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PARLIAMENTARY DEBATES
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HOUSE OF LORDS

OFFICIAL REPORT

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Abbreviation	**Party/Group**
CB	Cross Bench
Con	Conservative
DUP	Democratic Unionist Party
GP	Green Party
Ind Lab	Independent Labour
Ind LD	Independent Liberal Democrat
Ind SD	Independent Social Democrat
Ind UU	Independent Ulster Unionist
Lab	Labour
LD	Liberal Democrat
LD Ind	Liberal Democrat Independent
Non-afl	Non-affiliated
PC	Plaid Cymru
UKIP	UK Independence Party
UUP	Ulster Unionist Party

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House of Lords

Monday 5 March 2018

2.30 pm

Prayers—read by the Lord Bishop of Rochester.

Air Guns
Question

2.35 pm

Asked by ***Lord Black of Brentwood***

To ask Her Majesty's Government what plans they have to introduce a regime for the purchase, possession and use of air guns.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, the purchase, possession and use of air weapons are already regulated. However, we are reviewing the regulatory position in England and Wales. We asked for the views of interested parties in December and we received a large number of representations from the wider public. We will consider these carefully before deciding how to proceed and we will publish the outcome in due course.

Lord Black of Brentwood (Con): I thank my noble friend for that Answer. Is she aware that a growing number of crimes involving air weapons relate to senseless attacks on domestic animals, particularly cats, nearly half of which die as a result of the often horrific injuries? The Cats Protection charity recorded 164 attacks on cats and kittens with an airgun last year, while the RSPCA received nearly 900 calls to its cruelty hotline reporting air weapon attacks on animals. This makes 4,500 attacks in the last five years. Is it time to license these weapons, to ensure that they are possessed only for legitimate purposes by responsible owners, not by those who would cruelly inflict pain and suffering—and often death—on defenceless domestic animals?

Baroness Williams of Trafford: As a cat lover and cat owner, I totally sympathise with my noble friend's Question. The Government take animal welfare very seriously. Anyone who shoots a domestic cat is liable to be charged and prosecuted, under the Animal Welfare Act 2006, with causing unnecessary suffering. We are increasing the maximum penalty for this offence from six months' imprisonment and/or an unlimited fine to five years' imprisonment and/or an unlimited fine. The number of offences involving air weapons in the year to March 2017 was similar to that in the previous year and there were 64% fewer air weapon offences than a decade previously. Following the recommendation from the coroner in the case of Benjamin Wragge, we are looking at the regulation of air weapons with an open mind. The review will also consider the position in Scotland and Northern Ireland, where licensing regimes are in place for air weapons.

The Earl of Shrewsbury (Con): My Lords, I declare an interest as the honorary president of the Gun Trade Association. Is my noble friend aware that the primary concern of the shooting sports organisations—in this country—is the safety of the public through the responsible ownership and use of all legally held firearms? Does she agree that the firearms Acts deal with airgun issues in piecemeal fashion and need consolidation, so that they can be more easily accessed, understood and obeyed by all?

Baroness Williams of Trafford: In answer to my noble friend's first question, I totally agree and have seen at first hand that responsible use should be at the heart of all country and field sports. I will certainly take back his point about consolidating the various regulations and licensing.

Baroness Hamwee (LD): My Lords, the Government's guidance says that,

"if you have never shot before, you would be well advised to go to a shooting club … and learn … how to handle your air weapon safely and responsibly".

It advises people to learn about this. Does that not tell us all we need to know about the desirability and importance of licensing?

Baroness Williams of Trafford: My Lords, this country has some of the strictest gun laws in the world. The outcome of the review will be very interesting and the Government will certainly take good cognisance of it in responding to it. The noble Baroness is absolutely right that these things should be as tightly regulated as possible.

Lord Kennedy of Southwark (Lab Co-op): My Lords, the Minister is correct in saying that we have some of the strongest gun laws in the world. However, they are still not strong enough. In the hands of irresponsible people these weapons can kill; she mentioned the tragic case of Benjamin Wragge. An 18 month-old child in the constituency of my honourable friend Karin Smyth in the other place was injured by an air weapon recently. We need a responsible licensing system, and will the Minister look at the whole question of storage? The current advice is that these weapons can be stored in a locked cupboard, which is not good enough.

Baroness Williams of Trafford: The noble Lord is absolutely right, and the firearms licensing system is kept under review to make sure that it is not abused by criminals and terrorists and to preserve public safety. In response to the recommendations made by the Law Commission, we strengthened the firearms controls through the Policing and Crime Act. Two new offences were introduced of intending to unlawfully convert imitation firearms—making them effectively deactivated weapons—and making them available for sale or as a gift. We have recently consulted on proposals to prohibit two types of firearm—large-calibre and rapid-firing rifles—and on defining antique firearms in legislation to prevent them being used by criminals.

The Countess of Mar (CB): My Lords, what is the age range of offenders when they are caught? If they are youngsters, as I suspect, would it not be a good idea if parents, who often buy these things as presents for their teenagers, are advised that the present should be accompanied by lessons?

Baroness Williams of Trafford: In terms of the age range, people using guns have to be over 18. I certainly agree with the noble Countess that anyone who is in possession of a gun for whatever legal purpose definitely should be taught how to use it properly.

Lord Campbell-Savours (Lab): My Lords, the effectiveness of the law is dependent on the level of compliance. Is it not true that the level of compliance in Scotland is very low?

Baroness Williams of Trafford: As I said in my answer to my noble friend Lord Black, we are certainly looking at the regime in Scotland as part of our review and in coming to our conclusions.

Baroness Hodgson of Abinger (Con): My Lords, can my noble friend please tell me how many people were prosecuted last year for injuring animals in this way?

Baroness Williams of Trafford: I can certainly tell my noble friend about the number of fatalities. I know that the number of these crimes has fallen. I am trying to find the figure, but will have to write to her about that.

Lord Foulkes of Cumnock (Lab): My Lords, as we know, the Scottish Government do not always get everything right. However, in this case, the law there seems to be working effectively. Why is England having to wait?

Baroness Williams of Trafford: As I have said twice now, we will certainly look to the regime in place in Scotland as part of the review and in coming to a view.

General Practitioners: Workforce

Question

2.43 pm

Asked by ***Baroness McIntosh of Pickering***

To ask Her Majesty's Government what assessment they have made of the number of general practitioners taking early retirement; and what steps they are taking to increase the size of the general practitioner workforce.

Baroness McIntosh of Pickering (Con): My Lords, I beg leave to ask the Question standing in my name on the Order Paper. In doing so, I refer to my registered interest.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, in the 2016-17 pension scheme year, 721 GPs took early retirement, representing 62% of all GP retirements. However, it should be noted that many GPs who take their NHS pension then return to service. Early retirement does not necessarily mean a loss of skills and experience to the NHS. We recognise, however, the need to increase the general practice workforce, which is why the Government remain committed to delivering an additional 5,000 doctors working in general practice by 2020.

Baroness McIntosh of Pickering: My Lords, we appear to be in a vicious cycle of doctors retiring early and then coming back and working part-time and fewer EU doctors coming to work here. What can my noble friend do to increase the number of doctors wishing to enter GP practice as opposed to other specialties, and what will the certification procedure be for EU doctors to be recognised as doctors to practise post Brexit in this country?

Lord O'Shaughnessy: I thank my noble friend for her question. It is interesting to note, looking at the figures, that the total number of retirees from general practice has been falling in recent years, which is very welcome, even though in the past few years there has been an increase in the number taking early retirement. As for entering general practice, that is how we need to get more GPs. The number of training places has increased to a record 3,250, which is an 18% increase over the past three years. Finally, on certification, mutual recognition of professional qualifications is of course a matter for negotiation as part of our future relationship with the EU. However, I can tell my noble friend that the Government are committed, under whatever circumstances, to recruit 2,000 international GPs in the coming years.

Baroness Thornton (Lab): My Lords, I declare an interest as a lay member of a CCG. GPs are indeed retiring before the age of 60; in fact, last year, twice as many retired as three years ago. More GPs are leaving the profession than are joining it, and soaring numbers of junior doctors are leaving the NHS after their two-year foundation training. How do the Government intend to fill the failing pipeline of junior doctors, and would the Minister care to speculate why there is a flood of departing junior doctors right now? Could it be due to junior doctors' rock-bottom level of morale after their shabby treatment by the Secretary of State?

Lord O'Shaughnessy: The noble Baroness might be interested to note that in 2014, the number of GPs in specialty training was 2,671, and in 2017, it was 3,157—an increase of nearly 400. That is how we are filling the places.

Lord Carlile of Berriew (CB): Is the Minister aware of the increasing number of inner-city general practices where the entire GP workforce consists of locum doctors because of recruitment problems? Does he agree that that is an expensive way to provide GPs, and one which diminishes the doctor-patient relationship?

Lord O'Shaughnessy: I agree with the noble Lord: we need to crack down on agency and locum spend. That has been falling in recent years. The way we will fix this issue and the demand for general practice in a

sustained way is to increase the number of GPs coming into the service, and, as I said, that is exactly what we are doing.

Baroness Jolly (LD): My Lords, there should be a move to recruit newly-qualified doctors to general practice and to prevent GPs retiring earlier and earlier, but that is not as easy as it sounds. Can the Minister therefore tell the House what work has been done to enable job-sharing, so that part-time GPs balancing a family life can partner with older GPs who want a less full-time commitment?

Lord O'Shaughnessy: I shall have to write to the noble Baroness with the specifics on GP flexibility. However, one of the reasons that GPs take early retirement to take advantage of their pension is that it enables them to work flexibly afterwards.

Baroness Redfern (Con): My Lords, regarding the workforce, having pharmacists in GP practices means that GPs can focus their skills where they are most needed: diagnosing and treating patients with more complex needs. Does the Minister agree that this not only helps GPs manage demands on their time but helps to ease their workload, while patients have the convenience of being seen by the right professional, improving quality of care and ensuring patient safety?

Lord O'Shaughnessy: My noble friend is absolutely right. As well as our commitment to increase the number of GPs by 5,000, we also have a commitment to increase the number of GP practice staff by 5,000, including 1,500 pharmacists, who provide exactly the kind of support she outlined.

Lord Turnberg (Lab): My Lords, one of the reasons why general practice is less attractive than it used to be is because of the enormous bureaucratic load that is placed on GPs nowadays. They have to sit on committees and on CCGs, and they rush around doing non-clinical work. Is there any way to reduce this non-clinical workload?

Lord O'Shaughnessy: That is an important issue. We know that workload is a problem. I point the noble Lord and other noble Lords to NHS England's 10 high-impact actions. These are actions which all GP surgeries can take; for instance, using technology such as e-booking and e-prescribing to reduce the kind of workload he is talking about.

Lord Forsyth of Drumlean (Con): My Lords, does my noble friend not acknowledge that one reason that GPs are retiring after the age of 55 is that their salaries are such that their pension exceeds the limit, which the previous Chancellor reduced from £1.8 million to £1 million, and they find themselves having to pay tax on their pension contributions at 55%? Would not the simple solution be to raise the threshold, thereby allowing GPs to continue in practice and not be taxed on their pension contributions unfairly?

Lord O'Shaughnessy: My noble friend is quite right—there has been anecdotal evidence that that is the case. Of course, any policy changes are well above my pay grade, but I should point out that that does not seem to have affected early retirement among dentists and consultants, so it is possible that another critical factor is at work.

Lord Patel (CB): My Lords, it is suggested that part of the reason for the failure of junior doctors to be recruited as GPs is the nature of GP contracts, which treat them as independent contractors. I know that several are now employed as salaried doctors, but do we have figures for how many salaried GPs, as opposed to principal general practitioners, are employed by the NHS?

Lord O'Shaughnessy: That is an evolving model, as the noble Lord has pointed out, and I will write to him with the exact figures. The partnership model has an enduring popularity and importance, which is why the Secretary of State has asked for a review of it. However, as we see new models of care develop, I am sure that salaried GPs will become more of a feature of the system.

Lord Roberts of Llandudno (LD): My Lords, many refugee medical trainees are coming over. Is there no way that we could help them finish their medical courses and then deploy their skills in this country before it is safe for them to return to their country of origin?

Lord O'Shaughnessy: The noble Lord has asked that question before. He will be pleased to know that there is specific help for refugees and others through waiving fees for language courses and other elements of the professional qualification process, and we can bring those into practice as soon as possible.

Green Finance
Question

2.51 pm

Asked by ***Lord Teverson***

To ask Her Majesty's Government what plans they have to issue a sovereign green bond to support the United Kingdom's position in the global green finance market.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, the Government support development of the corporate green bond market. The Green Finance Taskforce is considering recommendations in this field. The Economic Secretary and the Minister for Energy and Clean Growth met the task force on 26 February to discuss emerging recommendations.

Lord Teverson (LD): My Lords, I understand the point about corporate green bonds, but a year ago France issued a €7 billion green sovereign bond, and

[LORD TEVERSON]
Poland did so before that. We are starting to lose our position in this market, not just in Europe but globally. Surely at this time it is really important that the City leads in this area. This would be simple and getting on with it now would involve no extra cost. Will we do so?

Lord Bates: We have said that we are open to that. It is one option being looked at by the Green Finance Taskforce, and it feeds into the work of the Green Finance Initiative in the City of London, which is doing great work in this area. However, we should not overstate the extent to which we are being left behind. We are in a position where some 63 green bonds in seven currencies listed on the London Stock Exchange, amounting to £20 billion—that figure represents an increase of 93% between 2016 and 2017. However, we will keep all options open and listen to the advice that we are given.

Lord Flight (Con): My Lords, will the Government consider allowing local authorities to raise funds by bond issues, particularly in areas of environment expenditure?

Lord Bates: Many of those areas are for the local authorities concerned to look at. One thing that we have introduced is the clean air fund, which was announced by the Chancellor, and some £220 million will be available specifically to help local authorities in that area, but of course local authorities are able to come forward with their own proposals, should they choose to do so.

Lord Davies of Oldham (Lab): My Lords, the House will be concerned that the Minister's main reply was that we are looking at this issue. France, Belgium and Poland have already acted, and certainly the next Labour Government will act promptly on the question of a green fund for the necessary control of climate change. Why are the Government always thinking about and considering things and looking at proposals when others act?

Lord Bates: We are thinking about it because there is quite a lot to think about. The issue is, first of all, whether the Government should be launching these bonds while the market itself is growing quite dramatically. Five years ago, there were virtually no green bonds, or a very limited amount, but now their issuance is $160 billion globally, with some $200 billion predicted for this year. That is happening. Secondly, the Debt Management Office would have to look at whether there is a sustainable demand for hypothecated bonds, in this case. It is not something that we have tended to issue, nor have previous Governments—we tend to operate through gilts. Therefore, it is right that we listen to the expert advice that we receive and then act upon it.

Baroness Kramer (LD): My Lords, I encourage the Government to take on board the warnings that Paris and others are surging ahead in this market because of their willingness to establish that base through green sovereign bonds. I suggest to the Minister that ordinary people would like the opportunity to invest in green and sustainable investments. Will the Minister turn to the NS&I and ask it to make available for ordinary people a scheme that would let them invest in some sort of green investment or savings scheme?

Lord Bates: The last point in particular is very interesting and it is certainly worth the NS&I looking at it. Again, that comes within the remit of the Green Finance Taskforce. It was asked to look at intuitional barriers to green finance but also at retail. All that is very much in its remit, and we would encourage it to look at those issues.

Lord Mountevans (CB): My Lords, given my understanding that there is no cost premium for a sovereign green bond, and given the very positive signal that issuance from the UK Government would carry, will the Minister acknowledge the benefits that this would have for pump-priming the market, as with the sovereign sukuk, for encouraging other public sector issuance—for example, municipal green bonds—and for boosting the creation of green finance skills in financial institutions?

Lord Bates: A lot is being done to pump-prime the market at the present time. Some of the issuances that have already taken place or been announced, such as that from Barclay's and the Thames tideway tunnel, have been part of the stimulation and growth packages that we referred to. That is why we have the task force, why we are very pleased to be partnering with the City in the Green Finance Initiative and why we should take its advice and act upon it.

Prisons: Women
Question

2.57 pm

*Asked by **Baroness Burt of Solihull***

To ask Her Majesty's Government what assessment they have made of the suitability of bids for replacement services for women prisons made following the closure of HM Prison Holloway.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, women formerly held at HM Prison Holloway were transferred to other prisons from July 2016. Where equivalent provision was not already in place at the destination prison, HM Prison and Probation Service managed the transition of services from Holloway, giving due consideration to the needs of both service providers and the prisoners that they support. As a result, bids for replacement services were not undertaken.

Baroness Burt of Solihull (LD): My Lords, 11 years ago, the Corston report stated that the Government should create a strategy to replace existing women's prisons with suitable, geographically dispersed, small, multifunctional custodial centres within 10 years. As the noble and learned Lord has pointed out, Holloway

is now closed and female offenders are being redistributed, even on short-term sentences, all over the country, which negatively impacts on the stability of their family life. Is the Minister saying that this policy is not now going to be pursued by the Government?

Lord Keen of Elie: My Lords, with regard to the dispersal of prisoners from HM Prison Holloway, there were at the time of the move 241 prisoners who had to be transferred to other prisons. Of those, 114 were transferred to Downview and the remand prisoners, extending to about 56, were transferred to Bronzefield. Both those establishments had suitable facilities and services for the prisoners who were transferred. We are, of course, engaged in looking at and renewing the entire prison estate at the present time, which is one reason for the disposal of HM Prison Holloway.

Lord Beecham (Lab): My Lords, it is nearly two and a half years since the closure of Holloway was announced and 20 months since it closed. As we have heard, prisoners have been moved outside London to Surrey, Kent, Peterborough and beyond, with serious effects on staffing and the well-being of prisoners now further away from their families. More efforts appear to be made to develop the former site than to replace the prison. Why was the closure implemented before accessible, suitable and permanent provision was secured?

Lord Keen of Elie: My Lords, accessible and suitable provision was secured for those prisoners who were transferred from Holloway. I have indicated that they were transferred to Downview, in particular, Bronzefield and one or two others. There were individual interviews in respect of all prisoners in order to determine the suitability of their transfer. In addition, 24 service providers at Holloway transferred to Downview and a further 12 were replaced with equivalent provision at Downview. We consider that suitable provision was made in respect of these transfers.

Lord Farmer (Con): My Lords, Brazil's Supreme Court recently ruled that pregnant women and mothers with children under 12 accused of non-violent crimes will not be held in prison on remand but detained at home. Do the UK courts consider the presence of dependent children when determining whether women awaiting trial for non-violent crimes will be allowed bail?

Lord Keen of Elie: My Lords, that is a relevant consideration because, since the Bail Act 1976, it is already presumed that a defendant will be bailed. That is the starting point in consideration of each defendant and that presumption has to be overcome. In looking at the presumption, a court will have regard to the personal circumstances of the defendant, including any caring responsibilities they may have.

Baroness Hussein-Ece (LD): My Lords, perhaps I may press the Minister further on the response he gave to my noble friend's Question when he said that the women from Holloway were being dispersed around the country, some as far as Peterborough. He made no mention of what is happening for women in London. Holloway was the largest women's prison and had been in London for many years. What has happened to the women who have a base, families, dependents and children in London, as has just been mentioned?

Lord Keen of Elie: As I indicated, the vast majority of those at Holloway were transferred to Downview, which is accessible in that context, and to Bronzefield. We are in the process of renewing the entire prison estate, but that cannot be done overnight.

Lord Ramsbotham (CB): My Lords, for some time we have been promised a strategy on women in the criminal justice system. Can the Minister tell the House when this strategy is expected?

Lord Keen of Elie: At the present time there is in development a strategy in respect of female offenders. I am not in a position to say when that will be delivered but we are carrying it through as swiftly as we can.

Lord Watts (Lab): My Lords, the Government have two choices. One is to speed up the process of modernisation of our jails; the second one is to reduce the number of people who are sent to jail. Is it not time they took one of those options on board and took action on this matter?

Lord Keen of Elie: My Lords, we are addressing both options.

The Lord Bishop of Rochester: My Lords, in relation to the strategy that is under development, can the Minister assure the House that this will include what happens to women upon release, perhaps with particular mention of women's centres? Some of the most vulnerable people in our society are often released even into homelessness and into places where there is no support.

Lord Keen of Elie: My Lords, we are seeking to invest in what is termed the whole system approach in respect of female offenders who are released from custody in order that we can develop a female offender strategy. By 2020 we will have invested £1 million in seed funding investment for community provision.

Lord Woolf (CB): Does the noble and learned Lord agree that in dealing with female prisoners it is most important that great attention is paid to the need for offenders to have regular contact with their children? Otherwise there is a danger of repetition by succeeding generations of what happened in the case of the offender.

Lord Keen of Elie: I entirely agree with the observations of the noble and learned Lord. We are concerned to ensure that such contact can be maintained. At another level, of the 12 prisons currently located throughout the country for female offenders, six have mother and baby units.

Baroness McIntosh of Hudnall (Lab): My Lords, of the women who were moved from Holloway when it closed, and aside from those who have since been released, how many have remained where they were sent in the first instance? This is relevant in respect, for example, of contact with families. How many, if any, were moved again after that first move?

Lord Keen of Elie: I am not in a position to give specific figures in response to the question from the noble Baroness, but I will undertake to write if they are available and I will place a copy of the letter in the Library.

Baroness Hamwee (LD): My Lords, the noble and learned Lord has mentioned mother and baby units. Am I right in thinking that those are units for newborn and very young babies? The noble and learned Lord, Lord Woolf, referred to older children and the importance of maintaining family connections beyond the age of six months or so.

Lord Keen of Elie: My Lords, I fully acknowledge that, which is why I added the addendum with regard to the number of mother and baby units because contact at that stage is also very important. Clearly we understand the need for contact between female offenders and their families in general.

Lord Cormack (Con): My Lords, is my noble and learned friend entirely confident that sufficient attention is being given to community restorative justice? Would not many of the women who are given custodial sentences be of better use to their families and society if they went down that route?

Lord Keen of Elie: My Lords, we are looking at alternatives to custody right across the prison estate. I would add this in response to my noble friend: I am never entirely confident about anything, let alone this issue.

European Union (Withdrawal) Bill

Committee (4th Day)

3.06 pm

Relevant documents: 12th Report from the Delegated Powers Committee, 9th Report from the Constitution Committee

Amendment 29

Moved by ***Baroness Sherlock***

29: After Clause 4, insert the following new Clause—

"Maintenance of rights in the area of family law

(1) Within six months of the passing of this Act, a Minister of the Crown must publish a report outlining the ways in which the rights afforded by EU family law continue to exist in domestic law.

(2) The report provided for under subsection (1) must include—

(a) the steps, if any, taken by Ministers of the Crown to negotiate the continuation of reciprocal arrangements between the United Kingdom and member States in the field of family law;

(b) the nature and duration of these reciprocal arrangements, if such arrangements have been successfully negotiated; and

(c) a declaration from the Minister of the Crown outlining whether, in their view, the rights of individuals in the area of family law have been weakened.

(3) The Minister of the Crown must lay the report before both Houses of Parliament."

Baroness Sherlock (Lab): My Lords, in moving Amendment 29 I shall speak also to Amendments 53, 120 and 336, all tabled in my name. In doing so, I should like to record my appreciation of the work done by the Brexit and Family Law group, especially the members of the Family Law Bar Association, Resolution and the International Academy of Family Lawyers who have worked so hard to produce expert briefing for the House.

At Second Reading I set out the problems facing international family law post Brexit. I have tabled these probing amendments specifically to give the Minister the opportunity to reassure the Committee that he understands the severity of the problems and tell us how the Government propose to take forward family law provisions within the UK after Brexit. I will spell out—as succinctly as I can, given the complexity of this issue—what the problems are, explain the only two ways I can think of in which the Government could deal with this, and invite the Minister to tell us in which direction they plan to take the country.

Amendment 336 simply clarifies what counts as family law for the purposes of this debate. It focuses on two main instruments, the first of which is Council Regulation No. 2201/2003, known as "Brussels II revised", or "Brussels IIa" in the jargon. It deals with jurisdiction for divorce and issues about parental responsibility for children. As well as private law disputes about child arrangements within a family, it covers child abduction cases and public law disputes where local authorities seek child protection measures. The second is Council Regulation No. 4/2009, known as the maintenance regulation, which deals with child maintenance obligations and maintenance for the adults in a family. There are plenty of other important EU instruments that affect families, but because of time I will not go through them all.

Let me explain how the EU family law provisions named in Amendment 336 work. Unlike in other areas of law, each EU state makes and keeps its own family law, so that countries decide the terms of their own substantive family law. These EU family law provisions are really about procedure and they do three things, the first of which concerns jurisdiction. They provide a mechanism for deciding which country's courts take precedence if cases are issued in two countries at the same time, thereby avoiding expensive parallel proceedings that could lead to contradictory decisions. The certainty and predictability make it easier for families to understand what will happen.

Number two is enforcement; that is, a court order for maintenance or child contact—or an injunction against harassment issued by an English court—can

be enforced in other EU states, and vice versa. Thirdly, there is co-operation between EU member states, for example the sharing of information to protect children, help locate people to make them pay maintenance or start proceedings across borders.

The Bill copies those EU provisions into UK domestic law, but the whole point of the regulations is that they will work on a reciprocal basis. When we leave the EU we will lose that reciprocal aspect. The Bill cannot solve that problem; in fact, it creates an additional one. By importing EU provisions, we do not change our substantive law but we do retain our obligations toward the judgments of other EU member states, without any guarantee of reciprocity. So we have a one-way street where the UK is obliged to apply current provisions but the EU 27 will not have to do the same for us. A Polish order to return an abducted child or enforce a contact order would be automatically enforceable in England, but the reverse would not be true. English orders might be enforceable using other international conventions, but those have different provisions and there would be a mismatch in the way decisions are treated. A British woman could be forced to stop her divorce case in the English courts if her husband had filed first in Germany, but the reverse would not be true. The couple could end up with cases running simultaneously in Birmingham and Berlin at vast expense and reaching contradictory decisions on maintenance with no certainty of enforcement. There are no other international conventions applicable across the EU to help in divorce cases. Lawyers will not know what to advise on how orders will be treated, and many families will not have the money to fight it out in court. Those who cannot afford advice will be lost.

I am afraid that, to complicate things further, these regulations are about to change. The EU is in the middle of renegotiating them: it is about to negotiate an update to Brussels IIa, creating a "Brussels IIa recast", in the jargon. In October 2016, the UK decided to actively get involved by opting into the renegotiation of Brussels IIa, which is expected to conclude some time next year. The reforms aim, broadly, to improve return proceedings after a child is abducted by limiting the number of appeals and concentrating on certain courts—to enhance children's rights and give children the chance to be heard in court—as well as making various other improvements, such as better co-ordination with the 1996 Hague Convention on Protection of Children. Those improvements are welcome, but they help us only if the recast provisions are complete before Brexit. If they are not—and they probably will not be—we will end up importing into our law provisions that will almost immediately be different from those from the EU, making it even harder to negotiate getting back any reciprocity.

A final challenge is that the UK contains a number of different jurisdictions—England and Wales, Scotland and Northern Ireland—all of which have different family law systems. We might come back to that later in the Bill. So that is the landscape at which Amendment 29 is directed. It invites Ministers to publish a report that outlines the way in which the rights afforded by EU family law will continue to operate in domestic law, what steps Ministers have taken to negotiate reciprocal arrangements between the UK and the EU 27, and whether the rights of individuals have been weakened as a consequence. I hope that Ministers will accept the amendment, but for the report to be meaningful we need the Minister to answer a key question today: what is the Government's vision for family law post Brexit? I will make it easier by making it a multiple-choice question, because I think there are only two choices. Option one is that we seek to retain the status quo as far as possible, permanently. The 2017 report of our Justice Sub-Committee of the European Union Committee—called *Brexit: Justice for Families, Individuals and Businesses?*—said that the three main EU regulations were,

"crucial to judicial cooperation in civil matters and reflect the UK's influence and British legal culture".

The report urges the Government to stay as close as possible to those rules when negotiating their post-Brexit position.

So the questions begin: is the Government's goal to stick with the provisions of the EU family law regulations? If so, we will clearly need some sort of reciprocal arrangement with the EU, covering the EU 27, to make those provisions effective. Question two: are there negotiations with the EU, ongoing or planned, to discuss that issue—and, given how tight time is, when might those be expected to conclude? Question three: if the Brussels IIa recast is adopted by the EU after Brexit, do the Government intend to amend the provisions brought into our law to reflect the improvements brought about through the recast measure?

3.15 pm

Finally on option one, full reciprocity would almost certainly mean being bound by the European court and its decisions, because it is very unlikely that the EU 27 will operate these EU family law provisions on a reciprocal basis unless the court is the overall arbiter of any issues about their interpretation. However, given that the court is dealing here with only procedural questions and not substantive law, are the Government content to live with that? That is the question to which my probing Amendment 53 is directed.

That is option one—to try to stick with what we have. Option two is a bespoke arrangement. We could try to make our own deal with the EU, with a brand-new framework for family law co-operation. That would be slow and difficult and we would not be able to do it by 2019—but is that the Government's preferred option, at least after transition? If so, could the Minister tell us what the parameters of that deal would be? Will they seek a new arrangement that stays close to the EU provisions, or a whole new deal? Since reciprocity will still be needed, what form of judicial oversight will there be and what will happen in the interim while the deal is being negotiated? Will we seek to retain the current EU provisions with the necessary European court oversight, even if just temporarily? What do the Government propose to do about the asymmetry in obligations I mentioned between us relying on the other international conventions and the EU 27? If we do not retain the current EU provisions, how will Ministers deal with the gaps this would leave after Brexit in which there are no equivalent international

[BARONESS SHERLOCK]
conventions? There are no domestic violence protection measures in place and there are no practical alternatives on divorce.

On maintenance and children cases, Ministers have signalled that we will continue to participate in the Hague conventions that already apply to us and that we may seek to continue to participate in the 2007 Lugano convention on maintenance. But Hague and Lugano do not offer the same level of protection and they contain narrower or less effective provisions than we have now. There are also questions of applicability, and it is to those that my Amendment 120 is directed.

Lord Grocott (Lab): Just before my noble friend leaves Amendment 53, I will say that I have followed her almost entirely and agreed with her, but I do not understand in practice what the amendment means by requiring UK courts and tribunals to "have regard to" relevant decisions of the European court relating to cases referred to it by the domestic courts of EU member states. In practical terms to a layman, what does "have regard to" mean? Is it standard legal terminology?

Baroness Sherlock: It is standard legal terminology, and I thank my noble friend for his question. It would mean having regard to the human rights model. I said at the start that these were probing amendments. One of the reasons why I tabled it in that form is that I knew that if I tried to do anything more specific I would end up getting a classic government answer about the European court. To be honest, I am not really interested in having a fight about that. All I want to do is to understand what the Government's approach to this is and how they will deal with whatever kind of judicial oversight is needed to enable reciprocity. So I will be open to whatever they come back and say; I will look at it in *Hansard* and judge it afterwards, rather than getting into it now. This is Committee and that is what I was trying to do.

My final questions are: will the Minister assure us that the 1996 Hague child protection convention will have continued application? Secondly, the UK will have to ratify the 2007 Hague convention on maintenance independently once we have left the EU. Because we have to give three months' notice on that, if we do not take action before Brexit there will be a minimum three-month gap in its applicability after we leave. So what steps are the Government taking to ensure that it continues to apply seamlessly?

I know that I have asked an awful lot of questions, but at heart there is a core question: do Ministers want to try to stay with the current reciprocal provisions, which are tried and tested? If the answer is yes, are they taking the necessary steps? If it is no, where are we heading and what are we going to do in the interim until we get there? These are important provisions for the effective conduct of cross-border family cases. There are a lot of international divorces each year. These issues cannot be ignored. Children will suffer if they are not returned promptly after being abducted, or if their main carers do not get the maintenance they are entitled to. Families can lose time and money fighting court cases in two countries, with no certainty as to what happens at the end. We need to know where we are heading. To that end, I look forward to the Minister's reply.

Lord Marks of Henley-on-Thames (LD): My Lords, I support Amendment 29 and the supporting amendments. My noble friend Lady Hamwee has put her name to them to express our strong support from these Benches.

The Foreign Secretary said in his one of his more perceptive interventions—delivered, appropriately, on Valentine's Day—that if we get the right deal on aviation and visa-free travel, British citizens will continue to travel within the EU, meet interesting people and fall in love. It follows that they may also marry and have children with EU citizens.

There are approximately 16 million international families in the European Union and about 140,000 international divorces in the EU annually. While the statistics are not collected by individual countries, a great many of them involved British citizens married to citizens of other member states. Over many years, we have painstakingly constructed an effective, fair and widely admired set of arrangements for permitting very different family law systems to operate alongside each other within the EU, while enabling member states to respect the laws, orders and arrangements made elsewhere in the Union.

Importantly, as the noble Baroness, Lady Sherlock, explained, EU family law concerns procedural and not substantive law. All EU states have their own substantive family law; in the UK alone, we have three systems: one for England and Wales, one for Scotland and another for Northern Ireland. However, EU law has established a common set of rules for jurisdiction, recognition and enforcement of judgments and orders and cross-border co-operation. The Brussels IIa regulation, enforced since 2005, governs jurisdiction; that is, where proceedings ought to be brought and decided. It applies to divorce and cases concerning children; in private law disputes, such as those concerning residence or contact between parents and children; and to public law disputes where local authorities are concerned for child protection. The regulation also provides rules for child abduction cases, of which there are roughly 1,800 a year within the European Union, simplifying and expediting the enforcement within the EU of the protections accorded by the Hague convention.

The maintenance regulation which the noble Baroness, Lady Sherlock, also mentioned, enforced since 2011, enables parties to enforce maintenance obligations for adults and children across the Union. Further EU measures, directly applicable in all member states, reinforce protection for victims of domestic violence and assist in enforcing out-of-court settlements.

The effect of the Bill is that the UK would continue to be bound to apply EU family law in its entirety as it stood at exit day. However, there would be no reciprocity. We would be bound to recognise and enforce the decisions of EU member states, but the 27 remaining member states would be under no such obligation to recognise or enforce decisions of UK courts. So British citizens would be at a significant and lasting disadvantage. There would be the risk of proceedings in the UK being pursued in parallel with proceedings in EU

member states and so the risk of conflicting judgments, with EU judgments enforceable in the UK and UK judgements unenforceable in the EU. This would be,

"the worst of all outcomes",

as the Family Law Bar Association, Resolution and the International Academy of Family Lawyers pointed out in their excellent joint paper published in October. It would, as the paper asserted, leave our citizens in a position of significant vulnerability and confusion, and lead to unfair outcomes.

A further issue is that Brussels IIa is currently being revised. British family lawyers have been playing their important part in shaping the new arrangements. However, the new regulation will not apply to the UK unless we legislate for it to do so. Even legislating for it to do so will not bring about reciprocity unless we agree in negotiations to that reciprocity, and there's the rub, because EU law is subject to interpretation and ultimate determination by the Court of Justice of the European Union, yet the Government insist on rejecting the direct application of CJEU decisions. Decisions of the CJEU in this field concern the rights of individual citizens. Cases are referred to the court because national courts seek the determination of individual cases before them by the European court. Members of this House have asked over and over again: why should the 27 give that up?

Amendment 53 is designed to explore a continuing role for the CJEU. The court has provided a successful system for the determination of disputes and for the supervision, monitoring and development of EU law. In our debate on the European arrest warrant on 8 February, I suggested that if we went ahead with this project to leave the EU, we could seek some adjustment of the constitution of the court, so that in areas of cross-border co-operation involving the United Kingdom the court might include a UK judge and a UK Advocate-General, which it otherwise would not, after we left, whether by the creation of a separate division of the court or by some other means.

The noble and learned Lord, Lord Mackay of Clashfern, whom I see in his place, raised the constitution of the court in Committee with my noble friend Lady Ludford, last Monday. However, I cannot see any basis on which we can preserve the benefit of EU family law, just as in many other areas where we seek continued co-operation with the EU, without agreeing to its fundamental underpinning by the guarantee of recourse to the CJEU. There has been no answer from our Government on these issues.

European family law brings this country an unqualified benefit. There is no down side. The Government, in answers from the Dispatch Box, have recognised this. They say they want to continue to benefit from the rules for cross-border co-operation in family law. However, we can no longer be asked to listen to pious protestations from the Dispatch Box in this House to that effect when, almost in the next breath, they contradict themselves by rejecting the decisive role of the Court of Justice in determining the application of the rules. Amendment 29 would insist on some frankness on the part of the Government about the consequences of Brexit for family law—frankness with the British public, who have a right to be informed of the threat to international co-operation in this area, and frankness with this Parliament, which will in due course be asked to enact a statute approving any withdrawal terms.

This Bill and the Government's obsessive stubbornness on the question of the CJEU threaten to make international co-operation in family law a needless casualty of Brexit, with absolutely no countervailing benefit, either for British citizens or for citizens of the rest of the European Union.

Baroness Butler-Sloss (CB): As a family judge, I regularly tried international family cases, so I entirely agree with the noble Baroness, Lady Sherlock, and the noble Lord, Lord Marks, and very much support Amendment 29. I am dismayed, I have to say, by the inadequacy of the current wording of the Bill, which does not refer specifically to family law and does not deal with the main issue of reciprocity and the importance of the European court in Luxembourg. I will reiterate two figures because they are important for noble Lords to know. One is that there are 140,000 EU divorces between the UK and other member states. That is not a small number. There are 1,800 EU child abduction cases—an area of the law that I spent a disproportionate amount of my time trying under the Hague convention before the EU law came in and enormously improved the Hague convention.

3.30 pm

Both noble Lords referred to the three main procedural areas: jurisdiction, recognition and enforcement, and co-operation. We do not want parallel hearings. We do not want someone starting a divorce in London and in Warsaw and carrying it through to the end, where we may find that we have to obey what Warsaw says and Warsaw has absolutely no need to take the slightest notice of us. This is a truly worrying thing. When it comes to the recognition and enforcement of orders, it is incredibly important that a domestic violence order in this country will be applied in another country, where the offender is living, and if the victim goes to, say, Slovenia and the offender misbehaves, the Slovenian courts will apply our English domestic violence injunction. That will no longer be the case under the Bill.

The other important thing is co-operation. Again, I come back to child abduction, which is perhaps the saddest of all the areas of international family law, when the child is removed precipitately from one parent and taken somewhere else. Currently, if there is an English order the EU country where the person is will try to find him—very often him but sometimes her—and then apply the English court order. That is such a bonus that we have and it is more efficient because it is stricter than the Hague convention of 1980.

The Bill applies to replicating existing law but, as the noble Baroness, Lady Sherlock, and the noble Lord, Lord Marks, pointed out, it does nothing about the changes that are going through at the moment. There is really no point in our replicating laws that are about to be changed because they will not then apply in the rest of Europe.

That is the first problem but the second and infinitely more important problem is reciprocity. There is no point us applying European law if the various countries

[Baroness Butler-Sloss]

of Europe do not have to apply ours. That really will be such a disadvantage for British citizens. This matter that noble Lords are currently looking at is nothing to do with the rights of EU citizens. It is exclusively, from our point of view, the opportunity for fairness and justice for the British citizens involved in international family affairs, so we urgently need certainty for family cases.

We also have to bear in mind that, unlike most of the law discussed here, where I can understand the issue of sovereignty—I do not actually agree with it but I can understand people's feelings about sovereignty on substantive law—what we are talking about is not substantive, it is procedural. I would have thought it would be much easier to accept the European court decisions on procedure than on substantive law. But we really must have the European court if we are to have reciprocity with the other 27 countries—entirely for the benefit of British citizens, although clearly it would also benefit the citizens of the other 27 countries.

Would the Minister be prepared to see me along with a number of others, particularly the Family Law Bar Association, the international family law association and Resolution, the organisation for solicitors in family law, so that we could go through with him how we ought to take the Bill forward? Currently, the way civil law is being looked at just for replicating it is utterly inadequate. It would be profoundly unjust to British people to let it stay like that.

Baroness Tyler of Enfield (LD): My Lords, I support Amendment 29 and will speak briefly to Amendment 336, to which my name is attached. I remind the House of my declared interest as chair of the Children and Family Court Advisory and Support Service. I wish to dwell on that experience in my remarks today, by thinking in this debate about the impact on the child and whether or not they feel that their voice is heard.

It is for this reason that I feel it is vital that the Government take all possible steps to achieve an outcome which retains full reciprocal arrangements between the UK and member states in the field of family law. It is so vital that families needing to go to court must know that whatever court they end up in, and in whatever country, its decision will be respected by other courts. We have heard a lot from distinguished lawyers about the current reciprocal arrangements, which have been built up and evolved over decades. They have provided real benefits to families across the UK. These harmonised rules across the EU for establishing jurisdictions to hear cases, to recognise and enforce each other's orders, and to co-operate across borders have made a real difference to families caught up in these difficult situations.

Replicating provisions in our own domestic law without full reciprocity would leave our citizens in a position of real vulnerability and confusion. It would lead to very unfair outcomes for British citizens, a point which has already been made. As the noble Baroness, Lady Sherlock, said so persuasively, the EU instruments which affect UK family law deal primarily with procedural, not substantive, family law. Sovereignty is not the issue here and I really hope that in this debate, as we look at what happens to family law in the context of Brexit, we will not get caught up on the high altar of sovereignty. This is about what happens to very vulnerable and distressed children and families.

I turn briefly to Amendment 336, to which my name is attached. The reason I wanted to attach my name is that the first regulation cited in this amendment—I will not go into the technical detail—is one that we at CAFCASS use a lot in both private and public law, since the fundamental principle is to ensure the reciprocal recognition of court orders between the EU states. It saves re-litigating and protects children who move between states, whether they are living there temporarily or permanently. It also requires states to co-operate with each other in providing information in public and private law, and to assist in placing children in public law cases in other member states; this is practical but really critical. The absolutely key point is that these arrangements help to alleviate the inevitable distress and disruption for the children and families involved.

Our key role at CAFCASS is to ensure that the voice of the child is heard in family courts, whether in public law, which is usually where local authorities are making an application for a child to be removed from a parent and taken into care, or in private law, which is usually where parents are separating with such high levels of conflict that the court is involved in deciding child arrangements such as residence and contact. At the moment, my strong sense is that the critical voice of the child is absent from discussions about what happens to family law post Brexit. This will be much to the detriment of children and young people involved in family proceedings, who are often extremely vulnerable and going through a very difficult period in their lives. This can lead in turn to real emotional distress and trauma, and have an adverse effect on mental health and well-being.

Many of these children will have had what is called in the research "adverse childhood experiences" first-hand, including abuse, domestic violence and bereavement. That is why what we do to our family law as we look at the Bill is so important. We need to make sure that it is as child-friendly as possible, rather than something that is done to children and over which they feel they have no control.

Baroness Massey of Darwen (Lab): My Lords, I rise to support my noble friend Lady Sherlock in this group of amendments. I appreciate the wisdom of noble Lords who have spoken.

I will add a few comments, mainly on children's rights and child protection, which have been spoken about by the noble and learned Baroness, Lady Butler-Sloss, and the noble Baroness, Lady Tyler. I should declare an interest as the chair of the sub-committee on children in the Council of Europe. The EU does not have legal power to change domestic family law, but in procedural rules it ensures that family-related decisions made in the UK can be recognised and enforced in other countries in the EU. Most children live in families, and therefore family law will often have an impact on children. The current rules ensure a level of certainty for families, and therefore children, who move about the countries of the EU. The rules prevent parents avoiding their obligations by moving

around. This is because EU law has uniform rules across member states for family law proceedings, including those involving children. EU law ensures that public law decisions to protect children can be enforced in countries of which the child is a non-national. Such law emphasises the best interests of children, as enshrined in the UN Convention on the Rights of the Child—which I am sure will come up over and over again in the discussion on children—where the welfare of the child is deemed paramount and a child who has the capacity must be given the opportunity to be heard, including in family disputes. The EU maintenance regulation provides for child maintenance to be automatically applicable in any other member state to which either of the parents and/or the child move.

My noble friend and others mentioned the Hague conventions. Other options to ensure family welfare, such as creating bilateral agreements, would take more time to implement and children and families would suffer. The six-week deadline for the resolution of child abduction cases should be retained. Membership of the EU judicial network to facilitate information sharing between courts dealing with family issues should continue. One example of the protection of children is related to the EU directive of the European Council establishing minimum standards for legislative and practical measures to support victims of crime. This includes the specific needs of children and the need to pay attention to services and support in, for example, gender-based or domestic violence. The directive includes special reference to the need to ensure that children's best interests are the primary consideration and to ensure a child-friendly approach.

I am impressed by and grateful for the report by the EU Committee chaired by my noble friend Lady Kennedy of The Shaws, *Brexit: Justice for Families, Individuals and Businesses*. It addresses the 1996 Hague convention in respect of parental responsibility and measures for the protection of children. The maintenance regulation is designed to ensure that rules on jurisdiction and the enforcement of decisions relating to maintenance obligations are continued and provides that obligations should be determined in accordance with the Hague protocol. The report comments on the Brussels IIa regulation in relation to divorce, legal separation and the annulment of marriage. It carries specific rules on child abduction and access rights. I will not go into this in detail but will just say that witnesses to the inquiry on which the report is based commented favourably on Brussels IIa. Sir Mathew Thorpe stated that it is a,

"laudable ambition to achieve better justice for European citizens where issues cross the border of member states",

and viewed the regulation as "broadly successful". David Williams QC stated that Brussels IIa had spread into every area of our domestic law.

3.45 pm

The committee which produced the report expressed concern about the loss of Brussels IIa and the maintenance regulations, in particular the provisions relating to international child abduction. Paragraph 93 of the report states:

"To walk away from these Regulations without putting alternatives in place would seriously undermine the family law rights of UK citizens and would, ultimately, be an act of self-harm".

When asked if the great repeal Bill would help avoid any gaps in the legal protection provided by these regulations, Professor Rebecca Bailey-Harris said, "It will not". Several other witnesses expressed similar reservations. Concerns were also expressed about the impact on the family court system—for example, on the workload which would follow the loss of regulations.

I will not say more on this as we have in our midst a greater expert on these issues than I am, the noble and learned Baroness, Lady Butler-Sloss. But could the Minister give us a view on the proposed post-Brexit alternative solutions offered by witnesses in chapter 4 of the report I have spoken about, or on any other alternative to these issues of family law? I have tried to give a brief flavour of how the whole package of benefits to families will disappear if family law is weakened and if we lose sight of the importance of decisions about Brexit which will affect families and children.

Lord Farmer (Con): My Lords, I apologise that this is the first time I have spoken during the passage of the Bill: I was unavoidably out of the country when it received its Second Reading. My contribution, if I had been able to make one then, would have touched on the vital area of the implications of Brexit for family law.

I understand that, as the noble Baroness, Lady Sherlock, has said, these are probing amendments, but I find myself in disagreement with the noble Baronesses who have tabled Amendments 29, 53 and 336. This is generally not the case: indeed, I and other noble Lords are aware of their very strong track record in championing families in general and family justice in particular. However, under their amendments the UK would either remain entirely subject to EU law in the family law context or enter into some bespoke arrangement—such an arrangement does not exist presently between the EU and any other non-EU member state—which would lead to the same outcome.

Reciprocal arrangements are possible only by being subject to EU laws. The UK government position in the withdrawal legislation is that EU laws on the day we leave the EU will become part of UK national law, but not that we will be bound to those laws on an ongoing reciprocal basis, whether in the short term or for eight years or more. As far as I am aware, this is not being proposed in any other area of UK law. I understand and share the concern for children and families that drives many of those tabling these amendments. However, if accepted, they would lead to a situation in which, in effect, the UK had not left the EU. I will look in turn at Amendments 29, 53 and 336.

Amendment 29 would bind the Government to publish a report on the maintenance of rights in family law within six months of the Act being passed. If that event takes place in June 2018, two years after the referendum, this proposed new clause would take us to late 2018 and a matter of months before we leave the EU. Obviously, the Government need not take the full time, but it is worth saying that there have already

[LORD FARMER]
been many meetings and consultations: I am aware of an early round with international lawyers and the Ministry of Justice as early as October 2016, with responses requested by the MoJ by November 2016 so it could report to DExEU.

A major family law conference was held by Cambridge University in March 2017 with academics, practitioners and policy advisers from across the UK and some EU nations, again with civil servants in attendance to report back. A couple of other conferences were held last spring. Then over the autumn, I know there were direct meetings between practitioners and civil servants about these issues, including the proposal that we should remain part of EU family law after we leave the EU. These meetings continued throughout the latter part of 2017 and, no doubt, are still ongoing.

Noble Lords will be aware that just before Christmas there was a debate here on the European Union Justice Sub-Committee's report on civil law matters. Allowing another six months would unnecessarily extend what has already been a long consultation process. Nothing has been said by any government department to hint that the UK Government will contemplate such a dramatic change to the withdrawal legislation that we will continue to be a direct party to EU legislation in one distinctive area of law.

Baroness Ludford (LD): I thank the noble Lord for giving way; I was anxious to ask him this before he sat down. I respect his professed commitment to the rights of families and children, but he appears to be saying that a rather ideological commitment to escape the jurisdiction of the European court and the other enforcement mechanisms should prevail above the needs of divorcing people and especially children who need maintenance obligation enforced and who may have been the subject of abduction. As the noble and learned Baroness, Lady Butler-Sloss, said—as a judge, she has vast experience in this area—it was much easier once EU law provisions came into force than under the international conventions. Can the noble Lord honestly tell me that he could look children in the eye and say it is better to be outside the reciprocal EU arrangements?

Lord Farmer: I thank the noble Baroness for her intervention. I believe it will be better in the long run. We have mentioned the Hague convention. There are many experts; Professor Paul Beaumont, for instance, is a leading expert, who has said at international conferences that in his opinion the Hague alternatives will be perfectly adequate and satisfactory on our leaving the EU.

Moreover, the amendment anticipates a report on steps taken to negotiate continued reciprocal arrangements—that is, effectively, continued membership of EU family law. This position has not been adopted in any other area of law, as far as I am aware, and is not supported by organisations such as the Law Society.

The Archbishop of York: I thank the noble Lord for giving way. He really needs to answer the question posed by the noble and learned Baroness, Lady Butler-Sloss. The Hague convention can of course go some way to help, but it is much weaker than the present reciprocal arrangements. It seems to me that it is no good to simply incorporate EU law that we then cannot reciprocate at all. What would be the point? What about, for example, extradition, where we have agreed with other countries that are not part of the EU to have the same arrangements? We have managed to do that for extradition and no sovereignty question has been raised—it is a question of process. Will the noble Lord explain how he thinks simply incorporating EU law into our laws is going to guarantee that British citizens who are in the EU and EU citizens who are in Britain are treated the same in matters of family law? How would that work?

Lord Farmer: I thank the most reverend Primate for his intervention. There is a requirement that our courts, as we heard earlier, would take regard of EU law. We were not being tied to precedent, but certainly—

Lord Hannay of Chiswick (CB): I am grateful to the noble Lord for giving way, but I have some doubts about his repeated assertion that the sort of approach in the amendments is not being taken anywhere else in the EU statute book. I wonder if he would like to read the Prime Minister's speech at Munich and her references to the European arrest warrant, and try to parse and construe them in any other way.

Lord Farmer: Am I going to be able to make my speech? I thank the noble Lord for that intervention. I will be referring to the Prime Minister's speech on Friday, which I think has some bearing and is more up to date. I am happy to talk to the noble Lord following this debate.

The amendment is highly presumptuous in suggesting a report on a measure that has no established government or parliamentary support. Passing this amendment as even contemplating a possibility of ongoing reciprocal arrangements and thence continually being bound by EU law would allow and openly encourage other areas of law, trade and social life to seek the same. This is not what the Government have said they would permit or seek. Acknowledging the possibility of this distinctive arrangement will encourage the hope of other aspects of trading and commercial life in being bound to the EU in our future arrangements.

Finally, the amendment suggests that there should be a declaration whereby a Minister of the Crown considers whether the rights of individuals in the area of family law have been weakened. This is legally controversial—and I think relates to a point just made—because of a difference of opinion on the respective advantages and disadvantages for families of EU family laws. Proposed new subsection (2)(c) in this amendment is highly presumptive of the expectation that there will be weakened rights, and would act to countenance some sort of special arrangement for ongoing reciprocity and being part of EU laws.

Amendment 53 to Clause 6 would give a UK court the power for eight years after March 2019—that is, to 2027—to refer matters relating to family law to the European court for a preliminary ruling, and it would then be bound by that ruling. Moreover, proposed new subsection (1C) states that UK courts must have

regard to decisions of the European court for those eight years, but these eight years could be extended with proposed new subsection (1D). Those eight years appear to me to be entirely arbitrary; certainly, they are intended to take us beyond the next general election. But again the intention of the supporters of this amendment would appear to be that we are forever bound by the European court.

This Bill brings EU law into UK law. The Government have made it very clear that we will not be bound by the European court, but we will give strong regard to its decisions. When we apply law which is the same as EU law, the Prime Minister has made it very clear that our courts will look at European case law. The UK courts will not be bound, as understood in the common-law system of precedent in which courts are bound by higher court decisions. This was the result of the referendum and the present approach of the Government. But when it is looking at UK legislation which is similar to or indeed the same wording as EU legislation, there will need to be strong and good reasons—in my words, but as generally understood—for us not to follow it. That is already similar to the way the UK courts look at the Supreme Court decisions of other friendly jurisdictions when dealing with other international family laws—for example, in relation to Hague conventions in respect of child abduction. The UK is well able and frequently does give very strong and high regard to such decisions without being legally bound by them.

The Prime Minister was clear in her Mansion House speech on Friday on this issue. She used very careful words confirming continued strong recognition of European court decisions but not bound in law. We cannot be bound by EU laws in a reciprocal arrangement with the EU in respect of EU laws unless we are also bound by the European court. The EU will simply not countenance the UK being part of any arrangement for being bound into EU laws without being bound into the European court. This amendment must fail because proposed new subsection (1B) requires that we are bound.

One of the reasons that I and others are very keen we leave this aspect of the EU and its political agenda is because the EU intends its laws to have universal application. This means that they do not apply to just intra-EU cross-border family matters. The EU laws must apply to all cases with no other EU involvement—so, at present, a London/New York family or a London/Sydney couple are bound by EU law. This deals with several areas such as divorce jurisdiction and the inability to bring claims for reasonable needs on a divorce settlement. If the amendment is allowed, we will have cases before the UK courts which have no EU aspect—because we will have left the EU—but in which one party could apply for a preliminary ruling to the European court where it suited their litigation advantage. One can imagine the astonishment of lawyers in, for example, New York or Sydney, saying, "But you, the UK, left the EU several years ago in 2019. Why is this still being referred to the EU and subject to EU law?" Today we must lay to rest, once and for all, any suggestion that the distinctive area of family law should alone be bound by European court decisions.

4 pm

Finally, Amendment 336 inserts a definition into the Bill. First, I can see no other area of law so defined presently before the House of Lords—not criminal law, regulatory law, financial services law or similar, yet these are areas at the very forefront of our relationship with the EU. This shows how distinctive, unusual and highly unacceptable it is for family law to be made into a special case—moreover, a special case going so much against the direction of government policy on leaving the laws of the EU. The fact that this one area of law is included should ring major alarm bells with Government and others.

The amendment refers to two pieces of EU law and erroneously equates these with family law. These two pieces of EU legislation are certainly most used in practice. But if there is going to be this definition then it should be all pieces of EU law in the family law context. There are several others. One relates to domestic violence, whereby domestic violence protection orders made in one EU member state are automatically recognised and enforceable in another. It was brought in primarily for the parts of the EU with land borders to prevent a perpetrator of domestic violence quickly crossing a nearby land border to escape domestic violence orders. It has been used, exceptionally, only a couple of times by the UK, but the fact that it is not included highlights that this definition is not all of EU family law. It refers only to the pieces of legislation which are of most interest to those behind these amendments and allow, for example, the highly concerning practice of "race to issue" which militates against couples in saveable marriages being reconciled to each other.

Importantly there are other international laws pertaining to family law to which the UK is already a signatory and which are satisfactory alternatives to these EU laws. They are created by the Hague Conference on Private International Law. Some of these laws were the models on which EU family laws were built and share many common characteristics. Most fundamentally, these laws are worldwide, with more than 80 signatory countries, working together, co-operating and looking after the best interests of children and the recognition and enforcement of family court orders and arrangements. That is why the UK can leave the EU and have no part in any reciprocal enforcement arrangement without any material detriment to family law and family life. The other alternatives exist, have been used before the EU laws came into existence, and lawyers work with them daily in practice and work closely with Governments around the world in their operation. They work well.

Lord Liddle (Lab): This is not my area of expertise, but it seems to me that the noble Lord, in his very detailed speech, has not addressed the central point, made by the noble and learned Baroness, Lady Butler-Sloss, about the benefit of being able to enforce decisions in other member states. Is the noble Lord arguing that these wonderful international arrangements, which he referred to as being just as effective as the EU, provide for that enforceability? I very much doubt it.

Lord Farmer: I thank the noble Lord for another intervention. They are a matter of negotiation and finding the best practice, as they are even with the EU.

[Lord Farmer]

As I said, up until now they have operated well with other Governments around the world. They work well in the USA, Canada, Australia and countless other countries.

The narrow definition of family law in Amendment 336 ignores certain EU laws on the service of documents and taking evidence because we have perfectly satisfactory alternatives through Hague worldwide laws. Moreover, working with worldwide family laws with countries across the world, not just Europe, fits in entirely with the Government's intention that on leaving the EU we will be a worldwide-facing country, looking at our global role and using the leading initiatives and developments in the UK to aid and encourage other legal systems.

Baroness Kennedy of The Shaws (Lab): My Lords, I am sorry that I was not here at the beginning of the discussion on this amendment. My name is on a later amendment associated with the discussions on family law. As many in the House know, I chaired the group in the European Union Select Committee that dealt with family law. We created the report referred to by the noble Lord.

It is just not true that world law deals with this issue just as well as European law. Every family lawyer will tell you that some directives have made a huge difference to the safeguarding of children, women with abusive husbands and enforcing maintenance orders made in this country. Those directives can be enforced in another country in Europe with great ease without someone having to get themselves lawyers over there. However, you cannot do that with the United States. You have to get yourself "lawyered" up to the eyeballs in America to deal with your husband taking your children there and not returning them to you. If your partner goes off to another part of the world and is not paying maintenance, it is a very expensive and problematic business to get maintenance paid for your children, who need it. Therefore, I ask the noble Lord to please not mislead the House by saying that there is an equality of arms in this respect around the world. That is not true. We seek a mechanism to make this system operate after we leave the European Union—some kind of agreement that makes it possible for children, and perhaps abused partners, to have proper mutual recognition arrangements to enable them to seek remedies and enforcement easily. That is the point of this and that is what is misunderstood by the noble Lord.

Lord Farmer: I thank the noble Baroness for her intervention. Perhaps I can speak to her afterwards concerning countries outside the EU. It is worth mentioning that Professor Beaumont who I mentioned earlier—a leading expert on both the EU and The Hague—said in his opinion that The Hague alternatives are perfectly adequate and satisfactory on our leaving the EU. Apparently, the House of Lords committee does not seem to have heard this evidence.

I am sure noble Lords will be pleased to hear that I am coming to the end of my remarks. This amendment should be rejected because it concentrates on the UK remaining Eurocentric, not global, which is an important point if we are leaving the EU. Academics and lawyers who would have spoken favourably about the Hague laws were not consulted by the House of Lords Justice Sub-Committee, yet practitioners and others have described to me the incredible benefits to children and families from the UK being part of these worldwide international laws.

Lord Carlile of Berriew (CB): My Lords, the noble Lord, Lord Farmer, is rightly respected for his expertise on a number of subjects—this was not one of them. Indeed, it was palpable that the atmosphere in the Chamber was curdling as he spoke. I remind the noble Lord and, indeed, the Committee, and particularly the Minister, who I suspect did not enjoy the speech we have just heard, about the danger of double standards on this subject. I remind the Committee in particular of Section 1 of the Children Act 1989, and of the standard that that Act imposes on courts. By "courts" I refer to every court dealing with children's issues, from the Amlwch magistrates' court, if the noble Lord, Lord Wigley, will forgive that reference or enjoy the name check, to the Supreme Court and, indeed, to the President of the Family Division, a role which my noble and learned friend Lady Butler-Sloss filled with such great distinction. It is worth reminding your Lordships that the "paramount consideration"—those are the statutory words—when a court considers the upbringing of a child or anything to do with the child is that child's welfare. Section 1 of the Children Act 1989 does not merely deal with physical aspects of the child's life but includes, for example, in Section 1(3)(a),

> "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)".

Those are the standards that this Parliament places on our courts.

There is a danger that, if the Government do not sort out the problems so ably articulated by those who have spoken to these various amendments, we will have a situation of double standards. The courts will be obliged to apply those standards but our Government will abandon them, possibly merely to avoid a few cases coming before the Court of Justice of the European Union. That is completely unconscionable. I am not saying that the only solution is to fall under the jurisdiction of the Court of Justice of the European Union; there may be alternatives, such as a treaty with the European Union that provides for similar processes, albeit through our own courts, and reciprocal arrangements with other courts. The Court of Justice of the European Union is not a shibboleth—one way or the other. It is just the current way of solving a series of problems, which nobody is able to improve on at the moment.

It would be completely unacceptable to hear from the Minister who responds to this debate words such as, "We hope to negotiate"; "We are considering negotiating"; or "We expect that we will achieve". That will not do, because it does not put the welfare of children first. So when the Minister comes to reply, I hope that we will hear, specifically, how many meetings have taken place in an attempt to start to negotiate a resolution of issues affecting the welfare of children who may be abducted in the most appalling circumstances; when the next series of meetings is to take place on that subject; at what level it is being done; and to what

extent the leaders of the family Bar and the family solicitors are being involved in the process of consultation and negotiation. Otherwise, we will have no option but to adopt something like these amendments on Report.

Lord McConnell of Glenscorrodale (Lab): My Lords, I very much welcome the amendment in the name of my noble friend Lady Sherlock, and the important questions that she posed to the Minister at the start of the debate. The debate has shown how critically important it will be to get the answers to these questions right, not just in the coming months but in the coming years and perhaps decades. The noble and learned Baroness, Lady Butler-Sloss, was forensic in her description, which came from very real experience, of the benefits of the current system and of what might be lost if we make the wrong decisions in passing the Bill.

I will not go back over all the points that have already been made; in the current circumstances I will be deliberately brief. I will raise two points in particular. First, within the United Kingdom we have different jurisdictions concerning family law and some of the other legal rights that have been mentioned in the debate so far. I would welcome some reassurance from the Minister in his response that appropriate discussions are taking place with the Scottish Government and others to ensure that whatever we enact here in the UK Parliament is appropriate for the whole of the United Kingdom, and not just for the legal system in England or England and Wales.

Secondly, on a point of principle, there is a reason why this subject matters so much. We can have ideological debates about our future economic partnership with the European Union, and we can have ideological or political debates about the financial position before and after exiting the European Union—but children and family law are at the very core of the things that matter to us most: the relationships between parents and children; the relationships between children and other children who might be estranged from their brothers and sisters; the relationships between adopted children and their natural parents, whom they may wish to contract later in life; and the relationship between estranged couples.

That is why this debate is different from others, and why in this instance I urge the Government and everybody on all sides who supports or sympathises with Brexit to look for solutions to these issues that deal with the personal, not the political. I urge them to ensure that, whatever arrangements are finally agreed, those personal rights will give families an opportunity to continue contact and to seek appropriate rights and redress, and to be able to do so in the easiest and least expensive way possible.

4.15 pm

Lord Mackay of Clashfern (Con): My Lords, I hoped that I would get an opportunity to intervene, as the person who first presented to Parliament the text that has just been referred to in Section 1 of the Children Act. I strongly support the view that the interests of the children in question should be the primary consideration in everything that applies in family law. I am interested to see that the definition of family law chosen in Amendment 336 is not one of ours but is imported from the European Union. However, that is a rather unimportant point.

If this Bill is ever to finish its Committee stage, it is important that we realise that it is concerned primarily with putting existing European law which is effective in our country on to the statute book in a way that will work on Brexit day. It is not concerned with the negotiations—although your Lordships are interested in how they progress, and nobody is more interested than I am in how children's affairs will progress. I agree with what has just been said: it is a question not of politics or ideology but of making sure that we have the best thing we can for our children. Incidentally, I do not agree that we did not enjoy the speech of my noble friend Lord Farmer. He can speak for himself, but it is not for us to make judgments of that kind about our fellow Members of this House—and I hope that nobody is judging me too hard, either.

My point is that the Bill cannot provide for reciprocity. We cannot legislate for the laws of France, Germany or anywhere else in the European Union—but we can do our best to ensure that our law conforms as far as possible with existing European law when Brexit day comes, because that is an invitation to the others to reciprocate. If we have a system that does not in any way mirror the existing European system when Brexit day comes, how can we ask others to do the same? We cannot. Therefore, it is a question not of reciprocity but of ensuring that this Bill does things properly from our point of view and that the ground that we have to plough for reciprocity is properly ploughed and ready. That is why the Bill is so important.

It is also fairly important that we make some progress with the Bill. Therefore, I will say simply that I entirely endorse the importance of family law and the reciprocal arrangements with the EU, and I would like to see more effective reciprocal arrangements with many other countries. From my time as Lord Chancellor for 10 years I have strong and sad memories of receiving many people who complained that their children had been abducted and taken to a country from which they could not be brought back. That is not the way in the European Union and, fortunately, it is not the way in quite a number of other countries.

It is true, however, as the noble Baroness said, that you may be required to employ a lawyer. In fact, it is rather difficult to get your maintenance payments in this country, never mind the United States. I did my best to try to improve that situation with the CSA—but it has not proved very satisfactory, as the noble Baroness knows very well. It was a difficulty: many times people came to me and said that although they had an order from the court for money, they could not get a penny.

This is an important series of amendments and it is right that we should look at them. However, we must restrain ourselves from considering the negotiations if we are going to finish this Bill at all.

Baroness Deech (CB): May I ask the Minister a few questions, because I suspect that his response is going to proceed on the basis that the Hague conventions are sufficient? It is true that the biggest number of

[Baroness Deech]
abductions that come to our courts relate to Pakistan, the USA, Australia and then Poland. It would also be very sad if either we or the rest of the EU put ideology ahead of the welfare of children. Therefore, I want to know what the Minister's prediction is as to the arrangements that might be made.

Overall, I feel that the amendment is perhaps too narrow. We have units in this country that study the effect of abduction: we have a permanent bureau, the International Centre for Missing and Exploited Children and the International Child Abduction and Contact Unit, which can look not just at the European Community countries but at the others. We need a global view of the welfare of children and cross-border abduction, not just an EU view. How does the Minister think we can cope, given that the EU takes apparently 164 days to deal with returned children, whereas we manage to do it in 90 days? For a small child, a matter of a few months is extremely important.

Is the Minister satisfied that we can swiftly and properly sign up to the 2007 Hague convention, which at the moment we are a party to only through the EU? We need to, and we should be able to, join it in our own right. Those are the questions that I put to the Minister.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, I am obliged. "Reciprocity" was the term used and emphasised by the noble Baroness, Lady Sherlock, and my noble and learned friend Lord Mackay of Clashfern. They both recognised the significance and the relevance of that term in the context of the issue we are discussing and of this Bill. They may have approached it from different directions, but there is a common recognition there. I will come back to that point in a moment, particularly in the context of this Bill and not the other Bills that may follow it in due course.

I acknowledge the commitment of the noble Baroness, Lady Sherlock, to family law and the rights that it provides to many of the most vulnerable in our society. I also extend my appreciation to the report on this subject produced last year by this House's EU Justice Sub-Committee, under the chairmanship of the noble Baroness, Lady Kennedy. In addition, I understand that the noble Baroness, Lady Sherlock, met my noble friend Lord Callanan and officials to discuss this matter a week or so ago. I observe also that officials have engaged in discussions with a variety of groups, including Resolution and the Family Law Bar Association, and others at an EU level, to discuss this critical issue.

To the noble and learned Baroness, Lady Butler-Sloss, I say that I would be perfectly willing to meet—or at least to arrange a meeting with other Ministers who might be more directly involved in this issue—at some stage in order to discuss with all relevant and interested parties the issues that arise here.

I emphasise that the Government are committed to maintaining an effective system for the resolution of cross-border family law disputes once the UK leaves the EU in 2019—of course we are. Any system which requires cross-border dialogue and co-operation needs a common language to be effective. To that end, as part of our future partnership we want to agree a clear set of coherent common rules about: which country's courts will hear a case in the event of a dispute—that is choice of jurisdiction; which country's law will apply—that is choice of law; and a mutual recognition and enforcement of judgments across borders. That can be achieved within the EU and beyond the EU as well.

We are only beginning to embark on the negotiations of our future partnership with the EU 27 but we set out our position on this in a future partnership paper in August last year. That paper makes clear that an effective framework of civil judicial co-operation, which includes family law, is an important part of any deep partnership we want to establish with the remaining members of the EU. We believe that the optimum outcome for both sides will be a new agreement negotiated between the UK and EU as part of a future partnership which reflects our close existing relationship.

My noble and learned Friend, Lord Mackay of Clashfern made the point that the object of this Bill is to bring into our domestic law existing EU law so that we start out in the same place as the other members of the EU. We have to bear in mind the means of ensuring that litigation in a cross-border case involving UK and EU parties, wherever it takes place, can be as easy, efficient and cheap as possible. Such an agreement is necessary to provide confidence and certainty to families and individuals.

As the noble Baroness reminded us in backing up a point well made last year by the EU Justice Sub-Committee in its valuable report, reciprocity is key. This Bill can bring EU rules and regulations across into UK law, but it cannot place requirements on the remaining EU states. That is precisely why we want to negotiate a new deal with the EU and, as of this month, we are set to embark upon that negotiating process.

The current reciprocal rules on which we hope to model a new agreement provide a legal route to resolving what are often difficult and intractable problems. As noble Lords may know, and the noble Baroness readily appreciates, that can include determining in which member state a divorce takes place, child arrangements are made, maintenance issues are determined and, on the fraught issue of child abduction, the return of an abducted child is facilitated.

As I have mentioned, this area goes far beyond the EU. The EU, of course, is important, but we have the Hague conventions with respect to children, one in 1980 and one in 1996. The Hague convention in 2007 has the EU as a signatory, not the individual members of the EU. We will be taking steps to engage with the council on the Hague conventions in order that we can become individual signatories of that convention. I acknowledge the well-made point of the noble Baroness, Lady Sherlock, about the three-month time lapse that could potentially occur. We are mindful of that in setting about the process of negotiation because no one wants to see a gap in the process.

We also have the Lugano convention which engages with not only the EU, as a signatory, but also the other parties to it—Norway, Iceland and Switzerland. Returning to the point raised by the noble Lord about having regard to cases of another court, as between the

Lugano convention and the EU it is agreed that each will have regard to the decisions of the other's court. They are not bound by them or subject to the jurisdiction of the other, but they will have regard to them and take them into consideration when construing the rights and obligations that arise under these various conventions. So it is not making yourself subject to the CJEU but, in general terms, it is saying that you will respect its decisions and look at them for consideration.

Perhaps I may elaborate on that a little. The role of the CJEU is often either misunderstood or exaggerated in this context. What we are concerned about, generally speaking, is the ability of a court in one jurisdiction to recognise the pre-eminent jurisdiction of another country, the willingness of the courts in one country to recognise the orders made by the courts of another country, and the willingness of the courts in one country to enforce the judgments of another country in respect of these matters. Of course, if you are within the EU, the construction of a particular provision such as the Brussels convention—Brussels Ia, IIa and so on—would ultimately be a matter for the CJEU. However, in negotiating with our other partners, we recognise where we start from and the wide ambit of these conventions, and we understand how critical they are to family life going forward. No one is going to ignore them or turn their back on them, so I can assure noble Lords that we are intent on negotiating this. The precise way in which it will be done will have to be the subject of negotiation with our EU partners.

The noble Lord, Lord Carlile, asked me, as it were, to enumerate the negotiations that are ongoing, but so far we have been dealing with the separation agreement. From March we have set upon the negotiation of our future partnership; that is what the Prime Minister set out in her recent speech.

With regard to the other jurisdictions within the United Kingdom, officials within the Ministry of Justice are in regular contact with officials in Scotland and in Northern Ireland in regard to these matters. Of course we take account of those, and I hope that the noble Lord, Lord McConnell, will recognise that I am conscious that there are different laws in the different jurisdictions of the United Kingdom.

4.30 pm

Lord McConnell of Glenscorrodale: I thank the Minister for giving way. Of course discussions are taking place between officials in the different departments, but are Ministers talking to each other and are agreements being reached that will ensure that the right decisions are made to serve the different jurisdictions of the UK?

Lord Keen of Elie: I cannot say that agreements are being reached at this time because we are only setting out on the process of negotiation with regard to the future partnership; I cannot take that any further at this stage. However, our position is that family law co-operation is critically important, and it is no different from our general position with regard to civil co-operation.

I would acknowledge that the development of Brussels IIa is an improvement on the Hague conventions, and indeed I believe that some would acknowledge that it is an improvement on the terms of the Lugano convention in this regard as well. The terms have been refined and developed, and it may be that there will be a further negotiation and conclusion over Brussels IIa—what might be termed as Brussels IIb, I suppose—which may well occur after Brexit. Nevertheless, in order to ensure that we have reasonable alignment and therefore the basis for reciprocity, we will want to take into consideration such developments in the law.

Let us be clear: generally speaking, these developments take place for all the best reasons. They are developments that reflect improvements, so why would we turn our face away from improvements in the law on the reciprocal enforcement of family law matters related to maintenance, divorce and child abduction? We have no cause or reason to do so and of course we are going to embrace these matters.

I appreciate that the amendments in this group are probing in nature, but I shall try to address some of the specific details. The report called for in the first amendment tabled by the noble Baroness would require the Government to publish details of how rights in EU family law operate in domestic law as well as key details of the negotiations within six months of this Bill receiving Royal Assent. With great respect, that is an arbitrary deadline which makes no reference to the position of the negotiations at that stage or the other documents that the Government will be publishing on the subject. These documents include not only any final agreement reached in the negotiations regarding continuing judicial co-operation on family law, but also the explanatory material that Ministers will publish when they exercise their key Bill powers to amend retained EU law. That will include retained EU family law. So, as I am sure the noble Baroness is aware, any agreement between the UK and the EU will be detailed clearly within the withdrawal agreement and domestically legislated for in the upcoming withdrawal agreement and implementation period Bill, which Parliament will have a full opportunity to scrutinise. However, I have to say that it does not arise in the context of this Bill.

The next amendment concerns the jurisdiction of the CJEU. We will discuss that in more detail when we come to debate Clause 6, so I will not take up a great deal of time although I want to make a couple of points. First, it is not necessary for the UK to be subject, unilaterally, to CJEU jurisdiction to secure a reciprocal agreement in this field any more than it is a requirement of the signatories to the Lugano convention to secure agreement with Brussels regarding family law matters. There are a number of existing precedents: not just Lugano, but the Hague convention as well. As I have indicated, the jurisdiction of the CJEU is sometimes either exaggerated or misunderstood in this context. In the EU, it is of course the final arbiter of the construction and application of EU instruments, but that does not mean that we have to embrace the CJEU's jurisdiction to have a suitable partnership agreement with the 27 members of the EU.

Baroness Ludford: In his lengthy reply, the Minister appears to perpetuate some of the misunderstanding that underlay the Prime Minister's speech on Friday, which is that somehow if you mirror the laws of the EU 27 and start from the same position, you do not

[Baroness Ludford]
need the rest of what Commission jargon calls the ecosystem—in other words, the common rules and the enforcement of institutional and supervisory mechanisms. Surely that is the difference between the EU context and the Hague and Lugano conventions, and accounts for the difference between having regard to and mutually recognising and enforcing judgments. It is part of a complex of arrangements. There is a qualitative difference between the international arrangements and the EU arrangements, which does not seem to come through in the Minister's response.

Lord Keen of Elie: With respect, neither I nor the Prime Minister misunderstood any of that. With great respect, I want to correct the noble Baroness on one point: that ecosystem is simply not required for mutual recognition and enforcement of judgments by two separate jurisdictions. That happens between the countries of the Lugano convention and countries in the EU in any event. I am talking about starting from the same point, with common rules regarding judicial recognition and enforcement, and moving from there to the negotiation of a new partnership. We do not foresee the sort of difficulty that the noble Baroness alludes to in that context.

At this stage, I want to come back to the point I was seeking to make. First, it is not necessary for the UK to subject itself unilaterally to the CJEU's jurisdiction to secure a reciprocal agreement. Many other countries do that. Secondly, in any event, the Government have been clear throughout debate on the Bill that it is in no way designed to legislate for any future agreement between the UK and the EU. That is not the purpose of the Bill. We cannot unilaterally legislate for our future relationship with the EU simply by including in our domestic legislation certain provisions about recognition of family law, maintenance and other agreements—a point that the noble Baroness, Lady Sherlock, readily acknowledged at the outset of her opening remarks some considerable time ago.

I understand that the intention behind Amendment 120 is to make sure that there can be continued application of international agreements, such as the Hague 2007 maintenance convention, which the UK currently operates by virtue of its membership of the EU. Of course, we are intent on doing that; as I noted earlier, we understand that there is a potential three-month gap there, which we need to address. I hope I can reassure the noble Baroness that we are clearly intent on securing an agreement, albeit not as an EU member and not subject to the direct jurisdiction of the CJEU, which ensures that we can maintain the highest standards of family law and mutual recognition, whether it be jurisdiction, choice of law or enforcement. I invite the noble Baroness to withdraw her amendment.

Lord Marks of Henley-on-Thames: I entirely understand the response the noble and learned Lord gave to the effect that you can, of course, have a treaty to ensure reciprocity, but he does not appear to recognise the role of the CJEU in the difficult cases where there is an argument about what reciprocity means and the obligations on states that are parties to that treaty. I do not know that there has been any explanation from the Government of how we deal with the difficult cases without accepting the jurisdiction of the CJEU. Would he like to elaborate?

Lord Keen of Elie: I am happy to repeat the observation I made earlier: these difficult cases are resolved, for example, between Norway, Iceland, Switzerland and the other members of the Lugano convention embraced within the EU. In that context, each of the courts—the Lugano court and the CJEU—respects each other's judgments, but they are not bound by them. That happens all the time. Ultimately, it would be for the domestic courts of each jurisdiction to determine what they were and were not prepared to enforce in the context of these agreements. That does not present any insurmountable difficulty, any more than it does in the context of the reciprocal recognition and enforcement of orders made pursuant to the current Hague conventions.

Again, I am obliged to the noble Baroness, Lady Sherlock, and to the noble Baroness, Lady Kennedy of The Shaws, for the report. I repeat my offer of further meetings to the noble and learned Baroness, Lady Butler-Sloss.

Baroness Sherlock: My Lords, I thank all noble Lords who have contributed and the Minister for his reply. When I tabled these amendments—I realise that they have not found favour in all corners of your Lordships' Committee—my aim was simply to have a discussion that I thought had not happened since the Bill began. It had not happened in another place and, with all respect to the Government, it has not been happening in the kind of detail we need in the publications we have seen so far. We have at least now begun to have this conversation and I am delighted that we have.

The debate has established to so many people quite how important these family law provisions are. They are fundamental to the welfare of so many of our children, because issues of child abduction, child protection and child contact are caught up at the centre of this. Those points were made very well by my noble friends Lady Massey and Lord McConnell of Glenscorrodale, and by the noble Baroness, Lady Tyler, and the noble Lord, Lord Carlile. The importance of a single effective family law system was stressed very well by the noble Lord, Lord Marks, who also expressed how well-functioning and widely admired our system is. The need for it was underscored so well. I am hugely grateful to the noble and learned Baroness, Lady Butler-Sloss. When I heard her speech I wanted, in the way children do nowadays, to say "what she said". She expressed it so well that I should have walked away at this point, but I think convention prohibits it so I press on.

I will pick up two or three points that were in contention. I do not think I will take up all the points made by the noble Lord, Lord Farmer, but his most important contention was that the provisions in the Hague conventions and elsewhere are sufficient unto the day. I hope he will take the opportunity, when he can read *Hansard*, to reflect on the comments made by the noble and learned Baroness, Lady Butler-Sloss,

and my noble friend Lady Kennedy of The Shaws, and to look at how the weight of opinion in family law is clearly against him on this matter.

I would be happy to discuss this further outside the Committee, but to make a couple of specific points, Brussels IIa is distinctly better than Hague because it has a stricter timetable on abduction. There is a back-up mechanism—a second bite of the cherry—so that the child's home country has another opportunity to overrule a decision by another court not to return an abducted child. The Brussels II recast will make that far better still.

The noble Lord, Lord Farmer, mentioned the provisions on divorce, which I found harder to understand. My understanding is that the 1970 Hague convention is much more restrictive than the current arrangements and that very few EU members are signed up to it anyway. It has no direct rules about jurisdiction, so we would be back to these forum conveniens arguments deciding expensively where which court should rule. Those things take at least two days in court, probably with a circuit court judge or above. I do not think there is a practical alternative on divorce, but I would be very interested if the noble Lord wanted to intervene or to talk to me later to challenge that.

I hope that we would all widely accept that the current EU provisions are the superior offering available. The challenge would be to find out how we can best salvage what is there. I take the point made by the noble and learned Lord, Lord Mackay of Clashfern, from whom I dissent with great trepidation, that the Bill is doing what it can to replicate the current provisions. The problem is that, by importing those provisions, it is not replicating the current situation, because, by doing so in a context of no reciprocity, it is creating asymmetry between our obligations to the EU 27 and theirs to us. That needs dealing with very early on.

4.45 pm

I am grateful to the Minister for acknowledging some of the issues here. I am pleased to hear that the Government are aware that this matter needs urgent attention and that negotiations on it have begun this month. I am grateful for his reassurance that the Government are attending to the issue in respect of 2004 Hague convention and will, I presume, therefore look to give notice subject to permission of the EU. I am grateful to him also for agreeing to meet the noble and learned Baroness, Lady Butler-Sloss, to discuss this matter further, because that would give me considerable assurance.

I was grateful to the noble Lord, Lord Callanan, for inviting me to meet him. He quite simply asked me what I was looking to do with these amendments. I explained then exactly what I have explained to the Committee today: all I wanted was for the Government to come to the House and tell us whether they wanted to replicate as far as possible what we have now and, if not, what the alternative would be, how it would be implemented, under whose aegis and what would happen in the interim. From what I have heard today, we are a little step down that road. We have some time between now and Report. We should give the Government the opportunity to make more progress and, in discussion with the noble and learned Baroness, Lady Butler-Sloss, and others, to explain more about their thinking. I hope that we might then if necessary—maybe it will not be necessary—return better informed on Report.

I thank all noble Lords for their contributions. I beg leave to withdraw the amendment.

Amendment 29 withdrawn.

Amendment 30

Moved by ***Baroness Jones of Moulsecoomb***

30: After Clause 4, insert the following new Clause—

"EU Protocol on animal sentience

The obligation on Ministers of the Crown and the devolved administrations to pay regard to the welfare requirements of animals as sentient beings when formulating law and policy, contained within the EU Protocol on animal sentience as set out in Article 13 of Title II of the Treaty on the Functioning of the EU, shall be recognised and available in domestic law on and after exit day."

Baroness Jones of Moulsecoomb (GP): My Lords, this very amendment has been debated in the other House and was voted down by 18 votes. I think the Government were shocked by the public outcry at the amendment being lost.

EU law puts an obligation on the Government and devolved Administrations to "pay full regard" to the welfare requirements of animals when Ministers make decisions and implement policies. This means that Ministers have to think carefully about how their decisions might harm animals.

The British Government played a key role in making this law during our term of EU presidency. It has influenced more than 20 pieces of EU law, including the ban on conventional battery cages for chickens and the ban on cosmetics testing on animals. Certain lobby groups claim that protecting the animal sentience laws will be disastrous; for example, that farmers will not be able to control agricultural pests or to go out and shoot pigeons. This simply cannot be true. If it is not the case with the law as exists today, then nothing will change tomorrow if we retain it.

The Government's stated intention in the White Paper was for the withdrawal Bill to bring all EU law into UK law and then only amend retained EU law in future legislation. I have raised this issue previously and find it rather offensive that the Government would make such a promise and then not honour it.

Ministers have admitted that these animal protections will be lost as the Bill is currently worded. I understand that it is unfortunate to have to make "single issue" amendments to the Bill, but unless and until we are able to fix the Bill properly to retain all EU law, I have little option but to propose this amendment.

As a compromise when the amendment was proposed in the other place, the Government said that a new Bill would be created to include protections relating to animal sentience—I am sure that they will claim today that my amendment is not needed because of that new Bill. However, the Government's proposals are weaker than the EU law. They have changed the wording in

[Baroness Jones of Moulsecoomb]

the draft Bill and included a much broader list of exceptions. Ministers would have only to have "regard" rather than "full regard" for animal welfare, and there is a massive loophole whereby a Minister can make decisions harmful to animal welfare whenever there are other matters of public interest.

A legal opinion commissioned by Friends of the Earth concluded that the Government's proposals make it far too easy for Ministers to ignore animals, and their decisions would be subject to legal challenge only where they were so irrational that no reasonable authority could have come to them. That is a rather broad exception. The Government's proposals do a very good job of appearing to protect animal rights, while actually reducing them to near zero.

The House of Commons Environment, Food and Rural Affairs Select Committee looked at the Government's draft animal sentience legislation and tore it to shreds. It basically said that it should be removed from the animal welfare Bill and kicked into the long grass. So it looks likely that, despite the Government's best intentions, their draft legislation on animal sentience might never see the light of day, let alone reach the statute book. We need to keep this in the withdrawal Bill: it is essential that we retain the existing provisions of EU law. We cannot allow a gap in protections between Brexit day and the point at which the Government are able to provide a suitable animal protection Bill. Ministers have been telling various people that animal sentience is already protected in UK law and that we do not need my amendment. If so, why have the Government drafted their own proposal on the issue? The situation is very simple: this protection does not exist in UK law, it stems from EU law.

Without this amendment to retain Article 13, animals will lose these protections, there being only the vague hope that the Government might one day bring forward a Bill. Once it is retained, we can always go back to it and change it with a future Bill—I would be happy to work with the Government to improve these animal protections—but in the meantime my amendment will keep these animal protections once we leave the EU. I beg to move.

Baroness McIntosh of Pickering (Con): My Lords, it gives me great pleasure to follow the noble Baroness—I am sure we will have another opportunity to consider the contents of her amendment—and to speak to my own Amendment 212, which inserts a new clause. I hope that I am not responsible for the typo in subsection (3), which refers to, "the Untied Kingdom". It is not in my interest or that of the country to untie all the arrangements that we have in the United Kingdom.

The purpose of this amendment is to consider,

"border arrangements relating to animal welfare",

and broaden it out to other themes as well. I am delighted to see my noble friends the Minister for Exiting the European Union and the Minister with responsibility for agriculture in their place to hear these concerns. As of 11 pm on 29 March 2019 the UK becomes a third country and will be treated as such until the new relationship and other arrangements are in place. In her speech on Friday the Prime Minister set out five tests, one of which is that any agreement on our future relationship must protect people's jobs and security. I wish to consider these remarks in the context, specifically, of the border between Northern Ireland and southern Ireland.

In our debates on Amendment 18 in Committee last week we were told, including by the Minister, that the Bill represents a snapshot. That snapshot would mean that there are no checks at borders between Northern Ireland and southern Ireland because of the common travel area. Indeed, the first scenario that exists today is that the Belfast agreement of 1998 setting up the common travel area means that there are currently no checks on the border between Northern Ireland and southern Ireland. The second scenario assumes that there will have to be a border if we have either a free trade area or, worse still, WTO rules, in which case there will be border checks. I reminded the Committee that that border is 300 miles long.

In preparing for today I came across a rather useful piece which I found, I regret to say, on Twitter, and which I bring to the attention of the Committee. It is by Katy Hayward, whom I believe teaches and lectures at Queen's University Belfast. She looks at the case of Britain being outside the single market and the customs union, either in a free trade agreement with the EU or under no deal, and it appears that agricultural products would have to be checked at the border. Assuming that animals are moving across the Irish border, I put to the Committee that this cannot be done by technology, either for this category or indeed for food, farming and agricultural products. Instead, there will have to be physical checks and inspections by veterinary surgeons and other enforcement officers. This will also be because we have very high standards of animal welfare, animal health and animal hygiene in this country—which I am immensely proud of—which mean that goods passing across the border will have to meet EU requirements going into Ireland and our requirements coming into the United Kingdom from Ireland.

I draw the Committee's attention to what Article 5.1 of the draft protocol published by the European Commission last Wednesday, 28 April, says about agricultural trade:

"The provisions of Union law on sanitary and phytosanitary rules"—

please do not ask me what phytosanitary rules are because I have not had time to find out—

"listed in Annex 2.5 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland".

For the other 27 European Union member states, food and other agricultural products coming into Ireland from the UK, whether from Northern Ireland or Great Britain, will be in free circulation within the remaining single market. The remaining 27 member states will demand reassurance on standards, not least because some may seek economic and competitive opportunities from the Irish authorities in these circumstances.

The purpose of the amendment is to seek reassurance from the Minister that the Food Standards Agency will have the staff and resources it needs to ensure that these cross-border arrangements, when in place, will be policed properly.

Lord Hain (Lab): The noble Baroness is making a very compelling argument about the agricultural and livestock issues associated with the Irish border. I suggest to her that it is even more compelling if the Committee takes account of the fact that many of these farms actually straddle the border; in other words, livestock moves back and forth of its own volition all the time. It is absolutely vital that these phytosanitary issues are addressed but the Government seem to be in denial about them.

Baroness McIntosh of Pickering: I am grateful to the noble Lord for that point. He is much more familiar with Northern Ireland and these arrangements than I am, but I am very cognisant of this and I am sure that the powers that be are as well.

Baroness O'Neill of Bengarve (CB): My Lords, I too find the word "phytosanitary"—the Brussels term—a bit of a nuisance. "Biosecurity" is a term with which I am easier. One might wish to look at these issues with respect to the Irish border rather differently from the way in which one looks at the movement of persons and of goods. I will say nothing about the movement of goods and persons for now but will speak simply about the movement of beasts—and, indeed, carcasses. It seems to me that there is probably a remedy which consists in devolving standards of biosecurity—yes, to Stormont should it come back into operation—with the proviso that they may not go lower than EU standards and, of course, UK standards. This might give the desired level of protection for the movement of animals and of plants. Unfortunately, the movement of plants is in the hands of the wind and has caused great damage in Northern Ireland because of the fact that it cannot easily be controlled. There, I believe, would be the place to look.

Just on one other point, I say that the common travel area dates from the 1920s not from recent years.

Baroness McIntosh of Pickering: I am most grateful to the noble Baroness and I think she confirmed the need for physical checks. I have not considered plants or people in Amendment 212. There is a very real problem, which I have raised separately and privately, of the tripartite agreement between France, Britain and Ireland in relation to racing. That covers not just the racehorses but the stable lads and jockeys. But for today's purposes I am restricting my remarks to animals and food products. The other reassurance I seek is that there will be sufficient vets. We might not have sufficient vets when these arrangements come into place next year, or other relevant inspectors at borders and UK ports by 11 pm on the magic date of 29 March 2019.

5 pm

It is fanciful to think that animal welfare, health and hygiene can be dealt with by technology, unless the Minister can put my mind at rest on that. I am having great difficulty with the arguments perpetuated by those who wish us to rush into these new arrangements without considering what needs to be in place. I know from my conversations with the Food Standards Agency that a whole raft of internal domestic legislation needs to be brought into play.

It has been stated that the United Kingdom becomes a third country on the date of Brexit, and that UK food businesses have to assess the need for and make changes to comply with the multiple regulations, including,

"the labelling of food placed on the EU-27 market as of the withdrawal date".

The Minister will no doubt be familiar with that notice to stakeholders from the EU Commission dated 1 February this year on the withdrawal of the UK and EU food law. That notice sets out an alarming number of regulations, which I presume will fall into the category of "directly applicable" but which will form the subject of the Bill. They will have to be transposed by the time that we leave, so I would like an indication of what the timetable is. The notice impacts not just on the UK and national authorities in preparing but on private parties such as food-producing businesses. Many of those must ensure that they comply with these regulations, presumably by 30 March next year.

There is also a need to prevent the import of what I would say was substandard meat into the United Kingdom. This is a different issue from that of the northern/southern Irish border. It relates to imports of food and meat from Argentina, Brazil and the USA which meet lower standards—often considerably lower—than consumers in this country are used to.

The spectre is also being raised of a free trade agreement, as the Prime Minister set out on Friday. I will refer to the OECD paper on free trade arrangements, which is doing the rounds of the Committee at the moment. It specifically sets out that, as a general rule, developing countries are normally and rightly helped more in those circumstances, but that sometimes has the unintended consequence of pushing food prices up here. We have already seen how the 15% to 20% fall in the value of the pound on the result of the referendum served to push prices up. That is before we even consider what the impact will be if there is no deal, or what the consequences of tariffs as well as non-tariff barriers and rules of origin will be. We will then have to agree on the nomenclature of each individual product. Obviously if it is a carcass, as the noble Baroness suggested earlier, it is easily identifiable; but if it is a sausage, it is commensurately much more difficult to describe and agree on before the tariff can be set.

I understand that many of the small and medium-sized companies involved in the production of food are extremely alarmed at the potential increased cost for them. Currently, the UK exports to the EU 40% of our lamb, 80% of our dairy products and 75% of wheat and barley. The NFU and other farm organisations argue that it is vital that we have zero-tariff, frictionless trade with the EU, as indeed the Prime Minister seeks. I point out that the EU is far from self-sufficient in the sheepmeat sector and that it imports considerable quantities from New Zealand and Australia. The UK is currently one of four producing member states, including also Spain, Greece and France, which between them produce 68% of the EU's sheepmeat requirements.

I emphasise that having been brought up in Teesdale in the Pennines, represented North Yorkshire and met farmers regularly, I know that the importance of live trade to hill farmers across the whole United Kingdom is substantial. While the live trade may be small in

[Baroness McIntosh of Pickering]
quantity and highly regulated, it provides a substantial livelihood to hill farmers which would be threatened. If we end the live trade, it will have the perverse consequence of opening the way to more imports into the EU from New Zealand and Australia. Australian and New Zealand lamb already accounts for 23% of EU consumption.

To sum up, with Amendment 212 I am seeking an assurance from the Minister about the type of border checks that will be required for animals and animal products and whether physical checks on farm and other agricultural products will be required. Will he admit that technology simply will not work and, if that is the case, can he assure the Committee that the FSA, vets and other enforcement officers will have all the staff and resources they require? I also seek a commitment from the Minister that all the regulations set out in the notice I referred to will be in place before March next year. Finally, I hope he will accept that in the context of Brexit and our trade with the remaining EU 27 member states, the limited live trade in animals that exists for fattening and finishing should continue for the sake of the livelihood of hill farmers everywhere in the UK.

Baroness Bakewell of Hardington Mandeville (LD): My Lords, I support the noble Baroness, Lady Jones of Moulsecoomb, on Amendment 30, to which I have added my name. Coming as it does after the previous vital group of amendments on family law, this group is on a very different aspect of the impact of the Bill. As the noble Baroness, Lady Jones, said, this issue was debated in the other place. On that occasion, there was much rhetoric about whether animals can feel pain and emotions. I can only assume that those who deny animal sentience have not visited the countryside in the spring. Surely those who see young lambs running around with each other, teasing, jumping and enjoying the thin sunshine and light breezes do not assume that that is not a natural activity. Similarly those who see sheep lamb in the depths of winter, as many do, and see their offspring shivering in the bitter winds and driving rain cannot imagine that they would not choose to find warmth and shelter if they could.

There are many farmers and experts present in your Lordships' House, along with those like me who have no connection with animals other than that we live in the countryside. We will all have heard and suffered the pitiful lowing of a cow which has recently been separated from her calf, even though it may be in an adjoining field. This distressing calling for her calf can go on for hours and long into the night. She misses her calf and wishes everyone to know this so that eventually they may be reunited by her persistent calling. Farrowing pigs in metal arcs scattered around open fields are able to root around in the dirt and keep a watchful eye on their playful young in peace and tranquillity. This is a very far cry from farrowing crates, in which they do not have enough room to turn around and certainly cannot nurture their piglets.

Some noble Lords will think that I have a very rose-tinted view of the countryside in assuming that young animals enjoy playing, exploring and getting into mischief. Very many children's books give human characteristics to animals. Beatrix Potter's books are a very famous example. Some of these characterisations are fanciful, but others are based on observing at close quarters the behaviour of animals. Those who have met a small troop of escaped and inquisitive piglets marching down the middle of the road looking for adventure and trouble cannot deny that many of the fictional caricatures are based on fact. Lambs like to play, piglets like to investigate their surroundings and calves are attached to their mothers. The very process of suckling for their sustaining milk means a bond is formed.

As we move forward with Brexit, it is essential that the protocol on animal welfare is high up the list of government priorities. The United Kingdom is nothing if it is not a nation of animal lovers. I have often been surprised and alarmed, as an elected councillor, at the number of letters which people have written to me about animal welfare issues, including hunting, compared to the very few I would get about child cruelty and abuse—although this latter subject has recently moved up the consciousness of the nation, as demonstrated this afternoon. If the Government do not rigorously defend and transfer into domestic UK law Article 13 of Title II of the Lisbon Treaty on the Functioning of the European Union, I fear this will be a very serious miscalculation of the mood of the country on this issue.

Organic farmers who have built up their award-winning herds over many decades prize the quality of the meat of their animals, which rightly fetches high prices in the marketplace. Butchers are keen to demonstrate to the restaurants and hotels they supply with meat which particular farmers it comes from. For their part, catering establishments which believe the quality of the raw meat is half the secret of a successful dish and to a steady flow of customers are also keen to list the source of the meat and fish on their menus.

Organic and other farmers keen to sell to quality outlets will tell you that the way in which their animals are slaughtered affects the flavour of the meat from the carcass. They believe an animal that is stressed at the point of slaughter will produce meat of an inferior quality to that of an animal that is slaughtered completely unaware of what is about to happen to it. This is very important to those farmers who have nurtured their animals to produce a high-quality product.

Standards of animal welfare in abattoirs and slaughterhouses are important, as is the presence of a qualified vet. Many of these vets currently come from EU countries. Can the Minister give reassurances to the Committee that, post Brexit, there will be sufficient trained veterinary officers to ensure robust standards of animal welfare at the point of slaughter? Those of your Lordships who are vegetarian or vegan will not be much interested in the quality of the meat which comes out of the abattoirs, but I believe they will care very much about the way in which the animals are treated as they come forward for slaughter.

Just as it is unacceptable for animals going for slaughter to be nervous and afraid, it is unnecessary and damaging and causes suffering to transport live animals to the EU for slaughter. If we have insufficient abattoirs in the UK to cope with our own animals, then we must increase that capacity. Just as we should

not export live animals for slaughter, we must not accept live animals sent to the UK from the EU to be slaughtered here. As the saying goes, there is many a slip between cup and lip, and in the transfer of law from the EU into UK law, we must ensure that animal welfare is preserved at all costs. It is also important that high UK animal welfare standards are not undermined by cheaper imports produced to lower standards, as has already been referred to.

Whether it be the family pet pig that is coming for slaughter or a large herd of sheep, the way in which we treat animals says an awful lot about us as a caring society. In leaving the EU under Brexit we must preserve those principles of our culture which define us as a country. We will have a long time to regret it if we do not. I look forward to the Minister's response to the issues raised in this debate.

Lord Wigley (PC): My Lords, I have my name to Amendment 30, which I will address in a moment, but before doing so I turn to the comments of the noble Baroness, Lady McIntosh. I am not sure whether she or other noble Lords heard the programme on Radio 4 at lunchtime yesterday about the problems ports in the Netherlands face in taking the steps needed to meet the 29 March deadline next year in due time. What came out of that is that it patently is not going to happen. It is not just that the resources are not available—there will be questions of resources and who pays for them, hence some of the duties that will be forthcoming—but it is a question of actually getting qualified vets. There are just not enough to do the job and there is no prospect of finding enough by the deadline, so it is not going to happen in that way. The reality of the situation facing us, and facing our partners within the EU, is starting to come home to roost.

I listened to the intervention a moment ago by the noble Lord, Lord Hain, on Northern Ireland. The mind boggles at the idea of vets chasing animals roaming around their own farm across the border. That is totally impractical. If we then say, "We accept that there will be an agreement between the north and south of Ireland with regard to the movement of animals that may be different to the relationships with the UK", the question arises of the ports in the UK that will be taking these in. In any case, as the noble Baroness, Lady McIntosh, said, food coming in from the third world will need to be inspected. The thing just defies credibility.

5.15 pm

Lord Deben (Con): I am sure the noble Lord is aware that there is only one vet in an abattoir who is not a national of the rest of the European Union. So this is not a small issue. He might think vets are going to run around chasing animals but it is much more likely that there will be no vets to run around chasing anyone.

Lord Wigley: Absolutely—I accept that entirely. I was painting the picture that had been depicted by the noble Lord, Lord Hain, in order to illustrate how ludicrous the situation is. The noble Lord is right with regard to the backgrounds—the national origins—of a very large proportion of the vets that we have; we just do not have enough now. If the demand is going to be that much higher, the problem is going to grow out of all proportion.

I turn to Amendment 30, to which I have added my name, to support the comments made by the noble Baroness, Lady Jones. I support the amendment, which probes the surprising situation that the Bill does not include provision to carry into UK law the principle of Article 13 of the Lisbon treaty recognising animals as sentient beings. Of course animals cannot be put on a pedestal alongside human beings, but they are clearly sentient, as the noble Baroness said. No one who has had anything to do with the countryside or with animals would deny that possibility, so the question arises as to why we are deliberately excluding this. Alarm has been raised among animal lovers as the Animal Welfare Act 2006 does not fully cover this, if we had to resort to that direction.

In the other place, the Government gave an understanding that they would consider how this could be rectified. I would be glad to know what their intentions are. I am not sure whether they are in a position to do so, but I suggest that an amendment should be put into this Bill to give MPs another bite at the cherry. However, if the Government are relying on the draft legislation that I believe they introduced on 12 December to cover this point, a response to the draft Bill was due in by 30 January, as I understand it, but there is still considerable dispute about the appropriateness of Clause 1. We in the Committee have a right to know what the Government's intentions are on that, and whether the provisions that they are trying to make in that direction will meet some of the points raised by the amendment.

The other aspect that I wish to address is that EU laws on animal sentience have allowed Wales—the National Assembly and the Welsh Government—to take a lead on certain animal safeguarding matters. I remember that when my own party, Plaid Cymru, was in coalition government in the National Assembly from 2007 to 2011, we were able to introduce legislation to ban the appalling electric shock collars that had been used. Can the Government give an undertaking that, when these powers are repatriated from Brussels, the National Assembly and indeed the Scottish Parliament will retain the competence that exists under European provisions in order to take the sorts of steps that I have mentioned in relation to electric shock collars and, indeed, a range of other animal well-being provisions? Can we be assured that these powers will not be centralised to Westminster, thereby imposing on to Wales and Scotland a straitjacket that may constrain their ability to act in a positive manner on these important matters?

Lord Deben: My Lords, I declare an interest as the owner of a few Red Poll cattle, which are the local cows of my part of Suffolk. I also was one of the longest-serving Ministers of Agriculture, and this is a matter of very great importance to me. I hope that my noble friend the Minister will realise that he is asking of us, if he does not accept these amendments or agree to do something about this issue, three things, and none of them seems to me acceptable.

[Lord Deben]

The Minister is asking us to accept that, when the Government promised that the withdrawal Bill would take into English law all that is at the moment in European law, and that we would start again from there, that is not the case with sentient animals. The noble Baroness, Lady Jones, explained that very clearly. There are two ways in which it does not. First, it is not complete—and the Government accept that, because they had very urgently to rush forward the advice that they were going to produce a sentient animal Bill to overcome the gap in this Bill. Will my noble friend explain why it is not in the Bill? It is a real issue. If the whole purpose is to use this Bill to ensure that the law after we leave, if we were to leave the European Union, will be the same as before, why is there this exception? It is very important for my noble friend to answer that question because he has in the past, when I have asked him other questions, told me that it is not about the withdrawal Bill, that it is a different issue and comes up elsewhere. This is clearly about the withdrawal Bill—the issue is clearly missing and it ought to be here. My questions are, "Why isn't it here?", and whether he will undertake to include it.

We are also supposed to accept that there will be a Bill that will cover this issue. That is a difficult thing for this House because we know very well that, with the best of intentions, the Government do not have a great deal of time to bring in these Bills, and certainly not before the self-imposed end date that they insist upon. Therefore, are we supposed to rely not only on the Government's good faith, which I am sure I can, but on their ability to deliver on time? Otherwise, there will be a gap when this protection is not afforded.

No doubt my noble friend will say that we will work all that out in the negotiations, but these negotiations are likely to take place after the due date on which we would leave, if we leave the European Union. What is more, clearly, it is not going to be left to the negotiations, because he has already told us that we are going to have a sentient animal Bill—so it is not just a matter of the negotiations. Not only are we supposed to accept that this is outside the Bill, even though that is the Government's fundamental proposition about the Bill; we are also supposed to accept that they will be able to bring forward legislation that will cover this matter in time for there not to be a gap, which is unconnected with the negotiations because otherwise we would not need to have that until after the negotiations, in which case we could merely take it into our law.

I am afraid that this is very complex and, worse than that, we have before Parliament a Trade Bill. It is clearly the Government's intention not to restrict their future trading arrangements to ensure the high standards of animal welfare that I spent quite a lot of my life arguing about in the European Union and working for in this country. Those standards are not enshrined in the Trade Bill. There are no arrangements in that Bill for this House to discuss, or to have, in any sense, an influence on, trade negotiations and agreements. We are, therefore, fixed into a position in which we have to accept that this omission from the arrangements of the withdrawal Bill is accidental—it is of no importance and will be covered by another Bill. We also have to accept that there will be another Bill and that it will be in time. What is more, we are to accept that what is in the other Bill will cover this issue. As we know, it has, in the words of the noble Baroness, Lady Jones—I would not like to use the phrase myself but I can repeat it—"been rubbished" by the Select Committee which looked at it. It does not actually do the job.

The Trade Bill will not give any protection for animal welfare, so that our farmers, who meet high standards, will have to accept imports from elsewhere which do not meet them. The argument about chlorinated chicken—I know that phrase has been ridiculed but it is useful—becomes very strong. I hope your Lordships are aware of why the words "chlorinated chicken" are so important. The United States has to chlorinate its chickens because it does not have high welfare standards and unless you chlorinate them you have even more food-borne disease than America has now. It has at least four times the food-borne diseases that we have in Europe. This is no passing comment; it is a fundamental issue of the health of the British people, leave alone the issues of sentient animals.

I am sorry that there is more to say—but this is a very serious area. The Government seem to have misunderstood the way in which you take EU laws into British law. EU laws have always to be read in their context, inside the protocols which make those laws operate. The trouble with this particular bit of the withdrawal Bill—as indeed with much of it—is that when you take the bare bones and put them into English law, you lose that context. You really do have to find a way of getting the context in, otherwise the bare bones do not have the same effect as they do at the moment in the application of EU law.

There is another thing that I find difficult with the Government's willingness to discuss this issue in such a peculiar manner. I can understand my noble friend, and other Ministers at various times, recognising that some of us do not think that withdrawal is a very good idea. That is perfectly understandable, but we are not debating this on that basis. What we are doing is trying to make sure that the withdrawal Bill does what it is supposed to do—and we are trying to do that as a House that has that specific duty and job. I know that the *Daily Mail* finds that hard to understand, but what we are here for is to ensure that the legislation that is passed is, in detail, what was intended. The House of Commons—the other place—is now less able to do that because of the way in which it restricts the time spent on these matters. I know that my noble friends would much prefer this House to spend less time on the Bill. But if we do not spend the time, no one else will go through it in the way that we will have to if this is not to be a disaster not just for animals but for human beings, because we will have none of the necessary restrictions.

5.30 pm

The trouble is that it will be no good our coming back afterwards and saying, "You ought to have done this". The Government will merely say, "You ought to have understood that at the time". Well, I think that we do understand it; the people who do not seem to understand it are the Government. They do not seem to understand what you have to do if you want to leave the European Union but keep the laws in place. That is a serious matter. There are many other examples in the

Bill, but I have chosen this one because it is more glaring than the others and because the public would be appalled to discover that the Government had failed to protect sentient animals and the health of the nation and to have taken a holistic view on this.

I will end on that point. Leaving the European Union—were we to do it—is a holistic activity. We will remove ourselves from the relationships we have had for more than 40 years and set up something entirely new. That is a holistic movement. Therefore, we have to think about what we do holistically. We cannot do a little bit and then a little bit more; we have to think about it in the round. My noble friend the Minister may say that I have missed the point and that the noble Baroness, Lady Jones, is right that we cannot tackle it in this way but he will come back with a proposal to do it differently. If he does that, I am prepared to apologise. However, if he does not do that, he will be asking us to accept that the withdrawal Bill has a large gap here, contrary to what the Government promised. That gap is not small or unimportant but very large—and it will affect the health of not only animals but human beings. This will be particular true on the border between the north and south of Ireland. I am ending on this point because I remember when we did not have the arrangements that we have now and when the United Kingdom Government had to try to stop the constant smuggling of animals across that border. We had a Minister who was known as the "Minister for Pig Smuggling".

That is another thing that people forget. They forget the enormous advances we have made in bringing together the north of Ireland and the Irish Republic. I have rarely been as angry as I was when I saw extreme Brexiteers trying to ridicule the Good Friday agreement as if it did not matter. I say that as somebody who was caught up in the Brighton bombing and whose wife was caught up in it, and who had to help pick up things afterwards. I do not accept that these things should be treated with the sheer vulgar partisanship that we have seen from some Members of the House of Commons and people elsewhere. I am merely saying that the Government do not seem to have come to terms with that when it comes to the movement of live animals, the movement across that border and the whole question of what it means to withdraw from the European Union.

My noble friend must accept that this is no passing matter; it is not just a case of supporting animal welfare because it is so popular. I do not think that anyone has ever told me that I am sentimental about this. I take a very clear and hard line on it—but I also happen to be reasonably rational. What the Government are asking us to do is not something that the revising Chamber should dream of doing. We should insist on this being changed.

Lord Davies of Stamford (Lab): My Lords, I congratulate the noble Baroness, Lady Jones, on introducing the amendment very clearly and effectively. I support it strongly. I also commend the speech of the noble Baroness, Lady Bakewell, who spoke straight from the heart. However, there was nothing at all sentimental or false about what she said; it was said straight from experience and was very matter of fact.

I too have the benefit of living in the country—I see it as a benefit, anyway—and I see many animals. I have cattle grazing on my land and I have a dog; I should declare that interest. I have many times been able to verify how intelligent these animals are, how sensitive they are and what an extraordinary relationship they can have with human beings. All of this is orthodox science. It was demonstrated by Pavlov or Konrad Lorenz and has been demonstrated over and over again, so I do not think there is any doubt about it. It has always seemed to me that caring about sentient animals is one of the marks of a civilised society. There is terrible cruelty to animals in this world. The situation is obviously worse in many poorer countries, for reasons one understands. I think that the European Union has probably the highest standards of anywhere in this matter—certainly far higher than the United States. I hope that we can keep things that way if we have to leave the European Union and that we will at least not resile from those standards. That is why I want to comment on what has just been said.

I am not sure that I have ever said this before, but I agree with every word that the noble Lord, Lord Deben, said in his excellent speech. That being the case, I might normally be tempted simply to record my agreement and then sit down. However, I have some slight hope that if I make similar points to those he made—it was my intention to make exactly the points he pre-empted me in making—but from a rather different perspective, and the Government hear a similar message from different parts of the House, they might for once consider whether there might be something in those points—and it would be very desirable indeed if the Government thought again about the matter.

The noble Lord, Lord Deben, made a couple of very important points. I will not follow him on Northern Ireland as we shall have other opportunities to debate that in the course of our proceedings, and I look forward to taking part in those debates. The noble Baroness, Lady Jones, made it very clear that the Government clearly intend that there should be protection for sentient animals in our legislation, but not to the same high standard that applies at present. Over and over again—countless times—we have heard in these debates that the Government's only intention in bringing forward this Bill is to transpose Union law into British law so that there is no legal vacuum or legal confusion if we leave the European Union. We understand that that is a perfectly reasonable and logical response to the situation and I think that most of us on this side of the House want desperately to take the Government's words in good faith.

However, over and over again we find that that is not true, that there is a surreptitious agenda and that rights and protections which exist by virtue of our membership of the European Union are not being carried forward and that the Government appear to have no intention of carrying them forward into domestic law after Brexit. The noble Baroness, Lady Jones, made this absolutely plain and cited the Government's proposed wording to replace the article in the Treaty of Lisbon on animal welfare. It is quite clear that the Government want to weaken that language. Why do they want to do that? I had always thought that there was a consensus among civilised, humane people on the

[Lord Davies of Stamford]

protection of animals which went across this House and the other place and had nothing at all to do with political parties. Is that not the case? Why should the Government therefore decide in this case not to carry forward into British law the existing levels of protection in the Treaty of Lisbon but to deliberately reduce them and dilute them? Why is that? I cannot understand it.

Secondly, on another point made by the noble Lord, Lord Deben, there should be no illusion about this matter as regards international trade. If we are serious about animal welfare, we must impose exactly the same standards that we impose on our own farmers in this matter on any imported animal products, otherwise we will make complete fools of ourselves without any gain to animal welfare at all. All that will happen is that the business will go to farms in other countries which apply appalling standards of animal protection or none at all and who therefore have an economic advantage and can undercut the British farmer with produce that is produced in barbaric fashion. I include in that the way the Americans produce their beef, which is absolutely revolting. They now have zero grazing for over 95% of their beef, which means that you have two animals in an area slightly smaller than the Table in front of me. They never see the air or a blade of grass in their life. That is appalling but it undoubtedly gives the Americans an economic advantage.

Viscount Ridley (Con): The noble Lord is repeating a point he made last week about American agriculture. I let it pass then, but on that occasion he said that if you go to Texas, there are no cattle outdoors, and that you would not see a lot of Texas longhorn outdoors. I go to Texas quite regularly and see an awful lot of cattle being raised outdoors. The noble Lord should be careful not to exaggerate what is happening. I do not know what relevance this has to EU withdrawal, but it is important not to go too far in this respect.

Lord Davies of Stamford: I will come to the relevance to EU withdrawal in a moment. I will just say that I feel that I have not lived in vain, because the noble Viscount has listened to what I said and thought about it for several days. I was perhaps speaking figuratively; in this life you can never apply the word "infinity" or "zero" in a completely literal sense. He may have been to the wrong part of Texas, or to parts where there are expensive ranches and the oil billionaires who own them like to have some longhorn on display. Those ranches exist, and I have seen one or two of them. Perhaps the noble Viscount has some friends who invited him there. That is not the heart of the beef economy. If the noble Viscount knows anything about Texas—he obviously does—he will know that Fort Worth used to be the centre of the Texas meat industry. I used to go there very frequently because I had a lot of dealings with Lockheed Martin, which is based there. I went there at different times of the year and I got to know the countryside around Fort Worth and towards Dallas quite well. That would have been cattle country 100 years ago; there would have been cattle on every horizon. I have literally never seen a single live animal in the area around Fort Worth, which was the headquarters of that industry. That is not a part of the United States where wealthy people have ranches with animals on display, which is a very different matter.

The point I was making—I will not say before I was interrupted, because I was pleased to have the intervention from the noble Viscount, particularly if he has been listening to my speeches carefully—was that there is no point in having any kind of regard to animal welfare and persuading ourselves that we are being humane and civilised in doing so if we then let in, in our imports, meat or other agricultural products which derive from inhuman practices. All we are then doing is making sure that the business and the activity moves from this country abroad with not a single iota of gain to animal welfare or happiness, and causing the destruction of the British livestock industry in the process. That makes no sense.

If we are to do this, we have to do it properly. We should make it a matter of moral commitment that when we leave the European Union—if indeed we do—we stick to the high standards which the European Union has set in this matter and certainly do not dilute them, and secondly, that we ensure that we impose those standards if we have left the European Union and are in a position to sign free trade agreements with other countries. I have explained why I think it is unlikely that we will be in that position in practice with the United States, but supposing that we were, we should in that eventuality impose exactly the same standards on anybody who wants to sell us meat or other agricultural products in future.

Lord Bowness (Con): My Lords, noble Lords will be pleased to know that I will be brief. I put on record my support for Amendments 30 and 98, and for the sentiments expressed by my noble friend Lady McIntosh of Pickering. I cannot imagine what good reasons there can be for opposing this amendment. I appreciate that a number of directives and regulations will be incorporated into our law, but not this important treaty provision. As other noble Lords have already said, a hallmark of a civilised country is how one treats one's animals, and recognition of animal sentience is key to that.

5.45 pm

I do not think that there is any dispute between those of us who support the Government's amendment on that point. Immediately after the other place voted down the amendment very similar to the one we are discussing, the Government rushed to introduce a draft Bill to bring the concept of animal sentience into our domestic law. We have heard that the consultation ended in January, we have heard the views of the Select Committee in the other place, and we know that the Bill leaves much to be desired. We would therefore like the Minister, as the noble Lord, Lord Wigley, said, to tell us at what stage we will hear the Government's consideration of the responses and the committee's response, and, more importantly, when a Bill—not a draft Bill—will be introduced. At the time the amendment was voted down, the Government's position appeared to be to reject as much as possible of anything derived from the European Union. But now, as all the problems of withdrawal are belatedly beginning to be recognised—we are now prepared even to participate in agencies and pay for the privilege—we can perhaps take a different view on matters of this kind.

To accept this amendment would cost nothing. As far as I can see, it needs no negotiation: we can take it on board now and build on it in future. Whether it be in the draft Bill, a revised draft Bill or another Bill, I know not. However, I know, as my noble friend Lord Deben, mentioned, that the future may be some way away, given the legislative pressures there will be on Parliament to deal with the withdrawal agreement Bill, the Bill on transition or implementation—according to your preference—to say nothing of the fishing, immigration and agriculture Bills. I accept that the Government are committed to high standards, but under pressure, amendments may be overlooked and mistakes made.

As a member of the Secondary Legislation Scrutiny Committee of your Lordships' House, in April 2016 I saw, with the rest of the committee, that the Government were seeking to repeal the catchily-named Code of Recommendations for the Welfare of Livestock: Meat Chickens and Breeding Chickens 2002 and wanted to replace it with an industry-led, voluntary code of practice. Fortunately, they had a change of heart, despite resistance and objections from the industry, and have now introduced a new statutory code, which comes into force later this month or is already in force. I draw from that the conclusion that one cannot be too careful, even if you accept the good intentions of government. I suggest that the amendment should be accepted; we have nothing to fear from it, and it will keep the Government focused on the issue in the long term as the future of EU directives and regulations becomes, in time, more and more uncertain. I hope that the Minister will feel able to accept the amendment and, if not, since the Government intend to do it—as witness their draft Bill—why not?

Baroness Miller of Chilthorne Domer (LD): My Lords, I add my support to this important amendment, which has received widespread support from around the House. Noble Lords have rightly concentrated on farm animals because of the implications of the trade Bill—I associate myself with the wise remarks of the noble Lord, Lord Deben. However, let us remember that the animal sentience directive applies not only to farm animals but to all animals: wild animals, companion animals, working animals and lab animals. If we did not accept it, it would be a major step backwards. This House will remember that the Animal Welfare Act 2006 was a major step forward, but it was quite controversial and took a lot of time to go through both Houses. That is one reason why I am particularly surprised at the Government wanting to spend lots more time on animal sentience—time which we know Governments rarely have. As other noble Lords have said, they could simply include it in this Bill and avoid all that time being taken up.

So the question I ask myself is: what loopholes are the Government hoping to create for themselves in their Bill? There must be some reason why they do not want to put provision firmly into this Bill. Those suspicions fuel public anger when people realise that the Government are resisting an amendment of this sort.

Lord Teverson (LD): My Lords, my noble friend Lady Bakewell was absolutely right to talk about Britain as a country of nature and animal lovers. I remember that one of the first things to happen when I became an MEP in the mid-1990s was that I received a sackful of mail about live animal transport. The Rwandan genocide was taking place at the same time but I received no letters whatever about that, despite the EU's role. I relate that story only to show that I am in no way sentimental about this issue, but I completely support Amendment 30 in particular because I can see no reason why we should not include it in the Bill.

I chair the House's EU Energy and Environment Sub-Committee, which covers agriculture. During an inquiry into Brexit and animal welfare, one thing that clearly came out was the trade issue, which a number of noble Lords have referred to. At that time—and I really do not see things as being very different now—it seemed to everyone on the committee that there was a schizophrenia within government. On the one hand, Defra was saying that high animal welfare standards would continue after Brexit. One obvious point to make about this amendment is that it does not in any way constrain our Government from increasing welfare standards after Brexit. It would not get in the way of that, so that is no reason to resist it. On the other hand, the Department for International Trade was very gung-ho in fulfilling its mission of getting free trade agreements throughout the world more or less as part of the Brexit dividend—agricultural trade being an important part of that.

Two other things came across during our inquiry. One was that no one in the industry resisted retaining the current EU and UK animal welfare standards and legislation—no one wanted to reduce them. The other was that WTO rules are very unclear in this area. There is no guarantee in trade agreements that you can prevent trade happening. Whether under WTO rules or under FTAs, there is no guarantee of enforceable animal welfare clauses. The example given was the EU's resistance to accepting North American hormone beef. The EU effectively lost the case on animal welfare and has to provide compensation to the United States for that restriction. Therefore, this is an area where I still see a fundamental difference within government—between Secretary of State Liam Fox and Secretary of State Michael Gove. I do not see that as resolved, and that is why this proposed new clause has to be included in the Bill.

I have a question for the Minister. In her speech last week, the Prime Minister mentioned remaining a member, or an associate member, of the European Aviation Safety Agency, the European Medicines Agency and the European Chemicals Agency. I did not see this mentioned in her speech but is it the Government's intention to try to remain an associate member of the European Food Safety Authority and, as part of that, the Panel on Animal Health and Welfare? This is viewed as one of the most authoritative and excellent organisations in that area but, by not being an associate member of the European Food Safety Authority, we will no longer be a member of or an influence on that panel.

This amendment is fundamental. The Government can gain only praise by accepting it, and I hope that they will do so.

Baroness Jones of Whitchurch (Lab): My Lords, I wish to speak to my own amendment in this group, as well as supporting the other amendments in the names of the noble Baronesses, Lady Jones and Lady McIntosh.

On animal sentience, the noble Baroness, Lady Jones, rehearsed the background to the amendment and other noble Lords have done so too. Animal sentience is an important underlying principle. It comes from Article 13 of Title II of the Treaty on the Functioning of the European Union, which states clearly that animals are sentient beings. It is therefore very important that this principle is transposed into UK law. However, as we have heard, when the Greens, Labour and others fought for amendments in the Commons to enshrine this principle in the Bill, it was voted down by the Conservatives. I hear the voices of some Members opposite who still do not quite understand why that happened; we, too, do not understand why they took that decision.

There was then an immediate backlash, not only from animal charities but from animal lovers around the UK. The noble Baroness, Lady Bakewell, gave us a flavour of how passionate people are—quite rightly—not only about the countryside but about their personal interconnection with animals and about how important animals are to them. All those arguments have been made very well.

Effectively, the Secretary of State realised that his reputation was about to be trashed and he decided that there would be a process of damage limitation. His solution was to announce that the original amendment was not well drafted and that a separate Bill on animal sentience would be produced. A draft Bill has now been produced and it bears all the hallmarks of a rushed job. Apart from anything else, it combines two distinct issues: increasing sentences for animal cruelty—something that has been in the pipeline for some time—and attempting to define animal sentience. As the noble Baroness, Lady Jones, pointed out, it is therefore not surprising that the Commons Environment, Food and Rural Affairs Committee produced a scathing pre-legislative scrutiny report on it. The noble Lord, Lord Deben, queried whether he could quote the noble Baroness as having rubbished it. It is fair to say that the committee did rubbish it. It said that the Secretary of State should go back to the drawing board and that animals,

"deserve better than to be treated in a cavalier fashion".

It also recommended that the separate bit of the Bill on animal cruelty should go ahead as planned and that much more thought should go into the Government's vague and ambiguous reforms around animal sentience.

We agree with that analysis. We would be happy to work on the animal sentience Bill to make sure that we get it right, but then of course it has to take its place in the queue of Defra Bills that have already been promised within the next year—a point echoed by other noble Lords. Bills on agriculture, fisheries and the environment have already been promised. Most are in draft form, although some are not even at that stage, and they all have to be delivered within the next 12 months or so. This one would have to take its place in that line of legislation, not to mention all the other EU withdrawal Bills also currently in the pipeline.

It is a bit of a stretch to think we will ever get to a separate animal sentience Bill, so we come back to the amendments on animal sentience before us today. Our belief is that amendments of this nature are necessary to provide a guarantee of the transposition of EU rights for animals, which the Government have promised. Again, I thought that the noble Lord, Lord Deben, made that case very forcefully. Ultimately, this is a simple process, which can be accomplished by a simple amendment. If we can find better wording than that which we have put forward, that is absolutely fine; that is the purpose of Committee stage and we would be happy to hear the Minister's suggestions on that. We would then welcome the chance to work on a more thorough animal sentience Bill, which would take into account the concerns of the Environment, Food and Rural Affairs Committee and reflect the latest scientific evidence on how animals experience pain and suffering—a lot of new research is coming forward on that issue, of which we need to take account. Today, the task before us is to ensure that all existing EU law is transposed appropriately. We believe a simple amendment of the kind we have put forward would achieve that purpose.

6 pm

On a separate issue, we also welcome Amendment 212, which relates to the transport of live animals across borders and requires that animals being brought into the UK comply with UK welfare standards, even where those standards are higher. The noble Baroness, Lady McIntosh, made a powerful point about live animals crossing the Irish border. Again, this is an issue we have rehearsed here a number of times. The Irish border remains an unresolved challenge that has to be addressed, of which the transport of live animals is one part, but we all know that the issue is much bigger than that. Although we agree with the wording of the noble Baroness's amendment, she also raised the broader issue of the continuing transport of live animals. We do not necessarily see eye to eye on that, but it is a matter for another day because it is not specific to the amendment before us. However, the Minister might want to comment on it.

As we have heard from around the Chamber, there are huge challenges around the movement of livestock from outside the EU. Noble Lords have raised all sorts of practicalities: for example, we have heard about the lack of vets, with virtually all vets in abattoirs being EU nationals; and about the import of US beef that is full of hormones, and of chlorinated chicken, which disguises the poor welfare standards that they have in the US. This is not just a US issue but, as we know, a global issue. We take pride in our own current high standards of welfare and it is absolutely right that we should maintain them.

A number of the issues raised by noble Lords fit into other Bills, such as the Trade Bill and the subsequent migration Bill. They also fit into other Bills about the governance and environmental standards that we have been promised. For example, we would say that we need a statutory animal welfare body that makes sure our best animal welfare standards are maintained, and it is important that that is put in a separate bit of a separate Bill. The point made by the noble Lord, Lord Deben, is absolutely right: we need a holistic approach

to all this. Lots of these issues relate to separate Bills, but that does not mean we should not deal with the amendments to this Bill today. If they need to be cross-referenced with other legislation that comes on stream later, we may have to do that to make sure all passes are covered.

These amendments are important and we hope that the Minister has heard the strength of feeling from around the Chamber on these issues. By far the easiest thing to do is to adopt the amendments that we have proposed or some similar wording, on which we are happy to take advice. I hope the Minister sees the sense of this position and is able to support the amendments in this group.

Lord Davies of Stamford: Does my noble friend agree that the excuse that the Government cannot accept this amendment because another Bill may be coming along on the same subject cannot be accepted as genuine? If the Government do bring forward another Bill on this subject, there is absolutely nothing to stop them, if they so wished and if Parliament agreed, modifying the amendment as it is incorporated in the Act.

Baroness Jones of Whitchurch: That is our position: we should have this amendment now but work on it in the longer term. I am sure we could all find ways of improving it. The easiest and most honourable thing is to transpose what was in the treaty and move that wording over, then move on to something better for the longer term. I agree with my noble friend.

The Minister of State, Department for Exiting the European Union (Lord Callanan) (Con): My Lords, this has been an excellent debate and I thank all noble Lords who have contributed to it. I start by directly addressing the question put by the noble Baroness, Lady Bakewell, the noble Lords, Lord Wigley and Lord Davies, my noble friend Lord Bowness and others. There is no question but that this Government regard animals as sentient beings. As we said on this issue in the other place, we certainly agree with the sentiment of the amendments, such as that of the noble Baroness, Lady Jones of Moulsecoomb. However, as I will set out, we cannot support them.

Article 13 of the Treaty on the Functioning of the European Union, to which many noble Lords have referred, places an obligation on the European Union and EU member states when formulating and implementing certain EU policies to have regard to the welfare requirements of animals because animals are sentient beings. However, the weakness of that article—this relates directly to my noble friend Lord Deben's point—is that it applies only to a limited number of EU policy areas and, even then, allows for certain religious and cultural traditions which many would consider to be cruel. Two examples, of course, are bull-fighting and the production of foie gras. Article 13's effect on domestic law is minimal. As the Secretary of State for the Environment has made clear, as we leave the EU, we believe that we can do much better.

We have made it clear that we intend to retain our existing standards of animal welfare once we have left the EU, and, indeed, to enhance them. This Bill will convert the existing body of EU animal welfare law into UK law. It will make sure that the same protections are in place in the UK and that laws still function effectively after we leave the EU. However, the purpose of this Bill is to provide continuity by addressing any deficiencies in law as we leave the EU. It is not about improving EU laws that the Government think could be better. That is why, at the end of last year, the Government published draft legislation, the Animal Welfare (Sentencing and Recognition of Sentience) Bill, to which a number of noble Lords have referred. The draft Bill sets out how we can better enshrine in domestic law the recognition of animals as sentient beings.

Let me reply to the questions asked by my noble friend Lord Bowness and the noble Baroness, Lady Jones. The Secretary of State for the Environment has been clear that we will legislate and that there will be no gap left in our law on sentience after we leave the EU. We believe that the draft Bill is a significant improvement on Article 13, imposing a clear duty on the state to have regard for animal welfare when considering all policies, rather than just the six areas outlined in Article 13.

Lord Deben: My noble friend has said that the reason we are not including that part of the article which is excluded is that it does not go very far and it is not good enough, but that is not what the Government promised. The Government said that they were going to include in this Bill all the present legislation. That is all we ask. Why will he not include even so deficient a piece as this and then do the additions afterwards, which is what he has told me he is going to do on every other occasion?

Lord Callanan: Because we do not think that Article 13 works in the context of UK law; it applies only to EU law. I have set out why we think we can do better.

The public consultation on the draft Bill closed on 31 January. The Government are analysing the responses and will publish a summary and next steps in due course—I hope before we get to Report. I hope this reassures the noble Baroness, and indeed my noble friend Lord Deben, about the Government's firm stance on animal sentience.

Lord Wigley: The Minister emphasised that he hoped this would be brought forward by Report. If it is not, would he be prepared to look at an amendment along these lines to meet the Government's shortcomings and ensure that the Bill covers the possibilities we have outlined in the debate, rather than relying on the possibility of future legislation that may not reach the statute book?

Lord Callanan: I do not want to give the noble Lord an exact commitment but, as I have said, we hope to have it by Report stage. If that is not the case we will look at what can be done in its place.

Amendment 30 seeks to transfer the obligations contained in Article 13—to have regard to the welfare requirements of animals as sentient beings when developing and implementing certain EU policies—to domestic law. Unlike Article 13, however, the amendment applies only to the formulation rather than the formulation and implementation of law and policy. Furthermore, once the UK has left the EU we will obviously no

[LORD CALLANAN]
longer be a member state and therefore no longer formulate or implement any EU laws or policies. Therefore, by referring to the obligations contained in Article 13, it is not clear what the effect of the amendment would be in practice. Although it is assumed that its intention is to require the welfare requirements of animals to be taken into account in formulating domestic law and policy, it appears that the amendment would only require it when formulating and implementing EU policy and law, which of course we would no longer be doing. As I have said, the Government have published a draft Bill which introduces a clear duty on Ministers to have regard for animal welfare when formulating and implementing all government policy and not only the six areas I mentioned earlier.

Amendment 98, tabled by the noble Baroness, Lady Jones of Whitchurch, seeks to apply the requirements of Article 13 to the use of Clause 7. It would require Ministers to pay full regard to animal welfare requirements when introducing any legislation under Clause 7. I remind noble Lords that the purpose of Clause 7 is to allow the Government to address deficiencies in retained EU law arising from our withdrawal. Clause 7 provides powers for Ministers to make secondary legislation to deal with any problem that would arise on exit—for example, to remedy any provisions that would have no practical application after the UK has left the EU.

However, the power is temporary and can only be used for up to two years after exit. After that point it will expire. Similarly, the proposed amendment to Clause 7 would only have effect for two years from the date of our withdrawal from the EU. The amendment would also only apply to those regulations introduced by Ministers before March 2021 for the purposes of addressing deficiencies arising from our withdrawal. Therefore, the limited protection provided for animals by the amendment would also expire on 30 March 2021.

The amendment would not hold Ministers to the standards required in Article 13 two years after we have left the EU and, therefore, would weaken the current obligation in Article 13. The provisions set out in our draft Bill in December go beyond the two years following our exit from the EU and will apply to more than just those regulations that deal only with any deficiencies arising from the UK's withdrawal from the EU.

6.15 pm

The purpose of Amendment 212, tabled by my noble friend Lady McIntosh of Pickering, appears to be to require the Government to negotiate an agreement with the EU on the importation of live animals from the EU regardless of where the animals originate. It further seeks to ensure that any such agreement requires imported animals to have been raised and kept in accordance with UK welfare standards. I can reassure noble Lords that there is no need for such an amendment as the Government are already seeking to ensure that our high welfare standards are maintained. The Bill will transfer to the UK statute book all EU food safety and animal welfare standards. Our current high standards, including import requirements, will apply when we leave the EU.

Further, a system whereby we would need to check every single animal imported into the UK to ascertain the conditions under which it had been kept prior to import would be extremely difficult to enforce and extremely costly to administer. The Government are proud of the high food safety and animal welfare standards that underpin our high-quality Great British produce and we have no intention of undercutting our reputation for quality by lowering our food and animal welfare standards in pursuit of any trade deal. We have some of the highest animal welfare standards in the world and the Government have made it clear that we intend not only to maintain but to enhance these standards as we leave the EU.

My noble friend Lady McIntosh and the noble Baronesses, Lady Bakewell, asked me about the Food Standards Agency. Defra is working closely with the FSA to ensure that the food safety regulatory regime remains robust as the UK leaves the EU. The number of new checks post-exit for EU imports into the UK of live animals, and therefore the staff needed, will depend on the outcome of the negotiations. I thank the noble Baroness for raising that point.

The noble Lord, Lord Wigley, asked about the devolved Administrations. I can assure him that the National Assembly for Wales will retain all the powers it currently has to implement animal welfare legislation. We are discussing with Ministers in the devolved Governments of Wales, Scotland and Northern Ireland whether or not the animal provisions in our Bill should apply to them.

The noble Baroness, Lady Bakewell, asked about the number of vets at the point of slaughter. We recognise the key role that veterinary surgeons from the EU and the rest of the world have played in maintaining public health and animal welfare both within our own government service and within the wider veterinary service. UK law requires that official vets be in attendance at slaughter houses, and this will not change post exit.

It is important that consumers have confidence in the food they eat, and this will not change when we leave the EU. There are a number of possible measures which could be adopted and the issue is under active consideration.

I hope I have provided assurance to the noble Baroness and that she will feel content to withdraw the amendment.

Baroness Jones of Moulsecoomb: My Lords, I thank the Minister for his response and all noble Lords who have contributed to the debate. I would like to offer them all a hug but I fear I might be infringing HR regulations. I am aware that the Whips have been looking anxiously at the clock and I shall try to be brief.

The amendment would not change anything that exists in the UK at the moment—it is merely a safeguard. If the Government bring forth a Bill I will be incredibly supportive. I am not saying this is the best option for animal protection but it is as good as it gets. It is the best we have at the moment and I certainly do not want to see any worse protections.

Chickens have already been mentioned. I would like to add that mastitis is common in the States—it is an infection of the udder, which means that the milk

produced has a high level of pus in it. Americans consume a lot of pus in their milk because of the way their animals are farmed. The noble Viscount, Lord Ridley, might have seen cows with sore udders in Texas. We cannot have this in our country and the British public would not allow the Government to drop our welfare standards. If the Government are going to bring forth a Bill, fantastic—but in the meantime let us have the amendment to keep things as safe as possible.

I hope the Government do not come back to your Lordships' House with a fudge. Many noble Lords are more knowledgeable about this issue than I am, and it would not be accepted. It is a mistake for the Government not to say, "We will have this until we can do better". If they did, I would support them. I would love to not withdraw the amendment but, with your Lordships' permission, I will.

Amendment 30 withdrawn.

Clause 5: Exceptions to savings and incorporation

Amendment 31

Moved by ***Lord Pannick***

31: Clause 5, page 3, line 11, leave out subsections (1) to (3)

Lord Pannick (CB): My Lords, Amendments 31 and 33 arise again out of a report from your Lordships' Constitution Committee. They are in the names of four members of that committee, the others being the noble Baroness, Lady Taylor of Bolton, and the noble Lords, Lord Norton of Louth and Lord Beith. In the same group I have tabled Amendment 31A.

These amendments address the inclusion in the Bill of the principle of the supremacy of EU law. Noble Lords will know that under the European Communities Act 1972, EU law takes priority over any inconsistent domestic legislation or rule of law. That is why the Merchant Shipping Act 1988 was disapplied in the Factortame case to the extent that it was inconsistent with the EU law rights of Spanish fishermen.

Since the purpose of the Bill is to read across the substance of EU law as at exit day and so secure continuity, the Constitution Committee recognises the need to maintain the priority of retained EU law over laws that were enacted or made prior to exit day. The scheme of the Act is that any future Act of Parliament will take priority over retained EU law. Our objection is to the Bill using the term, the "supremacy of EU law". We point out in Chapter 5 of our report:

"The 'supremacy principle' is alien to the UK constitutional system",

not only in its origin but also in its content. In our constitutional law, Parliament has supremacy and we think that it is very unsatisfactory that the Bill chooses to implement legal continuity by maintaining a legal concept, the supremacy of EU law, which leaving the EU is designed to abolish. If it is possible to avoid the use of the concept of supremacy for the application of our law after exit day, that would be preferable.

It is also difficult to see how Clause 5(3) advances the objective of legal certainty. To make the application of the concept of supremacy dependent on,

"the intention of the modification",

seems to the Constitution Committee to invite uncertainty. I would be grateful if the Minister can explain how subsection (3) is intended to apply in practice. Amendment 31 would simply remove the provisions relating to supremacy and it needs to be read with Amendment 33, to which I will turn in a moment.

Another approach is offered by Amendment 32A. It would be much more consistent with British legal principles for Parliament simply to enact, as Amendment 32A suggests and as Professor Paul Craig of Oxford University has suggested—I gratefully adopt his scholarship—a provision that if, on or after exit day there is any inconsistency between retained EU law and an enactment made or a rule of law enforced before then, priority shall be given to the retained EU law.

Whether Clause 5 should use the concept of the supremacy of EU law is linked to another fundamental issue raised by this group of amendments. The Constitution Committee has advised your Lordships that one of the defects of the Bill is that it fails to accord a defined legal status to retained EU law. That is the focus of Amendment 33. The Bill as currently drafted does not say whether the retained EU law is to be treated as primary legislation, as secondary legislation or as something else; and if so, what? The Bill ignores the problem save in paragraph 19 of Schedule 8 which tells us:

"For the purposes of the Human Rights Act 1998, any retained direct EU legislation is to be treated as primary legislation",

meaning that it cannot be disapplied by the courts but can be made the subject of a declaration of incompatibility. Our objection to paragraph 19 is that it begs a question: if retained direct EU legislation does have the status of primary legislation for the purpose of the Human Rights Act, does that mean that it does not have that status for any other legal purpose? The Constitution Committee advised in paragraph 51 of its report that the Bill will give rise to confusion and uncertainty about the legal status of retained EU law by failing to address this issue clearly and consistently.

The Bingham Centre for the Rule of Law has agreed with our concern that the Bill should confer a defined legal status on retained EU law. The centre has explained that individuals and businesses need to know about the status of one rule relative to another because the question of hierarchy is determinative of a number of legal questions. Which rule takes priority if there is a conflict between them? On what grounds may the content of a legal rule be challenged? What remedies are available if the legal challenge is successful, and what process must be followed if the rule is to be repealed or amended? Even worse, in the opinion of the Constitution Committee, the Solicitor-General told us in his helpful evidence that the Government would, if necessary, use the powers conferred in Clause 17 to make provision themselves to determine the legal status of particular retained EU laws for specified purposes. The report is very clear about that in paragraph 69:

[Lord Pannick]

"It is constitutionally unacceptable for ministers to have the power to determine something as fundamental as whether a part of our law should be treated as primary or secondary legislation".

We added that for the Bill to say nothing about legal status but to allow Ministers to determine the status of particular retained EU law for particular purposes is,

"a recipe for confusion and legal uncertainty".

Amendment 33 would implement the recommendation of the Constitution Committee by conferring on retained EU law the status of primary legislation enacted on exit day. The simplicity of that approach is that it would ensure, by a means entirely conventional on domestic legal principles, that retained EU law would take priority over previously enacted legislation, as the Government intend, but it would give way to legislation enacted after exit day—again as the Government intend. Another advantage of treating all retained EU law as primary legislation is that it would not be capable of amendment under existing delegated powers which are not Henry VIII powers. Ministers would be able to amend the retained EU law only by using existing Henry VIII powers where applicable or by using the powers conferred under this Bill. I should add that although the Bingham Centre for the Rule of Law does agree that the failure of this Bill to address the legal status of retained EU law is a serious defect, it does not agree with the remedy proposed by the Constitution Committee. The centre has expressed concerns that to treat all retained EU law as primary legislation risks devaluing its currency as well as running the risk that we will become inured to the use of Henry VIII powers to amend primary legislation.

The Bingham centre, like Professor Paul Craig, would prefer the Bill to accord a legal status to retained EU law that depends on the status which the norm had in EU law pre-exit day. There is an opinion from Mr Pushpinder Saini, the Queen's Counsel for ClientEarth, which makes a similar proposal. I would be content with such a solution to this complex problem on which different views may reasonably be taken as to the solution, but I emphasise that the Constitution Committee and the Bingham centre agree that there is a serious deficiency in this Bill since it fails to accord a defined legal status to the retained EU law. I therefore look forward to hearing the Minister's response to all three of the problems in the Bill raised by this group of amendments. First, the inclusion in Clause 5 of the concept of the "supremacy of EU law"; secondly, the failure of the Bill to confer a domestic legal status on retained EU law: is it primary legislation, is it secondary legislation; what is it?; and thirdly, the lack of clarity in Clause 5(3) with its reference to,

"the intention of the modification".

I beg to move.

6.30 pm

The Deputy Chairman of Committees (Baroness Morris of Bolton) (Con): My Lords, if Amendment 31 is agreed to, I cannot call Amendment 32 for reasons of pre-emption.

Lord Foulkes of Cumnock (Lab): My Lords, when I first heard of a Pannick amendment, I thought it was something like an emergency resolution. I now realise that it is an elegantly drafted and eloquently spoken to amendment. In the light of what we have just heard from the noble Lord, Lord Pannick, there will be no need for me to move Amendment 32.

Lord Dykes (CB): My Lords, I begin by very quickly thanking the noble Lord, Lord Foulkes, for his comments—with which I agree entirely—and the noble Lord, Lord Pannick, for his very comprehensive explanation.

In general, Clause 5 is very problematic as drafted. I am grateful for the suggestions that have been made so far. Other colleagues who have spoken on other occasions about this danger in Clause 5 have expressed real concern about it suggesting leaving out the main subsections. Even if Section 1 is not separately debated today, they all come together in a cohesive generality.

The Bill converts existing EU direct law—as has been said, mainly regulations but also directives and sometimes decisions—into UK law as it applies on the actual exit date. I fear that Her Majesty's Government, who have already shown massive incompetence in handling the whole wretched process of Brexit, underestimate the huge volume of SIs that would need to cascade through the system if enacted as they stand. I feel very strongly that it would not be seemly and proper to incorporate the words of the so-called supremacy of EU law as is written down now, even if there was a laid-down definitional basis. Even the qualified tone in subsections (2) and (3) does not reassure me. Unless the text is improved appropriately, I envisage endless scenes of parties arguing in UK courts over the underlying meanings—arguments for some length of time and at notable expense, of course.

Many outside expert observers of these matters—including, I recall, the Law Society—have flagged up these possible consequences. There have also been suggestions of them in various quarters, not least in our House's Constitution Committee. The principle of the famous Clause 2 in the original 1972 EU membership Bill should be invoked to decide on the solutions—albeit for the reverse objective and in the reverse direction—to mitigate these dangers and provide the cover-all effect needed to avoid unnecessary litigation and post-Brexit wrangling.

I conclude by emphasising that taking part in these irritating and, dare I say, excessively bureaucratic legislative procedures in no way implies my support for the Government's foolish, relentless, drive for a nightmare Brexit that fewer and fewer people in the UK now want. That is why I support the symbolic resistance of the noble Lord, Lord Adonis, to all the clauses standing part, including Clause 5.

Baroness Bowles of Berkhamsted (LD): My Lords, we are now looking again at the principle of supremacy and status. I agree with a great deal—in fact, almost all—of what the noble Lord, Lord Pannick, said. However, in the various amendments I have sprinkled around, I differ with him on one fundamental point: I always wish to preserve the rights of individuals and businesses to have legislation struck down. That is

their current position in that they can have EU law struck down. I put forward my alternative plan in Amendment 32A; I will explain how I got to it.

Broadly speaking, there are three baskets of EU laws. In basket 1, there are the treaties and the Charter of Fundamental Rights, which have to be followed by the European court. They are not revocable, as I am sure noble Lords know, and it is a big procedure to change them. In basket 2, I put legislative acts, meaning regulations and directives that set policy. To be precise, they can be identified by the article of the procedure in the treaty that they were made under. In the Lisbon treaty—the TFEU—it would be Article 289. The important point for noble Lords to hold in their minds is that these regulations and directives set policy. Basket 2 legislation can also be struck down by the European court—including on an action from individuals and businesses—for being incompatible with the treaty or the charter. A recent example is the data retention regulation that was ruled disproportionate in cases brought by Digital Rights Ireland and others. In basket 3, I put the implementation of Acts and delegated Acts and their predecessors. In the Lisbon treaty, that comes under Articles 290 and 291. These can be struck down by the European court for being incompatible with the treaty or the charter, as well as for being incompatible with the powers and instructions that were delegated to it in the legislation on which it depends.

If we take rights as our guide—by which I mean the right of an individual or business to challenge the validity of a bad law—then we get to the categorisation that the EU gives to law: that it is all secondary, except for the treaties and the charter. It is quite easy to accept that retained EU general principles—corresponding to basket 1, as I called it—should have primary status. Once converted under Clause 7, it would be wrong if they were changed or revoked other than by an Act of Parliament.

Basket 3 regulations are very close to statutory instruments in the way that they are made based on delegated powers, including an all-or-nothing single vote in the Council or Parliament to turn the whole lot down. There is also similarity in the ways they can be invalidated in court. That is quite easy to map on to our statutory instrument. Basket 2 is harder. The policy content and procedure of making the law look a lot like the making of an Act of Parliament; that leads some—I think Professor Craig was one of them—to conclude that it should map on to primary legislation. But then, if primary, it cannot be quashed under the general principles, so the rights of individuals and businesses are lost. Of course, if noble Lords look at Schedule 1—as we will later today—it can be seen that the Government's intention is that there is no right of action on a failure to comply with the general principles of EU law. That is wrong. Treating legislation as primary carries the same cost that the Constitution Committee accepts. As it says in paragraph 48 of its report:

"Treating retained direct EU law as primary legislation for all—including",

Human Rights Act,

"purposes is not without constitutional costs".

I consider that cost to be too high because I give more weight to maintaining status quo rights and the reasonable expectations of individuals and businesses than making judgments easier or fewer.

We have to address that question several times in the Bill. Each time, I come down on the side of the people's rights. No manifestos have ever said, "We want to take back control, including your right to challenge bad law". However, the secondary legislation nature of basket 2 may require some further protection from overly easy change and revocation by statutory instruments, especially once things are no longer pinned in place because we are not part of the EU. In the EU, this was not made by a statutory instrument-type process, nor is it amendable in that way, so basket 2—although of secondary legislation status—could be deemed amendable in life after Clause 7 only by an Act of Parliament. This idea is similar to the one we debated regarding Amendment 21 in the name of the noble Baroness, Lady Hayter. Such treatment means that there is a special category for these laws, but we are in an unusual situation. The fact is that basket 2 is an intermediate, piggy-in-the-middle category. It is secondary legislation-plus, or primary legislation-minus. It could be replicated more or less by secondary legislation plus amendment protection, or the other way round as primary legislation but challengeable as to validity, although that is a bit more controversial.

The piggy-in-the-middle nature shows up in other ways. Basket 2 legislation actually contains within the individual documents a great deal of detail that in the UK domestic system would be done in delegated secondary legislation. It is the same with directives: a greater level of detail is there than in the lean and mean UK Acts of Parliament. That is even more the case after implementation for the secondary legislation made under the European Communities Act. For example, look at the Sanctions and Anti-Money Laundering Bill, which recently received its Third Reading in this House. The money laundering regulations 2017, based on the fourth anti-money laundering directive, are some 112 pages plus a glossary. They were replaced in the Bill by one clause of 28 lines, including the headings and a three-and-a-half-page schedule listing delegated powers. It has been much amended and improved, but the contrast in content is much the same. If we made secondary legislation transposing directives into primary legislation, there would be a great deal of detail on which I would not wish to say I gave the sovereignty of Parliament a totally unchallengeable status.

There are three parts to my amendment. The first would reword the supremacy principle. I intend it to do the same thing and I am not precious about the wording. In fact, I just modified the Constitution Committee's idea and stole the idea that you allocate precedence as if it were primary legislation, but in my plan the only bit of primary legislation it gets is the precedence. The second part would allocate secondary status to basket 2 retained legislation, and indeed to basket 3—everything except for Acts, because where we have Acts they already are and look like Acts. I then allocate primary status to EU general principles. As I have indicated, for life after Clause 7, basket 2

[Baroness Bowles of Berkhamsted]
could be made so as to require amendment by primary legislation. Possibly that belongs in Clause 7 or somewhere else.

Lord Beith (LD): My Lords, my noble friend Lady Bowles has identified a problem that goes beyond what the committee sought to solve in its proposal, and proposed an ingenious way of trying to deal with it. The committee's proposal seeks to protect the important bits of that legislation from the degree of vulnerability provided by the repeal of statutory instruments under our present procedures. It is an intriguing point in some ways, because I expect this to be a shrinking area of law over time. If we leave the EU, one assumes that much of this legislation will in time be replaced by new legislation bringing that area of law up to date, not because it is EU law but because things move on and there is a need to do so.

That reminds us of the danger that the committee set out at paragraph 103 of its report. It said:

"If the 'supremacy principle' were to continue to feature in the Bill, clause 5(3) would need to be amended to clarify the extent to which retained EU law can be modified while retaining the benefit of that principle, and to clarify in what circumstances the modification of pre-exit domestic law would be such as to turn it into post-exit domestic law that is no longer vulnerable to the operation of the 'supremacy principle'".

We chose not to go down that road or try to define it because it seemed an extremely bad situation to get into. One other problem that I will add to the list so well adumbrated by the noble Lord, Lord Pannick, occurs in paragraph 87 of the report, which points out that Clause 5 would also need to be amended,

"to provide courts … with suitable guidance for the purpose of determining whether a rule of the common law should be taken to have been 'made' before or after exit".

If that is not done then the procedure that the Government have chosen will yet again promote and continue uncertainty. In both cases it would be better to go for some version of what the committee proposed.

6.45 pm

Lord Brown of Eaton-under-Heywood (CB): My Lords, I agree very substantially with my noble friend Lord Pannick's general approach. Any attempt to repeat or paraphrase what he said would merely weaken it. I shall not do so, but I will make two comments.

First, on the supremacy question, my noble friend is clearly right that this is a wholly alien notion and we do not want it incorporated in the Bill. I confess I could not find what he calls Amendment 31A in my Marshalled List—this must be my fault. Is it the same as what I have as Amendment 32B? I suspect it may be. I certainly read that amendment as modelled on Professor Paul Craig's proposal for how to deal with this. If that is the position—my noble friend nods helpfully to indicate that it is—I entirely support that approach. The language is substantially Professor Craig's and it is altogether satisfactory.

Secondly, my noble friend canvassed an outline of the alternative ways to deal with giving legal status to, and the categorisation of, retained EU law. On the one hand, the Constitution Committee suggested that we turn it all into UK primary legislation. Then there is Professor Paul Craig's competing approach, which is also endorsed by the Bingham Centre. I have a huge preference for the latter, not the former. As Paul Craig points out, we pass, in round figures, about 40 statutes a year. If we suddenly turn 10,000 or so instruments—the figure I think he suggests—which obviously in the ordinary categorisation would fall into the category of secondary legislation, into primary legislation, with all the consequences of that, we would simply overwhelm the statute book. We would make it impossible to deal with them properly as statutes. We would then inevitably start needing Henry VIII clauses in full measure. We would devalue primary legislation and give credibility and justification to use of Henry VIII powers, which is the last thing we want to do. Go down the Craig-Bingham line, not the Constitution Committee's recommended route. I say that with all respect and deference to the committee, whose report is overall an enormously helpful document.

Lord Campbell of Pittenweem (LD): My Lords, I can be brief. I wish to support the various submissions made by the noble Lord, Lord Pannick, but also to draw your Lordships' attention to some revealing contents of the Constitution Committee's report, in particular the words of the Solicitor-General, which seem to indicate very clearly the weakness of the Government's position.

As I recall, the noble Lord, Lord Pannick, confined himself to the first sentence of paragraph 69 of the report:

"It is constitutionally unacceptable for ministers to have the power to determine something as fundamental as whether a part of our law should be treated as primary or secondary legislation".

He went on to say that this is a recipe for confusion and legal uncertainty. I invite your Lordships to look to paragraph 67 on page 23 of the report, particularly the direct quote from the evidence given by the Solicitor-General. He says of the powers under discussion that,

"there is nothing unusual about these powers. However, I accept that the way and the context in which they are used is somewhat unusual … I accept that we are in new territory here. Having said that … when embarking on new territory, all Ministers tread extremely carefully".

If this is genuinely new territory, it is inevitable from the Solicitor-General's expression that there is no precedent. If there is no precedent for exercise of powers in the way the Government seek, that is not just something where we should tread extremely carefully; it is something which should be rejected outright.

Lord Mackay of Clashfern: I indicated at Second Reading that I would support the propositions that the noble Lord, Lord Pannick, has enunciated on behalf of the Constitution Committee. Bringing into our system legislation from an alien system and doing so reasonably consistently require it to have an allocated status of some kind. Making it primary legislation is probably the best. Otherwise, there will be doubt about precisely which item of legislation goes to a particular area. The result will be to make it possible to dispense with the rather outmoded idea of the supremacy of EU law once Brexit comes along by the date which allows our ordinary system to operate.

I have tremendous respect for the Bingham system and, as your Lordships know, for the noble and learned Lord whose name it carried. It has kept up the traditions and quality of his work wonderfully—I should perhaps in passing declare an interest: I find it very useful to support the Bingham institute in connection with its funding. However, it makes quite a lot of the difficulty of using Henry VIII clauses. This is a very special situation, as the Constitution Committee recognised some time ago, because trying to fit together two systems of legislation is certainly difficult. We must remember the timescale involved in trying to do it any other way. I shall not comment on the detail of the powers to amend proposed in the Bill—that is for a later stage—but it is reasonable at the moment to accept that this is a very special situation with a necessary operation which requires to be performed in reasonably short time to make the whole thing work. Therefore, the idea that we are dividing primary legislation by this method is open to doubt.

Lord Adonis (Lab): My Lords, when we last debated this issue, the Advocate-General for Scotland said that he was very attracted to the proposals published by Professor Paul Craig in his blog—the noble Lord, Lord Pannick, referred to that. I notice that Professor Craig published a subsequent blog on 26 February, also referred to by the noble Lord, in which he suggests that, once the process of transposing law has taken effect, we should assign,

"legal status to EU retained law in the UK based on the status it had in EU law"

Having read his blog as a non-lawyer, I felt that, if the intention is to give certainty, the proposals of Professor Craig would do that—except in one key respect which I hope the Minister might comment on: what process would be undergone between now and next February to allocate the huge body of retained law to one or other category if we were to adopt Professor Craig's mode of proceeding? Since the Solicitor-General said in the House of Commons that about 20,000 pieces of EU law will be transferred, and if it were possible to establish, as Professor Craig sets out, a criterion based on the intention of existing EU law which would divide between primary and secondary legislation, can the Minister indicate, if he is minded to go down that route, what process would take place, so that, on 29 March next year, we know the status of law being transposed?

Lord Keen of Elie: My Lords—

Lord Goldsmith (Lab): We need to speak from these Benches as well.

The noble Lord, Lord Pannick, made a powerful speech in favour of his amendment, backed by the powerful arguments of the Constitution Committee. It is apparent that this gives rise not to a difference on what the end objective should be: the need for clarity; the need for a clear status for EU law; and the recognition that retained EU law will need to retain its position of priority over pre-existing UK law because that is the status it has at the moment and because, as we have been reminded in debate after debate, the Government have promised that EU law will be passed across on exit day as it is at the moment. The routes proposed by the Constitution Committee and the Bingham Centre for the Rule of Law—and in the interesting proposals put forward by the noble Baroness, Lady Bowles—demonstrate that it is possible to reach those objectives by different routes.

However, the methods put forward by the Constitution Committee and the noble Lord, Lord Pannick, have the merit of simplicity and elegance. The status of the law is clear. We do not have to go through a process of trying to decide between now and next February what it is; we certainly do not have to go through a process of allowing a Minister to use powers under Clause 17 to assign a process, which would be, as the Constitution Committee says, an unacceptable approach.

It would have the additional advantage, or so it would seem to me at least, that retained EU law would then have some protection against amendability, save by the processes of this House and the other place considering the amendments which ought to be made rather than by a process of delegated legislation—I say "some" protection, because it would not be complete. Those seem reasons why the elegant solution proposed by the Constitution Committee and the noble Lord, Lord Pannick, has much to commend it

I would like to read when it becomes available what the noble Baroness, Lady Bowles, said, to make sure that I fully understood all of it. I do not disagree with the intention behind it, but the proposal of the Constitution Committee may achieve it more readily and elegantly.

Lord Keen of Elie: My Lords, I am obliged for all the contributions and for the opportunity to respond to this debate. These provisions and amendments may be technical, but, in debating them, we must not lose sight of the real practical consequences that follow from how we deal with this issue. As the noble and learned Lord, Lord Goldsmith, observed in passing, we are aiming at the same goal; it is a question of which route can most appropriately take us there. I shall come on in due course to look at some of the routes proposed.

Lord Goldsmith: I was referring to the different proposals by the Constitution Committee and the Bingham Centre, rather than to the Government's proposals.

Lord Keen of Elie: Then I reassure the noble and learned Lord that we are all intent on arriving in the same place; it is a question of how we arrive there. I shall deal with the routes that he touched on.

Perhaps I may correct one point: the noble Lord, Lord Adonis, referred to the work of Professor Craig and to some previous remarks that I had made about that. I commend to him what I said as recorded in *Hansard*. I referred to the publication of 26 February on the previous occasion; it did not come out after those remarks were made. I shall mention Professor Craig's analysis in due course. The task of categorising such legislation would be challenging, but we would consider it as one route forward.

As we know, one of the core requirements of EU membership is the principle of supremacy of EU law. In the event of any conflict with domestic law, domestic law must give way. When we leave the EU, it would

[LORD KEEN OF ELIE]
make no sense and would not be in keeping with our principles to leave that unchanged in our law; we all recognise that.

7 pm

Clause 5(1) is therefore reflective of an important principle. It makes clear that the principle of supremacy will not apply to any domestic legislation which is passed or made on or after exit day. I had understood Amendment 32 in the name of the noble Lord, Lord Foulkes, to be aimed at the same outcome. I note that he has not moved that, although he has moved and is no longer in his place. While the principle of supremacy will end for new law after exit day, we have been clear throughout that we want to ensure certainty and continuity in the way our existing laws work. That is crucial if individuals and businesses are to have confidence that our statute book will continue to function as it does now. The Bill therefore sets out that, in relation to any pre-exit domestic legislation, the principle of supremacy will continue to apply, so far as relevant, to the relationship to retained EU law. Remaining silent within the Bill or taking a different approach would, we apprehend, risk changing the law and creating uncertainty as to its meaning and effect. I suggest that our approach to this issue strikes the right and sensible balance between ending the supremacy of EU law and maintaining coherence and continuity in the way our statute book functions.

Reference has already been made to the Bingham Centre's report, particularly by the noble Lord, Lord Pannick. On this specific point it says that,

"the objective of clauses 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. Anything which is not crystal clear about that fundamentally important point risks giving rise to legal discontinuity, because it leaves scope for argument about which rule takes precedence in the event of a conflict between retained EU law and pre-exit domestic law".

The amendments put forward by the noble Lord, Lord Pannick, and the noble Baroness, Lady Bowles, seek to remove the principle of supremacy from the Bill, but then to replicate its effect in domestic law in a different way, or to modify that effect: I acknowledge that. Indeed, the noble Baroness seeks in her Amendment 32A to replicate and modify the effect of the principle of supremacy in our domestic law and create an internal hierarchy within the category of retained EU law after exit. Like the noble and learned Lord, Lord Goldsmith, I shall look in some detail at her description of that hierarchy in *Hansard*. There is concern that such a hierarchy, or the way that such a hierarchy would be determined, could undermine the clear position in the Bill. It is also implicit in her amendment and the hierarchy she seeks to create that we would essentially be assigning a single status for all purposes to that legislation. That may not be appropriate.

The noble Baroness's amendment also provides, as I understand it, for the general principles of EU law to be treated as primary legislation. While that may be aimed at ensuring ongoing protection for these principles, it is unclear how this would work in practice. Not all the general principles are contained in legislation. They have been developed in the jurisprudence of the ECJ and the CJEU over many years and are applied by the CJEU and domestic courts as an aid to interpretation and when determining the lawfulness of legislative and administrative measures within the scope of EU law. Given their very nature, there is no definitive, agreed list of existing general principles. To simply deem these non-legislative principles to be primary legislation in the way the noble Baroness proposes in her amendment would, I suggest, raise real questions of workability.

Amendment 31, proposed by the noble Lord, Lord Pannick, would remove references to the principle of supremacy from the Bill entirely. Amendment 32B would ensure that retained EU law continues to have precedence over pre-exit domestic law in the event of any inconsistency between the two. Amendment 33 would assign a single status for all purposes to all retained EU law. As I understand it, the noble Lord is therefore arguing that it is unnecessary to retain the principle of supremacy if we are to treat all retained EU law as though it is domestic primary legislation enacted on exit day and make clear that, in a conflict between retained EU law and pre-exit domestic law, retained EU law has priority.

Lord Pannick: It is more fundamental than that. The difficulty is, why use the concept of the supremacy of EU at all? It is surely inappropriate in a Bill of this nature.

Lord Keen of Elie: Not necessarily in the context of retained EU law, which comes over with that principle of supremacy standing behind it. I will come on to deal with that in more detail. I understand that, as the noble Lord indicated, his amendments draw on the recommendations made in the Constitution Committee report on the Bill—although I was interested to note that Amendment 33 appears to go further than the recommendations put forward by the committee, in that it extends the status of primary legislation to all retained EU law, rather than just to law being preserved by Clauses 3 and 4 of the Bill. So there is that difference between Amendment 33 and the recommendations of the Constitution Committee.

I understand entirely the concerns here and the attraction that these amendments have as a result. It is only right, however, that we should examine fully the consequences of dealing with status in a one-size-fits-all way.

Baroness Young of Old Scone (Lab): Before the Minister moves on to the consequences, perhaps I might draw his attention to the status of environmental law currently drawn from the European Union. Of course, a considerable proportion of the anticipated changes that will be required are in environmental law, because so much of what we draw from Europe is environmental law. At the moment, the status of environmental law drawn from Europe has been pretty random, to be frank, and not at all reflective of the importance of the legislation. It has been random, whether it is drawn from a regulation which would be picked up by the clauses that the Minister mentioned or from a directive which would not be picked up in

that way. But it did not really matter that it was rather random in its status, because the framework provided by the ECA was there, and therefore none of the legislation could be meddled with randomly by the Executive. Of course, once the safeguard provided by the ECA has gone, the status of existing environmental law becomes rather strange. It sticks out like a sore thumb, in that some of it that one would think was sufficiently important to be considered eligible, as it were, for primary legislation, has not got that current status, while other bits of law that are pretty functional and practical have a much lower status. So I urge the Minister to think about just how complicated the process would be if we did not simply adopt a single status for all that law.

Lord Keen of Elie: First, with respect to the noble Baroness, I do not accept that the way in which environmental law has been received and enforced in our domestic legislation has been random. We differ at the outset to that extent. Of course, various propositions have been put forward, one of which is to give the status of primary legislation to all retained EU law—but that would raise difficulties that I will come on to address. The categorisation below that can be carried out: indeed, the noble Baroness tried to set out for Amendment 32A a hierarchy that could be employed in that context. But I do not consider that environmental law stands out in the way that the noble Baroness suggests.

Our concern is that, as I mentioned, a one-size-fits-all approach will not really work. Again, I quote from the Bingham Centre's report, which stated:

> "We consider that the Rule of Law objectives of legal continuity and certainty are better served by the approach taken by the Government in the Bill. The principle of supremacy is well understood and its future role is very limited, being confined to the relationship between retained EU law and pre-exit UK law. Treating all retained EU law as primary legislation enacted on exit day, on the other hand, will increase legal uncertainty because it changes the settled approach and leaves unclear whether the interpretive obligation, to interpret pre-exit UK law so as to be compatible with retained EU law, continues to apply".

EU law that is being converted into domestic legislation under this clause covers both a vast range of different policy areas and different types of EU law, from regulations and directives applying to agriculture and farming to detailed and technical pieces of tertiary legislation, such as the list of contents for a dye or chemical. At the end of the day, treating all of that as primary legislation would present, as the noble and learned Lord, Lord Brown of Eaton-under-Heywood, indicated, a quite enormous task for Parliament if it is going to legislate to amend any of that retained EU law. How many Acts of Parliament would we have to contemplate putting through this House to wrestle with that demanding position? It really would be formidable. Because this legislation will come on to our domestic statute book in a unique way, it will not already have been scrutinised and approved by this Parliament—so we would be bringing in this enormous body of law and treating it as primary legislation when nobody in this Parliament had actually examined it.

The breadth of this body of law, in the case of EU law being converted, is unique in its nature, which is why the Government have deliberately chosen to tread rather carefully and not simply assign a single status to that retained law in domestic legislation. While assigning a single status for all purposes to all retained EU law may be theoretically possible, it would have the most difficult consequences and might lead ultimately to a situation in which we had to extend the use of Henry VIII powers beyond any reasonable limit normally contemplated in the context of provisions of this kind.

Beyond that practical consideration, there is a more fundamental concern about the constitutional appropriateness of what has been proposed. Domestic primary legislation is less vulnerable to subsequent amendment and is less vulnerable to challenge in the courts for a very good reason—because, as I said, it has undergone scrutiny by both Houses of Parliament, which means that there can be no doubt about Parliament's intentions so far as that primary legislation is concerned. That would not apply to retained EU law.

While we are spending considerable time scrutinising this Bill, we are not able to scrutinise the law it is converting. Some of that law is itself the EU's own subsidiary legislation, which has not been subject to comparable scrutiny anywhere. The noble Baroness observed on an earlier occasion that the European Parliament had had the opportunity to scrutinise much of this. It has had the opportunity to scrutinise some of it, but scant scrutiny—if any—of the subsidiary legislation has actually occurred in the European Parliament. By contrast, our proposed approach has been to deal with the status of converted law for certain specified purposes, such as that alluded to by the noble Lord, Lord Pannick: that is, paragraph 19 of Schedule 8 in the context of the Human Rights Act and rights arising from there.

Of course I understand the concerns put forward by the Constitution Committee and noble Lords about the consequences of the case-by-case approach that we are taking. I do not dismiss them lightly and I do not say that the Bill is a perfect solution to the issue that we have to address. As I indicated on day three of Committee, there is some scope for considering how we can take this forward. Reference has already been made to the work of Professor Paul Craig and the alternative model of categorisation that he proposed in his article of 26 February. That is something that we are looking at—albeit, as the noble Lord, Lord Adonis, anticipated, that it might involve a considerable amount of work. But if that can be an appropriate and effective categorisation, rather like that of the noble Baroness, it is something that we are willing to look at.

Again, I ask the Committee not to dismiss lightly the potential ramifications of treating all this law as having the status of primary legislation just to exclude the concept of supremacy from the operation of Clause 5. That would raise formidable problems for us and we do not see it as an effective way forward for the Bill. But, as I indicated previously, we are looking at the mechanisms employed here, and a mechanism that avoids actually applying the doctrine of supremacy may find greater traction as a way forward if we can come up with a suitable categorisation for retained EU

[Lord Keen of Elie]
law, rather than a blanket categorisation of primary legislation. I invite the noble Lord to withdraw his amendment.

7.15 pm

Baroness Bowles of Berkhamsted: Perhaps I may make an observation. Leaving general principles out of it, if you categorise all the legislation as secondary legislation and then deem that some of it can be amended only by Act of Parliament, you do not have to sort it all. You would have to sort it only when you wanted to amend it—and at that point you would look at the basis on which it was made.

Lord Keen of Elie: I am obliged to the noble Baroness for that observation. Obviously, that is something that we would take into account. It perhaps touches on a question I did not answer from the noble Lord, Lord Pannick, with regard to Clause 5(3), where he queried the reference to the "intention of the modification". Of course, what that makes clear is that this will need to be considered on a case-by-case basis.

Lord Pannick: Of course, "case-by-case basis" suggests lots of work for lawyers and a lot of legal uncertainty. I am grateful to the Minister and all those who spoke in the debate. There was, I think, widespread agreement in the debate—apart from the Minister—and from expert commentators that a legal status does need to be conferred in the Bill on retained EU law. How one confers the legal status is much more difficult than what legal status one confers. I would say that there is more than one way to skin a cat—but that may upset those who spoke in the previous debate.

I am grateful to the noble and learned Lords, Lord Mackay of Clashfern and Lord Goldsmith, for supporting the approach recommended by your Lordships' Constitution Committee. But I agree with the noble and learned Lord, Lord Brown of Eaton-under-Heywood, that there is also great force in the suggestion made by Professor Paul Craig that the Bill should confer a status of either primary or secondary legislation, dependent on the category of EU law from which the retained EU law derives. I say to the noble Lord, Lord Adonis, who asked about this, that Professor Craig is not advocating a process of allocation on a case-by-case basis; he is advocating that legal status should depend on the article of the EU treaty from which the retained EU law derives—a much more objective approach.

Lord Brown of Eaton-under-Heywood: Did my noble friend hear Paul Craig say at a seminar, as I did, that it would take four competent EU lawyers four days in Brussels to classify, consistently with the classification both pre and post Lisbon, all this legislation? Four lawyers, four days—that is perhaps the answer to the question of the noble Lord, Lord Adonis.

Lord Pannick: Well, it depends. How long is a piece of string—how long does it take EU lawyers to allocate? But it is an objective approach. There may be difficulties, but they would be far fewer than the problems that would be posed by not addressing this problem at all in the Bill or by leaving it to Ministers to determine the matter. The other suggestion was that made by the noble Baroness, Lady Bowles. She may have the right answer. She spoke of various baskets—I think it was "baskets" rather than the word used by Sir John Major as Prime Minister in relation to opponents of the Maastricht treaty.

The core point is that it is unacceptable for the Bill to ignore the question of legal status. It is a problem that needs to be addressed if the Bill is to achieve its objective of securing legal certainty. Therefore, I hope that the Government will, as the Minister indicated, reflect on these issues before Report. I beg leave to withdraw the amendment.

Amendment 31 withdrawn.

Amendments 32 to 33 not moved.

House resumed.

United Kingdom-European Union Future Economic Partnership

Statement

7.20 pm

The Lord Privy Seal (Baroness Evans of Bowes Park) (Con): My Lords, with the leave of the House I will now repeat a Statement made by my right honourable friend the Prime Minister in another place. The Statement is as follows:

"With permission, Mr Speaker, I would like to make a Statement on our future economic partnership with the European Union.

In December, we agreed the key elements of our departure from the EU and we are turning that agreement into draft legal text. We have made clear our concerns about the first draft that the Commission published last week but no one should doubt our commitment to the entirety of the joint report. We are close to agreement on the terms of a time-limited implementation period to give Governments, businesses and citizens on both sides time to prepare for our new relationship, and I am confident we can resolve our remaining differences in the days ahead. Now we must focus on our future relationship: a new relationship that respects the result of the referendum, provides an enduring solution, protects people's jobs and security, is consistent with the kind of country we want to be and strengthens our union of nations and people. These are the five tests for the deal we will negotiate.

There are also some hard facts for both sides. First, we are leaving the single market. In certain ways, our access to each other's markets will be less than it is now. We need to strike a new balance but we will not accept the rights of Canada and the obligations of Norway.

Secondly, even after we have left, EU law and ECJ decisions will continue to affect us. The ECJ determines whether agreements the EU has struck are legal under the EU's own law and if, as part of our future partnership, Parliament passes a law identical to an EU law, it may make sense for our courts to look at the appropriate ECJ judgments so that we both interpret those laws

consistently—as they do for the appropriate jurisprudence of other countries' courts. But the agreement we reach must respect the sovereignty of both our legal orders. That means the jurisdiction of the European Court of Justice in the UK will end. It also means that the ultimate arbiter of disputes about our future partnership cannot be the court of either party.

Thirdly, if we want good access to each other's markets it has to be on fair terms. As with any trade agreement, we must accept the need for binding commitments. So we may choose to commit some areas of our regulations, such as state aid and competition, to remaining in step with the EU's.

Finally, we must resolve the tensions between some of our objectives. We want the freedom to negotiate trade agreements around the world. We want control of our laws. We also want as frictionless a border as possible with the EU, so that we do not damage the integrated supply chains that our industries depend on and do not have a hard border between Northern Ireland and Ireland.

However, there are tensions in the EU's position and some hard facts for it, too. The Commission has suggested that an off-the-shelf model is the only option available to the UK. But it has also said that in certain areas none of the EU's third-country agreements would be appropriate, while the agreement envisaged in the European Council's own guidelines would not be delivered by a Canada-style deal. Finally, we need to face the fact that this is a negotiation and that neither side can have exactly what we want. But I am confident we can reach agreement so I am proposing the broadest and deepest possible future economic partnership, covering more sectors and co-operating more fully than any previous free trade agreement.

There are five foundations that must underpin our trading relationship: first, reciprocal binding commitments to ensure fair and open competition so that UK businesses can compete fairly in EU markets and vice versa; secondly, an independent arbitration mechanism; thirdly, an ongoing dialogue with the EU, including between regulators; fourthly, an arrangement for data protection that goes beyond an adequacy agreement; and, fifthly, free movement will come to an end. But UK and EU citizens will still want to work and study in each other's countries, and we are open to discussions about how to maintain the links between our people. We then need to tailor this partnership to the needs of our economies. We should be absolutely clear that this is not cherry picking. Every free trade agreement has varying market access, depending on the respective interests of the countries involved. If this is cherry picking, then so is every trade arrangement. What matters is that our rights and obligations are held in balance.

On goods, a fundamental principle in our negotiating strategy is that trade at the UK-EU border will be as frictionless as possible, with no hard border between Northern Ireland and Ireland. This means no tariffs or quotas and ensuring that products need undergo only one series of approvals in one country. To achieve this, we need a comprehensive system of mutual recognition. This can be delivered through a commitment to ensuring that the relevant UK regulatory standards remain as high as the EU's, which, in practice, means that UK and EU regulatory standards will remain substantially similar in future. Our default is that UK law may not necessarily be identical to EU law but should achieve the same outcomes. In some cases, Parliament might choose to pass an identical law. If the Parliament of the day decided not to achieve the same outcomes as EU law, it would be in the knowledge that there may be consequences for our market access. We will need an independent mechanism to oversee these arrangements, which, I have been clear, cannot be the European Court of Justice.

We also want to explore the terms on which the UK could remain part of EU agencies such as those critical to the chemicals, medicines and aerospace industries. This would mean abiding by the rules of those agencies and making an appropriate financial contribution. The UK would also have to respect the remit of the ECJ in that regard. Parliament could decide not to accept these rules, but with consequences for our membership and linked market access rights.

Lastly, to achieve as frictionless a border as possible and to avoid a hard border between Northern Ireland and Ireland, we need an agreement on customs. The UK has been clear that it is leaving the customs union. The EU has also formed a customs union with some other countries but those arrangements, if applied to the UK, would mean the EU setting the UK's external tariffs, being able to let other countries sell more into the UK without making it easier for us to sell more to them; or it would mean the UK signing up to the common commercial policy. That would not be compatible with a meaningful, independent trade policy and it would mean we had less control than we do now over our trade in the world. We have set out two potential options for our customs arrangement: a customs partnership where, at the border, the UK would mirror the EU's requirements for imports from the rest of the world for those goods arriving in the UK and intended for the EU; or a highly streamlined customs arrangement, where we would jointly implement a range of measures to minimise frictions, together with specific provisions for Northern Ireland. Both would leave the UK free to determine its own tariffs, which would not be possible in a customs union.

Taken together, the approach we have set out on goods and agencies and the options for a customs arrangement provide the basis for a good solution to the very specific challenges for Northern Ireland and Ireland. My commitment to this could not be stronger: we will not go back to a hard border between Northern Ireland and Ireland; nor will we break up the United Kingdom's own common market with a border down the Irish Sea. As Prime Minister, I am not going to let our departure from the EU do anything to set back the historic progress made in Northern Ireland, nor will I allow anything that would damage the integrity of our precious union. The UK and Irish Governments and the European Commission will be working together to ensure we fulfil these commitments.

This approach to trade in goods is important for agriculture, food and drinks but here other considerations apply. We are leaving the common agricultural policy and the common fisheries policy, and will want to take

[Baroness Evans of Bowes Park]

the opportunity to reform our agriculture and fisheries management and regain control of access to our waters. I fully expect that our standards will remain at least as high as the EU's, but it will be particularly important to secure flexibility here to make the most of our withdrawal from the EU for our farmers and exporters. We will also want to continue to work together to manage shared stocks in a sustainable way and agree reciprocal access to waters and a fairer allocation of fishing opportunities for the UK fishing industry.

On services, we have the opportunity to break new ground with a broader agreement than ever before. For example, broadcasting and financial services have never previously been meaningfully covered in a free trade agreement. We recognise that we cannot have the rights of membership of the single market, such as the country of origin principle or passporting, but we should explore creative options, including mutual recognition, to allow broadcasting across borders. My right honourable friend the Chancellor will set out more detail on financial services later this week. We will also look to agree an appropriate labour mobility framework that enables travel to provide services in person, as well as continued mutual recognition of professional qualifications. Finally, our partnership will need to cover agreements in other areas including energy, transport, digital, civil judicial co-operation, a far-reaching science and innovation pact, and cultural and educational programmes.

We cannot escape the complexity of the task ahead. We must build a new and lasting relationship, while preparing for every scenario, but with pragmatism, calm and patient discussion I am confident we can set an example to the world. Yes, there will be ups and downs over the months ahead, but we will not be buffeted by demands to talk tough or threaten a walk-out and we will not give in to the counsels of despair that this simply cannot be done—for this is in both the UK's and the EU's interests. As we go forwards, foremost in my mind is the pledge I made on my first day as Prime Minister: to act not in the interests of the privileged few, but in the interests of all our people, and to make Britain a country that works for everyone. My message to our friends in Europe is clear. You asked us to set out what we want in more detail. We have done that. We have shown we understand your principles. We have a shared interest in getting this right, so let us get on with it. I commend this Statement to the House".

7.32 pm

Baroness Smith of Basildon (Lab): My Lords, I thank the Minister for repeating the Statement. It seems that the Prime Minister is trying to create an optimistic, upbeat tone to quell the fears of those who are concerned about negotiations, so first I welcome the greater degree of candour from the Prime Minister. While others around her told us how easy it was going to be to leave the EU, she has admitted that it is complex, difficult and uncertain. She was clear that we have to face up to some hard facts, that life is going to be different and that our access to each other's markets will be less than it is now. Her honesty recognised that we will not be allowed to have all the benefits without all the obligations, which is a far cry from Ministers telling us that we would have the exact same benefits. She also admitted that even after we have left the EU we will still be affected by decisions of the ECJ and that to ensure good access to each other's markets,

"we must accept the need for binding commitments",

and she accepted the principle of regulatory alignment in some areas. She has also accepted that in these negotiations neither of us can have "exactly what we want". These statements are welcome in recognising the harsh reality of what has to be achieved with so little time left.

The Prime Minister has regularly stated her red lines—no single market, no customs union and no role for the ECJ—which we have consistently said she was unwise to use as a starting point for negotiations, yet some of those red lines are now looking distinctly pink.

On Northern Ireland, the Prime Minister said more about this in her Friday speech than in her Statement today, but it still seems to me, and others, that there is an inherent contradiction at the heart of the Government's commitment that there will be no hard border between Northern Ireland and the Republic of Ireland while they remain opposed to any form of customs union. We were relieved to hear the Prime Minister reject the Foreign Secretary's assertion in his private memo to her that it is not the responsibility of the UK to resolve the Irish border issue. The Prime Minister was absolutely clear on Friday that it is her Government's responsibility to resolve this issue. She spoke of her personal commitment and said she recognised the anxieties caused by Brexit and the "desire for concrete solutions". It is not a desire; it is a necessity, and it is fast becoming an urgent one. If the Government really believe that this issue can be resolved without any form of customs union, they need to start telling us how and to do so soon. The Prime Minister remains resolute against a customs union, but she is seeking a customs arrangement or a customs partnership, so we look forward to hearing more details about the "not a customs union" as negotiations continue.

The Prime Minister has also recognised that some of her early red lines have had to fade. We appreciate her acceptance of the necessity to remain in at least some of the EU agencies, even as an associate member. The Prime Minister identified the European Medicines Agency, the European Chemicals Agency and the European Aviation Safety Agency as being critical. We agree with that description. Many of us are bitterly disappointed that given the importance of the European Medicines Agency, the UK is losing it. Have there already been exploratory discussions with the EU on the principle of remaining, in whatever capacity, in these agencies? Are the Government prepared to negotiate similar arrangements for other agencies? Does the Minister accept that this may well mean a continuing role for the ECJ in the UK? Before she answers, it may help if I tell her that at the weekend, when I did a radio debate with Jacob Rees-Mogg, he described this as "perfectly sensible". The Minister will be aware that we were a member of Euratom before we joined the EU. She will have heard the debate on Euratom last week in your Lordships' House. We have now had the

Prime Minister's comment that she wants a "close relationship" with Euratom. Can the Minister tell us what that means? The Prime Minister has not gone as far as she has on the agencies, where she wants associate membership, but she talked about a close relationship. This is also a critical agency for the UK.

In the same way that there has been an evidence-based shift on the position regarding the agencies and the role of the ECJ, the Government have to recognise that if they are genuinely serious about the Northern Ireland border, they need to look at it without unrealistic and unnecessary red lines. We are clear that remaining in a customs union is the best way to deliver the frictionless trade the Prime Minister wants. For Northern Ireland, that means no customs duties or checks at the border. It means no checks for transporters, food, animal hygiene and so on. It will resolve the issue.

I welcome the fact that the Prime Minister says that Brexit is not an end in itself, yet in a further contradiction she has repeated that no deal is better than a bad deal. Surely both statements cannot be true.

Finally, on Saturday morning I was very fortunate to enjoy the company of the political editor of the *Sun*, Tom Newton Dunn, as he hosted "The Week in Westminster" with two MPs, Jacob Rees-Mogg and Sarah Wollaston, and me. Perhaps that is where the Prime Minister's biggest achievement was evident because with such divergent views, they both supported the content of the speech. Indeed, Jacob Rees-Mogg admitted that it was "very encouraging for the unity of the Conservative Party". So much of the Brexit journey has been about internal Conservative Party management. As we have heard, that canny blend of "We're leaving the EU" with some red lines becoming pink smudges or fudges just might buy the Prime Minister some time. She said that all negotiations are about cherry picking on all sides. Michel Barnier has welcomed her acceptance that negotiations require trade-offs. Perhaps the Prime Minister has finally accepted that negotiations must be less about red lines and more about a pragmatic Brexit.

The noble Baroness knows from our previous discussions that we welcome a pragmatic approach, in the interests of the economy, of jobs, and of maintaining rights and standards. As part of that, I hope she will be able to confirm that she understands that it becomes even more crucial that Parliament has not just a meaningful vote but an ongoing meaningful role.

Lord Newby (LD): My Lords, the Prime Minister has set five overarching tests for a successful Brexit. Three are simply vacuous: respecting the referendum, being enduring and being consistent with the kind of country we want to be. Two are more substantive, but both are being actively undermined by the Government's own Brexit stance.

The first is protecting people's jobs and security. Has the Prime Minister given any thought to how that sounds to the 300 Ryanair workers at Glasgow Airport as the company closes its international base there, on the basis of Brexit, to the 288 workers at Landis+Gyr in Stockport as it moves its production to Romania, or to the small businesses which have contacted me explaining how leaving the customs union and single market will impose costs on them that will force them out of business? The Statement contains some welcome shafts of realism, none more so than the statement that our access to EU markets will be less than now. Does the noble Baroness the Leader accept that less access means less trade, which in turn means fewer jobs, lower national income and higher prices?

The second substantive test set by the Prime Minister is that Brexit must strengthen,

"our union of nations and our union of people".

Leaving aside the impasse in discussions with the devolved institutions about the transposition of EU law, how does the noble Baroness think that sounds in Northern Ireland? The Prime Minister has come up with absolutely nothing new to reassure people that there will be no customs border between the north and the Republic. Of the options on the table, one simply says that SMEs, which represent 80% of trade, can carry on as if the border did not exist. How could that possibly work if standards diverge or if the UK strikes its own trade deals with different tariffs from those applying in the EU? This is the only example I know of where the Government's policy is indeed bold and imaginative—but it is hardly credible.

As for the technological solution to the border, does the noble Baroness agree with Pascal Lamy that there is no such thing as a virtual border? Does she agree with the report, much touted by Brexiteers, from Lars Karlsson, which explains on page 11 that, on the highest tech option he can see, an app on a mobile phone of a lorry driver "opens the gate automatically" as the lorry approaches the border—that is, a gate, a physical thing, not a virtual border. Has she read his description of the Norway/Sweden border, the most technologically advanced in the world according to him, where at staffed customs posts most goods traffic is cleared "within 3-9 minutes"? There is no soft border there either.

The Prime Minister refers briefly to our being able, in theory, to negotiate new trade agreements after Brexit. When she rang Donald Trump over the weekend to complain about his plan to slap a punitive tariff on UK steel, did she ask him how that fitted into a comprehensive free trade deal? Did she consider that in fighting any US steel tariff, the EU as a whole was likely to have a bit more clout than the UK on its own?

More generally, the speech sets out a range of areas where the Government plan to follow EU rules but pay for the privilege and lose any say in how they are set. Having associate membership of various EU bodies is better than nothing, but in reality we become rule-takers. On the trade in goods, the PM admits that we will have to follow standards "substantially similar"—that is, as near as makes no difference to identical—to those set by the EU.

The rationale for becoming rule-takers instead of rule-makers is that Parliament retains the right to diverge from the EU rules if it chooses. But the speech demonstrates how in practice it will not dare do so because of the damage it would cause to business and the economy. The Prime Minister wants to exchange the reality of influence for the pretence of sovereignty—and what is worse, she clearly accepts that it is a pretence.

[Lord Newby]

The Government are going through extraordinary contortions of both policy and language to try to replicate as far as possible the existing terms of our EU membership. It all begs the question, "Is it worth it?"—and invites the response, "No".

Baroness Evans of Bowes Park: My Lords, I am grateful to the noble Baroness and the noble Lord for their comments. I particularly welcome the noble Baroness's constructive comments and assure her that we take the scrutiny and involvement of Parliament as we develop our new relationships with the EU extremely seriously and will continue to do so.

The noble Baroness asked about agencies. As the Statement set out, we want to explore with the EU the terms on which the UK could opt to remain part of EU agencies—as she rightly said, the European Medicines Agency, the European Chemicals Agency and the European Aviation Safety Agency. There may well be other agencies, such as those related to our future security partnership, that the UK chooses to remain a part of, and we will continue those discussions. Again, in relation to Euratom, it will be of benefit to both sides for the UK to have a close association, and that too will continue to be part of our ongoing discussions. As Prime Minister said, after we have left the jurisdiction of the ECJ, EU law and the decisions of the ECJ will continue to affect us, including through our respecting its remits where we agree that the UK should continue to participate in an EU agency.

The noble Lord asked about access to the EU market. He is right that the Prime Minister has said, in relation to hard facts we have to face, that in certain ways our access will be less than it is now. But we are also seeking the broadest and deepest possible agreement, covering more sectors and co-operating more fully than any free trade agreement anywhere today, and of course we will have the freedom to negotiate new trade agreements—so the future is bright.

The noble Baroness and the noble Lord touched on the very important issue of Northern Ireland. I repeat again that, as we have said constantly, we want trade at the border to be as frictionless as possible, with no hard border between Northern Ireland and Ireland or between Northern Ireland and the rest of the UK. We believe this can be achieved by a commitment to ensure that the relevant UK regulatory standards remain at least as high as the EU's and by a customs arrangement. We acknowledge that there will be technological solutions to this, and we believe we have set out a structure by which we can begin and continue the negotiations with both the Irish Government and the European Commission to make sure we all achieve the aims that we have all clearly set out and to which we are extremely committed.

The noble Lord asked about future free trade agreements. I assure him that we have opened 14 informal trade dialogues with 21 countries, including the US, Australia and the UAE. These will form the groundwork for future FTAs. The Department for International Trade has a presence in 108 countries, and we have begun appointing a new network of trade commissioners. We are committed to new trade and new opportunities across the globe, but of course maintaining a strong, deep and positive relationship with the EU is what we are focused on in our negotiations with it.

7.49 pm

Lord Howell of Guildford (Con): Does my noble friend agree that this Statement is a welcome blast of common sense into an otherwise madly polarised debate? Will she also accept that the principle of mutual recognition, which has been embedded in EU law for the last 25 years and was in fact a British invention, can allow a welcome degree of flexibility in any kind of alignment or regulation or the development of different regulatory arrangements? It applies to all members inside the EU and to everyone associated with it, and there is no reason why we should not apply the same principles of mutual recognition, as the Prime Minister is arguing. Lastly, does my noble friend accept that of course there are cherries to be picked, but sometimes it is better to pick the cherries than to leave them to rot on the bough?

Baroness Evans of Bowes Park: I thank my noble friend for his comments. I entirely agree. It is important to remember that many regulatory standards are themselves underpinned by international standards set by non-EU bodies so we are certainly committed, and believe it is absolutely achievable, to ensuring that our relevant UK regulatory standards remain as high as the EU's. As I have said, many of these standards are underpinned by international standards—for instance, the UN Economic Commission for Europe sets vehicle safety standards—set by organisations of which we will continue to be a part.

Lord Falconer of Thoroton (Lab): I express my gratitude to the noble Baroness the Leader of the House for repeating the Statement. The prosperity of the nation is one of the principles that the Prime Minister referred to in both her Mansion House speech and her Statement to the Commons today. I assume, and I would be grateful if the noble Baroness could confirm this, that some economic assessment was made of what the impact would be of achieving all the things that the Prime Minister set out to achieve in her Mansion House speech. In that speech she set out what the UK's negotiating position would be, recognising that we would have less market access than before. I invite the noble Baroness to confirm to this House that that work was done and to indicate when it will be published, because the nation is entitled to see it.

Baroness Evans of Bowes Park: As I said in my response to the noble Baroness and the noble Lord, yes, the Prime Minister has said that obviously we will have different access to the European market, but we are also committed to developing a broad and deep relationship with the EU and to having trade agreements elsewhere. We have committed to providing Parliament with appropriate analysis ahead of the final vote on the deal.

Lord Higgins (Con): Will my noble friend confirm that it is now the Government's view that withdrawing from the customs union and the single market will have a damaging effect on the UK economy, as well as

creating a problem for the Northern Irish border? If that is so, is that not a very strange position from which to start the negotiations? Should Parliament not have an option of voting at this stage on whether those particular red lines, which would have a damaging effect on the entire population of this country, are going to happen?

Baroness Evans of Bowes Park: I am afraid I do not agree with my noble friend. As the Statement set out, the EU has formed a customs union with other countries but those arrangements, if applied to the UK, would mean the EU setting the UK's external tariffs, being able to let other countries sell more into the UK without making it easier for us to sell more to them, and the UK signing up to the common commercial policy, which could not be compatible with a meaningful trade policy. We are leaving the customs union and the Prime Minister has set out two potential options for our future customs relationship.

The Lord Bishop of Leeds: My Lords, I am grateful to the noble Baroness the Leader of the House for repeating the Statement, which seems to express a realism in some areas that many people have been articulating for the last year. It is just surprising that it has come so late. What worries me is the language, and I would be grateful if I could have a response to this. In the section on agrifood and fisheries in the Prime Minister's speech on Friday, we read:

> "I fully expect that our standards will remain at least as high as the EU's. But it will be particularly important to secure flexibility here to ensure we can make the most of the opportunities presented by our withdrawal from the EU for our farmers and exporters".

Which is it to be? "Flexibility" implies that standards could go down as well as up. If that phrase is in, the language is fairly woolly. I "fully expect" that I will be a millionaire by the time I am 65; I doubt it, though—my full expectations do not necessarily accord with reality. Could we please have some reflection on the language? It still seems dominated by assertion and aspiration rather than the sort of hard-nosed detail we need.

Baroness Evans of Bowes Park: The UK, rightly, has some of the highest environmental and animal welfare standards around our agrifood sector; we want that to continue and we fully expect that it will. However, what we want is an agreement that ensures consistency of outcomes and standards for agrifood, while adding scope for flexibility in how we achieve this, and to make sure that our farmers and fishermen are able to take advantage of the freedoms that we may have by now leaving the EU.

Lord Kerr of Kinlochard (CB): I would like to ask the Minister a couple of practical questions. I admire the detail in the speech; there is a lot to learn in it, and I wish it had been given 18 months ago. However, I do not fully understand the "customs partnership" concept. Is it the case that if a container ship from Asia docks in Hamburg or Rotterdam, for containers coming on to Britain the authorities there will be expected to apply our definitions and rules of origin and the rates of duty that we set? If so, what is their incentive to agree to that additional complication for them? As for the agencies, what is the incentive for continental pharmaceutical or chemical industries to agree that we—uniquely, as no one outside the EU has membership of the single market's agencies—should be allowed membership of them? Why should they agree? These are very interesting proposals, but are we sure of their negotiability? We present them as our offers; in fact, they are our requests. Why should the EU let us pick the cherries?

Baroness Evans of Bowes Park: A customs partnership would mean that at the border the UK would mirror the EU's requirements for imports from the rest of the world, applying the same tariffs and the same rules of origin as the EU for those goods arriving in the UK and intended for the EU. By following this approach, we would know that all goods entering the EU via the UK paid the right EU duties, removing the need for customs processes at the UK/EU border. In relation to agency membership, there are indeed precedents. Switzerland, for instance, is an associate member of the European Aviation Safety Agency, which means that airworthiness certifications are granted by its own aviation authority and disputes are resolved through its courts.

Lord Wallace of Saltaire (LD): On managed divergence and regulatory alignment, the phrase "managed divergence", which I gather the Cabinet agreed on 10 days ago, does not appear in the Prime Minister's speech or this Statement. What we have on regulatory alignment is the very odd statement that Parliament in many cases will pass identical laws to an EU law. That sounds remarkably like a sort of Potemkin sovereignty, in which we do it independently but we simply follow what the others have done. That is not real sovereignty at all. Do the Government now accept that the advantages of regulatory alignment across the whole goods sector are such that, in practice, we will want to maintain the same standards, or do they accept, as the Foreign Secretary and others wish to go on insisting, that there are some rules out there that we will somehow want to diverge on?

Baroness Evans of Bowes Park: It will be not just for this Parliament but for future Parliaments to decide what our regulations look like. As the Statement set out, we may choose to commit in some areas of regulation, such as state aid and competition, to remain in step with the EU. The UK drove much of the policy in this area, so we have much to gain from keeping proper discipline on the use of subsidies and anti-competitive practice. The noble Lord is right: the Statement said that Parliament may choose to pass an identical law. Businesses that export to the EU have told us that in some instances it is strongly in their interests to have a single set of regulatory standards. However, if the Parliament of the day decided not to achieve the same outcomes as EU law, it would be doing that in the knowledge that there may be consequences for market access, but it would be its decision to do so.

Lord Wigley (PC): My Lords, the Minister has emphasised the need to be flexible and the need for give and take and to be reasonable. Does that go as far as extending to being flexible and reasonable about the date of 29 March if, by being flexible, it is possible to get a negotiated outcome rather than a no-deal solution?

Baroness Evans of Bowes Park: We are very confident of getting a deal and, as we have said, we will be leaving the EU in March 2019.

Lord Hannay of Chiswick (CB): My Lords, can I ask the Minister about two points on what I join others in recognising is a more pragmatic approach than we have had in the past? For example, in the Statement that she read out today were the words,

"we may choose to commit some areas of our regulations, such as state aid and competition, to remaining in step with the EU's".

I am sure that the Minister knows that state aid and competition issues are ruled on by the European Commission after lengthy inquiries and are subject to the jurisdiction of the European Court of Justice. If we are going to do the same, how are we going to do it? By osmosis?

Baroness Evans of Bowes Park: Well, as the Statement made clear, if, as part of our future partnership, Parliament passes, for instance, an identical law to an EU law, it may make sense for our courts to look at the appropriate ECJ judgments so that they can interpret those laws consistently.

Lord Davies of Stamford (Lab): It is an unconvincing Statement in many ways but there are three particular delusions and contradictions in it. First, the Prime Minister still has not explained how you can have two countries with different tariffs and no controls at the border, but that is exactly what she promised the Irish before Christmas. Secondly, and very importantly, the Prime Minister is still under this extraordinarily naive delusion that she can sign trade agreements with Mr Trump without obliging us to take American agricultural products, which is quite inconceivable, and that she can sign a trade agreement with China while retaining quotas on Chinese steel imports. She obviously does not know Mr Xi Jinping. She also does not take seriously Mr Modi's statements about the need for Indian immigration as a priority, in the event that he signs trade agreements with this country.

Thirdly, it really must be almost unprecedented in history for a Government to adopt policies that are directly designed to weaken a major staple of economic activity in that country, which is exactly what is happening here with the rejection of the idea that we should retain passports for the single market in financial services, banking and insurance. Will the Minister commit to making a study of the economic costs of that very self-destructive policy?

Baroness Evans of Bowes Park: Well, I am afraid that I do not agree with the noble Lord's extremely pessimistic view of every aspect of both the Statement and the Government's approach. We believe that we will be able to develop a deep, special and productive relationship with the EU, which is what we are committed to, and the Prime Minister in the Statement set out the principles underpinning that.

In relation to the noble Lord's point about passporting, the reason why we are not looking for passporting is that we understand that it is intrinsic to the single market, and it would require us to be subject to a single rule book over which we have no say. We are looking for a collaborative, objective framework that is reciprocal, mutually agreed and permanent, and therefore stable for businesses—and we believe that we can achieve this.

Lord Forsyth of Drumlean (Con): I note the question asked by the noble Lord, Lord Kerr—why should we allow the European Union to pick the cherries for us? Could my noble friend perhaps not suggest that, given that the Prime Minister's speech has been extremely well received, not only within the Conservative Party but by the media and the wider country, now is the time for all of us, whatever our views on Brexit and whatever our party, to get behind the Prime Minister and, while we are about the nation's business, to get the best deal for our country? Could my noble friend also confirm that what Donald Tusk said, which is that nothing is agreed until everything is agreed, applies to this process and that, in particular, it applies to our commitment to provide finance to the European Union?

Baroness Evans of Bowes Park: My noble friend is absolutely right that we want to enter into the next phase of negotiations in a positive and productive manner and believe that that is the same for both sides. Of course, our future partnership will need to be tailored to the needs of our economy, and this follows the approach that the EU has taken in the past. The EU's agreement with South Korea, for instance, contains provisions to recognise each other's approvals for new car models, whereas the agreement with Canada does not. The EU's agreement with Canada contains provisions to recognise each other's testing on machinery, while the agreement with South Korea does not. So it is possible to develop relationships that work for both sides, and that is exactly what we intend to do.

Lord Lea of Crondall (Lab): If I may echo the Leader of the Opposition, this is a movement towards realism. However, is this Statement not really on two rather inconsistent themes? On the positive side, the calculus is, on page 4:

"What matters is that our rights and obligations are held in balance".

That is an excellent idea of a calculus. But in the same Statement, on page 2, it makes the unqualified statement,

"we will not accept the … obligations of Norway".

So how is this calculus going to be carried out, and with what degree of transparency? How do we know that the rights and obligations of Norway are incommensurate with what we need as a country? How is this calculation going to be carried out? It could be argued that, in the case I have mentioned, it is perfectly possible to show that the calculus could be positive. Could the Leader of the House enlighten us as to how these obligations and rights, advantages and disadvantages, are going to be balanced out in public?

Baroness Evans of Bowes Park: That will be part of the negotiations, but what I can say—and I have said many times—is that we are seeking the broadest and deepest possible future economic partnership with the EU, covering more sectors and co-operating more fully than any free trade agreement. We believe this is achievable, because it is in both our interests, but also because of our unique starting point that on day one we have the same laws and rules. Rather than having to bring two different systems closer together, the task will be to manage the relationship once we have two separate legal systems. That is why we believe that we need to look beyond precedents and find a new balance.

Lord Hay of Ballyore (DUP): I rise also to support the Statement from the Leader of the House. I also welcome the commitment from the Prime Minister that there will be no return to a hard border and no border in the Irish Sea. I live closer to the border, probably, than any other Member of this House. I live in the city of Londonderry, about 20 miles from the border. I have listened to some very good speeches in this House on Brexit and on the border, and some not so good. I never believed in my lifetime that there would be so many experts on the border between Northern Ireland and Ireland in this House. I say that very sincerely.

I also believe that there are some Members of this House—and I hope that I am wrong but only time will prove it—who are using Brexit and especially the border issue as a political stick to beat the Prime Minister with. I say that very sincerely. Certainly, in Northern Ireland there are parties who are using the border to undermine Northern Ireland's position within the United Kingdom. People talk about a hard border and a soft border, and then people talk about keeping Northern Ireland in the customs union and within the single market. That is undermining the position of Northern Ireland in the United Kingdom.

I want to ask the Minister a question very clearly. I am very happy when our Welsh and Scottish colleagues talk about their Assembly. Unfortunately, in Northern Ireland at this moment in time, we have no Assembly. Would the Minister agree that, with an Assembly in Northern Ireland, some of these issues would be more easily resolved?

Baroness Evans of Bowes Park: Certainly, the Government are working very hard with the main parties in Northern Ireland to try to re-form the Northern Irish Assembly, because we absolutely want that body back representing the people of Northern Ireland. I can also say that the UK and Irish Governments are equally committed to ensuring that our departure from the EU does not lead to a hard border. The Prime Minister and the Taoiseach have committed to work with the Commission to explore proposals and develop practical solutions to this question; that is something that we are focusing a lot of energy on, because we absolutely agree on its central importance.

8.09 pm

Sitting suspended.

European Union (Withdrawal) Bill

Committee (4th Day) (Continued)

8.30 pm

Amendment 37

Moved by ***Baroness Massey of Darwen***

37: Clause 5, page 3, line 21, at end insert "except in so far as the Charter is necessary to protect the rights of children and young people as provided for in the UN Convention on the Rights of the Child and the European Convention on Human Rights."

Baroness Massey of Darwen (Lab): My Lords, Amendment 37 focuses on the protection, welfare and rights of children once the UK is no longer a member of the EU. I am disturbed by the notion of excluding the European Charter of Fundamental Rights in our domestic systems. Why is removing this being considered? What can be put in its place that is better? Perhaps the Minister can give the House an explanation.

Lord Brown of Eaton-under-Heywood (CB): Are the microphones on?

Baroness Massey of Darwen: I apologise if there are no microphones, although it is not my fault. There has been little effort to consider how Brexit might affect children. I do not know who has been consulted on this. Perhaps the Minister can tell me. Have children been consulted? Organisations now often consult children about matters which affect their lives. Have the UK commissioners for children been consulted? They are advocates for, and speak for, children. Has the voluntary sector, which does such a splendid job in supplying information and support to children and those of us who work for them, been consulted? If not, why not? Have academics who support children's rights been consulted? If all these people have been consulted, what are the results of such consultations? Has an impact assessment on how Brexit will affect children been considered? If not, why not?

I believe that there are 80 EU instruments which entitle children to protection and welfare. EU directives have not all been incorporated into UK law, yet these are comprehensive. There are numerous case studies on children as victims of crime—the sexual abuse and exploitation of children, criminal justice, and legal aid for victims. All these emphasise what it will mean to not have the European charter in place. Some have argued that our domestic laws on children are sufficient to protect them in all instances. This is not the case and I shall discuss it in a moment.

Last Monday, my noble and learned friend Lord Goldsmith spoke about the need to retain the European Charter of Fundamental Rights and stated that the charter will not be downloaded into our domestic law. An opinion by a Queen's Counsel concludes that this would weaken human rights protection in the UK. The independent Bingham Centre for the Rule of Law has stated that the charter does much more than codify rights and principles. The Joint Committee on Human Rights, commenting on the Government's

[BARONESS MASSEY OF DARWEN]

right-by-right analysis of the withdrawal Bill, concluded with six devastating paragraphs in support of retaining the charter. The final paragraph states that some of the charter rights,

"are based wholly or in part on provisions of the ECHR".

Other international treaties also come into play that have not been incorporated into domestic law, such as the UN Convention on the Rights of the Child, to which the UK is a signatory. However, the UNCRC is not incorporated fully into UK law and there are no legal or financial sanctions for non-compliance with its provisions. The noble and learned Baroness, Lady Butler-Sloss, was hoping to comment on this but has had to leave.

The response also states that,

"a failure to preserve relevant parts of the Charter in domestic law after Brexit will lead to a significant weakening of the current system of human rights protection in the UK".

The Children's Rights Alliance points out that the European Charter of Fundamental Rights sets out in a single document the fundamental rights protected in EU law and of particular importance to the protection of children's rights.

We all know that the UK under successive Governments has made great strides to protect and enhance the welfare of children. Examples include the Children Acts of 1989 and 2004 and the Children and Social Work Act 2017, which is not yet in force. However, our domestic laws do not cover the full range of children's entitlement regulated by the EU. We have no constitutional commitment to children's rights at central government level, the level at which most EU legislation will be amended or repealed after Brexit.

I give other examples. The Children Act 1989, of course, enhanced the welfare of children but did not regulate the full range of children's rights to protection covered by EU law—for example, as regards consumer protection and health and safety. The Children Act 2004 strengthened the 1989 Act but does not cover cross-border recognition and enforcement of family orders currently regulated by EU Brussels I and II. In particular, the right of a competent child to be heard in relation to child abduction or family disputes is significant. The Equality Act, welcome though it is, is not particularly strong as an instrument for children's rights and does not cover many issues that would be of concern post Brexit—for example, equality in the workplace.

The Children and Social Work Act improves decision-making and support for looked-after children and for safeguarding work at the local level. It also makes relationships and sex education appropriate to age mandatory in schools. However, it seems to contradict amendments introduced by the Immigration Act 2016, specifically on care support for unaccompanied children when they reach the age of 18 and do not have leave to remain, are not asylum seekers or do not have a first immigration application for leave to enter or remain.

Other Acts such as the Borders, Citizenship and Immigration Act 2009, the Modern Slavery Act 2015 and the broadcasting Act 2003 contain measures to protect children, but are not fully comprehensive and obligations may be vulnerable to repeal when implemented through statutory instruments. The EU (Withdrawal) Bill could create problems for thousands of families affected by divorce or separation or involved in cross-border EU-UK family or child protection cases.

In 2017, UNICEF published its report on the progress made on children's rights in the UK. It stated that while we have made much progress, we are weak in assessing the impact of legislation and policy on children. There have been significant advances in child protection and welfare in Wales, Scotland and Northern Ireland. However, these devolved measures will be impaired by Brexit as much of EU law affecting children may well be repealed through the use of delegated powers at a centralised level. This, of course, is worth a debate in itself. The Minister may say that Government cannot ignore the Human Rights Act 1998 and the Equality Act 2010. But these Acts, welcome though they are, have limited relevance to children. The European Charter of Fundamental Rights and the UNCRC go wider and deeper. Does the Minister accept this? If so, could he say—I ask this again—what will replace the European Charter of Fundamental Rights? The only way to ensure that children's rights and welfare are protected is for it to be incorporated as part of retained EU law.

The Government should ensure that all existing protections for children's rights and welfare in the EU legislative framework are reserved in domestic law. We cannot leave children from the UK—but also, in certain cases, from the EU—vulnerable to unclear or non-existent laws. I cannot understand the decision to drop the European Charter of Fundamental Rights when nothing else is in its place, and I do not know what will be. Why bother? Why reinvent? Any charter or convention, if attacked, must surely weaken the commitment to human rights, and we should resist such attacks with all our might.

The Earl of Dundee (Con): My Lords, in connection with EU withdrawal, and as already intimated, there are perhaps two key aspects concerning our protection of children. First, that the current level of cross-border co-operation should not diminish. Secondly—which this group of amendments highlights—that UK domestic law and its deployment should continue to be guided by the United Nations Convention on the Rights of the Child.

With regard to the first, can my noble friend the Minister reassure us that to safeguard children the right steps are being taken so that the UK will remain part of relevant cross-border interventions, including Europol and the European arrest warrant agreements?

The second focus is on United Kingdom law protecting children. Here, two inconsistencies already obtain. For, while subject to EU legislation, our own UK legal provision still falls short of that covered by EU law on children. In relation to UNCRC there is an even wider gap. That is since, although guided by it, none of the United Nations Convention on the Rights of the Child has been incorporated into UK domestic law at all—hence within Amendment 70 the exhortation that it should now come to be.

However, in spite and irrespective of such apparent anomalies and omissions, after EU withdrawal clearly our principal aim must be to avoid any slippage of

existing UNCRC standards. What plans does my noble friend now have to ensure that we do avoid this?

Yet at the same time, does he concur that we ought to go much further; thus not just guarding against the erosion of standards; but in properly maintaining them also seeking to build upon and improve them?

For, rather obviously, sustained cross-border co-operation as well as improved national legislation protecting children are both in the interest of all states. To mutual benefit, therefore, this consideration in turn reflects the positive opportunity for attaining much better results for protecting children's rights.

All the more so is that the case with us since, although leaving the European Union, we will remain within Europe's consensus on human rights and the rule of law represented by its far larger affiliation of the 47 states of the Council of Europe, in which parliament, along with those here tonight, including the noble Baroness, Lady Massey, the noble Lords, Lord Russell and Lord Foulkes, and my noble friend Lord Balfe, I have the honour to serve.

Baroness Lister of Burtersett (Lab): My Lords, I will speak to Amendment 70, in my name, supported by the noble Lords, Lord Storey and Lord Russell, and the noble Earl, Lord Dundee, to whom I am grateful. However, my remarks are also relevant to other children's rights amendments in this group, some of which I have signed. I am grateful, too, to the Children's Society for its assistance, and to all the children's organisations that have worked so hard to ensure that children's interests are not forgotten as we debate the Bill.

I have already made clear my strong opposition to the removal of the Charter of Fundamental Rights from retained EU law, and colleagues have made clear the damaging impact this is likely to have on children. Amendment 70, which is a probing amendment, goes further than other amendments in this group in that it provides for the full incorporation of those parts of the UN Convention on the Rights of the Child ratified by the UK. The convention covers all aspects of a child's life and sets out the civil, political, economic, social and cultural rights to which all children are entitled. Key principles include the best interests of the child being a primary consideration in all actions concerning children, and children being able to express their voices in all matters affecting them.

8.45 pm

The amendment was inspired in part by a recent Coram statement that:

"As the UK prepares to leave the rights framework of the EU, it is an opportunity for parliament to ensure that vital rights for children are protected and continue to be promoted across a diverse range of areas ... now is the time to align the commitments of the UK nations and incorporate the provisions of the UNCRC into domestic law to ensure that the UK shows clear and unambiguous leadership as a champion for children in the world".

Now is the time, because the EU has an overarching constitutional objective to promote and protect children's rights, which will be lost. However well individual pieces of domestic legislation such as the Children Act 1989 may do so, they do not provide comprehensive protection, as my noble friend Lady Massey has already said.

By the same token, the amendment was also prompted by the way in which the Government have used the convention to counter arguments that the removal of the charter will damage children's rights. For example, at Second Reading the Minister stated that,

"children's rights … will of course continue to be protected under the Children Act 1989 and through our remaining party to the United Nations Convention on the Rights of the Child".—[*Official Report*, 31/1/18; col. 1694.]

He hoped that that would provide reassurance—but I am afraid that it does not. As I said, the Children Act is just one piece of legislation. Protection within domestic law is partial and piecemeal, although it is better in the devolved nations. As Ministers know full well, because, as has already been pointed out, it is unincorporated, the convention cannot normally be used to defend children's rights other than by means of the charter when within the scope of EU law.

The legal opinion provided to the EHRC makes it clear that such international treaties have force in domestic law only in limited circumstances and to limited effect. That is, in effect, recognised in the introduction to the Government's own right-by-right analysis, and it is exemplified by the case of R(SG) v Secretary of State for Work and Pensions, in which three out of five Supreme Court judges found that the benefit cap was in breach of the UNCRC. However, because the convention is not incorporated, it was left to Parliament to address the issue—which of course it did not. The key argument was that the cap is not in the best interests of the child—as I noted, a key tenet of the convention. The UN Committee on the Rights of the Child has expressed regret that in the UK the right of a child to have his or her best interests taken as a primary consideration is still not reflected in all legislation and policy matters, and children's views are not systematically heard in policy-making on issues that affect them—as I said, another key tenet.

The Joint Committee on Human Rights, of which I was then a member, in its report on the UK's compliance with the convention reached a similar conclusion and expressed support for incorporation, as did all the children's NGOs giving evidence. Although the then Children's Commissioner preferred an incremental approach, this was on purely pragmatic grounds and on the assumption that we would not be moving in the opposite direction with the removal of the charter of children's rights protections.

The European Network of Ombudspersons for Children issued a statement on Brexit last October in which it expressed concern at the lack of regard for the voice and position of children and their fundamental human rights in the Brexit process. It called on the UK Government and the EU to conduct a children's rights impact assessment and to conduct meaningful engagement with children so as to take account of their views. This is particularly important as they did not have a vote in the referendum and may feel powerless in the face of a process that will shape their futures. Indeed, in a consultation held by the Children's Law Centre in Belfast, the children, we were told, felt angry and frustrated that a decision that will impact on their lives

[BARONESS LISTER OF BURTERSETT]

was taken without them. Earlier today, some of us met some of the children from Northern Ireland. When I told them about the amendment in my name today, they cheered and wished it godspeed.

The ombudspersons network asked each EU Government to communicate to their children's commissioner or ombudsperson how they would pay due regard to the rights of children during the negotiations. Echoing what my noble friend Lady Massey asked, will the Minister tell your Lordships' House whether the Government have done that and how they have paid due regard to children's views and rights since the referendum? I am afraid that, in the Commons, the network's plea fell on deaf ears. Apart from the valiant efforts of my honourable friend Kate Green, no attention was paid to children's rights, which were bracketed with animal rights in the Committee debate.

The Minister Dominic Raab assured MPs that,

"the UK's commitment to children's rights and the UN convention … is and will remain unwavering. Our ability to support and safeguard children's rights will not be affected by UK withdrawal from the EU".—[*Official Report*, Commons, 17/11/17; col. 504.]

But, as we have already heard, it will. Children have so far been bystanders in the Brexit process, yet it is their future that we are determining. We have an opportunity in this House to put that right. If the Government's commitment to children's rights is really so "unwavering", I can see no justification for refusing to use this opportunity, as Coram argued, to incorporate the convention that safeguards those rights. I believe that we have a duty to do so.

Baroness Greengross (CB): My Lords, I will speak to Amendments 38, 39 and others regarding the rights of participation of children and the maintenance of dignity in older people. The EU charter includes children's right to participation in Article 24, as we have heard, but there is no broad right to children's participation in law domestically, although there is some provision for it in certain cases.

One of the general principles of the UN Committee on the Rights of the Child concerns children's right to be heard and to have their views considered and taken seriously. Accordingly, in 2016 the UNCRC made recommendations to the UK, including that it should:

"Establish structures for the active and meaningful participation of children and give due weight to their views in designing laws, policies, programmes and services at the local and national level".

However, in the UK there continues to be no permanent structure or action plan to facilitate the systematic participation of children in policy-making, although the DfE has indicated that it wishes to improve such engagement, and has recently published several child-friendly consultation documents.

The European Charter of Fundamental Rights brings together in a single document the rights which underpin EU law. It has included new issues that require protection—for example, the protection of personal data—extended existing rights and established new rights, such as the right to human dignity. It reaffirms the rights for children that already exist in the European Convention on Human Rights, such as the right to education, and includes key rights enshrined in the UN Convention on the Rights of the Child. As the UK has not incorporated certain treaties such as the UNCRC into domestic law, there is no guarantee that rights contained in unincorporated treaties would be adequately protected after Brexit. It is therefore very important that the charter is retained in its entirety, in order not to weaken existing rights protections.

For example, the charter has strongly influenced the development of EU regulations in relation to cross-border family law. In 2016, one in 10 children born in the UK was to a family with one parent from the UK and another from an EU member state. EU cross-border family law regulations, covering issues such as child custody, contact, child abduction and child maintenance, provide these families with certainty about their legal rights in difficult situations.

If the family breaks down and disputes arise between UK and EU parents, the EU framework ensures child rights-based court proceedings that make a difficult situation slightly easier for a child to cope with. For example, regulations ensure that children have the opportunity to have their opinion heard during court proceedings that determine if they are to be returned to a parent in another country. Further charter-based proposals are being agreed that will strengthen children's rights further, ensuring that the best interests of the child is a mediating principle.

The protection of the rights of children and older persons in the EU Charter of Fundamental Rights is essential as there are not such specific protections in the European Convention on Human Rights. Children in the UK cannot access the UN Committee on the Rights of the Child as the UK has not ratified the third protocol, and there is no treaty on older persons.

Dignity for older people, especially those in care, is about supporting people with the same respect you would want for yourself or for a member of your family, treating each person as an individual and giving people independence and choice as to how their needs and wants are met. There are good examples of people who have been treated in a dignified manner but also, alas, several such as Mid Staffordshire and Winterbourne View have been identified by the Care Quality Commission. The last thing we want is that gaps in the law allow such cases to rear their ugly heads once more.

The principle of the inherent dignity of all people underpins human rights treaties. The right to dignity in the EU charter echoes the principles and rights of the charter of the United Nations and the Universal Declaration of Human Rights. Dignity underpins all the provisions in the EU charter and is as relevant for children as it is for the rights of elderly people and those in need of care and their right to be treated with dignity, to participate in social and cultural life and to fulfil their dreams and aspirations.

We have come a long way in this area and the present and previous Governments have made great strides in helping us to treat anyone who lacks the capacity or the ability to self-determine—in dementia, for example—with consideration and dignity, and it would be more than a pity to put all this to waste. The amendment will signal to both our own people and

EU members that the UK remains committed to maintaining the human rights standards we have established together.

I was in Adelaide in Australia some years ago and I went to the local museum. The history of what happened to English children who were sent to Australia has recently been in all our news and papers. We know what can happen to a country with which we have a great deal in common. We must not allow anything to lessen our understanding of and commitment to the human rights of both the young and the old in our society.

Lord Wigley (PC): My Lords, I have added my name to Amendment 37 and I associate myself strongly with the words of the noble Baroness, Lady Massey. I will not delay the House by repeating her persuasive arguments. I warm to the amendment spoken to by the noble Baroness, Lady Lister, in her effective speech.

Issues relating to the rights of the child obviously arise in the generality but I am not going to go after that. To save time, I will concentrate on some aspects that relate to the devolved context, which has already been mentioned by the noble Baroness, Lady Lister. Stronger protection for the child is necessary through legislation and it has been secured in legislation passed by the National Assembly in Wales and also in legislation in Scotland. One piece in Wales is the Rights of Children and Young Persons (Wales) Measure 2011. It imposes a duty on Welsh Ministers to have due regard to the rights of children as expressed in the United Nations Convention on the Rights of the Child when those Ministers exercise any of their functions. To achieve the objective, since 2012 the Welsh Government routinely undertake child rights impact assessments on proposals to change Welsh law or policy that may have a bearing on the well-being of children.

My fear, which is shared by colleagues in the National Assembly, is that the withdrawal Bill will limit the scope of the devolved legislatures to amend laws relevant to children along the lines I have mentioned. These are powers which are currently within the devolved settlement, but there may be uncertainty as to the future. When we withdraw from the European Union, there is concern that these competences may come under Westminster and the powers in Cardiff to that extent would be curtailed. Indeed, the devolved regimes may, under those circumstances, be required by Westminster to act in a manner that contradicts their own commitments to children's rights. I hope that the Minister can put my mind at rest in this matter and give the devolved regimes the clarity, certainty and transparency they seek.

9 pm

Lord Judd (Lab): My Lords, I rise to support these amendments very strongly. One of the sadnesses of recent social and political history in Britain is that although this country won immense respect at the time when the convention was being drafted, it has never been fully incorporated into our law. That applies to successive political Administrations. Now, with Brexit, this is being thrown into strong relief. Incidentally, I am very glad to see that those who are speaking to these amendments have emphasised how this illustrates why the charter matters and how we have been wrong to treat it so lightly.

I want simply to say this: we were champions in the drafting, introduction and birth of the convention. Whatever happens on Brexit, we must take the opportunity presented to us by these amendments to ensure that what is enshrined in the convention is made in every way absolutely fundamental to the policy and the work of any future Administration.

Baroness Meacher (CB): My Lords, I rise to speak to speak to Amendments 68, 97 and 158, all of which would ensure that following our departure from the EU, children's rights will continue to be given due regard. The Government have claimed that the Bill will ensure continuity—in fact, a number of noble Lords think that is correct—and that there will be no legislative cliff-edge if or when we leave the EU.

However, whether by accident or by design, there is a gaping children's rights hole in the Bill. These amendments would not introduce any new policy or extend provision; rather, they require only that where EU legislation has been developed in line with the principles of the UNCRC, new UK law or amendments to retained EU law will also pay due regard to the UNCRC. The Government have argued in previous debates that children's rights are fully protected in UK law. I will clarify that this is not actually so and I want to pay tribute to the Children's Society and a number of academics who have enabled me to do this. The Government argue that, for example, the Human Rights Act 1998 incorporates the ECHR into UK law and does the job of protecting children's rights. However, that ignores the fact that the ECHR is confined principally to civil and political rights, while remaining relatively silent on a range of social and economic rights that form the substance of EU law. There are further problems in relation to the process of bringing a claim for an alleged breach of ECHR rights.

The Children Act 1989 provides important protections for children in both public and private proceedings, but it does not regulate the full range of children's rights that are covered by EU law such as consumer protection, health and safety, and non-discrimination; other speakers have mentioned one or two of these. It also does not cover the cross-border recognition and enforcement of family orders which are currently regulated by Brussels I and II. Furthermore, the Children Act 1989 is often interpreted narrowly, to the detriment of the fuller range of rights set out in the UNCRC. A crucial example, as the noble Baroness, Lady Massey, said, is the right of a child to be heard following abduction before a return order is made. The crucial question is, does the child wish to be returned? It is pretty desperate if they do not, and they will not be able to make their wishes known, as I understand it, even if they are of an age and maturity to make that appropriate. The Children Act 2004 places obligations on local authorities but does not extend those to immigration authorities or commercial or private entities to whom public authorities have contracted out aspects of their children's services. These days, of course, much of that work is contracted out.

[BARONESS MEACHER]

The Equality Act 2010 provides a number of protections for children and young people. However, it does not cover many of the issues that are a real worry for children, post Brexit. For example, it does not promote the need for public agencies to act in the best interests of the child as a top priority in the way the UNCRC does, which the EU implements. The Immigration Act 2016 proposes to withdraw leaving care support from unaccompanied young people at age 18, as has been mentioned, if they do not have leave to remain or are not asylum seekers. A lot of these kids probably do not have the knowledge and information they need to be in a position to claim those rights. There is therefore a human rights issue here, for which there is no provision in UK law. The Modern Slavery Act 2015 provides good protection for young people. However, the removal of Section 32 of the EU charter following Brexit will weaken protection against child labour. It will leave weak obligations on business in this area. Also, the EU trafficking directive includes requirements to have regard to the children's best interests and to consider the long-term outcomes for children. These are absent from the Modern Slavery Act, wonderful though that Act is.

At an EU level, the rights of the child are currently guaranteed by Article 24 of the charter and are one of the fundamental rights mentioned explicitly in the commission's strategy. They are thus included in the regular fundamental rights check, which the commission applies to relevant draft EU legislation. These safeguards will not apply to new UK laws or amendments to retained EU law. If, or when, we leave the European Union, we will thus need to correct the statute book and legislate for the future in areas of previous EU competency, such as matters relating to justice, specific areas of social policy, consumer protection and research and development. Across the UK, the range of issues where children could be exposed also covers data protection, paediatric medicine clinical trials, food labelling, television advertising, the rights of migrant children to access education and healthcare and, importantly, cross-border family law, as others have mentioned.

In conclusion, I do not believe that these gaps in UK law are the Government's intention, but an oversight that can and should be corrected between Committee and Report. Does the Minister agree that if this Bill is about providing "certainty and continuity" for people—as the noble Baroness, Lady Evans of Bowes Park, said at Second Reading—it is only right that the Government provide certainty and continuity for children also? I would be grateful for an assurance from the Minister that he will take these matters back to the department for consideration before Report. Also, it would be helpful if children's rights could be included on an agenda for a briefing session on the Bill with Ministers in the next few weeks.

Baroness Tyler of Enfield (LD): My Lords, I rise to lend my support to this group of amendments on children's rights and to briefly say one or two words on Amendments 37 and 69, to which my name is attached. Like the noble Baroness, Lady Massey, I want to talk about this group because my fundamental feeling is that the voices of children and young people are simply not being heard in the Brexit process. Frankly, that is ironic when we consider that they are the population group who will be most affected by this—and for the longest time.

The Government's plan not to retain the European Charter of Fundamental Rights through the EU withdrawal Bill is a real concern to me, particularly in relation to children. As we have heard, the charter enhances rights for children that already exist in the European Convention on Human Rights, such as the right to education. It also includes key rights enshrined in the UN Convention on the Rights of the Child, such as the rights to care and protection, to express views freely in accordance with their age and maturity—the principle of best interests being a primary consideration—and the right to know both parents. I know that others have said this, but I make the point that these are not small, trifling matters or marginal extras; they are fundamental things we should be very concerned about.

The charter contains certain provisions of great importance to children and young people that are not protected in domestic law at constitutional level. Children's rights enshrined in the charter have been translated into practice through EU legislation, policy and case law. This includes legislation on child-friendly justice systems, and the charter has strongly influenced the development of EU regulations relating to cross-border family law. We heard an awful lot about this earlier in our debate on family law and I certainly do not intend to repeat that because we heard it in great detail. I simply make one point, which was my key point in that debate. It is crucial that children, including children born to families where one parent is from the UK and the other is from an EU member state, feel that their voice is heard in this process and that their wishes and feelings can be expressed, so that they feel that a fair decision is being made about what happens to them regarding these crucial decisions in their lives, particularly if they are to be returned to a parent in another country.

Finally, the noble Earl, Lord Listowel, is not in his place to talk in more detail about Amendment 69, to which I added my name because I felt it very important that a government body or right in statute exist somewhere to ensure that children's physical and psychological needs are being met and considered, particularly when they are a victim of any form of neglect, exploitation or abuse. As many in the Chamber will know, no group of children has suffered more neglect, exploitation and abuse than children in care. That is why this amendment, which I know was tabled as a probing amendment, is so important.

Lord Foulkes of Cumnock (Lab): My Lords, I have one brief question that I would like the Minister to answer. Most of the debate has been about children, apart from the contribution of the noble Baroness, Lady Greengross. I will talk about the elderly. I need to declare an interest—although we would all need to

declare that interest. I am chair of Age Scotland. Like the noble Earl, Lord Dundee, as he mentioned, my noble friend Lady Massey who moved the amendment, the noble Lord, Lord Russell, who will speak, and the noble Lord, Lord Balfe, who is in his place, I am a member of the Parliamentary Assembly of the Council of Europe. How will Council of Europe recommendations be incorporated into United Kingdom law if we leave the European Union? I ask this because an excellent report has been approved by the Parliamentary Assembly of the Council of Europe entitled *Human Rights of Older Persons, and their Comprehensive Care*.

A noble Lord: Author!

Lord Foulkes of Cumnock: The author is the noble Lord, Lord Foulkes of Cumnock. This was approved unanimously by the appropriate committee and by the parliamentary assembly. It recommends a whole range of things, including an adequate income for the elderly, appropriate housing, action on elder abuse, intergenerational provision, which is very important, the integration of health and social care—I am glad to see that the Government are doing that at a national level, but it needs to be done at a local level as well—and many more. These are very important recommendations, although I say so myself, immodestly. They are things that everyone is agreed on, but what strength, power and influence will they have? Will they just be advisory to the British Government, or will they take them as being more than that and as clear indications of the kind of action they propose to take? Would the recommendations of the Parliamentary Assembly of the Council of Europe and the Council of Europe itself have greater influence if we were to leave the European Union? If the Minister is not able to answer that question today, because I know that it has come out of the blue, I would be willing to receive a letter from him in due course.

9.15 pm

Lord Russell of Liverpool (CB): My Lords, I have my name to Amendments 37 and 70, and declare my interest as a trustee of the charity, Coram. I remind the Minister that it is the hereditary oik from the Cross Benches here again for the second time—good evening.

There appears to be broad agreement that it would be disappointing and unfortunate if we inadvertently managed to let children's rights slip as a result of our anything-but-straightforward and frictionless departure from the EU. The United Kingdom has often played a prominent role in developing global human rights frameworks, and I sincerely hope that the Government intend that we should continue to do so in the hereafter.

Many of us have taken on board the distaste which many on the pro-leave side feel for the charter. Indeed, I have watched online a video of the Minister lamenting the United Kingdom being told to make prisoners have the vote and to allow some individuals involved in terrorism to be given greater human rights than he thought was entirely appropriate. The European Scrutiny Committee of another place in 2014 described the charter as creating a state of confusion.

Baroness Ludford (LD): I think I heard the noble Lord refer to prisoners' votes. That was the judgment of the Strasbourg court about the European Convention on Human Rights; it was nothing to do with the European Charter of Fundamental Rights. In any case, the way in which it has been demonised is wrong, because it said only, "Please have a scheme", and not, "All prisoners must vote".

Lord Russell of Liverpool: I thank the noble Baroness for that intervention. All I would say is that the discussion I heard was framed in the context of the European charter of human rights, probably incorrectly.

Baroness Ludford: Very incorrectly.

Lord Russell of Liverpool: That committee was chaired by Sir William Cash and included a certain Member for the 18th century, Mr Rees-Mogg, so I think that we can conclude that it was clearly completely impartial. We have got the message.

The question that we are posing to the Government, in response to a wide range of representations which many of us have had, is whether they will honour their commitment to defend the rights of children as we come through this process.

I mentioned at Second Reading that scrutinising and discussing this Bill in a non-partisan and apolitical way might be helpful, so I have a specific question for the Minister: does he have a twin brother or a doppelganger? Can he be same person who on 30 January was responsible for writing two articles? One of them appeared on the ConservativeHome website and said:

> "From the beginning we have been clear that we need—and indeed want—to adopt a collaborative approach and listen to the views of Parliamentarians from all sides of the House. The necessity and sheer scope of this legislation means that thorough debate and examination is more important than ever. We took this approach in the House of Commons and we will continue to do so in the Lords … The House of Lords has a well-deserved reputation for its detailed and thorough scrutiny. This Bill should be no exception—it will benefit from the forensic examination the Lords can bring and we look forward to that razor-sharp review".

On the same day, in the *Sun* newspaper, he wrote:

> "We are seeing a co-ordinated push by the defeated elites; the Europhiles will use their majority in the Lords—a majority that rests heavily on quangocrats and busybodies, some of them in receipt of fat Brussels pensions"—

which possibly includes Members of the European Parliament—and:

> "For the Lords to overturn a result supported by more British voters than anything else in history would be outrageous".

He described some of your Lordships as scheming Peers who want an anti-democratic coup. So I have two more questions for the Minister; could he share with us what he had for breakfast the day he wrote

[LORD RUSSELL OF LIVERPOOL]
those two reports, because I shall try to avoid eating the same? Secondly, did he ever consider a career in the Foreign Office?

Let us please forget the unending politics and focus on the children, whose voice and interests have hardly been top of mind as a rather unseemly procession of opinionated individuals compete for media airtime and attention. I recall noble Lords to the fact that I am speaking to Amendments 37 and 70. Amendment 37 aims to bring into domestic law the parts of the European Charter of Fundamental Rights into UK law that are necessary to protect children's rights. I appreciate that we are not going to bring the charter overall into our law; however, it has some very important provisions: the child's best interests must be a primary consideration in all actions, children's views may be expressed and shall be taken into consideration, and children have a right to maintain a personal relationship with both their parents unless that is contrary to their interests. It contains other articles, as other noble Lords have mentioned, including on education and the prohibition of slave labour—the Minister will be aware that our Prime Minister has a particular interest in anything to do with child slavery.

Amendment 70 goes about achieving the same end in a different way. The UNCRC is viewed by most of us as the gold standard. The Government have stated that the source of the rights of the child set out in Article 24 of the European Charter of Fundamental Rights stem from the UNCRC, but as others have mentioned, it is not incorporated into domestic law. We share the concerns outlined by the Joint Committee on Human Rights in its recent report, *Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis*. There are several examples of where the UNCRC and the charter have fundamentally helped where there are gaps in our own law. Among these are cross-border family breakdown; the right to be forgotten and data protection; and where 17 year-olds, who are still children under the law, are arrested and treated as if they are adults, which is against the law.

I believe that we must protect the hard-won protections of children and ensure that they are not inadvertently lost. I also support Amendments 68, 69 and 97, all of which are simply trying to probe the Government, to understand how they see the way forward. What all of us are saying is that, however we go forward, we must ensure that in no way, shape or form are the rights and protections of children in any way impaired.

Lord Brown of Eaton-under-Heywood: My Lords, I too strongly support the rights of children. Indeed, I support the rights of the elderly, in whom, like the noble Lord, Lord Foulkes, I must, alas, declare an interest. However, with the best will in the world, I cannot support any of these amendments. The first point I make is that we debated reasonably fully last week the desirability or otherwise of incorporating this charter into UK domestic law in this Bill. The previous group is said to have been "already debated" and I find it difficult to see the logic of now debating a host of questions which raise the same idea, only more narrowly focused on one or two specific, individual charter provisions. This debate has ranged far and wide. We have even been back to cross-border co-operation, which was the subject of an earlier group, and I am certainly not going back down that trail.

I shall turn to the specific rights addressed here. The suggestion that the rights of children could be a primary consideration in any decision affecting them is hardly radical. As the noble and learned Lord, Lord Mackay, noted earlier, the Children Act 1989 puts it rather higher than a primary consideration: it is the "paramount consideration". Of course there are areas beyond the scope of the Children Act as such which are in play with regard to children, but for the life of me I cannot think of a single case in recent years affecting children—or, indeed, the elderly—which would have failed under the convention and the common law but would have succeeded only by reference to the charter; nor can I envisage such a case in the future. Somebody may be able to devise a scenario which would meet that but I have not been able to do so.

In any event, the Article 24 rights are regarded as retained general principles of EU law and therefore will continue to apply. The right to be heard on the part of children is not a contentious one. I took the opportunity of the regrettably short break we were given this evening to look at a particular decision—indeed, I think it was one of the last Supreme Court cases I was involved in, and my noble and learned friend Lord Hope will remember it because he presided over it. It was a group of extradition cases under the title of HH v Deputy Prosecutor of the Italian Republic. In the course of it the question of the children's views was raised; it was an extradition case but the same principle applies across the wide field of children's interests. The noble and learned Baroness, Lady Hale of Richmond, who gave the lead judgment in the case, concluded:

> "I share the view of the Official Solicitor that separate legal representation of the children will rarely be necessary, but that is because it is in a comparatively rare class of case where the proposed extradition is likely to be seriously damaging to their best interests. The important thing is that everyone, the parties and their representatives, but also the courts, is alive to the need to obtain the information necessary in order to have regard to the best interests of the children as a primary consideration, and to take steps accordingly".

I do not know of cases where children's interests are lost because they are not permitted to express their views.

Baroness Massey of Darwen: I have a number of case studies on these issues, which I will show the noble and learned Lord. Children's rights are not always consistent, particularly in youth justice cases. I know that children in custody in the youth justice system are very often ignored, mistreated and not heard.

Lord Brown of Eaton-under-Heywood: I would be extremely obliged to the noble Baroness if she would put these cases clearly and crisply on a piece of paper

and share them not only with me but with the Official Solicitor, who I think would be extremely interested in the proposition that children's rights are being ignored in the youth justice system. But if they are ignored now, when the charter is available, what is to be lost?

Baroness Lister of Burtersett: The noble and learned Lord may remember that in my speech, which was about the UN convention rather than the charter, I cited a case, which I am sure he is familiar with—R(SG) v Secretary of State for Work and Pensions—where three of the judges, including the noble and learned Baroness, Lady Hale, found that the Department for Work and Pensions was in breach of the UNCRC, but because it was not incorporated they could not find against the Government and said that it was for Parliament. Here is a clear example of where three out of five judges found that children's rights in the charter—the best interests of the child—were not being treated as a primary concern, yet they could not find for those families.

9.30 pm

Lord Brown of Eaton-under-Heywood: I was going to come specifically to that case but, as I understand it, it was put forward not as a charter case but as a UNCRC case. I am not talking about that yet; I am talking about the charter because if it would not avail those children, then what is the point and why is it so important to incorporate those provisions of the charter? The UNCRC is a completely distinct point. I acknowledge that there may be a case and if that case is made good and establishes in full measure the proposition which the noble Baroness is advancing, it may be sensible, whether in this legislation or somewhere else—it would not logically take any part in this Bill—to incorporate the convention into domestic law. I acknowledge that it has not been. But unless you can show that something is to be lost by not continuing to honour the charter—if you fail to do that—with respect, it does not make any logical sense to bring in the UNCRC at this point of the Bill. I hope that the Committee can follow the logic of the way I put that.

I do not really want to spend a long time on this. The noble Lord, Lord Foulkes, and I are even more concerned about Article 25 and the rights of the elderly. That charter right is put in this way and it is worth incorporating what it says:

> "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life".

That is of course an admirable sentiment, a great principle and a suitable aspiration. But is it really said to be an enforceable right, which the courts would pay regard to if they had already rejected the claim under the common law and the convention? With the best will in the world, it does not make sense. I do not want to rain more heavily on everybody's parade but I respectfully submit that it would not be a good idea to adorn this Bill, which has a limited aim, with these additional rights that logically do not stem from the ending of the charter.

Lord Berkeley of Knighton (CB): My Lords, I certainly would not attempt to trade cudgels with the noble and learned Lord but Amendments 37, 38 and 69 seem common sense to me. If one thinks in terms of child trafficking and one particular area that personally concerns me, female genital mutilation, there is the taking of young girls out of this country to be mutilated and brought back, and sometimes they are brought here to be mutilated. It surely makes sense that we have the strongest possible cross-border co-operation, whether we are in the EU or out of it.

Baroness Deech (CB): My Lords, my noble and learned friend Lord Brown is of course right. There is a simple proposition in law, which is that the United Nations convention, like others, is not directly enforceable in this country—let alone between two individuals—until and unless it has been incorporated into our domestic law, which it has not been. On the face of it, if one brought it as it stands by our decision tonight, or later, how would we tackle things such as where the charter and the convention say that every child has the right to know and be brought up by his parents? How would we reconcile that with our very complicated and subtle laws about, for example, sperm donors or surrogate parents? How would we reconcile a child's right to education with our very lax attitude towards home schooling and our inability to bring that under control? How would we reconcile it with the very sad fact that the majority of divorced and estranged fathers do not turn up to see their children, even though their children would like to and have a right to see them?

In other words, it is extremely complicated. It is not enough simply to wave a flag for what a good thing the United Nations convention is, which indeed it is, unless it is incorporated in a careful and detailed fashion into our law, which it has not been. It therefore cannot be by a side wind as this Bill goes through Parliament.

Baroness Sherlock (Lab): My Lords, this has been an interesting and important debate and one that was much needed. As my noble friends Lady Massey of Darwen and Lady Lister and the noble Baroness, Lady Greengross, pointed out, there does not seem to have been enough attention paid to how Brexit may affect children. This point was made strongly in the briefing that a number of us attended and in the written materials given to us by an alliance of children's organisations, and we are all very grateful for the work it put into briefing the House on this.

Many children's charities are worried that neither the referendum nor the subsequent discussions engaged adequately with the voices of children and young people, especially those under 16, who still should have the opportunity to express their views.

A number of areas have been raised. I shall not go through them all, but we heard interesting comments around issues of cross-border co-operation by the noble Earl, Lord Dundee, and the noble Baroness, Lady Meacher, on the European arrest warrant, Europol and Eurojust. The noble Baronesses, Lady Meacher and Lady Greengross, touched on family

[BARONESS SHERLOCK]
law and cross-border co-operation, which I will not come back to, having spoken rather a lot on that on an earlier amendment, but I will be interested in anything the Minister has to add on that.

Two specific issues came up tonight. One is the status of children's rights in the UK after Brexit and the other is we how retain appropriate mechanisms for ensuring that due regard is paid to children's rights when policy and law are being developed. As my noble friend Lady Massey pointed out, a range of different types of EU regulations affect children. The way the key mechanisms come together is interesting. For example, the European Convention on Human Rights, the EU Charter of Fundamental Rights, particularly Article 24, which is based on the UNCRC in the first place, the UN Convention on the Rights of the Child and the constitutional commitment in Article 3(3) of the Treaty on European Union to protect the rights of the child in all EU activities affecting children. The interesting result of this is that measures enacted at EU level, whether or not they directly target children, are interpreted and applied by member states in a manner that is consistent with international children's rights standards. That is what we are trying to chase down here today. The risk of losing some of that is what these amendments are concerned with.

Amendment 37, tabled by my noble friend Lady Massey of Darwen, and Amendments 38 and 39, tabled by the noble Baroness, Lady Greengross, seek to retain parts of the Charter of Fundamental Rights. Amendments 68, 69, 70, 97 and 158, tabled variously by my noble friend Lady Lister, the noble Baroness, Lady Meacher, and the noble Earl, Lord Listowel, refer in various ways to the UNCRC and the requirement at least to have regard to the provisions of sections that have been ratified by the UK or, in some cases, to go further than that. My noble friend Lord Foulkes and the noble Baroness, Lady Greengross, made a powerful case for the importance of attending to the right to dignity for older people, especially in care. I am sure the whole Committee will be interested to hear the Minister's response on those important issues.

Looking at these different instruments, Ministers in general argue that removing the charter will not result in a reduction in rights and they cite their right-by-right analysis, but as we have heard sometimes that may simply indicate that aspects of a charter right are protected domestically without necessarily meaning that those rights are being fully protected. My noble friends Lady Massey and Lady Lister referred to a counsel's opinion obtained by the EHRC which offered a very different assessment of the likely reduction in rights. I should declare a historical interest as an EHRC commissioner in the long-lost and greatly missed days before I joined this House and had the opportunity to spend many evenings discussing the importance of Brexit.

The EHRC briefing states that "some Charter rights", for example the right for a child's best interests to be a primary consideration in all actions taken by a public or private institution,

> "have no equivalent protection in UK law. Furthermore, the Charter provides remedies, such as the ability for an individual to challenge laws that breach their fundamental rights, which are not otherwise available in UK law".

The noble and learned Lord, Lord Brown of Eaton-under-Heywood, mentioned that we had a debate on day 2 in Committee specifically about the charter—led, if I may say so, brilliantly by my noble and learned friend Lord Goldsmith—but the reason that these amendments are being debated here is because when he responded to that debate, the noble and learned Lord, Lord Keen of Elie, did not make any reference to the issues raised about children and therefore people who are concerned about children's rights want to understand how they will affect the people they are concerned about.

The noble and learned Lord said in reply:

> "I understand the concerns expressed by some about whether some rights would somehow be left behind, but if we can and do identify a risk of such rights being left behind, we are entirely open to the proposition that we have to address that by way of amendment to the Bill, and we will seek to do that".—[*Official Report*, 26/2/18; col. 573.]

Can the Minister tell us whether an audit has been done in respect of children's rights to see whether any of them will accidentally be left behind? If so, what was the result, and if not, when will it be done?

What of the other measures? My noble friend Lady Lister quoted the reply given by the noble Lord, Lord Callanan, at Second Reading, in which he sought to reassure the House that children's rights would continue to be protected by the Children Act 1989 and through our remaining party to the UNCRC. The UNCRC is hugely valuable, and I was pleased to hear it being defended so vigorously and passionately by my noble friend Lord Judd. But as many noble Lords have said, although we have ratified the UNCRC, the convention has not been fully incorporated into UK law and there are no effective sanctions for non-compliance.

The Children Act 1989, to which the noble Lord, Lord Callanan, referred, applies of course only to England and Wales. The problem for children in the UK as we leave the EU, as pointed out very clearly by my noble friend Lady Lister, is that there is no explicit constitutional commitment at a central UK level to children's rights, and it is that level at which most EU legislation will be amended or repealed in the period post Brexit. We do not have any specific statutory provision requiring respect for children's rights in lawmaking, and no general requirement to safeguard and promote the welfare of children in the UK.

As the noble Lord, Lord Wigley, pointed out, there are devolved provisions, such as the Rights of Children and Young Persons (Wales) Measure 2011 and the Children and Young People (Scotland) Act 2014. But as a number of noble Lords have pointed out, my noble friend Lady Massey among them, the Bill brings competence on matters that have been arranged under EU law back to Westminster and would seem, on the face of it, to prevent devolved nations from exercising their powers to stop or amend legislation from Westminster—even, as the noble Lord, Lord Wigley, pointed out, where it might contradict their own commitments to children's

rights. I look forward to hearing the Minister explain to the Committee how the Government will deal with that.

On one level, these conversations may sound academic, but the noble Lord, Lord Russell, made a passionate defence of why human rights matter. They matter for everybody, even—probably especially—for people we do not want to give them to, but they certainly matter for children. One reason they matter is because of what we are talking about at the end of this: how to ensure that our children are safeguarded, protected from harm and enabled to flourish. I know no Government would want to challenge that aspiration, but the danger is that where there is no specific requirement to pay due regard to the interests of children when deciding matters in legislation, law and practice, especially when the matters may not appear to specifically relate to children, there is a real danger those interests can, and do, get overlooked.

The noble Lord, Lord Russell, and the noble Baroness, Lady Meacher, gave some important examples of forced child labour and slavery, but there are also some examples that are wholly unrelated, on the face of it. Under current EU law, the free circulation of goods and services between member states—a very fundamental principle of course—has to be balanced against the need to ensure the welfare of children who are exposed to them. In post Brexit trade deals, how will similar safeguards be ensured and, if it is necessary, how can they be enforced legally?

The noble Lord, Lord Russell, referred to data protection. The general data protection regulation makes specific recommendations in respect of children, saying that they have the right to be properly informed in language they can easily understand. Children's charities fear that without that, our children will specifically be targeted by marketing of things that will not be good for them.

Nearly a quarter of our population are children. As we have heard, they did not get to vote in the referendum, but they are the ones who will live with its consequences for the longest time. I doubt many of the parents who voted leave did so in order for their children to be less well protected than they are at the moment.

We should be celebrating and building on the significant contribution the UK has made to the EU's work on promoting the best interests of children. I hope the Minister has heard the concern from around the Committee and that the Government's previous assurance does not seem to have given the reassurance that he might have hoped. If the Government do not like these amendments, could he tell the Committee how they will ensure that our children will be protected in future?

9.45 pm

The Minister of State, Department for Exiting the European Union (Lord Callanan) (Con): My Lords, I am grateful that the important issue of children's rights has been raised. I thank noble Lords for these amendments, which seek to make changes relating to the United Nations Convention on the Rights of the Child and the charter of fundamental rights, specifically to incorporate them into domestic legislation via the Bill and to impose statutory duties on Ministers to consider the UNCRC when making regulations. Many of the noble Lords who have spoken to these amendments have a track record of tirelessly championing children's rights over the years, and the issue is of utmost importance to them and to this Government. Protecting children's rights is paramount, and I assure noble Lords that I have heard their concerns about how existing rights and protections for children, and our commitment to the UN Convention on the Rights of the Child, will continue as the UK exits the EU.

Amendments 37 and 38, in the names of the noble Baronesses, Lady Massey of Darwen and Lady Greengross, seek to provide that some or part of the charter of fundamental rights would remain part of domestic law following withdrawal from the EU. As a number of noble Lords have observed, we have already debated the wider issue of the charter at length and noble Lords will be pleased to hear that I will not go through the general arguments today, although I thank the noble and learned Lord, Lord Brown, for rehearsing some of them. I take the opportunity again to reassure the Committee that the Government remain fully committed to children's rights and the UN Convention on the Rights of the Child. Our ability to support and safeguard children's rights will not be affected by the UK's withdrawal from the EU.

I have heard the concerns of the noble Baroness, Lady Massey, about the impact of Brexit on children's rights and the need to ensure that their welfare, safety and best interests are not compromised as we leave the EU. The rights and best interests of children are already, and will remain, protected in England primarily through the Children Act 1989, which sets out a range of duties to safeguard and promote the welfare of children, including making the child's welfare the paramount consideration for any court—I think the noble and learned Lord, Lord Brown, referred to that. Children's rights and best interests are further protected through the Adoption and Children Act 2002, which among other things ensures that the child's welfare is the paramount consideration in all decisions relating to adoption. In addition, other legislative and administrative measures are in place, including the Children Act 2004, which imposes general safeguarding duties in relation to children on various bodies.

Scotland, Wales and Northern Ireland have their own measures for the protection of children's rights which fully comply with the UN Convention on the Rights of the Child. Additionally, the European Convention on Human Rights as a whole offers the protection of children's rights, and this is implemented domestically by the Human Rights Act 1998.

Lord Wigley: The Minister referred to Wales, Scotland and Northern Ireland having devolved competence. Can he give an assurance that all the powers they currently have in that context will be maintained after Brexit?

Lord Callanan: I will come on to the noble Lord's question shortly and answer him directly. None of this extensive framework is altered or in any way diminished by our exit from the EU and the non-retention of the charter. Amendments 68, 69 and 70, tabled by the noble Baronesses, Lady Meacher and Lady Lister, and the noble Earl, Lord Listowel, would incorporate the UN Convention on the Rights of the Child into domestic legislation and require all public authorities and Ministers of the Crown to have regard to it. Further, Amendments 97 and 158, tabled by the noble Baroness, Lady Meacher, seek to ensure that regulations made to remedy deficiencies in retained EU law are not contrary to the UNCRC. Again, I thank noble Lords for these considered amendments. Although tabled with great intention and faith, in reality they would not enhance the existing safeguards in place to preserve the rights of children in this country—measures that I have already outlined and which will remain in place after the UK's withdrawal from the EU. I thank the noble Baroness, Lady Deech, for her comments and points on this matter.

It is also important to highlight that in addition to these measures, which are a combination of both legislation and commitments, the UK Government already have a commitment to Parliament to give due consideration to the UNCRC when making policy and legislation. In response to the noble Baroness, Lady Massey, I assure noble Lords that the Government are working closely with the Children's Rights Alliance for England to ensure that children and young people's views are heard and taken fully into account when developing policy and delivery in this area. We are hugely grateful to it for the great work it does to help preserve children's rights and deliver a framework of actions on the UNCRC. These actions are designed to embed children's rights across Whitehall and beyond, as we set out in a Written Ministerial Statement in October 2016. Those actions include developing and promoting training for civil servants to help them understand children's rights and the UNCRC, and looking at how we can promote and embed good practice.

As I have set out, the UK already meets its commitments under the UNCRC through a mixture of legislative and policy initiatives, which effectively safeguard the rights of children in this country, negating the need directly to incorporate the UNCRC itself. That approach is in line with normal practice for implementing international treaties. By going over and above measures already in place, and which will of course remain in place after we leave the EU, the amendments would create new burdens on public bodies and individuals, when the UK's existing laws and commitments already adequately safeguard the rights of children in this country.

Amendment 70, from the noble Baroness, Lady Lister, addresses continued co-operation on various security and law enforcement tools. Those discussions will be a matter for negotiations with the EU. The continued security of Europe is unconditionally guaranteed and is of paramount interest to us. The Government have been clear that the UK remains unconditionally committed to European security, and in the exit negotiations we will work to ensure that the UK and the EU continue to co-operate closely to safeguard our shared values and combat common threats. We recognise in that regard the value provided by Europol, the European arrest warrant, Eurojust and ECRIS. I hope that that provides appropriate assurances to my noble friend Lord Dundee and reassures other noble Lords of our wholehearted commitment to children's rights and the UNCRC, showing that our ability to support and safeguard children's rights will not be negatively affected by UK withdrawal from the EU.

I turn to Amendment 39, tabled by the noble Baroness, Lady Greengross, on the rights of the elderly. I entirely sympathise with the concerns raised today and I reassure the Committee that the Government are committed to the welfare of the elderly. I particularly thank the noble Lord, Lord Foulkes, for drawing my attention to his no doubt excellent report in the Council of Europe. I must profess that in my extensive reading material I omitted to go through that worthy document but, now that he has drawn my attention to it, I shall make it my priority to get hold of a copy and will reply to him in writing on it.

There are enforceable domestic safeguards for the rights of the elderly under the Human Rights Act and the Equality Act. Older people will continue to benefit from the existing strong protections against age discrimination, harassment and victimisation in the Equality Act 2010—for example, when accessing services when we leave the EU. Of course, the Government also make provision for the rights of the elderly in domestic legislation in a range of ways. To take just the most obvious example, domestic law provides for state pensions and the safety net of state pension credit, as well as disability benefits and other measures such as the provision of social care for those with eligible needs—subject of course to a financial assessment—free prescriptions where charges would otherwise apply, and travel concessions. Again, none of this is in any way diminished by our exit from the EU and the non-retention of the charter.

Article 25 of the charter is also a principle, which is different from a right. It cannot be relied upon directly by individuals in the way that rights can. Principles are a valued and important tool, and, in so far as the principles and rights underpinning the charter exist elsewhere in directly applicable EU law, or EU law which has been implemented in domestic law, that law will be preserved and converted by the Bill. Retaining Article 25 as a standalone right in this way is simply not necessary. If Article 25 was incorporated into domestic law, it would be unclear how it was supposed to apply and it would undermine the Bill's core objective: to give certainty and continuity after we leave the EU.

I turn to the question asked by the noble Lord, Lord Wigley, on protecting children's rights. The UNCRC does not impose a requirement on state parties to incorporate the UNCRC itself. It is focused on the implementation of rights without prescribing how state parties should achieve that. I reassure noble Lords that the UK meets its obligation under the

UNCRC through a mix of legislative and policy initiatives, as opposed to the incorporation of the UNCRC itself.

With regard to Wales, the Rights of Children and Young Persons (Wales) Measure 2011 requires Ministers to have due regard to the convention when exercising their functions. The Children's Rights Scheme 2014 sets out the arrangement Ministers have in place to ensure compliance. None of the rights exercised by Welsh Ministers will be affected by any of the provisions in the Bill.

My favourite hereditary oik, the noble Lord, Lord Russell of Liverpool, mentioned two articles. I certainly remember writing the article for "ConservativeHome" but have no recollection of writing an article for the *Sun* on the same day. I would be grateful if he would send me a copy of this for my delectation and interest, and I will respond to him when I have had a look at it.

I hope that my reassurances to noble Lords will enable them to withdraw or not move their amendments.

Baroness Massey of Darwen: My Lords, I thank the Minister for his reply. We have had an excellent debate on children's rights and protection, with many articulate and forceful contributions. The noble Baroness, Lady Tyler, stressed that children are potentially the most affected by Brexit because they are young and will be subject to the forces that Brexit might bring. I am disappointed by the Minister's response. Many of us have said tonight that we recognise that we have made great strides in defending children's rights and proposing things which improve those rights and the protection and welfare of children. But I would like the Minister to recognise what was also said: namely, that our domestic laws do not protect children in all circumstances. Many noble Lords have given examples of this.

As my noble friend Lady Sherlock said, our laws do not incorporate all the treaties and we should be working towards more incorporation. The noble Baroness, Lady Meacher, thought this might be an "oversight"—I think that was the word she used. Whatever it is, we need to sort it out. We need to recognise that children's rights and protection are not always incorporated into what we do. An example is youth justice, where 17 year-olds can be treated as adults rather than children. Children say that this is not right or sensible, and I agree.

The Government have made it clear that they are very keen on social mobility. It is important, but it will not happen unless children are encouraged to participate in their own futures. I am talking about empowerment as well as protection. Last November, I held a seminar in Portcullis House. One or two noble Lords were there as observers. We talked about child-friendly justice and child mental health. Almost half the participants were children and young people; others included academics, European politicians and NGOs. It was acknowledged by everyone that the contribution of young people was absolutely crucial to defining the needs of children and young people and responding to them. I recognise that the Minister says that they have talked to CRAE—for which I have the highest regard—on the rights of the child, but have the Government actually listened to what children have to say on this? I would like some evidence of that.

As I said, we have made progress on involving and protecting children, but we should be big enough to take criticism when it comes—and we are criticised. We are not rated highly at international level on how we deal with children. I gave the example of youth justice. We should not be complacent.

This is an important set of amendments, spoken to most forcefully by colleagues. I hope that the Minister will call a meeting of those present today and others to discuss how we can move forward on issues relating to Brexit and children. My questions and those of others have not been sufficiently answered. I still have reservations and I would like to meet the Minister to talk about them. I beg leave to withdraw the amendment.

Amendment 37 withdrawn.

Amendments 38 to 39B not moved.

Clause 5 agreed.

Amendment 40

Moved by ***Baroness Lister of Burtersett***

40: After Clause 5, insert the following new Clause—

"Future provisions relating to family friendly employment rights, gender equality and work-life balance for parents and carers

(1) A Minister of the Crown must, as soon as reasonably practicable, report to both Houses of Parliament whenever new or amended EU law in the area of family friendly employment rights, gender equality and work-life balance for parents and carers would have amended provisions or definitions in domestic law had the United Kingdom remained a member of the EU or the European Economic Area (the "EEA") beyond exit day.

(2) Having reported to both Houses of Parliament, the Minister must consider whether to seek to incorporate those amended provisions or definitions into domestic law, in order to ensure that there is no material reduction of gender equality and employment rights as a result of the United Kingdom exiting the EU or EEA and that those working in the United Kingdom have at least the same gender equality and employment rights and protections as they would have had if the United Kingdom had remained in the EU or EEA.

(3) New or amended EU law for the purposes of this section includes but is not limited to—

(a) any future EU directives relating to family friendly employment rights, including but not limited to rights for pregnant workers and employees, and those returning from maternity, paternity and parental leave;

(b) any future EU directives relating to gender equality;

(c) the proposed directive of the European Parliament and of the Council on work life balance for parents and carers.

(4) Reports presented under subsection (1) must include—

(a) an assessment of how such amendments to domestic law would have impacted gender equality

[BARONESS LISTER OF BURTERSETT]

and work life balance in the United Kingdom had the United Kingdom remained a member of the EU or EEA beyond exit day, and

(b) an assessment of how not implementing amended provisions or definitions in domestic law will impact gender equality and work life balance in the United Kingdom."

10 pm

Baroness Lister of Burtersett: My Lords, this amendment stands in my name and those of the noble Baronesses, Lady Altmann, Lady Burt and Lady Greengross, whose support I very much value. I also thank Working Families for its assistance.

The amendment would simply require the Government first to report to Parliament on developments in EU law in the areas of family-friendly employment rights, gender equality and work/life balance for parents and carers which would have affected UK legislation had we remained in the EU, and then to consider whether they should incorporate these changes into domestic law to ensure that such rights are not diminished or are no less than they would have been were the UK still a member of the EU. What it does not do is bind the UK to implement future EU law. While it is essentially a probing amendment, I hope to convince your Lordships that it goes with the grain of government policy and therefore there is no reason for the Government not to accept it or bring forward some other version of it. If the Minister cannot give me such an assurance, we may want to come back to this on Report.

In their note on equality legislation and EU exit, the Government rightly point to the UK's rigorous domestic equality legislation, part of which predates or goes beyond EU provision. The same is true up to a point when it comes to family-friendly and work/life balance provisions. But, as the Government acknowledge, only part of our legislation predates or goes beyond EU provision. There is wide agreement that, in the words of the Equality and Diversity Forum, the EU,

"has been an important driver for improvements which have benefited us all"—

and, I add, women in particular. An example is the pregnant workers directive, which, as Working Families attests from its helpline, has been crucial in helping protect women from pregnancy discrimination or maternity discrimination, although a recent EHRC report shows that it is still all too common. It is worth noting here that according to new analysis published in the journal *Social Policy and Society*, these pregnancy and maternity rights were watered down by the then UK Government during negotiations. Other examples of EU-driven legislation include the original right to parental leave, equal rights for part-time workers and the concept of equal pay for equal work of equal value, which strengthened our own pioneering equal pay legislation immeasurably.

The Joint Committee on Human Rights 2016 Brexit report likewise noted that:

"EU law has been described as the engine that hauled the development of UK anti-discrimination law".

Yet the Minister gave the committee,

"no commitment that the government would monitor or take account of EU law developments".

That, it observed, "may prove significant", especially so because we know there are a number of important directives in the pipeline, one of which is explicitly included in proposed new subsection (3)(c) in the amendment, a directive on work/life balance for parents and carers. This includes two measures on which I and many outside organisations have campaigned for many years: improved terms of paid parental leave and the introduction of paid carer's leave. I stress that work/family life balance is of increasing importance to men, as it has traditionally been to women. I am sure that the noble Baroness, Lady Burt, will say more about parental leave, because she has repeatedly raised the failure of the shared parental leave scheme to achieve its aim of significantly increasing fathers' take-up of the leave.

The draft directive would provide four months of non-transferable leave for both fathers and mothers, paid at a minimum of statutory sick pay levels. This could provide just the kind of boost needed to encourage greater paternal involvement. I hope and trust that whatever happens to this amendment, the Minister can give us an assurance that the review currently taking place of shared parental leave will include consideration of the directive.

In addition, the draft directive includes a right to five days of carer's leave a year, also paid at a minimum of statutory sick pay levels. As a vice-chair of the All-Party Group on Carers, I have been convinced of the importance of the case made by Carers UK and others for a period of such leave. As Carers UK argued in a report making the case:

"The evidence base for supporting working carers is growing, and it is compelling".

Around 3 million people—one in nine members of the workforce—combine working with unpaid care for a loved one, and the numbers are predicted to grow as the population ages. The danger is that without the safety net of the right to a few days' paid leave a year, carers will either reduce their hours or give up paid work altogether, which, as the Women and Equalities Minister said, is "a huge loss" both to them and the economy. Welcome as it is, the impact of the fund to help carers return to work in the private sector that she just announced will be reduced if it is not backed up by carer's leave. The state pensions reviewer highlighted this issue recently and recommended statutory carer's leave. Care leave is becoming increasingly common across the world, and if we do not keep up with our European neighbours on this matter we will fall further and further behind.

The question of future EU directives was also raised in the Women and Equalities Committee's Brexit report. The government response stated:

"The UK Government's record on equalities is one of the best in the world and we are determined to ensure that this remains the case … We are committed to protecting and promoting equality and to eliminating discrimination—leaving the EU does nothing to change this".

This amendment does no more than to support, help and promote this commitment.

I will not take up time by detailing the depressing evidence from the Working Families 2018 *Modern Families Index*, which shows just how far we still have to go to achieve genuinely family-friendly employment, and therefore how important it is that we keep pace with EU developments. But such evidence is also there in the work of Carers UK and other organisations, which are calling for some way of keeping pace with EU developments—notably the EHRC, the TUC, the Fawcett Society and the Fatherhood Institute. In addition, new public attitude research by the IPPR indicates strong public support for continued alignment with the European economic and social model, regardless of the position taken on the referendum.

When a similar new clause was moved in the Commons in the name of Ellie Reeves and a number of other MPs, it was given short shrift by the Minister and rejected in two sentences on the grounds that it,

"suggests a procedural device for incorporating certain EEA-related rules into UK law. This is entirely unnecessary given the wider snapshot of EU law this Bill will take at the point of exit".—[*Official Report*, Commons, 21/11/17; col. 904.]

That was entirely to miss the point. It is not about incorporating existing rules, which, as the Minister said, will be done as part of the wider snapshot, and of course government assurances with regard to existing equality and employment rights are welcome, even though they have not convinced everyone. Similarly, the government amendment to Schedule 7, ensuring transparency in any changes to equality legislation and placing reporting obligations on government, is welcome as far as it goes, although it does not go far enough, despite the assurances in the Minister's helpful letter to Peers.

Snapshots are static. The whole point of this amendment is to recognise that the world is not static—it will not be frozen in aspic on the day we leave the EU. Indeed, just the other week the Brexit Secretary assured business leaders in Vienna that Britain will remain a "dynamic and open country". This amendment is all about dynamism and openness to change in the wider continent of Europe. Mr Davis continued that Britain will be leading,

"a race to the top in global standards".

That is great, but how can it do so without ensuring that Parliament is informed about, and is able to consider changes in, such standards among its closest neighbours? In this spirit, I call on the Government to accept this amendment, or some version of it, to ensure that we do not lose the race in global standards of equality, family-friendly employment and work/life balance. Doing so would act as an important symbol that they are prepared to translate the Brexit Secretary's fine words into deeds. I beg to move.

Baroness Burt of Solihull (LD): My Lords, I support this small suite of amendments, to which I have added my name. We have heard from the noble Baroness, Lady Lister. Her excellent speech leaves very little for me to add and I will test the patience of the Committee by making only a couple of brief points.

I emphasise that Amendment 40 is not a grab for any further powers to keep the EU linked to Britain post Brexit. We merely wish to ensure that the UK Government consider any future EU developments in the areas of family-friendly employment rights, gender equality and work/life balance. I hope that the UK would be ahead in these areas, as in the past we have been a leader in these fields. Indeed, we may well introduce changes which the EU would do well to consider.

The noble Baroness, Lady Lister, referred to an EU directive coming down the line on shared parenting, the uptake of which in this country needs considerable improvement. The noble Baroness, Lady Williams of Trafford, has graciously agreed to meet me and others to discuss some of the proposals that we have been working up. However, that is for the future.

Right now, with suggestions that we could be jettisoning our membership of the European Court of Justice and with talk of leaving the European Court of Human Rights, some colleagues on these and other Benches fear that our proud record of leadership in these areas will be lost and that the United Kingdom will enter a race—not to the top, as Minister David Davis has suggested, but in the opposite direction, to the bottom. Amendments 89A, 129A and 157A would simply enshrine in law the certainty that existing EU protections relating to families in the workplace could not be changed or got rid of under secondary legislation.

Baroness Manzoor (Con): Can the noble Baroness explain where the evidence is that we will be reaching for the bottom in equality laws? I certainly do not see any evidence of that.

Baroness Burt of Solihull: I am grateful to the noble Baroness for her question. As I have just outlined, my concern is that there has been talk on the Government Benches—it has all been suspended at the moment because nothing will happen pre Brexit—of abandoning our membership of the European Court of Justice and leaving the European Court of Human Rights. That is what worries me and it is why I mentioned it.

Baroness Manzoor: With due respect, that does not affect what we are doing with equality and human rights legislation in the UK. Perhaps the noble Baroness could explain a little further what that would mean. I do not see any impact on equality law in the UK from leaving the institutions that she has mentioned.

Baroness Burt of Solihull: What I am concerned about is the general direction of movement that is being mooted in certain quarters regarding various types of rights for people in the UK in order to make the UK more amenable to having less protection in the fields we are talking about—employment, equality and human rights.

None of these amendments is unreasonable, and the Government would give considerable comfort to mums, dads and carers throughout the country if these simple amendments could be incorporated into the Bill.

10.15 pm

Lord True (Con): My Lords, I fear I must intervene at this point, having been restrained a little earlier. I did have some amendments down which I thought were rather germane to the transition period potentially, on which noble Lords could take different views, but in the interest of making progress I thought that those issues could be more intelligently addressed once we knew a bit more about the progress of negotiations.

I must point out that, prior to that, four groups of amendments had occupied your Lordships' House for five and three-quarter hours. At that average rate of progress and with 85 groups still to consider on the Marshalled List, many of which have been tabled by noble Lords who are concerned about leaving the European Union, we will need 13 more days in Committee, sitting for nine hours until midnight every day, with no dinner break and without considering any other business. With all respect, I do not consider that that is a good way to make progress or that it is sufficient progress to make. I think that a number of your Lordships will probably agree privately with those reflections.

We have a 19-clause Bill here, to which already your Lordships' have tabled 67 new clauses. Perhaps some of these statistics might be noted outside. The amendment to which I speak is such a new clause.

I feel that, with all respect—

Lord Davies of Stamford (Lab): My Lords—

Lord True: The noble Lord has spoken a great deal in the past few days; I would like to continue my remarks, if I may.

The important issue that is raised here is a perfectly good issue on which to have a debate in the Moses Room or on an Unstarred Question. These are matters of great importance. I strongly disagree with the noble Baroness who said that we had not made progress in this country: we have made a great deal of progress in this country. The performance of this country on gender equality, work/life balance and carers has been transformed in my lifetime. It needs to go further, but I cannot accept—

Lord Pannick (CB): Does the noble Lord accept that a great deal of the progress that we have made—for example, on gender equality—has been because of the judgments of the Court of Justice in Luxembourg, which has imposed standards that our Parliament has not imposed?

Lord True: I do not necessarily accept that at all. I do not think that the progress of—

Baroness Crawley (Lab): Why has the noble Lord singled out this set of amendments to be, in an ideal world, debated in a committee room rather than on the Floor of the House? Nobody has made that suggestion about any other set of amendments so far.

Lord True: I did not make that suggestion, and the record will show it. I was coming to make some suggestions about how we could address this as a House. We have had some outstanding debates in this House from committees of your Lordships' House on broader policy questions that arise from this difficult exit process. This is an extremely important issue, as I acknowledged at the outset, which deserves to be considered and continually considered in your Lordships' House. I am merely saying, with great respect, that perhaps the usual channels should give some consideration to ways in which some of the issues that have been raised on this quite narrow Bill could be discussed—but, since I have been invited to explain why, it is nothing to do with the matters concerned.

By the way, the noble Lord cannot argue that because progress has been made by one judicial process it would not have been made by other processes. After all, huge progress has been made in the United States of America, which does not accept the judicial authority of Luxembourg.

This worthy amendment seeks to raise and bring before your Lordships' House an important subject that your Lordships should consider and hold dear. However, the amendment is absurd in what it asks the Government to do—and that would be true if it was applied to any other field of public policy. So far in Committee we have had a series of general public policy debates. We have had several today which have been cloned, as it were, on to the Bill. The amendment wants Ministers to be required by law to watch only EU law as it develops and give regular reports to your Lordships' House whenever a proposal comes forward on what should happen. A new principle is being grafted on to the law for this one issue.

I could reverse the question: why for this worthy policy only? Will it be submitted in the rest of Committee as we proceed on different aspects of public policy on all these new clauses that we should have a process whereby Ministers are required to watch and report on this and that after we have left the European Union? That is not very sensible. Our Ministers and Government should watch the legislation brought forward in every advanced country of the world, not only among our European partners, but not have this specific process clogging up the statute book.

The remarks of the noble and learned Lord, Lord Brown—I am sorry, I can never remember his full title; I know it has got something to do with living in a leafy place with a wood nearby—on the previous group were absolutely correct. He made the point that we had discussed the Charter of Fundamental Rights before.

So, with the greatest respect, I oppose this amendment for the reasons I have given. It is not a sensible process on any aspect of law to ask any future Government to specifically watch the development of debates on future policy within the European Union and bring reports to your Lordships' House. That is simply not practical legislation.

I have the highest esteem for the noble Baroness, as she knows. I recognise that she is passionately committed to these issues, as is the noble Baroness, Lady Burt. They are trying to bring issues they care about before the House, but they do not have to do so on this Bill—and certainly not in the context of an amendment that will not work in practical terms.

We have been sent a Bill by the other place that is to provide for withdrawal from the European Union—not to provide a basis for a series of lengthy Second Reading-like debates on different aspects of public policy. That is the way we are drifting. It is why we took five and three-quarter hours to debate the first four groups and why, if we continued at that rate, we would have another 13 days to get through. The amendment is not practical and will not work. It raises an important issue, but we should move on. I will give way to the noble Lord now.

Lord Davies of Stamford: I am grateful to the noble Lord. He has been implying—rather more than implying—that noble Lords in this debate have been wasting time; that they have not been getting to the bottom of the subject or have been talking about irrelevancies. Is that what the noble Lord means to say—in other words, that we have not been doing a good job on this Bill? It seems to me that we have fairly elucidated the quite complex details in this proposed legislation so far. It is an enormously important matter and we can scarcely be accused of spending too much time on it. Our debates are being followed carefully by the country as a whole—and rightly so. If the noble Lord has any evidence of someone who has been filibustering or wasting time, I hope that he will bring it forward.

Lord True: My Lords, I could well be tempted and I suppose that it depends on how quickly you can see paint dry. I leave it to people outside your Lordships' House to judge the progress that we have made in the first four days, despite some of the undertakings and understandings of the Opposition Front Bench. Perhaps I may say that I greatly value and respect the Bench whose behaviour has been absolutely admirable and exemplary. I do not think that we have made fast enough progress, which is not justified. There are important issues to raise and I have simply suggested that these are some things that, as with the reports of your Lordships' committees, could be discussed in other forums—but surely not during consideration of this little 19-clause Bill with a rather narrowly defined purpose and given all the other legislation that we have coming forward.

I oppose this amendment. It suggests a new mechanism for the Government in relation to our future relations with the EU which is unnecessary. I look forward to seeing the progress that the noble Baroness wishes to see being made.

Baroness Drake (Lab): My Lords, I rise to speak to Amendments 89A, 129A and 157A in the group and I thank the noble Baronesses, Lady Altmann and Lady Burt, for their support. Many noble Lords have already referred to the executive powers in this Bill which go beyond those needed to deliver the intent of preserving and converting existing EU law into domestic law to provide legal continuity on exit day. Clause 7, for example, gives Ministers corrective powers to do whatever they consider appropriate to address a deficiency in retained law. As the Constitution Committee has observed, as wide a subjective concept as "appropriate", applied to such a broad term as "deficiency", makes Ministers' regulation-making powers potentially open-ended. Ministerial assurances on their use cannot substitute for a provision in the Bill to prevent the correcting powers being used to effect substantial changes to implement government policy outwith the stated intention of this Bill.

There are many areas of substantive policy which could be impacted by these open-ended powers, a concern that is captured in the long list of amendments to the Bill. I say to the noble Lord, Lord True, that if the Government more quickly took action to restrain the powers in Clauses 7, 8, 9 and elsewhere, and reflected the concerns that people have, the list of amendments that the Committee is debating might actually reduce in number. I am sure that he did not intend it, but choosing his moment at 10.25 pm to express his frustration at the amount of time spent on certain amendments, just at the point when we are discussing women's and family issues, does not help the case that there is increasing anxiety that the Conservatives want to cut back on employment rights, particularly as they are afforded to pregnant women and mothers.

The particular focus of these amendments is to prevent powers in Clauses 7, 8 and 9 being used to limit the scope of or to weaken rights relating to maternity, paternity, adoption, parental rights, the rights of pregnant women and breastfeeding mothers. Such rights are important because they affect the status of half of the population of this country. That is not a small or minority group, it is half of the population. When millions of women voted in the EU referendum to remain or to leave, I doubt that many will have done so in the belief that the result could prejudice their rights or status. These amendments reflect real concerns about the potential impact of Brexit and the application of this Bill on women, expressed by a broad coalition of women and equality organisations such as the Fawcett Society, Women on Boards, the British Pregnancy Advisory Service, Girlguiding and many others. Bodies such as the Equality and Human Rights Commission share an anxiety that in setting the future of the UK economy, the Government could weaken women's status in their vision of a differently regulated country.

The treatment of women who are pregnant and who care for children is fundamental to their ability to achieve social and economic equality. The penalty paid for child-bearing and caring is at the heart of the discrimination and loss of opportunity that many women continue to experience. It affects women who have been pregnant, are pregnant, may become pregnant and, by gender association, who do not have children. They all experience the consequences of a collective stereotyping of women.

10.30 pm

There is a deep anxiety that government policy will turn backwards to seeing pregnant women and mothers as a burden on business, rather than progressing forward, further empowering women, enhancing their economic life chances, lifting them from low pay or pushing them through the glass ceiling. The EU is an important source of rights for women, whose rights have not all derived from the UK Parliament but come from Europe: the pregnant workers directive, providing pregnant women with the right to time off for antenatal appointments and safe working conditions; EU case law, which made it clear that dismissal due to being pregnant or on maternity leave is direct sex discrimination; and the parental leave directive, giving working parents the right to unpaid leave to care for their child, who may be ill. Protecting the right to parental leave is a key component of giving women the chance to balance their work and home lives.

We know that substantial policy changes implemented through regulations, as the Bill permits, can carry substantial consequences for equality. The introduction of employment tribunal fees led to the number of cases brought to tribunal dropping by 79% over three years. The Supreme Court ruled that the fees were unlawful and stressed the impact on access to justice, adding that the fees were indirectly discriminatory, given the deterrent effect on women bringing discrimination cases.

I want to remind noble Lords of the background here that is driving anxiety. In February, the Equality and Human Rights Commission published the results of a survey of 1,106 senior decision-makers in business—conducted by YouGov on its behalf—revealing managers' attitudes around pregnancy and maternity discrimination. Allow me to highlight just a few of the results. More than one in three private sector employers agree that it is reasonable to ask women about their plans to have children in the future during recruitment. My translation: they are reluctant to recruit women who might become pregnant. Almost half of such employers agree that it is reasonable to ask women if they have young children during the recruitment process. My translation: they are reluctant to recruit women who have young children. Almost half of employers agree that women should work for an organisation for at least a year before deciding to have children. My translation: becoming pregnant in the first 12 months in a job warrants dismissal. A third of employers believe that women who become pregnant and new mothers in work are generally,

"less interested in career progression".

My translation: that is a subjective view that translates into "Don't promote mothers". Some 41% of employers agreed that pregnancy puts an unnecessary "cost burden" on the workplace. My translation: that is a one-line summary of the history of gender discrimination. Some 36% of employers disagree that it is easy to protect expectant or new mothers from discrimination in the workplace. My translation: discrimination is still endemic.

Many business attitudes are decades behind the law we have now—let alone the law we may aspire to—which encourages the temptation for government to use correcting powers in the Bill to weaken pregnancy and maternity rights. If women are to progress, safeguarding their rights and challenging stereotyping and business attitudes is not a marginal issue. It is fundamental to the status of half of the UK population, to the aspirations and life chances of daughters, granddaughters, sisters, partners and friends. At the moment, a significant number of women are deeply anxious that this Government do not recognise that and will, in a new regulated world, row back on some of that progress.

Will the Minister recognise the anxieties that I have identified and consider before Report—I am sure others will make the same request, driven by the extent of the powers the Bill—how a way can be found to restrict the correcting powers in the Bill from weakening rights related to maternity, paternity, adoption, parental rights or the rights of pregnant or breastfeeding women?

Baroness Altmann (Con): My Lords, I support Amendments 40, 89A, 129A and 157A, to which I have added my name. I am grateful to the noble Baronesses, Lady Lister, Lady Drake, Lady Burt and Lady Greengross, whose names are also on the amendments. These amendments deal with issues that, as the noble Baroness, Lady Drake, so passionately and rightly said, will impact half the population of this country and would potentially reintroduce rights that would otherwise be lost for women, carers and parents. These measures have support from many groups representing women's interests. I am grateful for briefings from the National Alliance of Women's Organisations, Working Families, Carers UK and the Fawcett Society, among others. It is vital that we protect existing protections and equality law for women and carers, and maintain these protections into the future.

The EU has been a leader in equal rights for women. I am proud that the UK has been a principal player in Europe on this agenda. Measures such as rights for part-time workers, sex discrimination laws that put the burden of proof on the defendant and the right to request flexible working have all contributed to a far more female-friendly and family-friendly working environment for millions of employees across the UK. Brexit must not put women's progress and prosperity at risk. It must also not dilute parental and paternity rights.

The Bill as drafted does not provide sufficient protection for hard-won equal rights that we have already attained. It introduces risks that rights will be weakened in future and fails to contain safeguards to ensure that the UK does not fall behind future EU advances on these issues. That is why these amendments seek to put in the Bill specific protections for the rights of important groups, including part-time workers and carers. The Government said that they intend to retain the current rights and protections, but why would they then resist putting them into the Bill explicitly? I hope that the Minister will come back on Report with his own proposals to this effect.

As we debated last week, the UK must not lose rights derived from the European Charter of Fundamental Rights. I suggest to my noble friend Lord True that the reason why there has been such a lengthy debate on individual areas of UK rights, including this series of amendments about women and carers—I echo the words of the noble Baroness, Lady Drake—is that the Government have chosen to exclude the charter of fundamental rights and unfortunately have raised suspicions that they seek to weaken rights after Brexit. Ministers must not be given powers that could enable them to bypass Parliament to weaken such rights. It is true that the charter covers rights contained in other UN treaties that have been ratified by the Government. However, those treaties are not incorporated into UK law. Therefore, they do not provide the same protections. These amendments aim to introduce specific safeguards into the Bill. I am sorry if my noble friend believes that these issues are not sufficiently worthy to be debated in this Chamber.

Lord True: I have made it absolutely clear that I consider these to be important issues. The points I made were entirely about the way in which progress is being made on this Bill. I would be extremely grateful if my noble friend did not impute to me things that I did not say and do not think.

Baroness Altmann: I am most reassured to hear my noble friend's words, but it is unfortunate that that issue was raised on this set of amendments about women, with the suggestion of moving to the Moses Room. I assure him that there are many on these Benches and across the Chamber who believe these issues to be extremely important for our country.

Many noble Lords across the House are concerned that the UK must not fall behind on gender equality and women's rights. As we have seen recently, there is still some way to go before we can say that we have achieved gender pay parity and there remains a need further to improve women's rights. Sadly, I have seen all too often women's issues fall under the radar of policymakers. There are many loopholes in UK law which penalise women predominantly. For example, in the area of pensions, part-time workers, usually women, still fall through cracks in both the national insurance and auto-enrolment pension systems, leaving them disadvantaged. Any weakening of women's rights and protections is moving entirely in the wrong direction.

The new clause proposed by Amendment 40 would help protect us from falling behind the EU. A practical example is the directive on work/life balance for carers and parents which the EU will bring in but not until after March 2019. The majority of carers for elderly parents tend to be oldest daughters in their late 50s or early 60s—I declare an interest as one such. The forthcoming EU directive would introduce carer's leave, which can be so important to help women who might otherwise have to leave work altogether. Women who stop work to care for loved ones when they are in their 50s or beyond usually never return to the workplace, denying them the chance of a richer retirement and wasting their valuable skills. Ensuring that we do not fall behind when the EU introduces protections for carer's leave is extremely important for women. We should not weaken rights and protections which they would otherwise enjoy. The amendments would not force the Government to adopt new EU laws and regulations, but they would ensure that Parliament had the opportunity to protect the position of the UK and keep pace with, or even exceed, improvements in these areas in the EU in future.

This Bill and earlier debates this evening highlight vividly that the Government's proposed legislation does not ensure the objective of transferring EU law into domestic law in all its aspects, nor does it achieve the same protections and rights as citizens have at the moment. There will be a watering-down, which is not appropriate for a country that has spent so much time and energy on enhancing the rights, protections and position of women, part-time workers, carers and families. To countenance measures that put those achievements at risk is unacceptable. I hope that the Government do not wish to risk the UK falling behind or moving backwards on these issues, and that my noble friend the Minister will return on Report with proposals of his own which can achieve the aims of the amendment.

Baroness Crawley: My Lords, I support the amendments in the names of my noble friends Lady Lister and Lady Drake. We could call this set of amendments "Keeping up with progressive forces" or "Ensuring UK women and families do not begin to lose out beyond the point of our exiting the EU". My noble friend Lady Lister wants the Government closely to monitor, report on and replicate future EU developments in the area of family-friendly employment rights, gender equality and work/life balance for parents and carers, as the noble Baroness, Lady Altmann, has just said.

10.45 pm

My noble friend Lady Drake calls for no regulations to be made under Clauses 7, 8 or 9 if such regulations weaken rights relating to maternity, paternity, adoption, parental rights or the rights of pregnant or breastfeeding women. Why are so many women's groups and family and equality bodies concerned? Because for all the emollient assurances from the Government that such rights are safe in their hands, many of us are not convinced. Indeed, as my noble friend Lady Drake pointed out at Second Reading, the Prime Minister herself failed to rule out in December the scrapping of the working time directive, the agency workers directive and the pregnant workers directive. Perhaps the Minister can reassure us tonight that such directives will not be scrapped, alongside the right to care for an ill child, maternity rights and part-time workers' rights.

My particular support for these amendments stems from the fact that it was my pride many years ago, as chair of the European Parliament's Women's Committee, to help broker into law the maternity leave directive, which has had an enormously positive effect on the women of this country in the intervening years. That law was brought in through very difficult negotiations with the UK Government of the day, who were not at all enthusiastic about it. So when

[Baroness Crawley]
people say, "How can you begin to think that our laws might regress?", I am the living, old proof that we had to work really hard to get where we are now from a very low base.

Back then, it was felt that family employment policy could go in only one direction—in favour of progress. Today, it feels as if there are hands itching to turn the clock back on the progress of those rights. There are those in the noble Lord's party—not the Minister, I am sure—who regard such rights as a drag on profits and bonuses in the workplace and in the boardroom. One concession by the Government, made during the Bill's Commons passage, is now in Schedule 7, paragraph 22. It tells us that before a statutory instrument is laid containing regulations under section 7, 8 or 9,

"the relevant Minister must make a statement—(a) as to whether the instrument or draft amends, repeals or revokes any provision of equalities legislation, and (b) if it does, explaining the effect of each such amendment, repeal or revocation".

While I congratulate those who succeeded in securing this small brake on government as part of the Bill, I ask the Minister: does knowing the Government's reasoning on the possible removal of rights make that removal any less painful for its recipients? In a recent parliamentary Question I suggested to the Government that British women would be better off, post Brexit, if we aligned ourselves as closely as possible with continuing EU legislation such as the directive on work/life balance for parents and carers. The Minister replied—I am glad to see the noble Lord, Lord Henley, in his place—that the Government would take note of what the EU does in the future but that the whole point of Brexit was that we could make our own decisions from now on. That is exactly what many of us are extremely concerned about.

Baroness Greengross: My Lords, I will be very brief. It is true that the UK has often gone further than the EU in providing key equality and employment rights that are of benefit to working parents and carers. As an example of this, when I started working with the Commission and the European Parliament many years ago, they thought of carers only as young people looking after young children. There was no mention of the fact that a whole lot of carers were looking after elderly people and that their numbers were increasing rapidly. This has changed. While Amendment 40 takes the Bill beyond simply incorporating the law as it stands at the point of exit, it is not about binding the UK into implementing future EU directives but will ensure that Parliament is informed of any such developments and commits our Government to considering their implementation.

I believe there is a danger that, without the assurances provided in the amendment, the UK might fall behind the EU on family-friendly employment rights in the future. The amendment will signal both to our own people and to EU members that the UK remains committed to maintaining fair and relevant employment rights and that we do not seek to become an offshore, low-wage, low-standard dystopian state.

Baroness Gale (Lab): My Lords, we have had a really good debate on equality and women's rights, and I am pleased to support the amendments in this group. Amendment 40, which inserts a new clause, was moved so ably by my noble friend Lady Lister, who explained in detail why it would be very useful to have it in the Bill. It is a very good amendment, which would require the Minister to report to Parliament whenever there are new or amended EU laws in the area of family-friendly employment rights, gender equality, and work/life balance for parents and carers, which would have amended provisions in domestic legislation if the UK had remained a member of the EU, and the Minister would have to consider whether or not to incorporate these provisions into domestic law.

There could be a danger that the UK will fall behind the EU on gender equality and women's rights when we do not automatically have to follow EU laws. The amendment means that Parliament will at least be informed of new EU laws and that consideration will be given to whether or not to incorporate them in UK law. This is not anything new, really. We do look at other countries and see what they are doing. If one thinks of the devolved nations, the UK Government have learned from the example of the Welsh Assembly, where we had a children's commissioner—the first one in the UK—and then the UK Parliament decided that there would be one for England. There are other examples I could go into where we have learned from other countries. There is no problem in looking to see what works in one area or one country and then incorporating it into our laws. That is the importance of the proposed new clause.

Amendments 89A, 129A and 157A, spoken to by my noble friend Lady Drake, would ensure that regulations will not weaken our rights relating to maternity or paternity, or adoptive parental rights, or the rights of pregnant or breastfeeding women. We know that even today regarding our gender equality rights, which have been hard fought for, there is ample evidence that employers do not always adhere to the law. In recent weeks we have heard of employers who seem to disregard the laws around maternity and pregnancy. The Equality and Human Rights Commission, as my noble friend Lady Drake mentioned, said recently that many businesses were "decades behind the law" and,

"living in the dark ages".

This followed a survey which showed that a third of those working for private companies thought it was reasonable to ask women during the recruitment process about their plans to have children in the future, whether they were pregnant and whether they had small children. This type of questioning is against the law and one wonders why it still goes on.

In December, the Prime Minister failed to rule out scrapping the working time directive, the agency workers directive and the pregnant workers directive, even though she was asked several times to give that assurance. The pregnant workers directive is of great value to women and gives much-needed protection in the workplace. So we need to ensure that delegated powers cannot be used to weaken maternity,

paternity, adoption or parental rights. One can see why, after that long fight for equality, it has still has to go on. We want to make progress all the time but there are grave concerns about the Bill.

I hope that the Minister will be able to give guarantees tonight in relation to these amendments. Equality rights do not just stand still; they have to progress all the time. That is why it is so important that we look to see what the EU is doing and then see whether it is something that we would want to incorporate into our laws. We really need that reassurance from the Government that the equal rights we have fought for, hard and over many years, will not be watered down at all. These are sensible amendments that would continue to ensure the protection of women in the workplace, as well as ensuring that women's equality rights do not fall behind those of future EU laws. I hope that the Minister can give assurances that he will look seriously at these amendments, because they are good and sensible ones.

The Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office (Lord Duncan of Springbank) (Con): My Lords, I am grateful to the noble Baronesses, Lady Lister, Lady Altmann, Lady Greengross, Lady Burt, Lady Drake and Lady Gale for their contributions, and for bringing this debate alive tonight. It is right and proper that that debate should be here.

I would like to make a few points, which are necessary this evening. First, on the day after Brexit, the rights which we have worked so hard while within the EU to create will be brought back. We have been a partner in the framing of those rules and we will return them to the United Kingdom. There will be no dilution. There will be no weakening or regression. These rules will come back and they will stand here. I emphasise that as members of the EU, we have never been bound by those rules as anything more than a foundation upon which we can build greater adherence to those rights. It is important to stress that.

The EU pregnant workers directive requires 14 weeks of paid maternity leave. In the UK we offer 52 weeks, 39 of which are statutory maternity pay. Our maternity entitlements are nearly three times greater than the minimum within the EU. We have given fathers and partners statutory rights to paternity leave and pay—an entitlement which the EU is only now starting to consider in its proposed work-life balance directive. In light of the comments of the noble Baroness, Lady Lister, she will be aware that the work-life balance directive is still only at the Commission proposal stage. We have not yet heard, or had a report, from the European Parliament or begun the necessary dialogue to determine what exactly will form the final elements of that directive. It is important to stress that the process of negotiation is right and proper. We have always taken part in that and will continue to do so. Exactly when it will reach the stage of clarity remains yet to be determined.

We have given the parents of all children up to the age of 18 a right to take up to 18 weeks of unpaid parental leave, while the parental leave directive requires only four months and applies only to the parents of children up to the age of eight. Again, we have sought to go further. It is important to stress that when we look at our ability to deliver against these EU expectations, we have never seen them as limiting us. We should be able to go beyond them.

Importantly again, it is not simply enough to enact these proposals; they must also be adequately enforced. That is why looking at the EU's enforcement scoreboard is particularly important. At that point we begin to understand how successful it has been not just in transferring the law into the statute book but in making the law a reality because it is by those instruments and the reality of that law becoming functional that we adhere, advance and create functional rights.

11 pm

Baroness Drake: The Minister's reference to enforcement is very important. Is he giving an assurance that there are no government plans to cap compensation in discrimination cases when we leave the EU?

Lord Duncan of Springbank: The noble Baroness will recognise that that is part of a discussion for another time. We have already touched on it on more than one occasion. If I may, I will focus primarily on the amendments before us today.

It is important that we recognise that the rights we have cannot be undone. That must be the fundamental guidance. For those who ask whether I can give a categorical assurance that there shall be no erosion of the working time directive, the answer is yes, I can give that assurance. We will not be eroding these rules as they come back or after they come back. It is critical that these rules become and remain functional as we begin to develop our own rulebook. It is right that we should be cognisant of the advances in the evolution of rights whether it be in the EU or elsewhere. We have heard this evening about a number of these rights which we have seen emanating from the UN. We should not be limited in that regard. Time and again we have found ourselves in the vanguard of particular rights. As we consider this suite of amendments, I do not think we should lose sight of the fact that in more than one area on more than one occasion we have pushed rights far further forward than had been the case of the median rights within the EU as a whole.

Lord Wallace of Saltaire (LD): The Minister just made an extremely significant statement. He will appreciate that part of the problem many of us have with the Bill is how far we trust the Government to have the very extensive delegated powers which are granted by the Bill and the chatter one hears, including from Ministers, about a desire to loosen EU regulations, in particular to loosen EU labour regulations. If the statement he has just made represents the Government's considered view, that puts a number of minds at rest, although it may upset a number of people within his own party.

Lord Duncan of Springbank: I hope I can put the noble Lord's mind at rest.

It is important that we recognise how these functional rights are developed and ongoing. The day after Brexit, our rulebook will be safe. The rights which we have will be incorporated and we will build on them as a foundation. They are not a ceiling. It is right and proper that both this Chamber and the other place are instrumental in taking forward the enhancement of these rights. We have to recognise that over the past 30 years our understanding of what is a necessary family right has entirely evolved. As the vice-chair of the LGBTI group in the European Parliament, I recognised how far we could push things within the European Parliament, but I was very clear about how far we could not push them within the European Parliament because of the inability of certain member states to move forward with us. In that regard, in terms of equalities, on not one occasion have we ranked lower than third in the whole of the EU—indeed, in the whole of the continent of Europe. We have pushed forward those rights far faster, deeper and more surely than many of the other member states, so we should not lightly shake them off. We will remain what we have been, I hope, all the way through: a deliverer of these rights, not just on paper, because that is not a functional right, but in functioning and working in the workplace and elsewhere. It is absolutely right that we do so.

In response to a number of the questions raised, I am conscious that there is unease and a certain regard that the Government today will take the first opportunity to cast these rights aside, to scrape the barnacles off the boat to allow the ship to move faster. I assure the Committee that they are integral parts of the engine of the ship and we shall not be discarding them. That is how important they shall remain.

Baroness Ludford (LD): If that is the case, and we are all very impressed by this unexpected and thorough assurance from the Minister on behalf of the Government, why can he not accept some amendments in this area and some others to put that in the Bill?

Lord Duncan of Springbank: The noble Baroness makes an interesting point as to why people have not been able to hear these points, but I am iterating what the Prime Minister, and a number of other Ministers in the Government, have said as regards this, and am pleased if I have been able to cut through some of the hubbub that has surrounded it. We are and remain a Government committed to ensuring that on day one after Brexit there is no diminution whatever in the rights which are and have been enjoyed through our membership of the EU. It is important to stress that. I hope I have been able to give noble Lords some reassurances this evening and some confidence that they will be able to set aside these amendments on this occasion.

Baroness Lister of Burtersett: My Lords, I am grateful to noble Lords who have spoken from across the Committee in support of this amendment—with one exception of course, the noble Lord, Lord True. I cannot help but point out that there is a certain irony that the longest speech came from the noble Lord who complained that we were wasting time. He took, I think, nearly a fifth of the non-ministerial time in order to tell us we were wasting time.

Lord True: I will rise to the bait. It is clear that one is going to be characterised and monstered, but the reality is that I very clearly set the remarks I made in the context of the four days that we have already had and the 13 days, at this rate of progress, it will take to complete Committee. I also made it very clear that I regarded the rights that are being discussed as important and hoped that the noble Baroness would see all that she hoped for come to fruition. I was as delighted as the rest of the Committee by what we heard from the Front Bench.

Baroness Lister of Burtersett: As some of my noble friends have said, it is odd that it is this amendment, when we are talking about women, families and carers—

Lord True: My Lords—

Baroness Lister of Burtersett: I think I should carry on. The noble Lord asked a question, to which the noble Baroness, Lady Altmann, gave a very clear answer, but perhaps the best answer came from the Minister himself. I thank him for his very courteous response and for his acknowledgement that this is a very valid amendment and debate, which we should be having. I very much welcome his categorical assurance that there will not be a watering down of the working time directive, and I know many other noble Lords welcome that as well. But I am puzzled. Yes, he has given assurances about not watering down existing rights, which is very welcome indeed, but I have not heard an argument against my amendment about keeping pace with what is happening in the European Union in the future. He was asked why he was not able to support the amendments, given the very positive stance he was taking, and I did not hear an answer to that. I am not going to pursue it now, but given his positive stance, and at the same time his failure to give arguments against this amendment, we may well want to return to this on Report. I beg leave to withdraw the amendment.

Amendment 40 withdrawn.

Schedule 1: Further provision about exceptions to savings and incorporation

Amendment 40ZA

Moved by ***Baroness Bowles of Berkhamsted***

40ZA: Schedule 1, page 16, line 12, at end insert "or

(c) the challenge relates to general principles of EU law."

Baroness Bowles of Berkhamsted (LD): My Lords, I have tabled three amendments in this group, and signed two others. What links them is the provision of continuity and the ability to challenge the validity of retained law, which noble Lords will note repeats a theme I followed with regard to Clause 5.

The Bill is a bit of a yo-yo when you want to find out what rights exist. Noble Lords might think that the rights are saved. Paragraph 1(1) of the Schedule rules out the possibility of a challenge but in paragraph 1(2) the possibility comes back in again, either if there is a European court decision before exit day or if an unspecified provision is made in regulation. My Amendment 40ZA would amend the provision about that regulation, adding,

"or … the challenge relates to general principles of EU law".

I have already spoken, in the context of Clause 5 amendments, about the fact that the EU legislation—more or less, except the treaties—is all secondary legislation and challengeable as to validity. I repeat that that gives individuals and businesses rights that I do not consider it proper to take away, even if the court making the final decision is no longer the European court. I therefore want to make it clear that such a right continues. As explained previously, retained EU law will contain many things that correspond much more to what would be in UK secondary legislation that could be struck down, so it is not such an outrageous proposition. I will not spend further time repeating what I said, save to say again that taking back control was never cast as meaning a general removal of rights from individuals and businesses.

The third sub-paragraph of paragraph (1) of the Schedule states:

"Regulations … may … provide for a challenge which would otherwise have been against an EU institution to be against a public authority in the United Kingdom".

My Amendment 40A would basically change "may" to "must". I do not see companies currently lining up to take their regulators to court so I do not envisage any tsunami of cases. This is just to ensure that what appears to be promised actually happens.

There are then two amendments in the names of the noble and learned Lord, Lord Goldsmith, and the noble Lord, Lord Foulkes, on which I will leave them to elaborate. My reason for signing them is the same: I am not satisfied with the notion that the general principles of EU law are merely to give the courts a way of flavouring interpretation in a non-fatal way. Although that may well be sufficient for many purposes, it is not the continuity of rights and rule of law that is currently enjoyed. For that reason, I seek the deletion of paragraph (3). I also support the retention of environmental protection as defined in Article 141.

Lastly, I come to my Amendment 63, which would amend Clause 6 but is directed to the same ideas of challenge to validity. It states that notwithstanding anything else in the Bill, there remains a right to challenge validity on the basis of proportionality. Many noble Lords have spoken eloquently on the issues of fundamental rights and human rights. I am now being a bit more mundane and flagging up the importance of proportionality, particularly for business and single market legislation, where it can affect competitiveness. At Second Reading the noble Lord, Lord Hill of Oareford, said,

"we had a lot of influence in the EU: pro-free trade, pro-markets, pro-business, pro-proportionate legislation".—[*Official Report*, 30/1/18; col. 1389.]

He was right, but one of the reasons why we kept going on about proportionality was that we do not have it in our own law. Our domestic test for irrationality is a lesser test, and we did not want to have to rely on CJEU salvation.

At the moment, yes, our courts have to consider proportionality when there is an EU dimension, and they will become responsible for more decisions that previously were taken by the European court. This means more consideration of wording that has been nowhere near a parliamentary draftsman and has been negotiated with the principle of proportionality underwriting everything. I cannot count the number of times that less than perfect and overprescriptive wording has been justified in a trialogue by the Commission, Council and parliamentarians with, "But it's subject to proportionality"—and I was not always there to change it. So that attitude has to be understood and applied. I am concerned that, when we have, as I am sure we will, some continuing alignment of regulations post Brexit, the deeper test of proportionality will not be considered and applied by government or public authorities unless they know that the ultimate sanction of striking down is available to the court. I beg to move.

11.15 pm

Lord Wallace of Tankerness (LD): My Lords, I shall speak to the amendment in the name of the noble Lord, Lord Foulkes of Cumnock, also subscribed to by my noble friend Lady Bowles. The amendment is primarily a probing one, to seek clarification from the Government on what they are seeking to do here. Paragraph 2 of Schedule 1 states:

"No general principle of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European Court in a case decided before exit day".

So if one allows for the double negative, it rather suggests that, if it was a general principle of EU law that had been determined by the European Court in a case before exit day, it will continue to be part of domestic law. Having reached that point, the following paragraph says:

"There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law",

and that no,

"court or tribunal or other public authority may, on or after exit day … disapply or quash"—

and so forth.

I am intrigued about why, having apparently established that there is a general principle of EU law that becomes part of our domestic law, when what is given away with one hand is taken away with another, one is not allowed a remedy based on that general principle of EU law. It would be helpful if the Government could clarify that.

[LORD WALLACE OF TANKERNESS]

The matter was raised in the report of your Lordships' Constitution Committee, which at paragraph 117 of its report quotes Professor Alison Young, who wrote:

"Schedule 1 to the Bill makes it clear that 'there is no right of action in domestic law on or after exit day based on failure to comply with any of the general principles of EU law' … This prevents claims of the nature found in Benkharbouche, where the Charter was used independently from other provisions of EU law. … But claimants will still be able to rely on general principles of EU law, which protect fundamental rights. They will not be able to use these general principles on their own, but they will still be used to interpret EU-derived law, which then in turn could be used to disapply legislation. For the claimants in Benkharbouche, the stronger remedy currently found under EU law for the protection of fundamental rights will disappear".

Again, I seek clarification from the Government as to why they believe that these protections should disappear as currently found in EU law. Indeed, the committee in paragraph 120 concludes:

"The effects of excluding the Charter rights, retaining the 'general principles', but excluding rights of action based on them, are unclear … We recommend that the Government provides greater clarity on how the Bill deals with the general principles and how they will operate post-Brexit".

I sincerely hope that the noble and learned Lord will take the opportunity when replying to the debate to respond to that recommendation from the Constitution Committee and give us a clarification.

There was also one specific point, on which I would ask for a view from the Government Front Bench. The provision in paragraph 3 is:

"No court or tribunal … may, on or after exit day … disapply or quash any enactment … because it is incompatible with any of the general principles of EU law".

I assume that that would mean to any enactment pre exit, which could of course include an Act of the Scottish Parliament. Therefore, would the provision in paragraph 3 prevent any challenge being made to an Act of the Scottish Parliament passed before the exit day on the grounds that it was outwith the legislative competence of the Scottish Parliament because it was incompatible with those general principles, but not on the grounds that it was incompatible with any other pre-exit European Union law?

In other words, if other EU law had been satisfied but there was still a problem or it was still not compatible with EU principles, would an action that had been raised before exit day on the grounds that it was incompetent have to fall because no court could make a determination of it because of this paragraph? Some clarification on this point would be welcome. It would appear that a principle is established, but not the remedy that might go with it.

Lord Pannick: My Lords, I have a similar question for the Minister. In paragraph 1(1) of Schedule 1, we are told:

"There is no right in domestic law on or after exit day to challenge any retained EU law on the basis that, immediately before exit day, an EU instrument was invalid".

I understand why that should be so, by reference to EU law principles, because at the moment you cannot challenge, in our courts, the validity of an EU instrument; you have to go to the Court of Justice. I am not sure whether the provision in paragraph 1(1) prevents, after exit day, a challenge to a provision of retained EU law brought by reference not to EU law but to common law principles. For example, are challenges on the grounds of legal certainty, the presumption against retrospectivity, or proportionality, which has already been mentioned, prevented by paragraph 1(1)?

Lord Faulks (Con): Would the noble Lord agree that proportionality now seems to be part of UK law, notwithstanding what the noble Baroness, Lady Bowles, said?

Lord Pannick: I do not think that the courts have accepted that proportionality can be a challenge by way of judicial review where you are not raising an issue of EU law or convention law—but we have come a very long way towards recognising proportionality as a principle of the common law. That is one reason why I am asking this very important question. I simply do not know whether you can challenge retained EU law after exit day by reference to traditional common law principles.

One reason why this matters is that the Supreme Court, in the HS2 case, suggested that this might be possible under existing law. As was raised in the debate last Monday, we should also bear in mind that, under Clause 2, retained EU law includes statutory instruments that do not owe their legal basis to the European Communities Act. They include statutory instruments enacted through other mechanisms, albeit that they are linked to EU law. At present, one can challenge those instruments by reference to traditional common law principles. Therefore, if Clause 1(1) were intended to prevent such a challenge after exit day, it would be a significant change in the law.

Lord Mackay of Clashfern (Con): Are these questions affected by the proposal to make this particular branch of law statutory? In that case, certain principles of our constitution might cause some difficulty.

Lord Pannick: The noble and learned Lord is absolutely right. If retained EU law were to be categorised as primary legislation, such challenges could not be brought. But the Minister resisted that suggestion in our earlier debate. I am concerned with the Bill as it is at the moment. What is the Government's intention in this respect?

Lord Goldsmith (Lab): My Lords, that short exchange has demonstrated how complicated this area is and how important the general principles of EU law are in it. It is, perhaps, late at night to be discussing this but it is extremely important because of both the principles and the way they operate. If one looks at it in this way, and takes the Government's intention not to take away rights as a part of this process, one has to recognise that the architecture which provides rights at the moment is

quite complicated. As a commentator has said, there is no single, simple answer to restoring the position in the light of what the Government propose to do.

Amendment 41, which stands in my name, follows the principle the noble Baroness, Lady Bowles, initiated by saying that the general principles of EU law should continue to be capable of giving rise to rights which can be enforced by our courts. The point has already been made that there is a difference between these general rights existing as a way of interpreting other rights—as an interpretive technique—and giving rise to freestanding rights themselves. Paragraph 3 of Schedule 1 prevents any action being founded in contravention of one of the general principles or rendering any Executive act unlawful or disapplying any legislation, including secondary legislation, on the grounds that it offends these general principles.

The general principles of EU law have been critical to a number of legal decisions relating to people's rights. One of those often cited is the case of John Walker, who brought a case for equal protection in pension rights for his same-sex partner, a claim upheld by the Supreme Court which recognised that prohibition of discrimination on the grounds of sexual orientation was a key principle of EU law. As I apprehend it, without that the case would not have succeeded.

The principle of effectiveness of remedies has also been relied upon. When the Supreme Court struck down employment tribunal fees that disproportionately affected disadvantaged women and low-paid workers, the principle of effectiveness of remedies was relied upon. Cases concerning caps on compensation and equal pay cases have depended upon the general principle that we find in the EU principles. The amendment standing in my name and that of the noble Baroness, Lady Bowles, seeks to enable those general principles to continue to have that effect in our law. It is important that they do for a couple of other reasons. Take, for example, something that was raised in the other place. What if there is a principle of EU retained law which is deficient, defective, does not operate properly or is disproportionate? Without being able to rely upon the general principles of EU law, it may be that all the court could do if faced with that would be to say that either that principle or that particular Act or that particular piece of law, though deficient or defective, has to continue to operate because there is no principle by which it can be struck down, and that would be a loss.

The other reason goes back, I am afraid, to the debate that we had last week on the charter and the Government's assertion that the charter is not necessary because all the rights are otherwise protected under our law. Of course, at the time the charter was drawn up we were still a member and, in many people's minds at least, were expected to continue to remain a member of the European Union with all that that implied, including the continued application of general principles. But if one looks—

Lord Faulks: My Lords—

Lord Goldsmith: If the noble Lord will allow me to make this point, he can then, of course, intervene. If one looks, as we did briefly last week, at the reasons given by the Government in their right by right analysis for why certain rights would, according to them, continue to exist, we see—I take this from the JCHR's analysis—that 16 out of 50 of the rights are based, in part at least, on the general principles of EU law. If the general principles of EU law have no more value than as an interpretive tool, that principle would disappear. That means that those rights that the JCHR saw could continue to exist and give rise to rights only because of the general EU rights.

11.30 pm

Lord Faulks: When we were having the debate about the charter, I specifically asked the noble and learned Lord whether principles which were referred to in the charter were actionable or not, and he said that in his contention, they were not actionable. I am not simply trying to make some forensic point, but I seek clarity from him as to why in that context he said that the principles were not actionable—I can well understand his answer, because principles are rather difficult to identify as regards a clear breach, for example—but he now says that the Bill is wrong and that principles should somehow be actionable.

Lord Goldsmith: I am grateful for the question, because it enables me to clarify that point. There are two sorts of principles. I was talking in answer to the noble Lord's question last week about the principles which are contained in the charter itself. The charter says that it is a charter of rights and principles, and the principles there—it is not that easy to identify which are principles and which are not—are not actionable in themselves. They may become actionable, because as they are aspirational tools, they are then implemented into law and are actionable at that stage. The principles we are talking about here are different. These are the general principles of EU law, which are, for example, the principle of legal certainty, the principle of proportionality, and the principle of non-discrimination. These are different in that sense; they are general rather than specific principles, and they are actionable at the moment. That is why the Walker case I mentioned gives rise to a remedy, as did the other cases where the Supreme Court struck down tribunal fees as being disproportionately high for particular categories of workers.

That is why we believe it is important to keep this. It is one element of the architecture to retain rights. I remind noble Lords that the Prime Minister made it clear that the intention was that rights would continue the same the day after exit as the day before. To remove general principles in this way, and the ability to rely upon them, will fail to keep that promise. This amendment also—it has been referred to already—specifically proposes that the general principles of EU law should include those which are contained in Article 191 of the Treaty on the Functioning of the European Union. Those are environmental principles of huge importance: the precautionary principle, the principle of polluter pays and the principle for

[LORD GOLDSMITH]

preventive action. Those principles and the others I referred to need to continue to operate to keep in place the rights that people enjoy at the moment.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, I thank noble Lords for their brevity.

Amendment 40ZA, in the name of the noble Baroness, Lady Bowles, seeks to ensure that challenges to validity could continue on general principles of EU law grounds. I will address concerns raised on general principles in more detail later. First, Schedule 1 generally ends the ability to bring challenges on validity grounds to what will become retained EU law after we leave the EU. We recognise, however, that in some circumstances, individuals and businesses may be individually affected by an EU instrument. For example, a decision of an EU institution or body may be addressed directly to an individual or business. After exit, they would continue to be able to challenge such decisions—in so far as they apply in the EU—before the CJEU, and to have them annulled. Of course, the converted form of the decision would however remain in force within the UK as retained EU law.

The noble Lord, Lord Pannick, asked whether paragraph 1 of Schedule 1 would, after exit day, prevent a challenge to a provision of retained EU law by reference to common-law principles. I understand that the answer is no, it would not, and it is not intended to do so. I hope that that meets the position that he raised with me a moment ago.

Domestic courts currently have no jurisdiction to annul an EU measure or declare it invalid, and we do not believe it would be right to hand them a new jurisdiction which asks them effectively to assume the role of the CJEU in this context. This amendment would effectively ask our courts to consider whether the EU acted incompatibly with the general principles when it made an EU instrument. Generally speaking, this is a function that we do not consider it appropriate to confer on domestic courts.

Therefore, although I appreciate the points raised by the noble Baroness, the amendment would undermine the Government's stated policy of a clear exclusion of both validity challenges and general principle challenges provided for within Schedule 1. However, we recognise that there might be some limited circumstances in which it would be sensible to maintain the ability to challenge retained EU law on validity grounds. The Bill therefore contains a power set out in paragraph 1(2)(b) of Schedule 1, to which the noble Baroness alluded, which would enable the Minister to make regulations providing for a right of challenge in domestic law to the validity of retained EU law in specified circumstances.

Sub-paragraph (3) sets out that those regulations may provide that a challenge which would previously have proceeded against an EU institution may, after exit, proceed against a UK public authority, because of course there would be no EU institution against which it could be directed. I seek to reassure the noble Baroness that the word "may" is there as a precautionary term lest, in the context of trying to make such a regulatory power, it be perceived that there is no easily identifiable body against which the matter can be directed. However, the intent is that it should be possible to proceed against a public body in those circumstances.

Lord Beith (LD): Can the noble and learned Lord envisage the circumstances in which such regulations would be made? Will Ministers have to decide between now and exit day a category of matters for which such regulation is to be provided, or are we to await a case coming up which ought to have been the subject of regulations which are then made? That surely cannot be possible.

Lord Keen of Elie: With respect, it is a precautionary power and it is intended that, where the circumstances arise, the Minister will address himself to those circumstances and contemplate the making of appropriate regulations.

Lord Pannick: Perhaps I may suggest to the Minister a circumstance in which this might arise. The day after exit day the Court of Justice gives a judgment saying that a provision of EU law is invalid. Nevertheless, that provision will be part of retained EU law—it will be part of our law even though it has been abolished in the EU. That might be a circumstance in which the Minister wishes to act.

Lord Keen of Elie: I fully acknowledge that that is most certainly a circumstance that could arise. Of course, one might address that circumstance by Parliament legislating to reflect the outcome of that post-Brexit decision. However, I fully acknowledge that, depending on the way in which one constructs the departure on exit day, one might find that what one has retained as EU law ceases to be EU law almost immediately after one has left the EU. I believe that that has been acknowledged on a number of occasions. Indeed, it could lead to the development of two parallel jurisprudences—one for retained EU law and one for EU law. That is an inevitable outcome of our decision to leave the EU but to retain in our domestic law that which was EU law at the point of our departure. I fully acknowledge that, but it might also be a circumstance in which potentially one would seek to exercise the exceptional regulatory power that is referred to.

Reference was made to Amendments 41 and 42, tabled by the noble and learned Lord, Lord Goldsmith, and the noble Lord, Lord Foulkes, which seek to retain indefinitely in domestic law rights of challenge based on the general principles of EU law. If agreed to, these amendments would empower domestic courts to quash administrative actions or secondary legislation or, indeed, even go as far as disapplying an Act of Parliament on the ground that it breaches one or more of the retained general principles of EU law—that could take place long after we have left the EU. That is why we have to have

a point in time at which we have certainty as to the scope for such challenges, and that is reflected in the schedule.

As the noble and learned Lord, Lord Goldsmith, acknowledged, Amendment 41 would go even further. It seeks to set out an ostensibly broader definition of which general principles are to be retained under the Bill. In that context, he alluded to Article 191 of the TFEU, which deals with environmental issues. I take issue with him as to whether the polluter pays principle and the precautionary principle are both now accepted as general principles of EU law. I would suggest that there is considerable doubt as to whether the former, in particular, constitutes what is recognised in EU law as a general principle, so I have some difficulty with that amendment.

I come now to Amendment 63, also tabled by the noble Baroness, Lady Bowles. It is, I apprehend, intended to retain this right of challenge but solely for the principle of proportionality, as she indicated, and specifically including where retained EU law is to be treated as primary legislation. It would also appear to permit the possibility of a challenge on the basis of invalidity of EU law, as well as judicial review of such legislation. It is our position that the general principles of EU law, such as proportionality, non-retroactivity and fundamental rights, will be kept in our domestic law, but in order to assist in interpreting retained EU law and not to give rise to additional stand-alone rights. Whereas some general principles are now set out expressly in EU treaties, the general principles were those that were first recognised by the European Court of Justice. They are essentially judge-made and determined as principles on the basis of case law. It is those principles that we are dealing with.

I come back for a moment to Amendment 41, which goes beyond just the issue of proportionality. It would undermine the approach that we are seeking to take if we were to pursue it. In particular the inclusion of Article 191 in the amendment risks going further than the existing principles that are, as I say, set out in EU law and consequently in UK law today.

Lord Goldsmith: Leaving aside Article 191—we can argue about that and there is a decision that appears to demonstrate the point: the case of Artegodan, where the court appeared to be willing to extrapolate from the precautionary principle a general principle of EU law—does the Minister accept that, so far as the other general principles of EU law are concerned, to exclude them from the ability to found a cause of action and not just be an interpretative tool would be a diminution of the rights that people currently have and would include a diminution of many of the rights that the Government are saying are already protected under English law?

Baroness Ludford: So that the Minister does not have to bob up and down, may I also ask him a question? He talked about our approach in this Bill. That leads me to reflect on how far the approach in this Bill fits, for instance, the Prime Minister's speech on Friday, in which she envisaged not only strong commitments in the area of trading goods but binding commitments in competition law. The noble and learned Lord talked earlier about how there would be EU law and then retained EU law in this country, the interpretation of which could diverge. How will the Prime Minister's commitment to binding commitments in some areas to stay fully aligned with EU law be reflected in this construction of the Bill? If we diverge, would we then have to have domestic legislation to bring us back on track with the EU?

11.45 pm

Lord Keen of Elie: The noble Baroness is confusing two distinct issues. The Bill is about the retention in domestic law of EU retained law at the point of Brexit. The Prime Minister was addressing our future relationship with the other 27 members of the EU in the context of our seeking to align in some areas and not align in others. This will be the subject of negotiation which is about to commence and will apply in agreeing a transitional period, and then our post-transitional period relationship with the other EU 27. They are two distinct issues.

On the noble and learned Lord's observation about the general principles, these are retained as an interpretive tool. It may impact upon the matter of remedies but not on the issue of rights. One has to bear in mind that distinction.

Reference was made by the noble and learned Lord, Lord Wallace, to the case of Benkharbouche, which was a classic example of where the issue of rights had to be distinguished from the issue of remedies. There were rights arising under Article 6 of the convention but there was an also an issue as to whether or not certain principles arising by reference to the charter were also in play. I believe it was Article 46 of the charter that was referred to by Lord Sumption, who delivered the opinion of the court. The point was that while the rights could be identified by reference to the convention or the charter, the particular remedy there arose by reference to the charter. I acknowledge that that is the case.

Lord Wallace of Tankerness: Is that not part of the point? An expectation has been built up by what has been said—that, on Brexit date plus one, people will be in the same position. The noble and learned Lord is admitting that they will not be in the same position because they may have rights but they will no longer necessarily have remedies.

Lord Keen of Elie: They will have rights but they may not have the same remedy, but that is quite distinct. We are talking about maintaining rights at the point when we leave.

Lord Goldsmith (Lab): Does the noble and learned Lord accept that Mr Walker would not have the same rights? Those are rights purely based upon EU general principles and nothing else. Does he not accept that in that case, at least, the rights would not be there?

Lord Keen of Elie: No, I do not accept that. I certainly do not accept that that is the position under reference to the Walker case. However, I am content to come back to the noble and learned Lord on that question on the Walker case but I do not accept that it falls in the way he indicates.

Perhaps I can make some progress. We remain of the view that after we cease to be a member of the EU there is a real risk of allowing general principle challenges to continue indefinitely, which is what these amendments would allow. Simply put, this would not be in keeping with our undertaking—our promise—to return sovereignty to this Parliament.

Of course we are aware of the concerns that have been raised, particularly about the impact on those whose cause of action precedes exit but who are unable, for whatever reason, to issue proceedings before some change takes effect. That is why we brought forward amendments on Report in the other place to provide reassurance that where a breach of the general principles occurred or gave rise to a potential claim before exit day—that is the important point—individuals and businesses will still have the opportunity to make certain claims based on the breach of the general principles of EU law for a period of three months after exit date. That period of three months after exit date is taken to mirror the period normally allowed in the context of applications for judicial review. That strikes a balance between ensuring that, on the one hand, individuals and businesses will still have the opportunity to bring these challenges and, on the other hand, delivering the result of the referendum and maintaining our parliamentary sovereignty.

While we believe that the compromises we have already made on the general principles of EU law have improved the Bill, the Government are looking again at these issues to see whether this part of the Bill can be improved in keeping with some of the concerns that have been expressed. That is because we understand the complexities of the issues that arise in the context of Schedule 1 and we are looking at those at present.

With that, I hope that the noble Baroness will see fit to withdraw her amendment.

Lord Wallace of Tankerness: My Lords—

Lord Keen of Elie: As the noble and learned Lord rises to his feet I am reminded of his reference to whether paragraph 3 includes Acts of the Scottish Parliament passed before Brexit day and not within competence. If they are not within competence, they are not law.

Lord Wallace of Tankerness: Perhaps I may explore that with the noble and learned Lord. The point I was making was that if the Acts were passed before Brexit day and they were challenged on the basis that the alleged incompetence was that they were not consistent with the general principles of EU law, would that challenge fail on Brexit day plus one, because it would mean that the court could no longer determine it?

Lord Keen of Elie: In the event that an Act of the Scottish Parliament was enacted beyond the competence of the Parliament, it would not and would never have been law. That is the position pursuant to Sections 28 and 29 of the Scotland Act 1998. I hope that that clarifies the point, but if I have misunderstood the noble and learned Lord—

Lord Wallace of Tankerness: Let me see if I can make it a bit clearer.

Lord Keen of Elie: I am quite prepared to discuss the point with the noble and learned Lord because it may be that we will look more closely at those provisions in the Scotland Act in the very near future.

Baroness Bowles of Berkhamsted: I thank the noble and learned Lord for his response and all noble and noble and learned Lords who have spoken in this debate. I think that it has been confirmed that it is every bit as bad as I thought it was, and in fact I am not even sure that it is not worse. We now seem to have some kind of parallel jurisprudence which appears not to be actionable either under general principles or under common law, so we have created a kind of lacuna that cannot be approached. I also reject the fact that we would not be going on indefinitely applying general principles because the whole point is that we have the law as it is in the snapshot until such time as we change it. While I understand that one would not necessarily want to go in for a sudden wholesale redrafting of things, as amendments are necessary—especially if we avail ourselves of some of the mechanisms we have talked about where an Act of Parliament is going to be needed either because it is primary legislation or because we have put that on as a safeguard—these things are going to be revised and updated. I am still concerned and it is something that along with others we might want to return to on Report. However, for now, with the leave of the Committee I shall withdraw the amendment.

Amendment 40ZA withdrawn.

Amendments 40A to 42 not moved.

Amendment 43

Moved by ***Lord Davies of Stamford***

43: Schedule 1, page 16, line 27, leave out paragraph 4

Lord Davies of Stamford: My Lords, it is not easy to generate a great deal of excitement at this time of night about an item of jurisprudence, but I rise to speak about the Francovich principle, which is extremely important both as a general principle—in fact, I do not think that there is any more important principle in our legal system—and as an instrument for driving ever-better standards of governance and of output by the public sector. Let me explain this briefly.

The Francovich case, as I think noble Lords will know, and certainly all noble and learned Lords will know very well, is a piece of jurisprudence dating originally from 1991 that has been with us for

25 years. It has become very much part of the scene, and I think that without exaggeration I can say that it is part of the political and legal culture that we have created in the European Union over that time. It has been extended by jurisprudence so that it covers states, public authorities and agencies as well as local government, and more recently it has also been extended to cover the private sector. What the principle says is that where an individual, a corporate body or a state body has been in breach of union law and corporate or private individuals have suffered thereby, they have the remedy that the courts concerned are able to impose damages proportionate to the losses incurred by those who have suffered as a result of the bad governance concerned.

When I say that it is a very important principle and a very important pragmatic instrument, let me explain that. Surely the very important principle here is that the state must be subject to the law. If I go out and break the law, I can be arrested, charged and eventually fined, or even sent to prison in certain cases—and I can certainly be sued for civil damages for negligence, breach of the law et cetera. If, however, state bodies are immune from the law, the relationship between the citizen and the state is very different from the one we like to think exists in a constitutional democracy. That principle is very important and it will cease to be enshrined in law if we do not amend the Bill as it currently stands.

The valuable, pragmatic instrument to which I referred is simply that the existence of the Francovich judgment, which—as the Library told me—has been cited by over 300 cases since and has played a major part in many decisions. If I had more time I would digress on the bad planning decisions that have been reversed and the beaches and rivers that have been cleaned up as a result of the working of this principle. The principle drives better government the whole time.

I dare say that the Government, in their contribution to the debate, will say, "It doesn't matter because when we leave the Union we can fall back on judicial review". Judicial review is a creation, of course, not of European jurisprudence but our own jurisprudence; it is a very valuable principle and a valuable achievement over the past 50 years. In my view, as I have already argued, it is not quite as important or valuable as the Francovich principle, but nevertheless it is a splendid thing. There is a big difference between judicial review and Francovich, because under judicial review, you cannot get any damages. You can spend £3 million or £5 million—I have no doubt that noble and learned Lords will tell me any amount of money you want—by running the case, but you will not get the damages that you would get under the Francovich case. All of us who have been involved in government know that there is nothing more terrifying for any Minister than the prospect of being exposed as responsible for the loss of money in their department. Indeed, the political life expectancy of any Minister who finds himself in that position is frankly a matter of hours rather than days. So the risk of having damages awarded against one is a very real threat to anybody in a position of responsibility—chief executive of the local council, chief executive of an agency, a Minister or whoever—and it makes everybody stop to think extremely carefully. That is what we are talking about in the amendment.

Going through the Bill, all of us face a great difficulty. We have a choice to make and I do not think that any one of us is completely clear on how we should make it. Hopefully, we will have taken a decision by the time the Bill emerges from Report, but it may take a little while yet. The choice is this: do we believe the Bill or the Government? If we believe the Bill, all these rights and remedies and protections are disappearing. That is what the wording of the Bill before us says—that Francovich has been abolished—quite unambiguously and clearly. In other parts of the Bill, as we have seen today and on other occasions in Committee, it is the same story. We were talking earlier about family rights and labour rights and so forth, and it looks as though some of those are not being protected—even animal rights are not being carried forward on the same terms, with the wording being changed and softened and so on. There are subtle ways in which rights and protections are being withdrawn. That is what you get from reading the Bill.

What is more, the Government continually tell us that all the Bill does is make sure that there is no legal uncertainty at the time of Brexit and that we will simply carry forward retained law into British law. In fact, there is an agenda in the Bill that is quite blatant to anybody who reads it. It is not a hidden agenda; it is quite obvious. It is a kind of power grab by the Executive at the expense of the citizen. The European Charter of Fundamental Rights is going, which is clearly a loss to the citizen. Again, the Executive cannot have the charter prayed in aid against them.

The most concerning aspect is of course the Henry VIII clauses that we have not yet come to, which constitute an extraordinary power grab by the Executive at the expense of Parliament. We have it here again with the Francovich issue. Again, it is a power grab by the Executive, who want to abolish this because it is a trial and a problem for them and the state. They have to perform or else they have to pay up and get humiliated. That is what we see.

Midnight

It is very difficult to know whether that is the truth or whether the truth is what we heard from the noble Lord, Lord Duncan, on the last group of amendments, which was put very appealingly and I am sure with great sincerity: that no rights are being removed at all, that there is no weakening or erosion—I think I quote his words exactly—and that all the rights and protections are being carried forward. I only hope that it is so. But if they are being carried in the case of Francovich and the other case as well, let us see it in the Bill. Let us remove the ambiguities in the Bill, because there is a clear contradiction between what we are being told about no rights and protections being abolished and the fact that we have here in front of us—I will quote it if anybody wants—the text referred to by the amendment, which would abolish this particular paragraph. So which is it: the very alluring picture we

[LORD DAVIES OF STAMFORD]

were given by the noble Lord, Lord Duncan, half an hour or an hour ago, and the similar picture given by the Prime Minister in her speech on Friday, or is it the Bill? That is the problem.

I hope that this matter can be resolved. I hope that the Government will tell us that we can set our minds at rest, that the assurances we have been given override the apparent message of the Bill, that if there are any problems or anomalies they will be sorted out on Report and that, among other things, the Francovich principle will be upheld and preserved.

I will make one final point. I dare say it will be said by the Government on this subject that Francovich will not be appropriate after we have left the Union because we will not be part of it any more and the whole purpose of Francovich is to provide a remedy to those who are disadvantaged by the non-observance of Union law in the European Union. My view is that we should make sure that those people who currently enjoy those rights and remedies—which is all our citizens—should continue to enjoy them in respect of the same laws as they do at present, in other words in respect of retained law. There could be a very reasonable and attractive agenda that would say that we should extend the Francovich principle from a Union law or a retained law to the generality of law in this country—British law, English law, Scots law et cetera. I would be very much up for that and in favour of it, but I see that as slightly complicating the issue and I fear that I shall be told that this Bill is not the right vehicle—that is probably correct—in which to achieve that purpose. But my purpose is to make sure that we continue to have the rights that we enjoy today—and if we accept the amendment we will achieve that.

The Deputy Chairman of Committees (Lord Faulkner of Worcester) (Lab): My Lords, I must advise the Committee that if this amendment were agreed to, I would be unable to call Amendments 44 or 45 for reasons of pre-emption.

Lord Carlile of Berriew (CB): My Lords, for those of us who have real enjoyment in the law, a nice bit of law at three minutes past midnight is rather like a comforting, calm, creamy cup of cocoa, but I recognise that not everybody is of the same view. With that in mind, I propose to elide in the remarks I am going to make comments on Amendment 45, which appears in my name and that of the noble Lord, Lord Lucas, and on Amendments 48 and 50, which appear with the same names. That should save time in a few minutes because I understand that we intend to complete that group as well.

These amendments are designed to retain the so-called Francovich principle. I congratulate the noble Lord who has just spoken on summarising it very well. I will add a little bit of flesh on it because I wish to try to tease out of the Minister a welcome response to those of us who seek to preserve at least part of the Francovich principle, although I would happily pass to him the burden of perfected drafting.

In the Gina Miller litigation, in which the noble and learned Lord and my noble friend Lord Pannick played starring parts, the Government in their submissions place considerable weight on their intention to enact what was then called a "great repeal Bill". As the Supreme Court understood it, that Bill would—and this is a quotation from the majority judgment at paragraph 34,

"repeal the 1972 Act and, wherever practical … convert existing EU law into domestic law at least for a transitional period".

Surprisingly, in relation to the Francovich principle, there has been no conversion and no transition. I ask the Minister to explain whether that really is the position that the Government wish to maintain.

The Francovich principle is a principle of existing EU law which requires damages to be available where three conditions are met: first, that the rule infringed was intended to confer rights on individuals—I am sure that we would all applaud that; secondly, that the breach was sufficiently serious to give rise to a legal action, which I am sure we would also applaud; and, thirdly, that there was a direct causal link between the breach of the obligation resting on the defendant and the damage sustained by the injured party, and I am sure that we would all applaud that, too. Perhaps the Minister would explain why he wants to get rid of that principle.

To provide a little more explanation for the fascinated non-lawyers here, who may just about be in a majority—

Lord Taylor of Holbeach (Con): Hear, hear!

Lord Carlile of Berriew: I always listen with great respect to the Government Chief Whip, especially when he sympathetically allows us to debate these issues after midnight.

In Francovich, workers who suffered damage when their employer became insolvent were entitled to compensation under an EU directive which required member states to secure their protection. Since Italy had failed to implement the directive, the individual workers brought a claim before their national courts for compensation from the state for the damage they had suffered due to this failure, and I think that we would all applaud that, too.

State liability is enforced not through the European courts but through national courts, thus the ECJ stipulated that national procedures should determine how state liability is enforced. The procedures for claiming damages from the state before national courts must comply with the principles of equivalence—that is, with the procedures available for comparable claims for damages—and effectiveness, to secure that EU law as well as national law is respected. As long as it respects these two principles, the member state can prescribe its own procedures for claims as regards, for example, proof and time limits—so it is hardly imposing wicked European ideas on the national courts, since they are left to enforce the principles concerned.

The Francovich principle has led to some significant legal actions; perhaps the best known in the UK is the Factortame litigation, which contained five cases concerning fishing rights.

What is the problem with the Bill? It is confusing. I quote from the summarised views of commentators more expert than me on this subject. It is said that Clause 6(1) removes the right to rely on EU law and obtain a reference to the ECJ after the date of exit. Paragraphs 3 and 4 of Schedule 1 plainly remove the ability to rely on EU law or utilise the Francovich principle after the date of exit. Or do they? I ask that because paragraph 27(3) of Schedule 8, which all noble Lords will have been reading carefully in preparation for this short debate, makes it clear that cases begun prior to the exit date are not subject to the restriction that I have described and therefore can continue to rely on Francovich.

As was pointed out by Dame Cheryl Gillan in another place on 14 November last, the Bill is contradictory, in that it both allows continued reliance on Francovich in cases commenced before the date of exit but also removes that right. That appears to mean that a litigant in a case started before the date of exit, and who has a legitimate expectation that the law will not change retrospectively and that he or she will be able to rely on Francovich, will lose that expectation. If I am wrong in that, I am not the only one and I would like a correction, please. All litigants have a legitimate expectation to have their cases heard under the rules applicable not at an arbitrary time, such as the date of exit, but at the time of the breach of the law concerned. This includes EU law at that time, if it was applicable, and on the face of it, the right of a reference to the ECJ if they are dissatisfied. The purpose of the two groups of amendments is to achieve something much simpler, clearer and more just than the conclusion if the complaints I have described are correct.

I respectfully suggest that if a relevant cause of action accrues before the date of exit, the claimant should be able to pursue that cause of action. That would be their normal litigation right, and exit should not retrospectively remove that normal litigation right. As the Bill stands, because of ambiguity there is a risk that some or all Francovich claims, unless they have already been completed, will be extinguished. Surely, that would be an incorrect and unintended consequence. Plainly—and I will deal with this in a moment—there are some concerns about the potential role of the ECJ.

Lord Faulks: One of the points I was going to make concerned the continued role of the ECJ, but while I am on my feet, I entirely understand the noble Lord's points about transitional provisions, but will he clarify to the House whether his support would go as far as the noble Lord, Lord Davies, in having a continuing Francovich?

Lord Carlile of Berriew: No, I would not go so far as the latter part of the speech of the noble Lord, Lord Davies. I recognise that if we leave the European Union, as we are doing, we have to have the transitional arrangements that were promised and that were referred to by the learned judges in the Supreme Court, on the basis of submissions that may well have been made by the noble Lord himself.

What I suggest to deal with the ECJ problem is one of two alternatives. One is to allow the ECJ jurisdiction to continue for the very small number of cases likely to arise. I recognise, of course, that that will attract political problems that might better be overcome by a more pragmatic solution. The pragmatic solution is to recognise and clarify that the United Kingdom courts, in dealing with such cases, should apply normal, comparative law principles; the sort of thing that we lawyers are accustomed to when we cite, for example, Australian or Canadian cases before the senior courts. This would mean that the courts of the United Kingdom, in dealing with such cases, should have due regard to ECJ decisions on similar and analogous matters. This would fall, as I say, within the ordinary principles of comparative law, whereby the United Kingdom courts give due weight to useful and relevant decisions in other jurisdictions. Thus we would have at least analogous law applied to the residual Francovich cases. We would have a right to make a claim on the basis of the date when the claim accrued, even if it is not yet quantified and not yet pursued, and the unintended consequences of retrospectivity would be avoided. In my view this would accord with sound legal principle.

I urge the Minister, even at this late hour, to say that he will return to the House with suitable and welcome government amendments for the clarification and preservation of what are proper bases for action.

12.15 am

Baroness Altmann: My Lords, I support Amendment 43, moved by the noble Lord, Lord Davies, and supported by the noble Lords, Lord Foster and Lord Foulkes, and to which I have added my name. I also support the thrust of Amendments 44 and 45. I will try to be brief in light of the hour.

Amendment 43 aims to ensure that the Government maintain their pledge not to water down rights if we leave the EU. I do not see why the Bill needs to explicitly remove the right to Francovich protection, which allows citizens—individuals and small businesses—to sue the Government for damages resulting from past breaches of EU law. I hope that my noble friend the Minister will reconsider the removal of this protection; otherwise, we will lose a key last-bastion protection for citizens and small businesses, which allows them some remedy against harm caused to them by government policy.

The Government say that people will still be able to sue in the UK courts, but in practice this power is not normally exercisable. I have personal involvement in this area and have seen how difficult it is to mount a legal challenge against the Government. A judicial review must be launched within a very short timescale, which most ordinary individuals would struggle to meet. When I was helping the 150,000 members of final salary pension schemes, including Dexion and Allied Steel and Wire, who had lost their entire company pension and part of their state pension as a result of flawed laws which failed to properly protect their pension rights when their company became insolvent, despite being obliged to

[BARONESS ALTMANN]

do so by the EU insolvency directive, I had to find lawyers who would work on a no win, no fee basis. Even then, the Government refused to agree not to pursue the claimants for their costs if we lost. These poor claimants faced losing all their assets, including their home, when taking the Government to court. Realistically, most people simply could not take such pressure.

It is unreasonable to remove the last-resort protection that such people have, which would allow them to appeal to the EU courts under Francovich protection for a ruling which would not risk the same costs and difficulties as a UK court action against the Government. If an EU directive was implemented wrongly, and the Government had not introduced sufficient protections, despite being obliged to do so, the amendment would ensure that the Bill does not remove people's last resort to redress. I hope that the Government will agree to this amendment or produce their own version.

Lord Foster of Bath (LD): My Lords, I have added my name to Amendment 43, and I support Amendments 44 and 45. I begin by disagreeing slightly with the noble Lord, Lord Carlile. I suspect that I am in a minority: those of us who are not lawyers.

However, I am very conscious that during our deliberations so far we have heard many times that the Bill is intended to ensure that,

"as a general rule, the same rules and laws will apply after we leave the EU as they did before".

About an hour ago we heard a very powerful reiteration of that from the noble Lord, Lord Duncan, who made it very clear that he believes what the Government seek to achieve. Yet that has to be put alongside the continuing concern in the other place and in many parts of your Lordships' House that somehow or other Schedule 1 provides the Government with a get out of jail free card—an opportunity to have a series of measures which appear at least to curtail some of the legal rights and remedies we have enjoyed as a result of our membership of the European Union. A glaring example of that was well illustrated by the noble Lords, Lord Davies and Lord Carlile, and the noble Baroness, Lady Altmann, and is contained in paragraph 4 of Schedule 1 in relation to Francovich.

As the noble Lord, Lord Carlile, rightly pointed out, Francovich is not just some right whereby anybody who feels slightly aggrieved by their Government not properly implementing some piece of EU legislation can immediately start action. Three clear criteria have to be met and have already been laid out: that there are rights conferred on an individual, that the breach was sufficiently serious, and that there is a clear causal connection between the breach and the damage sustained by the individual.

It seems clear, at least to me as a non-lawyer, that if paragraph 4 of Schedule 1 remains in the Bill, no retrospective claims under Francovich will be permitted, and certainly not if the proceedings have not been started before exit. In those cases, individuals will lose their ability to claim damages against the state for failure to implement EU laws and directives issued pre-exit. This would mean that the victim of a government failure to correctly implement an EU law must have started action before exit day, but that will not always have been possible and would seem contrary to natural justice. Access to justice, including the ability to challenge the actions of the state before a court of law, is central to the rule of law. If paragraph 4 of Schedule 1 remains as it stands, it seems that access to justice for some people will be denied.

I was in your Lordships' House some 10 days ago when we heard during exchanges on the Statement on air quality that the High Court had ruled that the Government's air quality plan, designed to tackle nitrogen dioxide in the air, was unlawful. The Court ruling said:

"It is now eight years since compliance with the 2008 Directive should have been achieved. This is the third, unsuccessful, attempt the Government has made at devising",

an air quality plan,

"which complies with the Directive and the domestic Regulations."

The judge, Mr Justice Garnham, added,

"In the meanwhile, UK citizens have been exposed to significant health risks".

It may be that some individuals will wish to argue, under the rule of Francovich, that they have suffered damage and deserve compensation because of the Government's failure to implement the 2008 directive. Without Amendment 43, or some similar measure, such individuals will be prevented from seeking justice unless they submit their claim and have their case under way before exit day.

In the other place, many other examples of potential loss of access to justice under Francovich were raised. Initially the Minister there, Dominic Raab, offered assurances that:

"Individuals will not lose their ability to vindicate their rights in court after exit".—[*Official Report*, Commons, 14/11/17; col. 290.]

It may be—I have no way of knowing—that he believes that to be the case because of Section 16 of the Interpretation Act 1978, which provides that,

"where an Act repeals an enactment, the repeal does not, unless the contrary intention appears ... affect any right, privilege, obligation or liability … accrued or incurred under that enactment".

So the right to claim under the rule of Francovich post-exit would seem to depend on whether the Bill before us provides an effective and clear contrary intention. Can the Minister tell us clearly whether the Government believe that paragraph 4 of Schedule 1 provides a clear contrary intention, within the meaning of Section 16 of the Interpretation Act 1978?

Certainly, there are some other lawyers who appear very uncertain about that point. For example, the very helpful briefing from James Segan of Blackstone Chambers leads me to conclude that seeking justice by arguing that there was no contrary intention or that it had been introduced ineffectively would lead

litigants into a legal quagmire, so I was slightly heartened when in the other place a little later in the deliberations the Minister changed his tune when pressed by, among others, Conservative MPs Robert Neill, Dame Cheryl Gillan and Sir Oliver Letwin. He told them that he acknowledged the importance of legitimate expectations and agreed to see whether these concerns could be addressed, at least transitorily, by regulation rather than in the Bill. I hope that the Minister can update us on progress on that thinking. He has already said in relation to other aspects of Schedule 1 that the Government are willing to do that.

I would have thought that by far the better route to securing the continuation of the rights under Francovich would be to accept Amendment 43 or something like it, and ensure that the Bill makes it clear that when the Government say that the same rules and laws will apply after we leave the EU, they really mean it.

Lord Pannick: I have two questions for the Minister. First, will he accept that the right to damages under the Francovich principle is more generous to claimants than the common law principle of judicial review under which you very rarely have a right to claim damages as you need to prove misfeasance in public office or something similar? Does he accept that Francovich is more generous? Secondly, does he accept that it therefore follows that paragraph 4 of Schedule 1 to the Bill conflicts with the Government's purpose in bringing forward this Bill, which is to read across all existing rights that are enjoyed under EU law? If he accepts that, what is the justification for making an exception for Francovich damages?

Lord Lucas (Con): My Lords, it seems to me that if the Government break the law, they should be judged on the basis of the law at the time that they break it and that this is not a Bill in which the Government should seek to advantage themselves by averting that principle.

Lord Leigh of Hurley (Con): My Lords, I spoke on this subject at Second Reading in respect of the disputes that arose under the old regime which seem to me to deserve fair treatment. I am aware of instances, in particular relating to small businesses, where it could lead to a very unfair result and deprive genuine claimants of going to the EU courts. The noble Lord, Lord Foster of Bath, mentioned the note by James Segan, and it raises a question which perhaps my noble and learned friend can answer about whether as it currently stands with paragraph 27 of Schedule 8, which was mentioned, and Section 16 of the Interpretation Act 1978, there could be action under the Human Rights Act. It would be politically unacceptable, apart from anything else, to see claimants pursuing their claims if there were that interpretation.

Lord Goldsmith: My Lords, I look forward to the answers that the Minister will give to the questions asked by the noble Lord, Lord Pannick. I have Amendment 44 which deals with the timing of the Francovich claim. I can be brief. My noble friend Lord Davies of Stamford set out very well what we are talking about. The noble Lord, Lord Carlile, indicated the problems to which the Government's approach gives rise. One can look at it this way: at the moment the Bill appears to say that if the Government were to commit an act that was unlawful—a breach of Union law, for example—before exit day, the Francovich claim could not be brought, except in circumstances where the claim had been brought before exit day. I do not see the justification for that. That amounts to whitewashing an unlawful act and, as has been said—and it seems to me to be absolutely right—it is quite inconsistent with the promise that has been made that we will have the same rights the day after exit day as the day before.

I look forward to the answers to those questions. Even if any change does not go as far as my noble friend Lord Davies of Stamford, said, it must at least apply, as the noble Lord, Lord Carlile, put it, to accrued rights, so that any act which is committed before exit day which gives rise to a Francovich claim should continue to do so.

12.30 am

Lord Keen of Elie: My Lords, I am obliged. Reference has been made to the Francovich principle. I am not sure there is such a principle, although there is the issue of Francovich damages, which arises from the case that was referred to in 1991. In order to put that into context, since 1991, and in the 20 years following, there have been 22—possibly up to 25—claims for Francovich damages in the UK courts. This is not some wide-ranging citizen or business right for the recovery of damages. There have been very few actual Francovich damages claims. I see the noble and learned Lord, Lord Goldsmith, shaking his head, but I invite him to study the case law.

Lord Goldsmith: I have no doubt about what the noble and learned Lord says. So why are they so worried about keeping it?

Lord Keen of Elie: I am just about to come on to that. I am obliged to the noble and learned Lord for his patience in that respect, and will endeavour to deal with matters as swiftly as I can, given the hour. The noble Lord, Lord Carlile, very correctly, pointed out the criteria that apply in determining whether or not there is a claim for Francovich damages: first, that the relevant provision of European Union law was intended to confer rights; secondly, that there has been a serious failure to implement European Union law; and thirdly, that there is a direct causal link between that failure and the loss complained of. I would not go so far as to suggest that Francovich damages are in some sense more generous than those available otherwise under the common law in this country, particularly those available in the context of judicial review. I have to point out to the noble Lord, Lord Davies, that damages are potentially available in a claim for judicial review.

Lord Davies of Stamford: The noble Lord, Lord Pannick, dealt with that point. In practice, damages are not usually available under judicial review. The general view of the public is that there is a very small chance of getting damages that way. That is the difference between that and Francovich, and it is very important.

Lord Keen of Elie: With respect, it is not. I have to say to the noble Lord that Francovich damages are a rare remedy, as I have already indicated. Damages in the context of judicial review are not so uncommon as the noble Lord was suggesting. They are available as a remedy, albeit in limited circumstances.

Lord Pannick: My Lords—

Lord Keen of Elie: Perhaps I can continue just for a moment. I would begin by looking at the Bill against that background. Paragraph 4 of Schedule 1 is perfectly clear in saying the right to Francovich damages is removed, because of course it is related to a breach of European Union law, and it would not be appropriate to continue—in accordance with Amendment 43—after we have left the European Union. The Bill is quite clear in saying that there is,

"no right in domestic law on or after exit day to damages in accordance with the rule in Francovich".

To that extent, it does deal with the issue raised in the context of Section 16 of the Interpretation Act 1978.

Lord Carlile of Berriew: I take it from what the noble and learned Lord is saying that he accepts that there are existing rights to recover damages available in the British courts which the Government wish to remove. That is a breach of promise, is it not?

Lord Keen of Elie: I wonder whether the noble Lord could exercise a small degree of patience while I just complete what I have to say on this topic. But we can take as long as it takes. As I was saying, in terms of paragraph 4 of Schedule 1, the right in domestic law to damages in accordance with the rule in Francovich is removed as at exit date. There is of course a proviso in paragraph 27 of Schedule 8 in respect of claims for Francovich damages which have already been raised prior to exit date—the point that the noble and learned Lord, Lord Goldsmith, made. The potential lacuna is this: there may be accrued rights as at exit date where no claim has been made. We recognise that and it was noted in the other place. We are open to addressing that issue in order to ensure that those accrued rights are not removed by the application of paragraph 4 of Schedule 1. That is something that we are prepared to look at, as I have indicated, because we are aware of the criticism that has been made about the potential removal of rights that have already accrued as at the exit date.

Lord Goldsmith: Do I take it from that that the Minister will be bringing forward an amendment to correct this?

Lord Keen of Elie: I am obliged to the noble and learned Lord. As I say, we are addressing that issue, which we recognise, and therefore in time for Report we will be determining what our position is. I cannot go further at this stage and I am not going to commit to an amendment, but I make it perfectly clear that we recognise that there is a potential lacuna arising from the fact that while, where a claim has been made before Brexit date it is continued, where the claim has accrued but no claim has actually been made it would be lost by this process. We recognise that there is room for criticism of the legislation on that basis; I am absolutely clear about that.

In these circumstances, I recognise the force of the amendment proposed by the noble and learned Lord, Lord Goldsmith, and that proposed by the noble Lord, Lord Carlile, in order to address that issue. I would take issue with the scope of the amendment proposed by the noble Lord, Lord Davies, which goes well beyond that and would maintain some sort of claim for Francovich damages in a context quite unrelated to our departure from the EU. I underline that this would not be appropriate.

I mentioned earlier the limited number of cases in which Francovich damages have arisen. That in itself suggests that it might be a proportionate response to the amendments made by the noble and learned Lord and the noble Lord, Lord Carlile, to allow for claims that have accrued because they are potentially very few indeed. I recognise that entirely. I am not committing to an amendment at this stage but I will make the position clear by the time we reach Report. In the circumstances, I invite the noble Lord to withdraw his amendment.

Lord Pannick: Before the Minister sits down and we all go to bed, I am very puzzled by his suggestion that there is currently a right to damages in judicial review such that Francovich damages do not add anything. In what circumstances is the Minister suggesting there is a right to damages in judicial review, other than in the very rare cases where you can prove misfeasance in public office?

Lord Keen of Elie: That is one example of where a claim for damages would arise in the context of a judicial review. There are distinct circumstances in which Francovich damages will arise. The noble Lord will himself recognise that the circumstances in which you can actually establish a basis of claim for Francovich damages are even rarer than those instances in which you can establish one in domestic judicial review.

Lord Pannick: I do not accept that. It is quite clear, I suggest, that damages under Francovich are provided in circumstances where you would not otherwise get damages because you cannot prove misfeasance but you can prove that the breach is sufficiently serious and that the law was intended to confer a right to damages. That is why I suggest to the Minister that paragraph 4 is taking away something of value.

Lord Keen of Elie: In response to the noble Lord's observations, we are dealing in the context of Francovich with the court having to find that there has been a serious failure with regard to an EU obligation, and I suggest that that is not very far from the test of misfeasance in the context of judicial review.

Lord Davies of Stamford: My Lords, I am grateful to everybody who has taken part in this interesting debate. I think that anybody listening in from outside will be impressed that we are working hard on a very serious matter at quarter to one in the morning.

Lord Goldsmith: And not drinking cocoa.

Lord Davies of Stamford: Yes, not drinking cocoa, indeed—absolutely right.

First of all, I must say that the noble and learned Lord, Lord Keen, has misunderstood a number of things. One is that I think he has got it wrong on the issue of damages. The noble Lord, Lord Pannick, is representative in what he said of the great majority of legal opinion on this subject and of the experience that any of us have had—via our constituents or otherwise—in this area of the law.

The second thing is that I think the noble and learned Lord has misunderstood that the major part of the importance of the Francovich system or jurisprudence is that it is a potential deterrent to those who might be inclined to misgovern us. People know that they are subject to this particular sanction if they do, and that has enormous effect. The fact that the power is used 25 times is not negligible—28 times I think it is in this country and 300 and something times over the Union as a whole. That does not mean to say that it is without effect, or that its effect is limited to those occasions. It would be very naive to say that; its effect is created by the presence of that particular sanction and means of redress for those who have been wronged in this way.

I also do not think that the noble and learned Lord is right in saying that the whole matter of Francovich is not very important because it applies only when there are serious issues. The principle of—to put it in language that I think he will understand—de minimis non curat lex—applies to everything really, in the Roman law tradition anyway. So it is not at all surprising that it applies in this case.

I want to leave the Committee with complete clarity about this, and there are three separate issues here. One is what we do about people who have a claim, or think they have a claim, under the Francovich principle—and I continue to call it that—and it is overtaken by events because they have not litigated before Brexit or they are half way through or they have not expressed their claim or put it in at all. What happens about them? That is important, because it may only be three or four people, and we should always be concerned about justice for anybody. I do not in any way denigrate people who have taken up a lot of time to talk about their particular subject; it is a perfectly respectable concern to have. But my concern is not really with that—mine is to my mind much more significant. Going forward, do we have the Francovich principle or something like it in our own legal system, both to enshrine that principle that the state is subject to the law like everybody else, which as I say is so important, and to make sure that we have that instrument of good government, which has a real deterrent effect on the behaviour of central and local government, public corporations and, indeed, the private sector? That is very important to me.

I disagree very strongly with the noble and learned Lord, Lord Keen, when he says that the Francovich system does not make any sense when we have left the European Union, because there will not be such a thing as European law here. He is quite wrong about that; there will be retained law for decades, no doubt, until it is changed by statute—if it is changed by statute over that time. It is called retained law; it is exactly the same law. The difference may be that, whereas you could litigate under it before Brexit, after Brexit you will not be able to litigate under it at all, which seems completely unreasonable. That means the loss of remedies and rights that we currently have in respect of exactly the same laws, because they are exactly the same provisions with exactly the same wording having exactly the same effect, whether they are today on 5 March, or on 1 April next year after we have left. That is what the whole principle of retained law is, as I understand it—and I think that the noble and learned Lord knows that.

It is my concern in this amendment to make sure that, when the citizens of this country have current rights and protections, they should enjoy all those after Brexit. I thought that the Government were in favour of that principle. We heard earlier from another Minister, the noble Lord, Lord Duncan, that he believes that that is the case and favours that principle—and I think that that principle is enormously important.

Then there is the third issue, which I raised—and it is probably not the last time that I shall raise it in this House. The experience of Francovich is such that I believe that it should be carried forward into the whole corpus of law in this country, Scots law and English law. We continue to have these rights and these remedies. I believe their jurisprudence in this case to be a considerable advance of civilisation in the European Union over the last 25 years; there have been many such advances and, if we are going to carry forward the assets that we take over rather than throwing them away on Brexit, we should make sure that we carry forward this one. That is not a matter for this Bill; what is a matter for this Bill is the second point that I make, which is to make sure that in respect of retained law the rights that currently exist will be carried through and not abolished.

I hope that the Government will think about that between now and Report. I would certainly welcome the opportunity to discuss the matter with them before we decide how we can take this matter further. In the circumstances, I beg leave to withdraw the amendment.

Amendment 43 withdrawn.

Amendments 44 to 47 not moved.

Schedule 1 agreed.

Clause 6: Interpretation of retained EU law

Amendment 48

Moved by ***Lord Carlile of Berriew***

48: Clause 6, page 3, line 32, after “Court” insert “except in relation to anything that happened before that day”

Lord Carlile of Berriew: I am grateful to the noble and learned Lord for what he said earlier. It was well worth waiting up for and rather more stimulating than the cup of cocoa that I referred to earlier. Having said that, I can see no point in prolonging the debate on this amendment. If it is appropriate, therefore, I seek leave to withdraw it.

The Deputy Chairman of Committees: The noble Lord must move the amendment before he can withdraw it.

Lord Carlile of Berriew: I beg to move. Can I withdraw it now?

The Deputy Chairman of Committees: It is the property of the Committee until the noble Lord obtains its permission to do so.

Amendment 48 withdrawn.

House resumed.

House adjourned at 12.46 am.