I come to amendment 127, in my name.

Although I am not entirely persuaded about the general approach that Adam Tomkins has taken with his amendments, perhaps the minister could comment on amendment 98 during his contribution to the debate. I am only guessing at this stage, but I assume that the minister will resist the amendments. If the other amendments in Adam Tomkins's name are rejected by the committee, would amendment 98 on its own be harmful? Would it add something with the form of words that says:

> "The Charter of Fundamental Rights continues to have the same legal authority"?

If that is additional without the other parts, which rejecting the cluster of amendments would take away, would there be a problem with that from the Scottish Government's perspective? I would be interested in the minister's comments on that.

20:45

I am grateful for the opportunity to touch on the amendments that were lodged by Claudia Beamish, Colin Smyth and others, in relation to the environmental principles, the principle of animal welfare and sentience and the wider principles of EU law. There has been some discussion in the committee about that and about the extent to which those principles need to be set out in some degree of detail. In giving evidence to the committee previously, the minister has seemed to be not yet convinced about but somewhat open minded to giving some movement on that issue.

A number of what I think are helpful and constructive approaches have come from different political parties—the Labour members whom I have mentioned, but also Green and Liberal Democrat colleagues. Those positive ideas about ways in which some of the principles should be set out are helpful suggestions for amendment of the bill. If the Government is going to resist all of those, the minister will clearly be expected to give some specific commitments about how he intends to address the questions that those amendments raise.

Finally, amendments 127 and 140, in my name, and the amendments in the name of Neil Bibby touch on issues that have some similarities. They do not have complete unity of purpose, but there are some clear similarities. I will, again, be interested in the Government's response to those. I have framed mine with reference to amendments that were debated in connection with the withdrawal bill.

In particular, I highlight amendment 25 to the withdrawal bill, which was debated on 12 December 2017. It sought to restrict the ability of regulations to

"remove or reduce any protections currently conferred upon individuals, groups or the natural environment ... prevent any person from continuing to exercise a right that they can currently exercise"

or

"amend, repeal or revoke the Equality Act 2010 or any subordinate legislation made under that Act."

As I understand it, some of the equalities issues were dealt with separately from that amendment, which fell, but it was supported by Labour members, my colleague Caroline Lucas and SNP members in the House of Commons debate. That is why I decided to use that form of words. It is clearly an approach that the SNP, Greens and Labour agreed was a useful contribution to the UK bill, and I hope that it will be seen by all of those political parties—and, perhaps, even others—as a useful contribution to this bill.

Neil Bibby: I wish to speak to amendments 128, 141 and 199, in my name, and in support of the amendments in the group that were lodged by Claudia Beamish and Colin Smyth. The purpose of the amendments is to protect those EU-derived rights that fall within devolved competence.

The minister is on record as stating that the continuity bill will, if passed, retain EU-derived law and give both the Scottish Government and the Scottish Parliament the powers needed to keep those laws operating. Labour shares that objective with the minister. However, we are clear that there must be checks and balances throughout the process.

Section 11, on page 9, deals largely with the restrictions that will be placed on Scottish ministers in relation to their regulation-making powers. Regulations made

"under subsection (1) may not—

(a) impose or increase taxation,

(b) make retrospective provision,

(c) create a relevant criminal offence".

They may not

"modify the Scotland Act 1998, or ... the Equality Act 2006 or the Equality Act 2010",

or

"remove any protection relating to the independence of"

the judiciary.

Amendment 128 makes clear that regulations made under section 11(1) may not

"remove or weaken any right or protection arising from devolved retained EU law"

relating to employment rights, equalities rights, health and safety rights, consumer standards or environmental standards and protections. Those are important rights and standards that must be protected.

Through amendment 141, I seek to apply the same proportionate constraints on the regulation-making powers in section 12 in relation to the compliance with international obligations. Amendment 199 would add a new part to the bill after section 17, which would make it clear that regulations must not be used to remove or weaken protections or EU-derived rights.

My amendments 128, 141 and 199 are not the only amendments that aim to safeguard EU-derived rights and protections. As has been mentioned, amendment 98, in the name of Adam Tomkins, on which he made important points, specifies:

"The Charter of Fundamental Rights continues to have the same legal authority in Scots law on and after exit day as it had on the day before exit day."

Patrick Harvie's amendments 127 and 140 seek to safeguard protections for individual groups and the natural environment. Those are welcome amendments, but I believe that my amendments would be the most comprehensive way of ensuring that the Scottish ministers cannot dilute EU-derived rights and protections.

I indicate my support for the amendments lodged by Claudia Beamish and Colin Smyth. Claudia Beamish's amendments 1 and 2 would ensure that, for the purposes of the bill, the environmental principles that are enshrined in the Treaty on the Functioning of the European Union are retained in Scots law. Those environmental protections received support from all Opposition parties in the UK Parliament, and I hope that they will have the support of the Scottish Government today. Colin Smyth's amendment 3, which would retain the principle of animal sentience, is complementary to amendments 1 and 2.

The amendments in the group lodged by me, Claudia Beamish and Colin Smyth protect workers, consumers and the environment. The amendments protect the rights and protections of the people whom we represent, and I hope that committee members will support them.

Ivan McKee (Glasgow Provan) (SNP): I will comment on amendments 127 and 140, and amendments 128 and 141. I can understand where the members who lodged those amendments are coming from, but we should look at what is actually written in the bill. It is stated clearly that the power to make regulations can be used only where there is a deficiency, and section 11(2) lays out the criteria for deciding where there is a deficiency. If there is no deficiency, the power does not exist.

Amendments 127, 128, 140 and 141 would put in place tests that would make the power very difficult to use. They would set the bar too high and risk making the power unusable, which defeats the whole purpose of having it. That is my concern, and I will be interested to hear what the minister says.

Murdo Fraser: I have a brief comment on amendment 128. I listened with great interest to Neil Bibby's arguments in proposing it, but my difficulty is that all the powers it refers to are currently reserved. It is therefore difficult to see how the Scottish ministers would have the capacity, even if they wanted to, to do any of the things that are referred to in amendment 128.

I do not think that Mr Bibby has the opportunity to wind up on amendment 128, which is unfortunate. We are maybe relying on the minister to enlighten us.

The Convener: As no one else wishes to speak, we will rely on the minister right now.

Michael Russell: Section 5 is a complex one that deals with a range of different issues, some of which spill over into the next group of amendments from Tavish Scott and Mark Ruskell. Some of what I say now will therefore be relevant to our next discussion, so I would be grateful if members could bear with me.

Patrick Harvie asked a specific question on amendment 98. He defined my intention correctly: I will not be encouraging support for it because we believe that it would add to the complexity. Provision is already made in the bill to exactly the same effect in section 5(1), and the amendment would omit the remedy. That is a vital issue in what the Conservative amendments are attempting to do.

Amendments 86, 95 and 96 are directed at requiring the bill or the Scottish ministers to specify what the general principles of EU law are. We consider them to include subsidiarity, proportionality, legal certainty, legitimate expectation, non-retroactivity, fundamental rights, equal treatment, prohibition of abuse of law, good administration and the precautionary principle.

The purpose of the bill is to convert EU law as it stands at the point of exit and to ensure continuity of the position as it exists on exit day. We do not think that it would be appropriate to prejudge the position in relation to which general principles have been recognised at the point of exit. That would be a matter for the courts to determine in a particular case, based on their assessment of European case law.

The explanatory notes set out some of the main general principles that the Scottish Government understands are currently part of EU law. Of course, we can commit to adjusting the explanatory notes to set those out more fully, without being exhaustive, given that the general principles could continue to develop prior to exit day.

Amendments 85, 89 to 94 and 98 are a series of amendments that try to bring the bill into line with the approach in the UK Government's bill to the general principles of EU law and the charter. However, they do so by removing the provisions that incorporate the general principles and the charter and by removing the remedies that are associated with incorporation. I make special mention of Liam Kerr's amendment 87 and say that we should all be confident that the phrase "relate to" is effective. It is a clear and well-used legislative phrase and means that the scope of section 5 is limited. I do not think that there is any dubiety on that. Regrettably, I have to say that, each time that I hear an amendment from Liam Kerr that seeks to clarify, it actually makes the wording more confusing.

The general principles of EU law and the charter have rights of action associated with them. It would be wrong to remove them, which, in effect, is what the Tory amendments seek to do. I therefore encourage members to resist all the amendments that are directed at removing the charter and individual rights and remedies from our law.

Amendments 1 to 3 would have the effect of extending the definition of what is meant to be a general principle of EU law, which would change the current legal effect of the law that we seek to bring into the domestic system. The general principles of EU law are those that have been recognised by the Court of Justice. Significantly, the general principles can be used as a basis for legal action and, unlike the UK Government's bill, this bill preserves and continues those rights through section 5(2).

There are, of course, other principles that are set out in the treaties, direct EU legislation and EU directives, including the specific principles that are mentioned in amendments 2 and 3 in relation to environmental law and animal welfare. They are important, but they are not intended to create legal rights in the same way as the general principles that have been recognised by the European courts. Any EU environmental or animal welfare legislation that is brought into domestic law through this bill will have been informed by all the EU's environmental and animal welfare principles. We are continuing to consider how best to enshrine our commitment to the EU environmental and animal welfare principles in light of the UK Government's decision to exit the EU.

I need to address whether we can take further steps to do that in light of what I have said and also of what I said at the Environment, Climate Change and Land Reform Committee this morning. I have thought very carefully about that. I want to define what we are already doing, what we can do in this bill and what we can commit to as we go forward. That will be of relevance to the items that are to be raised in the next group, too. Once I have done that, I will address some of the points that Patrick Harvie and Neil Bibby raised, which are similar to those points but on different areas.

As I tried to clarify this morning, I am happy to amend the explanatory notes to the bill to clarify that the precautionary principle is a general one of EU law and will therefore be covered by the provision in section 5 that the general principles will continue to be part of Scots law. Under section 5, the charter of fundamental rights will be similarly incorporated, including—this is crucial—article 37, which provides that

"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

What more can this bill do? At present, the environmental principles are used to inform EU policy development and legislation on environmental matters. As such, all EU legislation will be rolled over through the continuity bill and will become part of retained, devolved EU law, which will already have been informed by those principles. Similarly, where we are taking powers in this bill to correct deficiencies or to keep pace with EU legislation, we will make necessary changes to law that has already been informed by those principles.

21:00

However, to make sure that we are clearly committed in the bill to considering the environmental principles when seeking to make such changes, I commit today to work with members to lodge amendments at stage 3 that would require us to consider EU environmental principles and the principles of animal sentience when exercising the powers under sections 11, 12 and 13.

What more can we do in the future? The EU environmental principles guide the union in developing policy on the environment and, by extension, they guide environmental legislation in Scotland. That connection for future policy development will be lost when the UK exits the EU, so we need to consider carefully how we take forward this Government's clear intention that those principles will continue to sit at the heart of Scotland's approach to environmental policy, regardless of our future relationship with the EU.

That will likely require changes to our current law that cannot be made in the continuity bill. However, having discussed the issue with the Cabinet Secretary for Environment, Climate Change and Land Reform, I confirm that we will work with others to lodge amendments at stage 3 that commit us to consult on proposals on how best to ensure that the environmental principles continue to inform future policy and law in Scotland.

I am making clear commitments, and I hope that they are being clearly understood.

On the wider point that the amendments raise, given that the purpose of the bill is to convert EU law as it stands at the point of exit and to ensure continuity of the position as it exists on exit day, it would not be appropriate to use the bill to change the definition of what is understood as constituting a general principle of EU law.

Amendments 127 and 140, in the name of Patrick Harvie, would supplement the list of things that the powers cannot be used to do. They would

prevent them from being used to remove or reduce protections currently conferred on individuals and groups; protect rights that are currently exercisable; and prevent them from being able to increase burdens on individuals and businesses. Those are all laudable aims, but they could move us into the realm of doing what I have suggested would be very difficult to do—that is, to use the bill to change the definition of what is understood as constituting a general principle of EU law.

I need to apply the same commitment that I have made on the issues of environmental principles and the principles of animal sentience to this issue, too. That also applies to Neil Bibby's amendments 141 and 199. I cannot use the bill to make substantial policy changes, but I hope that I can find ways to make the commitments that both Patrick Harvie and Neil Bibby want in a way that is consistent with the bill. However, we should bear in mind that that does not—Murdo Fraser raised this point, and I am sure that he did so helpfully—cover reserved areas. We must be very careful that we do not find ourselves in that position.

I understand the motivation for the amendments, and I desire to deal with the areas raised. I can make commitments specifically on environmental issues; I can also make commitments to find a way to ensure that the purpose of the amendments from Patrick Harvie and Neil Bibby is dealt with at stage 3, and to work with the members to do so. However, those amendments would create circumstances in which the bill would be in difficulty.

Therefore, I encourage members to vote against amendments 85 to 87, 89 to 93, 94 to 96 and 98, and I encourage members not to move amendments 127, 128, 140, 141 and 199 on the basis of the commitments that I have made. I can return to those commitments when we come to the very similar provisions in the next group, but I have made them clear now for the avoidance of doubt.

The Convener: I call Adam Tomkins to wind up, and to press or seek to withdraw amendment 85.

Adam Tomkins: This has been a lengthy and a full debate on an important set of amendments to a very important provision in the bill—section 5, on the general principles of EU law and the charter of fundamental rights. I will make five brief points summarising the most salient aspects of the debate.

The withdrawal bill and the amendments in my name to the continuity bill seek to end the role of the EU general principles in domestic law, or Scots law, because the general principles of EU law are created, generated, expanded, defined and developed by the European Court of Justice.

One of the significant reasons for voting to leave the European Union was dissatisfaction across the political spectrum with the uncontrolled and uncontrollable expanse of the jurisprudence of the European Court of Justice. That is why we should look at the general principles in one way and at the charter of fundamental rights in another. The charter is a legal document that the ECJ can and does interpret but cannot rewrite, whereas the general principles of EU law can be rewritten—and are rewritten by the ECJ almost weekly. There is, therefore, a good reason in jurisprudence for being sceptical of and for wanting to limit the role of the general principles in our legal system post-Brexit. That is the first point that I want to make.

My second point is that to have in Scots law different rules on the role of the general principles from the rules in the rest of the UK under the withdrawal bill, as would be the case if the continuity bill were to be enacted in its current form, would simply make our administrative law unnecessarily complex. There is no good reason for doing that—there is no positive to be gained, but there are negatives to be risked. There is no reason for making Scots administrative law more complex in terms of its relationship with administrative law south of the border.

For example, to have the doctrine of proportionality—which we all accept is a general principle of EU law—play a role in Scots law that it will not play in English law would simply make the administrative laws of the UK's legal systems unnecessarily complex. No good reason has been put forward by any member—or, indeed, by the minister—for why that should happen. In my view, it should not happen.

The third point that I want to make is that I fully endorse amendment 86 in the name of my colleague Jackson Carlaw, which reflects the evidence that the Finance and Constitution Committee heard last week—I think—from the Law Society of Scotland. The Law Society will seek a definition of the general principles of EU law being included in the bill, if my amendments are unsuccessful.

Nevertheless, I add this note of caution. Even if we define in the bill what we think the general principles are—even if we say that they are subsidiarity, equality, proportionality and legal certainty—there will still be significant legal uncertainty about what those terms mean. For example, is subsidiarity to be understood as a general principle that says that power should be exercised in Scotland at the lowest possible level? Does it apply to the relationship between local authorities and the Scottish Parliament or between local authorities and the Scottish ministers, or is it a principle that applies only between a member state of the European Union and EU law, which is

how subsidiarity has been understood by the European Court of Justice? Therefore, even if we were to identify, in the bill, subsidiarity as a general principle of EU law that we want to continue in Scots law, we would need to lodge further amendments at stage 3, seeking clarification of exactly what is meant by subsidiarity.

The fourth point that I want to make is one that I made in the chamber in one of our earliest debates on the continuity bill. The minister was unable to respond to the point on that occasion, and I am disappointed that he has overlooked it in his remarks this evening. There is a straightforward and manifest conflict between section 5 as it is currently drafted and section 8. Section 8 seeks to end the role in Scots law, after exit day, of the ruling in Francovich v Italy. That is a case in which the European Court of Justice created a doctrine of state liability that is avowedly based on a general principle of EU law—namely, effective judicial protection and legal effectiveness. If we have, on the one hand, its continuing applicability—including causes of action—in sections 5(1) and 5(2) and, on the other hand, a clear rule that says that the Francovich ruling will have no role to play in Scots law going forward, there is a clear incoherence and inconsistency in the bill that will have to be teased out, tested and ruled on, in the end, by the courts.

The final point that I want to make is addressed to Patrick Harvie. I am gravely concerned that the minister seems to think that the precautionary principle—which, I know, Mr Harvie wants to safeguard in Scots law—is a general principle of EU law. The minister did not cite any legal authority in favour of that proposition, and I must tell Mr Harvie that I know of no legal authority in support of that proposition. I may have overlooked it—it may be that some recent decision of the Luxembourg court says that the precautionary principle is now a general principle of EU law—but I doubt that for the simple reason that the precautionary principle is not a general principle but one that applies particularly in the context of scientific and environmental regulation.

The whole point of the general principles of EU law is that they apply right across the spectrum of EU law. That is why they are called "general principles". If the minister thinks, or has been advised, that the precautionary principle, which is a specific element of European environmental law, is somehow captured by section 5, if I were Mr Harvie I would not rely on that without wanting to dig a long way down to understand whether that is really the case.

The Convener: If amendment 85 is agreed to, I cannot call amendments 86, 87 and 88 because they will have been pre-empted.

The question is, that amendment 85 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 85 disagreed to.

Amendment 86 moved—[Jackson Carlaw].

The Convener: The question is, that amendment 86 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 86 disagreed to.

Amendment 87 moved—[Liam Kerr].

The Convener: The question is, that amendment 87 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)

Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 87 disagreed to.

Amendment 88 moved—[Donald Cameron].

The Convener: The question is, that amendment 88 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 88 disagreed to.

Amendment 89 moved—[Adam Tomkins].

The Convener: The question is, that amendment 89 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 89 disagreed to.

Amendment 90 moved—[Dean Lockhart].

The Convener: The question is, that amendment 90 be agreed. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 90 disagreed to.

The Convener: I remind members that, if amendment 91 is agreed to, I cannot call amendment 92 because it will have been pre-empted.

Amendment 91 moved—[Adam Tomkins].

The Convener: The question is, that amendment 91 is agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 91 disagreed to.

Amendment 92 moved—[Jamie Greene].

The Convener: The question is, that amendment 92 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)

Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 92 disagreed to.

21:15

The Convener: If amendment 93 is agreed to, I cannot call amendments 1 to 3 and 94 to 97 because they will have been pre-empted.

Amendment 93 moved—[Adam Tomkins].

The Convener: The question is, that amendment 93 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 93 disagreed to.

The Convener: I call Claudia Beamish to move or not move amendment 1.

Claudia Beamish: In view of the minister's remarks about stage 3, I will not move amendment 1. I will not move amendment 2 for the same reason.

Amendments 1 to 3 not moved.

Amendment 94 moved—[Graham Simpson].

The Convener: The question is, that amendment 94 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 94 disagreed to.

The Convener: I call Jamie Greene to move or not move amendment 95.

Jamie Greene: In the absence of any reference to the amendment in the minister's summing up, I will not move the amendment.

Amendment 95 not moved.

Amendment 96 moved—[Donald Cameron].

The Convener: The question is, that amendment 96 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 96 disagreed to.

Amendment 97 moved—[Donald Cameron].

The Convener: The question is, that amendment 97 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 97 disagreed to.

The Convener: The question is, that section 5 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 5 agreed to.

After section 5

The Convener: Amendment 4, in the name of Tavish Scott, is grouped with amendments 5, 6, 20 and 21.

Tavish Scott (Shetland Islands) (LD): Convener, can I say how well you are doing in trying circumstances? I also have a word for Mr Tomkins. In his winding up, he said that he had five points to make. He did not understand that, like me, the convener was thinking that he would struggle to make BBC1 at 9 o'clock to watch "Shetland" tonight. Mr Tomkins needs to bear such things in mind when he judges how many points to make in a winding-up speech—before Murdo Fraser tweets accordingly.

Amendment 4 places an obligation on Scottish public authorities to apply the environmental principles that are set out in the amendment and, when carrying out their duties and functions, to have regard to a number of environmental considerations. Although not limiting the area of a court's consideration, the amendment also makes a specific provision that allows Scottish courts to make declarations of incompatibility whenever a provision of primary or secondary legislation is incompatible with the environmental principles that the minister mentioned earlier. The bill as drafted does not explicitly retain EU environmental and animal welfare principles, although it retains the charter of fundamental rights, which was referred to earlier, in terms of environmental protection. I am grateful—as, I am sure, other members are—to Scottish Environment LINK for setting out the argument to the committee last week in written evidence and in briefings to members.

The minister sent a letter to the Environment, Climate Change and Land Reform Committee setting out the Scottish Government's view on how the principles can be dealt with. He led some evidence on that a moment or two ago, and I will look to what more he wishes to say in respect of both my amendments and Mark Ruskell's amendments in due course, but I hope that he also recognises that amendment 4 provides a useful backstop that the committee might want to include at this stage.

Mark Ruskell's amendments 5 and 6 make it explicit that the environmental and animal welfare principles in articles 11, 13 and 191 of the Treaty on the Functioning of the European Union are translated into Scots law. Amendment 4 perhaps does that in a unified way for all those articles, so I am happy to move it.

I move amendment 4.

Mark Ruskell (Mid Scotland and Fife) (Green): I am happy to speak to the four amendments in my name in the group. They are amendment 5, on the principle of animal sentience; amendment 6, on the environmental principles; amendment 20, which attempts to clarify who will exercise functions and powers in relation to environmental regulation; and amendment 21, which attempts to create a requirement for consultation on what could be an emerging governance gap.

I will not repeat all the arguments that I made for the amendments six or seven hours ago in the chamber, but I would like to reflect briefly on some of the points that the minister raised, I think about 10 hours ago, in the Environment, Climate Change and Land Reform Committee this morning.

I acknowledge the point, which the minister made several times, that the principles that we are debating tonight have in effect been saved into current legislation and will indeed be rolled over through the continuity bill, but we need to reflect on why that is the case. The principles guide policy development and create good laws. In relation to animal sentience, there is a requirement not just on the European Union but on member states to have

"full regard to ... welfare requirements"

when formulating and implementing policy.

The principles are not just about where we have come from and where we are now in our policy. They are also about where we are going.

I heard what the minister said about a stage 3 amendment and how the guiding principles can perhaps be applied going forward. I say to him that I would like to see the principles applied, particularly in relation to how we will keep pace with European Union laws in the future.

Another point that the minister made this morning was that the bill is about saving European Union laws and not about introducing new definitions. I agree with that. Tempting as it was to bring forward a new version of the animal sentience provisions and a new, improved version of the article 13 provisions in the Lisbon treaty, I recognise that this is not the place to do that. However, it is about saving the important principles that we have, which have been guiding our policy development for many years.

I turn to the other amendments in the group, including those that have already been discussed. The main difference with my amendments is that I am attempting to disapply the case law requirement. There is some uncertainty about whether the principles have been fully and adequately tested in EU case law. If the minister can assure me that all the principles have been tested in EU case law—I note Mr Tomkins's comments about the previous group of amendments—I will be interested to hear that, as well as whether there are references for the case law. Let us prove whether the principles have been tested to destruction in EU case law.

Amendment 21 identifies that we could be heading for an EU governance gap, particularly in relation to the provisions of the ECJ. I know that the UK Government is, sensibly, consulting on the governance gap and has offered to extend the consultation to Scotland. I will be interested to hear the minister's views on that. It might make amending the bill unnecessary if he was to accept that offer.

Finally, with amendment 20, which attempts to create a list of who will carry out the functions and what they will be, I am again looking for clarity from the minister. Creating such a list seems an obvious thing to do. It could even be wrapped up in the governance gap consultation, which could consider the appropriate bodies to take on the functions. We need to sort that out ahead of withdrawal. If there is a commitment on that, I will consider whether to move amendment 20. I may seek to withdraw it if I get a rational response that that will happen.

Neil Bibby: Scottish Labour is minded to support the amendments in the group in the name of Tavish Scott and Mark Ruskell, which are similar to the amendments in the name of Claudia Beamish and Colin Smyth in the previous group.

Mark Ruskell's amendments make it clear that the environmental and animal welfare principles from the Treaty on the Functioning of the European Union will be translated into Scots law. His and Tavish Scott's amendments in the group, as a whole, set out practical ways of ensuring that environmental safeguards remain in place and that deficiencies that arise from withdrawal are addressed through consultation. I am therefore happy to support the amendments in the group if they are pressed.

Patrick Harvie: Once again, I am grateful to members for ensuring that we have a range of amendments and a range of options to consider in this critical area. Like my colleague Mark Ruskell, I commend the briefing from Scottish Environment LINK, which says:

> "If the Bill is to deliver on 'providing for continuity of law including environmental protections in EU law', as stated in the Bill's Policy Statement, EU environmental and animal welfare principles need to be explicitly referenced in its provisions."

Later, it says:

> "the Bill falls short of translating these commitments into legislation."

It is pretty clear to most people who have been part of the movement towards higher environmental standards not just in these islands but throughout Europe that the European Union has been a critical driver of that process, and I think that that is true of people across the political spectrum. Obviously, I think that my party colleagues in green parties throughout the EU have made a contribution to that, but it has been the case right across the political spectrum as well.

The European Union and its institutions and body of law have been critical in raising the standards, and I think that most of us understand that the Brexit ultras who are currently in control of the UK Government are the self-same people who have spent years writing articles and making speeches about how much they look forward to a bonfire of the regulations, and the idea that some sort of wild-west free-market agenda will be imposed instead of the strong environmental protections that we have achieved. The same goes for the social protections that have been achieved in the European Union.

Again, I commend those who lodged the amendments in the group. I want to hear something very positive from the minister about what he intends to do. I would like the amendments to be agreed to, but if he wants to persuade the committee to do something different from that, he needs to have a clear proposal about what is going to be different in the bill that will achieve the objectives.

On amendment 21 specifically, the suggestion that the Government should consult on what has clearly been identified as a governance gap is perfectly reasonable. If amendment 21 is agreed to and the minister was to come back at stage 3 and say, "Two months is too short a timescale, so we'd like to tweak it," I suspect that the supporters of the amendment would be perfectly willing to discuss what the timescale should be. However, there is a clear case for including a commitment to have that consultation in the bill, as well as the other issues that are raised in the group.

Michael Russell: I thank Claudia Beamish and Colin Smyth for not moving their amendments in the previous group. I want to make the same assurances to Tavish Scott and Mark Ruskell that I made to them, and perhaps to add some more,

because some other issues are being considered here.

I will deal with one or two specific issues and then go on to the more general issue. Mark Ruskell asked about case law. I think that it is dangerous to disapply case law in these circumstances, but we need to be clear about what that case law is. I will certainly look at using the explanatory notes, for example, to provide additional information on case law and other ways to do that. Also, I am happy to look at the applicability to public bodies as an extension to what we are discussing.

21:30

I understand that the Cabinet Secretary for Environment, Climate Change and Land Reform is going to the meeting of the ECCLR Committee, on which Mr Ruskell sits, to talk specifically about governance next Tuesday, and I will be there with her. I know that she will want to consult on the issues of governance, because it is absolutely right that that happens. If Mr Ruskell can wait until that meeting, I have an assurance that those issues will be covered.

Let me now address the issues that Patrick Harvie raised, before going into specific commitments. As he knows, I am a former environment minister. Like him, I am sceptical about what he calls the "Brexit ultras". I am not convinced, for example, that the current Secretary of State for the Environment and Rural Affairs in the UK Government is a born-again green—not even a pale green—and I am certain that his wish to deregulate will apply to social protections as well. I have dealt with that individual more than once over the past few years and I stand by what I say; indeed, I have debated these issues with him.

I am absolutely determined that these matters should not be weakened and I need to find a way to achieve that. Patrick Harvie asked me to convince him that I could, and I repeat the assurances that I have made and will expand on them in exactly the same way as I did in the previous group. I told the Environment, Climate Change and Land Reform Committee this morning that we will amend the explanatory notes to the bill to clarify what the bill does.

The precautionary principle is a general principle of EU law. There is clearly a difference of opinion on that between me and Professor Tomkins, which is not unusual, even this evening. We will amend the explanatory notes and the issue will be covered by the provision in section 5 that the general principles will continue to be part of Scots law. Under section 5, the European charter of fundamental rights will be similarly incorporated and, again, I quote article 37, which provides that

"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

That is what the bill does.

What more can we do? At present, the environmental principles are used to inform EU policy development and legislation. As such, all EU legislation, which will be rolled over through the bill and become part of retained devolved EU law, will already have been informed by those principles. Similarly, where we take powers to correct deficiencies and to keep pace, we will be making necessary changes to law that has already been informed by the principles.

However, I make this key commitment: to make sure that our clear commitment to considering the principles is on the face of the bill, which is what is asked for, I will work with members to lodge amendments at stage 3 that require us to consider the EU environmental principles and animal sentience when exercising the powers under sections 11, 12 and 13. Because of Mr Ruskell's amendment 20, I will include in that the issue of local authorities and public bodies, which I think also tackles something that Tavish Scott raised. We will look at that issue and we will make a commitment to do so in the bill.

What do we do next? As I said earlier, the environmental principles currently guide the EU in developing policy and, by extension, guide environmental legislation. We stand to lose that—it is one of the many things that we will lose through Brexit—and we need to look at how to take the issue forward, certainly in relation to governance, and by consulting on how to carry the principles forward to ensure that they inform future policy and law.

The Cabinet Secretary for Environment, Climate Change and Land Reform will also confirm that that consultation will take place and that we will include that in the bill. In our discussions over the next week I want to ensure that we also include the issue of environmental governance. Nobody is avoiding that issue, but we clearly need to get ourselves to a position from which we can do that. I have indicated what the bill can do, and I have intimated what it will do, what more it could do and what we can commit to for the future.

I turn to the issue of keeping-pace powers, which will become an issue for further discussion. I know that there is a desire to limit those powers and to increase scrutiny. I will support the limitation and scrutiny of those powers, but I will not support the idea of dispensing with them because, as I indicated to the Environment,

Climate Change and Land Reform Committee this morning, there are areas in which they will become exceptionally valuable. For example, there are issues to do with the list of fish diseases, as a number of members will understand—I know that Tavish Scott will, because he is familiar with aquaculture. The list of fish diseases requires to be updated because it applies across Europe; it is updated by European legislation. Unless we were able to apply the keeping-pace powers to such matters, we would find ourselves without the ability to move forward as quickly or in as determined a way as we ought to.

At this morning's meeting of the Environment, Climate Change and Land Reform Committee, I used the examples of animal health and invasive species. There is a variety of areas in which practical application of the environmental principles in the work that we do as MSPs requires us to use the keeping-pace powers. Because environmental law is such a large part of what we deal with, and because it is an area that I believe will be under threat from the UK Government, it is essential that we have the ability to exercise those powers.

I have indicated what our commitments are. I commit to doing the work that we require to do to lodge the necessary stage 3 amendments next week, and to work with the members concerned in doing so. I hope that that is sufficient to reassure members that we have a genuine intent in that respect, but we need to get this right.

Tavish Scott: I have three very brief points. I hear what the minister said about the keeping-pace powers. That is a debate for later on this evening—or some future point. All that Mr Russell has just said about the weight of environmental legislation and regulation that flows from Europe reinforces the point that it is necessary to make sure that however Parliament chooses to allow ministers to keep pace is subject to the most exacting of scrutiny, for the very reasons that he has given. That argument could be made from my side of the debate as well as from the minister's.

I hear what Mr Russell says about the commitments that he has made in relation to next Tuesday's meeting of the Environment, Climate Change and Land Reform Committee and to working with members across Parliament on amendments that would give effect to what we all seek to achieve. That is a sensible and progressive approach to the issue.

I indicate that, if agreement cannot be reached, I give notice that I will seek to lodge my amendment again at stage 3. However, I take Mr Russell's point that there is a lot to be gained by working with members—external organisations, which have very strong views on the subject, should also be involved—to develop amendments that will shape the bill in the right way to achieve the effect that we all want.

Therefore, I seek leave to withdraw amendment 4.

Amendment 4, by agreement, withdrawn.

Amendments 5 and 6 not moved.

Amendment 98 moved—[Adam Tomkins].

The Convener: The question is, that amendment 98 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 98 disagreed to.

Section 6—Principle of the supremacy of EU law

The Convener: Amendment 99, in the name of Liam Kerr, is grouped with amendments 100 to 103.

Liam Kerr: Amendment 99, in my name, reverts to the principles that I elucidated at the outset. The law must be certain, clear and precise, and the implications of each law must be foreseeable. Legislation must be worded so that it is clearly understandable by those who are subject to it. Therefore, my amendment proposes to leave out the words

"devolved enactment or rule of law"

and to insert

"law made by the Scottish Parliament".

There is a fundamental problem with the bill as drafted because, in relation to retained EU law, it is difficult to interpret to what law the principle applies.

Notwithstanding the ambiguity over the interplay between section 6 and any retained EU law, clarity will be immeasurably improved if my amendment is agreed to. Section 6(1) would then read:

"The principle of the supremacy of EU law does not apply to any law made by the Scottish Parliament passed or made on or after exit day."

That is clear, concise and comprehensive.

That clarity is also required in section 6(1) at line 38. Although I appreciate that Mr Russell has struggled to keep up with the force of my argument thus far, he will no doubt be pleased to note that amendment 100 is based on an argument raised by the Law Society.

Section 6(1) states:

"The principle of the supremacy of EU law continues to apply ... to ... any devolved enactment or rule of law passed or made before exit day".

A bill in the Scottish Parliament is passed when it is approved at the end of stage 3. There is then a holding period of normally four weeks before it can be submitted by the Presiding Officer for royal assent; during that period, it may be referred to the Supreme Court and the European Court of Justice. It is only on receipt of royal assent that it becomes enacted—in other words, it absolutely categorically becomes active only at the point of enactment. Prior to that, it is open to challenge. Thus, section 6(1) as drafted could apply to a "rule of law" that has been passed but not enacted and thus could be challenged.

There is a further issue, in that section 2(1) says that certain domestic legislation, "as it has effect" in law before exit day, will continue to do so. Section 6(1), by referring to legislation that has been "passed or made", apparently dispenses with the requirement for the "rule of law" to be in force or operative—that is, to be in effect. Given that section 6(1), and what follows, relates directly to section 2—among others—insofar as it accepts some things from that which section 2 saves, all sections ought properly to mirror each other in the enactment status of that which they seek to govern. Certainty would therefore be obtained by the use of "enacted" rather than "passed or made", and I urge the committee to agree to amendment 100.

My argument for amendment 102 is identical to that which I set out for amendment 99. Certainty, clarity and precision—to say nothing of comprehensibility—require nothing less than that that amendment be agreed to. To my mind, amendment 102 is a simple amendment; clarity would be immeasurably improved by removal of the words

"devolved enactment or rule of law"

and the simple insertion of

"law made by the Scottish Parliament",

so that the section would read

"disapplication or quashing of any law made by the Scottish Parliament passed or made"—

or "enacted", if the committee agrees to my amendment 100—

"before exit day."

I turn to amendment 103. My point in leaving out the words "passed or made" and inserting "enacted", as per amendment 100, stands. A bill of the Scottish Parliament is passed when it is approved at the end of stage 3; it does not come into effect until receipt of royal assent—that is, enactment. Clarity requires that the word "enacted" be inserted, which would lead to certainty. I urge the committee to agree to amendment 103.

I move amendment 99.

Donald Cameron: Amendment 101 is my only amendment in the group. I lodged it to address the Law Society's concern about the approach that is taken in section 6(1), which it has stated has no obvious intended effect, or is, at the least, unclear. The Law Society has asked whether section 6(1) is

"merely a declaratory sub-section or"

whether

"it simply paves the way for the retention of the principle in section 6(2)".

In essence, amendment 101 questions the purpose of section 6(1). My observation is that it is a declaratory provision—it simply states something and has no legal effect. If that is correct, I submit that we must say that. Therefore, my amendment expressly says that

"subsection (1) is only a declaratory provision."

21:45

James Kelly: I oppose all the amendments in the group. There seems to be a legal difference of opinion. I listened carefully to Liam Kerr's argument, bearing in mind that he has an element of legal expertise.

Murdo Fraser: An element?

James Kelly: I will give Liam Kerr some fulsome praise: I respect his legal expertise. However, his arguments did not convince me that his amendments would have any added legal or practical effect. I oppose those amendments and Donald Cameron's amendment 101.

Michael Russell: One of the core requirements of EU membership is the principle of the supremacy of EU law. In the event of any conflict with domestic law, domestic law must give way. Section 6 reflects the same approach as the UK bill in not applying that principle after EU exit. Similar to the UK bill, section 6 is intended to

make clear that the principle of supremacy will not apply to any domestic law that is

“passed or made on or after exit day.”

Although the principle of supremacy will end for new laws after exit day, it is considered necessary to make it clear that that has no impact on the way in which our existing laws work.

The bill, therefore, sets out that, in relation to any pre-exit domestic law, the principle of supremacy will continue to apply, so far as relevant to the relationship to retained EU law. Remaining silent in the bill, or taking a different approach, would risk changing the law and creating uncertainty about the bill’s meaning and effect.

Liam Kerr’s amendments seek to remove from the scope of the provision rules of law—for example, the common-law devolved Westminster acts and subordinate legislation—which would just leave laws made by the Scottish Parliament; by that, I take it that he means acts of this Parliament. I am not sure why he has proposed that, because it would add more confusion. The principle of the supremacy of EU law applies to all those things, as well as to enactments.

Donald Cameron’s amendment 101 seeks to provide that the removal of the principle of the supremacy of EU law is declaratory only. I am also not sure why he lodged that amendment. The principle of the supremacy of EU law is a significant legal principle that is currently part of our legal system. On leaving the EU, despite previous suggestions to the contrary, it is for the Scottish Parliament to determine how EU law is to be retained and applied in devolved areas. It might be argued that, once we leave the EU, it will be sufficiently clear that the principle cannot apply to any future domestic law. However, that cannot be assumed. Similar to the UK Government, we consider that it is necessary to make the provision clear in the bill. Section 6(1) has substantive legal effect, rather than being declaratory. Donald Cameron’s amendment would have the opposite effect and would cast doubt on the position.

I observe with a wry smile—which will confirm to Jackson Carlaw that at least I have a smile—that, having been accused of actions that are incompatible with the rule of law, I note the report by the Bingham centre, which is a very distinguished centre, on the matter. On the equivalent provisions in the UK bill, the report said:

“the objective of clause 5(1) to (3), namely to give retained EU law priority over pre-exit, but not post-exit domestic law, is not merely ‘a sensible one’, it is *required* by the Rule of Law.”

Therefore, I ask members to vote against amendments 99 to 103.

Liam Kerr: I have proposed a number of amendments that are designed to add clarity, reduce uncertainty and ensure applicability. I lodged amendments 99 and 102 because I believe that, as drafted, the bill is unclear. Why should the bill say

“devolved enactment or rule of law”

when, in my view, clarity could be given by simply replacing that with

“law made by the Scottish Parliament”?

Section 6, “Principle of the supremacy of EU law”, is fundamental and one of the key sections that we need to get right. In that regard, I concede that the minister makes a fair point in saying that perhaps my amendments have not gone as far as they need to. I am sure that he concedes that my points are equally of value. On that basis, I think that there is more to be done with amendments 99 and 102, so I will not press amendment 99 or move amendment 102 at this stage.

I turn to amendments 100 and 103. This is a technical point, but it is a valid one. We must use words that have meaning. If we use words that could have meaning, or ascribe to words a meaning where another is absolutely appropriate or necessary, that is folly. The reality is that “passed or made” means one thing and “enacted” very clearly means another. Also, section 6 relates to section 2 and other sections. If something different is intended, which would seem very odd, it must be clearly stated. If the same intent is required in all sections, the same word should be used.

If members feel disquiet about my analysis—I note with sadness that I failed to convince James Kelly—perhaps they will be more convinced by the Law Society, which makes exactly the same point in paragraphs 2 and 3 of its briefing note, on page 8.

I commend amendments 100 and 103 to the committee. I will not press amendment 99 or move amendment 102. I commend to the committee amendment 101, in the name of Donald Cameron, because his view that section 6 is merely declaratory, which should be stated, is important.

Amendment 99, by agreement, withdrawn.

Amendment 100 moved—[Liam Kerr].

The Convener: The question is, that amendment 100 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 100 disagreed to.

Amendment 101 moved—[Donald Cameron].

The Convener: The question is, that amendment 101 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 101 disagreed to.

Amendment 102 not moved.

Amendment 103 moved—[Liam Kerr].

The Convener: The question is, that amendment 103 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 103 disagreed to.

Amendment 104 moved—[Maurice Golden].

The Convener: The question is, that amendment 104 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 104 disagreed to.

The Convener: The question is, that section 6 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 6 agreed to.

Section 7—Challenges to validity of retained (devolved) EU law

Amendment 105 moved—[Maurice Golden].

The Convener: The question is, that amendment 105 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 105 disagreed to.

Amendment 106 moved—[Adam Tomkins].

The Convener: The question is, that amendment 106 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 106 disagreed to.

The Convener: Before we move to the next group, I want to suspend the meeting for about five minutes; we will have a break. I intend to close the meeting after we have considered the group entitled "Grounds for exercise of various regulation-making powers".

21:54

Meeting suspended.

22:05

On resuming—

The Convener: After discussion with the clerks, I have decided that we will, because I need to have in mind the duty of care to staff—it is not just about members—deal with the next three groups of amendments. We will finish with the group entitled "Interpretation of retained (devolved) EU law: status of decisions of the European Court after exit day". To deal with the group following that one would take us well past 11 pm and probably close to midnight, so I think that it will be fair to take just the next three groups. I am giving members early indication of that.

Amendment 107, in the name of Maurice Golden, is grouped with amendments 108 and 109.

Maurice Golden: Amendment 107 would amend section 7 at page 5, line 24. It would insert at the end of the section:

"As soon as practicably possible after the end of each quarter of the year the Scottish Ministers are to—

(a) lay before the Scottish Parliament, and

(b) make publicly available by such means as they consider appropriate,

a report on the number of challenges made to the validity of retained (devolved) EU law under this section."

The rationale behind it is that it would require ministers to report regularly on how many challenges to the validity of retained devolved law there have been.

Section 7 sets out the right to challenge what is or is not retained in Scots law after exit day. It puts down caveats on that from the European Court, saying that before exit day, an instrument is no longer valid to ministers. However, it also says, in section 7(2)(b), that challenges are not valid if they are

"of a kind described, or provided for, in regulations made by the Scottish Ministers."

That, in turn, is subject to subsections (4) and (5), which state that regulations can ensure that a challenge that would have been against the EU is instead

"against a Scottish public authority"

and that the regulations must be

"subject to the affirmative procedure".

Mike Russell's amendments 108 and 109, which will add a new section after section 9, go further and add the need for consultation before regulations are made. There is some provision for scrutiny of the regulations; that is welcome, but there is clearly still scope for new regulations to be made, with broad understanding of what is going on.

I have a quotation from the Law Society of Scotland—for clarification, I will, after Patrick Harvie's rather ill-advised comments about what I quoted earlier, read out the full quotation. Patrick Harvie said that the committee had received written submissions in relation to all those quotes. Although that may be the case, I quoted from a committee report, I reported a quote from a legal journal, and I also reported a quote from the Supreme Court. Although I am not party to the papers that the committee has received, I very much doubt that the Supreme Court has submitted written evidence to the committee, although I am sure that the Supreme Court holds it in high esteem.

The Law Society said:

"To the extent that the devolved rights or principles of EU law which are saved in sections 4 and 5 fall within retained (devolved) EU ... law, the saving appears to have limited effect because of section 7(1) which provides:

'There is no right in Scots law on or after exit day to challenge any retained (devolved) EU law on the basis that, immediately before exit day, an EU instrument was invalid.'

We note that regulations under section 7(2)(b) will describe the types of challenges which will be permitted to the validity of the retained (devolved) EU law. It would be

helpful were Scottish Ministers to detail the potential content of such regulations."

Amendment 107 would help to achieve that by requiring quarterly publication of the number of challenges that are made. That simple step would help us to understand the impact that saved law was having. I urge committee members to look at the law, to put their politics aside and, for once, to help to improve the bill for the good of Scotland and the Scottish Parliament.

I move amendment 107.

Michael Russell: My amendments 108 and 109 are a response to a request from the Delegated Powers and Law Reform Committee on a point that was raised initially by its convener, Graham Simpson. They will convert the scrutiny procedure for regulations under section 7(2)(b), which allows domestic court challenges to EU instruments on validity grounds after exit day, to an enhanced 60-day scrutiny procedure following consultation, like that which will be used in other cases under the bill. We accept that that is sensible because the regulations might create significant outcomes in the courts.

Although I thank Maurice Golden for lodging amendment 107, I encourage him not to press it. If he does so, I invite the committee not to support it. The items will be a matter of public record, so to create a further requirement to report on the public record would be unduly onerous. I am sure that ministers will keep Parliament informed about uses of powers. The committee will be able to scrutinise uses of powers, and the additional scrutiny procedure will add an extra dimension. The requirement in amendment 107 is, therefore, redundant.

James Kelly: I support Maurice Golden's amendment 107. It makes sense in terms of transparency because it would require challenges to be reported every quarter. I note that the minister said that the information will be made public, but specifying a requirement to do so in legislation would assure us that it will be delivered.

I also support the minister's amendments 108 and 109, which set out important aspects in relation to new regulations that come forward, particularly in relation to consultation. The minister has clearly taken steps to address the concerns about the lack of consultation in relation to some of the regulation powers.

I support all the amendments in the group.

The Convener: As no other member has indicated that they want to speak at this point, I call on Maurice Golden to wind up.

Maurice Golden: I will be very brief. Amendment 107 is all about transparency and improving scrutiny. Ultimately, it represents an improvement that will help the validity of retained devolved EU law under section 7.

The Convener: The question is, that amendment 107 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 107 disagreed to.

The Convener: The question is, that section 7 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 7 agreed to.

Section 8—Rule in *Francovich*

The Convener: Amendment 7, in the name of Tavish Scott, is in a group on its own.

22:15

Tavish Scott: I enter the Francovich area with some trepidation. I feel like very junior counsel with Adam Tomkins sitting here—even more junior than Donald Cameron feels in such moments.

The Francovich principle is an instrument for driving ever better standards of governance and output in the public sector. It dates from 1991 and has been extended over the past 25 years to cover states, public authorities, agencies, local government and, recently, the private sector. The principle is that if any of those bodies have been in breach of European Union law and an individual or corporate body has suffered thereby, that individual or body has a remedy, in that the courts can impose damages proportionate to the losses suffered as a result of poor governance. Without that remedy, people are left with judicial review, which is expensive and lengthy and does not provide damages. Francovich is a piece of what has been coined "people's law"—it is designed to give ordinary people the chance to obtain redress.

It has been part of the Scottish legal landscape for 25 years by virtue of our membership of the European Union. We should take the opportunity to retain what we can of it for the future and to continue it, as part of the bill.

I move amendment 7.

Neil Bibby: Scottish Labour and I support amendment 7, which was lodged by Tavish Scott with the support of my colleague Mary Fee, on the rule in Francovich. The amendment would ensure that the right in Scots law to damages in accordance with the rule in Francovich continues on or after exit day. Under EU law, since Francovich, member states have been obliged to make good any loss or damage caused to individuals by breaches of Community law for which member states can be held responsible.

We have been clear that leaving the EU must not mean any dilution of people's rights, including the rights of workers, small businesses and others protected by that rule. Our concern is that without a specific provision on Francovich, an important strand of legal protection could be lost. We will support amendment 7, so that Francovich can be absorbed into Scots law.

Patrick Harvie: I am open to supporting amendment 7 and will listen with care to what the minister has to say. If the minister is not able to convince the committee to reject the amendment, but still wishes to discuss further tweaks or changes at stage 3, all members, including those who support amendment 7, should be willing to listen. However, at the moment I am open to supporting the amendment.

Adam Tomkins: The Scottish Conservatives do not support amendment 7 for two reasons. One is that there is no reason for the continuity bill to differ from the withdrawal bill in relation to Francovich. The second and more important point is that, in relation to damages from public authorities, including the state and the Government, there has been significant change in our legal systems in the United Kingdom over the past 20 or more years since the Francovich decision. That has happened not just because of Francovich but because of changes in the common law both in Scotland and in England and Wales and because of the impact of the Human Rights Act 1998, which has increased the availability of damages against public authorities, including the Government.

The reality is that, irrespective of what the bill or any other enactment says about the on-going status of the specific rule in Francovich, public authorities find themselves increasingly liable for damages for a variety of reasons under a variety of causes of action. That common-law development will continue after Brexit, just as it has continued during the 46 years of the UK's membership of the European Union, irrespective of what the bill or any other legislation says about the specifics of Francovich. That is the core of the issue.

Michael Russell: Members have a difficult choice to make and I want to explain carefully why the Government does not recommend support for amendment 7. I understand the desire of many members to ensure that there is as little change as possible to the rights of individuals after Brexit—I did not seek and do not want that, so I have sympathy with that position.

The Scottish Government recognises the importance of the principle in Francovich, which allows damages to be claimed against the state for failures in implementing EU law. That is why the bill ensures that that important principle is retained when the claim arises before exit day. The bill does not require the claim to have been raised in the courts before exit day, which, as I am sure members will appreciate, would have been a significant loss to claimants of rights that had accrued before exit.

As Mr Tomkins indicated, the withdrawal bill takes a different approach to rights that have accrued before exit day. Under that bill, those accrued rights would be lost at that point if a claim had not actually been raised in the courts. It is interesting to note that, in the House of Lords last week, the Advocate General for Scotland recognised that that was a problematic approach and indicated that the UK Government may have to consider allowing Francovich damages for claims that have arisen before exit day, which is the provision that we are making.

However, Mr Scott's amendment 7 goes further by continuing the right to claim damages after exit day. In other words, Francovich damages could apply whether the claim arose before or after exit day. In general, we have sought to carry over all existing EU law, including the charter and general principles of law and the associated remedies. We have taken the view that the existing right to Francovich damages is inextricably linked to EU membership and the obligations of the UK as a member state of the EU. The purpose of Francovich damages is to provide a remedy to those who are disadvantaged by the failure on the part of a member state to properly implement EU law and, to some extent, to make an example of member states that fail in their obligations. Although it is for national courts to apply their own criteria, the Court of Justice of the EU has a central role in providing national courts with guidelines and indications for the application of the criteria. After exit day, the UK will cease to be a member state of the EU. I regret that, but that will be the case if we reach exit day.

Given that Francovich damages are inextricably linked to membership of the EU and the implementation of EU law, it is difficult to see what the rule would mean and how it could work effectively in relation to retained EU law. There will be no jurisdiction for the ECJ, no supervision of implementation and no ability to make an example of the state. I reiterate that, unlike under the UK bill, any person will be able to raise such an action in relation to implementation failures of the Scottish ministers prior to exit day.

I cannot support amendment 7 for the reasons that I have given. Of course I have sympathy with people who object to the changes that are taking place; I, too, wish that they were not taking place. However, it is very difficult to see how amendment 7 could operate, given the terms and conditions of its operation.

Tavish Scott: I am struggling slightly to understand the argument that, once the UK leaves the European Union, ministers wish to continue to have powers in respect of regulations and the laws that the EU passes, yet they do not wish to continue to have the Francovich process. That does not seem to be a consistent approach. In that context, I do not see why amendment 7 would be resisted.

I understand some of the other arguments that have been made, but it seems to me that we should not lightly throw away a system of judicial rule and a convention in Scots law that have been in place for 25 years and which specifically benefit ordinary workers and businesses—people who have been wronged and who do not have the big money that is necessary to take on large public agencies.

On that basis, particularly given the first point, on which I genuinely struggle with the minister's argument, I will press amendment 7.

The Convener: The question is, that amendment 7 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)

Against

Burnett, Alexander (Aberdeenshire West) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 7 disagreed to.

The Convener: The question is, that section 8 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 8 agreed to.

The Convener: The question is, that section 9 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 9 agreed to.

After section 9

Amendment 108 moved—[Michael Russell]—and agreed to.

The Convener: I was taken by surprise there.

Amendment 109 moved—[Michael Russell]—and agreed to.

Section 10—Interpretation of retained (devolved) EU law

The Convener: Amendment 8, in the name of Tavish Scott, is grouped with amendments 110 and 111. If amendment 8 is agreed to, I cannot call amendment 110 or amendment 111, because of pre-emption.

Tavish Scott: Amendment 8 would toughen up the bill where it says "may have regard to" and provide a more serious test, to give clearer guidance in relation to retained European Union law. It proposes that courts and tribunals "must" have regard to future European judgments. Scottish courts, of course, would retain the right to assess the significance of such judgments. That is in proposed new subsection (2) of section 10, which the amendment would introduce.

Proposed new subsection (2A) would require courts and tribunals to have regard to any withdrawal agreement that is signed. The example that Lord Pannick gave in the House of Lords—I seem to be reading the Lords proceedings more often than not these days—which forced a similar change to the UK bill, concerned regulation of medicinal products. If the withdrawal agreement between the UK and the EU were to say that there will be close regulatory alignment between the EU and the UK, as many members hope that it will, a court or tribunal in Scotland would be encouraged by the proposed new provision to pay close

attention to the determined meaning of EU regulation.

Proposed new subsection (2B) provides that it is perfectly acceptable for a court or tribunal, having been guided to consider EU judgments under subsection (2A), to decide that none has significant relevance to the matter before it.

On that basis and in that spirit, I hope that the committee will consider agreeing to amendment 8.

I move amendment 8.

Adam Tomkins: The convener will be pleased to hear that I will be very brief in speaking about section 10, which corresponds to clause 6 of the European Union (Withdrawal) Bill.

There is no reason for there to be any difference between the two bills in respect of the issue that section 10(2) deals with. Section 10(2) provides:

> "A court or tribunal exercising devolved jurisdiction may have regard to anything done on or after exit day by the European Court, another EU entity or the EU."

Amendments 110 and 111 would amend the provision, so that it would read:

> "A court or tribunal exercising devolved jurisdiction need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so."

That is also provided for in clause 6 of the withdrawal bill.

I lodged the amendments in the interests of consistency between the two bills, in the interests of legal certainty and in the interests of ensuring that the provisions really correspond with each other—as opposed to the Government claiming, wrongly, that they do.

James Kelly: I support amendment 8, in the name of Tavish Scott. The ability to interpret retained EU law accurately is important. Amendment 8 would enhance the bill and provide greater clarity.

I do not support amendments 110 and 111. I heard what Adam Tomkins said about making the continuity bill consistent with the withdrawal bill, but I am not convinced that his amendments make any difference. I will be happy with the wording of section 10 if it is amended by amendment 8.

Patrick Harvie: I, too, see merit in Tavish Scott's amendment 8.

On the suggestion that we change "may" to

> "need not ... but may do so if ... appropriate",

I am not convinced that simply saying, "This is what the UK bill does," is a strong argument. In my interpretation of the provision as Adam Tomkins proposes to amend it, I think that some criteria would be required to determine what would make such an approach "appropriate". The bill is clearer as it stands, and I would take some persuading to accept the changes that Adam Tomkins proposes.

Michael Russell: I will deal first with Adam Tomkins's amendments 110 and 111, which would amend section 10(2) so that instead of providing that domestic courts and tribunals "may" have regard to decisions of the European Court or other EU entities or the EU, it would provide that our courts "need not" have regard to anything done by the European Court or other EU entities or the EU but "may" do so if it is "appropriate to do so". That would align the provision exactly with the relevant provision in the withdrawal bill—a developing theme this evening.

22:30

The amendments would not alter the substance of the provision. We consider that the drafting of section 10(2) is more straightforward, in that it clearly emphasises from the outset the positive intention that the domestic courts can have regard to future EU judgments. It is very odd to provide for something in the negative—that something "need not" have regard to something. I therefore urge the committee to reject amendments 110 and 111.

Tavish Scott's amendment 8 puts me in more of a quandary, for two reasons. The first is that, as a general principle, requiring courts to do things tends to be a difficulty for the courts themselves, because they like to have discretion. Secondly, there are one or two issues with the drafting of the amendment to which I have to take exception—for example, the phrase should be "retained devolved EU law" rather than "retained EU law". However, I do not want to rule out absolutely at this stage what amendment 8 proposes. If Mr Scott will agree to discuss it with officials and me between now and stage 3, I think that we could find a way to toughen the provision without necessarily removing every discretion from the court. I also think that we would be able to phrase that in a way that would fit with the bill. I am not unsympathetic to making that happen and to toughening the provision, but we need to do it in a way that works for the bill.

Tavish Scott: I thank Patrick Harvie and James Kelly for their observations on amendment 8 and their support for it. I accept the minister's offer to look closely at how we can give effect to what amendment 8 seeks to achieve. On the basis of the minister's offer, I seek to withdraw amendment 8.

Amendment 8, by agreement, withdrawn.

Amendment 110 moved—[Adam Tomkins].

The Convener: The question is, that amendment 110 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 110 disagreed to.

Amendment 111 not moved.

The Convener: I call Jackson Carlaw to move or not move amendment 112.

Jackson Carlaw: I have stuck it out this long, convener, so I will move amendment 112.

The Convener: You mean that you did not want to put me off my stride again.

Amendment 112 moved—[Jackson Carlaw].

The Convener: The question is, that amendment 112 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 112 disagreed to.

Amendment 113 moved—[Graham Simpson].

The Convener: The question is, that amendment 113 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 113 disagreed to.

Amendment 114 moved—[Jackson Carlaw].

The Convener: The question is, that amendment 114 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 114 disagreed to.

The Convener: The question is, that section 10 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 10 agreed to.

The Convener: That brings the committee's consideration of the bill to a close for this evening. We will commence consideration again at 8 am in the chamber. I thank all members and the minister for their participation. I particularly thank the staff for bearing with us.

Meeting closed at 22:34.

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