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PARLIAMENTARY DEBATES
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HOUSE OF LORDS

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The first time a Member speaks to a new piece of parliamentary business, the following abbreviations are used to show their party affiliation:

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

No party affiliation is given for Members serving the House in a formal capacity, the Lords spiritual, Members on leave of absence or Members who are otherwise disqualified from sitting in the House.

House of Lords

Wednesday 21 March 2018

11 am

Prayers—read by the Lord Bishop of Leeds.

European Union (Withdrawal) Bill

Committee (9th Day)

11.06 am

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

Schedule 7: Regulations

Amendment 242A

Moved by ***Lord Low of Dalston***

242A: Schedule 7, page 52, line 16, leave out "section 7(1), 8 or 9" and insert "this Act"

Lord Low of Dalston (CB): My Lords, in moving Amendment 242A I shall also speak to Amendment 245A. These amendments aim to rule out the use of delegated powers to amend the protection of equality and human rights provided by EU law.

As a matter of constitutional principle, changes to fundamental rights should be made by Parliament by primary legislation, not by Ministers through secondary legislation. However, as it stands, the Bill does not rule out such changes being made by delegated powers. Delegated powers could be used to change the fundamental rights currently protected by EU law, such as rights to protection of personal data, children's rights, the rights of disabled people, the right to human dignity and protection from discrimination, as well as workers' rights, protections for pregnant women and nursing mothers, and rights to maternity leave.

There is a prohibition on changes to the Human Rights Act 1998. This is welcome as evidence of the Government's commitment to the entrenchment of equality and human rights, but the Bill needs to do more if that commitment is to be reliably delivered. The Human Rights Act safeguards only rights enshrined in the European Convention on Human Rights. Rights underpinned by EU law are different and need separate protection. To ensure this, it is essential that the Bill is amended to guard against excessive transfer of power from Parliament to the Executive and to ensure that any changes to fundamental rights are subject to full parliamentary scrutiny.

It is important to be clear that the new scrutiny procedures introduced in another place, though welcome, do not address this concern. They provide a mechanism in the form of a new sifting committee to recommend that the affirmative scrutiny procedure be used. However, this procedure does not allow Parliament to amend secondary legislation. The fact that it does not provide for effective scrutiny is demonstrated by the fact that there have been only 10 occasions since 1950 when delegated legislation has not been approved by Parliament under the affirmative scrutiny procedure. That is equivalent to one every six or seven years.

Stronger safeguards are therefore required in the Bill to exclude changes to equality and human rights from the scope of delegated powers and to require a Minister, when laying secondary legislation before Parliament under the Act, to make a statement that it does not reduce any protection provided under equality and human rights law. A number of amendments have already been debated that would provide these essential safeguards. I refer in particular to Amendments 82 and 82A in the name of the noble Baroness, Lady Hayter, which would prevent the use of secondary legislation under Clause 7 to make changes to the Equality Acts of 2006 and 2010; and Amendments 101A, 133A, 161 and 259 in the name of the noble Lord, Lord Adonis, which would prohibit the use of secondary legislation made under Clauses 7, 8, 9 and 17 to change laws relating to equality or human rights. I support those amendments. However, I wish to speak to two additional amendments, Amendment 242A and 245A, which continue to be necessary.

Amendments 242A and 245A, which emanate from the Equality and Human Rights Commission, give effect to the Government's commitment that current protections in the Equality Acts of 2006 and 2010 will be maintained once we leave the EU by placing it on the face of the Bill. In their White Paper legislating for the UK's withdrawal from the European Union, the Government promised that,

"all protections covered in the Equality Act 2006, the Equality Act 2010, and equivalent legislation in Northern Ireland …will continue to apply after we have left the EU".

That welcome commitment followed the recommendation of the House of Commons Women and Equalities Select Committee that it is important that the Bill,

"explicitly commits to maintaining the current levels of equality protection".

On the first day in Committee in the House of Commons, the Minister promised to introduce an amendment that would require,

"Ministers to make a statement before this House in the presentation of any Brexit-related primary or secondary legislation on whether and how it is consistent with the Equality Act".—[*Official Report*, Commons, 21/11/17; col. 904.]

That was in response to concerns raised in the debate by Maria Miller MP, chair of the Women and Equalities Select Committee. The Government made an amendment on this point in the Commons which is now at paragraph 22 of Schedule 7. However, it fails to fulfil the Government's commitment to maintain current equality protections and has the potential to undermine understanding of Ministers' existing statutory duties. The Government's approach requires Ministers to make an explanatory statement, including in relation to equality issues, when laying secondary legislation made under Clauses 7, 8 or 9 of the Act. However, it does not require a statement that current levels of protection will be maintained. It merely requires the Minister to explain whether and how equality legislation has been changed and that "due regard" has been had to the need to eliminate conduct prohibited by the Equality Act 2010.

[Lord Low of Dalston]

There is nothing to stop the Minister having had "due regard" to this need deciding to reduce protections. The duty to have due regard is already a requirement under the public sector equality duty and the Minister's statement would do no more than confirm that she or he has partially complied with an existing statutory duty. Furthermore, the requirement focuses on the first duty in the public sector equality duty—namely, to have regard to the need to eliminate discrimination, presumably because of the emphasis that parliamentarians placed on ensuring non-regression during debates in the House of Commons. However, the public sector equality duty also includes other duties—to have regard to the need to advance equality of opportunity, and to foster good relations.

The focus on just one aspect of the public sector equality duty rather than the whole risks confusion about whether Ministers are obliged fully to comply with the whole of the public sector equality duty as opposed to just this single limb of the duty. This must be rectified to ensure clarity and compliance with existing statutory duties. Again, the requirement applies only to certain enabling powers in the Bill under Clauses 7(1), 8 or 9. However, changes could still be made, for example, under Clause 17, which provides a very wide power:

"A Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act",

without the need for any explanatory statement.

Amendments 242A and 245A would remedy that deficiency by requiring a Minister, when laying secondary legislation before Parliament under any enabling provision in the Act, not just those clauses to which I have just referred, to make a statement that,

"it does not remove or diminish any protection provided by or under equalities legislation".

I beg to move.

11.15 am

Lord Wallace of Tankerness (LD): My Lords, I support the amendment moved by the noble Lord, Lord Low of Dalston, and support Amendment 245A, to which he also spoke. He has given a very comprehensive explanation as to the origins of the amendments and why we believe that they are important.

Two weeks ago, when we were debating Amendment 70A and other related amendments, one suggested that there should not be any change to equalities legislation, and the noble Lord, Lord Callanan, in responding indicated that that might not be appropriate. He said:

"For example, the Equality Act refers in several places to EU or to Community law. These references are likely to need to be replaced with the term, 'retained EU law'. As such, we believe that it is essential that the Clause 7 power is able to address these deficiencies so that we can ensure that the legislation that safeguards these rights and protections can continue to function effectively".—[*Official Report*, 7/3/2018; col. 1168.]

The amendment gets around the practical objection that the noble Lord, Lord Callanan, had to previous ones because, if all that was being done was changing terminology from EU law to EU retained law, clearly the test or certification referred to in Amendment 245A that the regulation did not,

"remove or diminish any protection provided by or under equalities legislation",

would be quite easily met.

The noble Lord, Lord Low, indicated some of the background to this amendment. An amendment was brought forward in the House of Commons in response to concerns expressed by the Women and Equalities Select Committee. He also indicated that what the Government did in their response really did little more than to reiterate a public sector equality duty that was already there under the Equalities Act. One reason why we were concerned that that was an inadequate response was, as the Minister responding to this will be well aware, that the public sector equality duty goes much further than just the one that has been put in this Bill. Given that in bringing forward secondary legislation, Schedule 19 of the Equality Act 2010 indicates that the public sector equalities duty is on Ministers when bringing forward subordinate legislation, on the principle of inclusio unius exclusio alterius—

Lord Willis of Knaresborough (LD): We talk of nothing else.

Lord Wallace of Tankerness: They talk about nothing else in Harrogate, as my noble friend Lord Willis said. But this proposal is just for clarity's sake, given that putting one public sector equality duty in the Bill could raise questions as to the status and validity of the other ones.

Another Latin maxim, if I am allowed, is ubi jus ibi remedium. In a number of our debates on equalities and human rights issues, we have heard Ministers talk about rights but say all too little about remedies—and when they do talk about remedies they do so in a way that gives some cause for alarm. The noble Lord, Lord Callanan, time and again, reminds us that the underlying purpose of the Bill is to ensure that there is a smooth transition in law on our departure from the European Union. That entitles us to question what is meant by law.

On 5 March in a slightly different context, the noble and learned Lord, Lord Keen, said in response to an intervention from me:

"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".—[*Official Report*, 5/3/18; col. 964.]

But is it right to divorce rights from remedies quite so easily? The noble and learned Lord will be familiar with Section 126(9) of the Scotland Act 1998, which states that,

"all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and (b) all those remedies and procedures from time to time provided for by or under the EU Treaties, are referred to as EU law".

For the purposes of the Scotland Act, EU law embraces both rights and remedies.

Too often in our debates, we have heard Ministers reassure the House that the Government are committed to retaining rights but they have sidestepped the issue of remedies. I believe that if there is to be a smooth

transition from EU law to EU retained law, it must include rights and remedies. The Government have not given us sufficient reassurance on this. That is why these amendments are necessary and I commend them to the House.

Lord Cashman (Lab): My Lords, I shall speak to Amendments 245A and 242A, and I assure your Lordships that you will get no Latin from me—maybe some Cockney rhyming slang, but certainly no Latin. I have added my name to these two amendments, which were so eloquently and powerfully moved and spoken to by the noble Lord, Lord Low of Dalston, and powerfully supported by the noble and learned Lord, Lord Wallace of Tankerness.

Noble Lords will be aware that I spoke at Second Reading on the issue of rights and protections, and have returned to the same during Committee in your Lordships' House. I make no excuse or apology for repeating what are grave concerns about the continuation of rights and equalities that we currently enjoy in the United Kingdom. As I have said before—it bears repetition—these rights have been hard fought for and, often, hard fought against. That they exist now is due to the hard work, persistence and sacrifices of generations.

These rights have been achieved through either recourse to law, proceeding through the courts to the European Court of Human Rights in Strasbourg or through the Court of Justice of the European Union, or by legislative changes primarily introduced since the election of the Labour Government in 1997. As I have said, there is deep concern that this Bill, and particularly delegated powers contained within it, will ultimately be used to reduce rights and equalities in the United Kingdom—including in Northern Ireland, where consequent problems for the Good Friday agreement will arise. I will not return to the issue of the charter of fundamental rights today but I will on other occasions.

Amendments 242A and 245A seek to bring security of protection and non-regression by ensuring that delegated powers are not used to diminish protections in the Equality Acts of 2006 and 2010. But I and other noble Lords, and people and organisations outside Parliament, also have concerns about other equality and human rights laws. The certification approach adopted in Amendment 245A could be extended to cover such rights, by requiring a Minister to certify that secondary legislation under the Bill does not diminish protection in equality and human rights law generally.

On Wednesday 7 March, we again discussed amendments that would restrict the use of delegated powers from making any changes to equalities and human rights legislation. The Minister, the noble Lord, Lord Callanan, raised an objection to the amendments that we were discussing on the basis that delegated powers would be needed to make technical changes to our laws to reflect exit from the European Union. He went on to state that the Government could not accept the amendments,

"as the legislation that underpins these rights and protections will contain many provisions that will become deficient after our exit".—[*Official Report*, 7/3/18; col. 1168.]

In his reply, the Minister offered examples where the Equality Act refers in several places to EU or community law, as the noble and learned Lord, Lord Wallace of Tankerness, said, and that such references needed to be replaced with the term "retained EU law". I will not detain the House further by extending the quotation, but I point out that Amendment 245A addresses this concern because it does not prevent a Minister making necessary technical changes to reflect our exit from the European Union, as these technical changes would not diminish existing protections.

In the same debate, the Minister referred to the government amendment tabled in the other place, now paragraph 22 of Schedule 7, saying that it will,

"secure transparency in this area by requiring ministerial statements to be made about amendments made to the Equality Acts under each piece of secondary legislation under key powers in the Bill. These statements will … flag up any amendment to the Equality Acts and secondary legislation made under those Acts, while also ensuring that Ministers confirm that, in developing their draft legislation, they have had due regard to the need to eliminate discrimination and other conduct prohibited under the 2010 Act".—[*Official Report*, 7/3/18; cols. 1167.]

This statement does not answer the concern addressed by Amendment 245A: that the Government's approach in the Bill does not fulfil their commitment to maintaining our current protections. It merely restates the existing statutory duty to have "due regard".

In debate, the Minister has reiterated clear commitments that there will be no roll back of rights. Therefore, I say to the Government and to the noble and learned Lord the Minister: put the commitments, and the assurances given in this House and in the other place, in the Bill and end the uncertainty that is so widely shared. I ask your Lordships that, when we return again on Report to the issue of the protection of equality and human rights, as we will, we work together to ensure that the departure from the European Union does not signal the beginning of a departure from the rights and protections that we currently enjoy and which are continuously under threat.

Lord Bassam of Brighton (Lab): My Lords, I will speak to Amendment 246 in this group—entre nous, I support the amendments from the noble Lord, Lord Low; they are rather good, and I can well understand why colleagues have added their voices in support. My amendment picks up a slightly different point. It emanates from the excellent report from the Constitution Committee, which in its summary, at paragraph 33, recommended that the Government bring forward statements accompanying regulations which modify retained EU law so that they provide an explanation of the intention of the modification to guide the courts.

One of the endearing frustrations of this House, and no doubt the other place, is that we can have very little purchase on statutory instruments. Rightly, I think, they are unamendable, but clearly there has to be a way of improving the understanding of what a statutory instrument does. This legislation is riddled with Henry VIII powers and powers that I think go well beyond what a Minister should properly have access to in making, effectively, law by decree. That is the central concern of a lot of the recommendations in the Constitution Committee's report. We are asking

[Lord Bassam of Brighton]
here for the Minister to ensure that, when a statutory instrument is brought forward, it has to satisfy a test of appropriateness under the relevant sections, state an intention of any proposed modification from the retained EU law that is carried over and provide guidance to courts to assist with interpretation.

Reflecting on some of the more recent debates on statutory instruments in your Lordships' House—for instance, last night's debate on free school meals—I wonder whether it would be helpful to your Lordships if we had a better understanding and explanation of those statutory instruments. The thing that always comes across to me when I listen to debates on SIs is this: there is very poor background information. The statistical data that is supposedly there to underpin the argument is often missing, the impact assessments have not been done, and we do not really understand the real effect of what is before us. In my book, that means that there is a lot of scope for the Government to get away with things. I do not think that is right or a product of good lawmaking.

11.30 am

I want to hear the Minister say that the Government will take the issue seriously. that they will consider bringing forward amendments to satisfy these points, because they need to be satisfied and the House will want to hear them being satisfied, and that in the future we will get clear statements of intent when there is a change and a variation through a statutory instrument that relates to EU law that has been carried across. That is important not just for lawmakers in your Lordships' House, but also for the courts when they come to determine an issue. Given the volume of work they are likely to confront, certainly in the early stages, that is going to be extremely important.

It is a weird world—you wait for several weeks with an EU withdrawal Bill and all your amendments come at once. That seems to be my misfortune this morning. If the noble and learned Lord can give us some reassurances on the sort of information that is likely to be supplied with statutory instruments, I am minded not to debate Clause 17 stand part. In a sense, it is a follow-on, because in that debate I would hope to hear that the Minister would want to consider ensuring that when information is provided as background for statutory instruments, the appropriateness of that statutory instrument is very clearly spelled out. I am looking to hear from the Minister some other words of comfort on that issue. In those circumstances, I will not call for a debate on Clause 17 stand part.

Lord Goldsmith (Lab): My Lords, we have had Latin from the noble and learned Lord, Lord Wallace of Tankerness, and French from my noble friend Lord Bassam. Later in the day, somebody else might be able to say something in Welsh or Irish, but I cannot do either.

This group of amendments relates to topics that we have already discussed in Committee and no doubt we will do so again: the extent of delegated powers and the extent of protection of rights. When the noble Lord, Lord Low, moved his amendment very cogently, he emphasised points with which I absolutely agree. There is concern that rights should not be removed as a result of what is taking place in the Bill. We have also looked at this topic before in Committee and no doubt we will do so again. I have referred on several occasions to the promise by the Prime Minister that rights after exit will be the same as the day before.

These amendments concern a different aspect—the explanatory statements which are proposed to be used for statutory instruments. The technique of using statements to be laid before the House is a valuable one. I previously referred the Committee to the benefits of the requirements under Section 19 of the Human Rights Act for certificates on the face of the Bill that the provisions are, in the opinion of the Minister, compliant with the Convention rights. The significance of such a statement is that, first, it puts a personal obligation on the Minister to be satisfied that the Bill does what is being certified. What is more, it is a requirement that those conditions are met and not simply that there is an argument that they might be met. I am glad to see the noble and learned Lord, Lord Irvine of Lairg, in his place. I have referred before to the memorandum that resulted in there being a requirement on Ministers when they come to certify under the Human Rights Act to do so on the basis of legal advice provided by government legal officers, or the law officers themselves, and also to be satisfied, at least more probably than not—I paraphrase and hope I have it right—that the requirement will be met in the case of a particular provision. That makes it not an idle requirement that the Minister should so certify but a very valuable requirement.

The idea of the statements is an important one. We have several questions here in relation to them. The first, raised by Amendment 242A, is that the requirement for such explanatory statements should apply to all cases where statutory instruments are being made under the Act and not simply those which are identified. I look forward to hearing from the Minister why the Government do not think, having taken the view that it is necessary, appropriate and right to have such statements in relation to certain statutory instruments, that it should apply to all statutory instruments made under this Act. Bearing in mind that it is not a requirement that stops the instrument being made, such a statement tells this House and the other place what the Government think they are doing—whether they think they are reducing protections or not—and puts both Houses in a position to take the steps that they think appropriate to deal with that in the light of what the Government say. Therefore, I look forward to hearing why the requirement for explanatory statements does not apply to all instruments under the Act.

The second amendment is the important amendment moved by the noble Lord, Lord Low, which asks why it is not right that the words,

"is satisfied that it does not remove or diminish any protection provided by or under the equalities legislation"

should be inserted in place of the much weaker words in the Bill providing that the Minister should have due regard to the need to eliminate discrimination, et cetera. As he rightly pointed out, this, in any case, deals with only one aspect of equalities legislation. I would hope that Ministers always had due regard to that, whatever

the circumstances and whether or not the Bill stated it. Something more is needed: a requirement that the Minister is satisfied that this does not in fact reduce the protections currently provided. That amendment should be supported and we look forward to what the Minister has to say.

The third amendment, Amendment 246, has been spoken to by my noble friend Lord Bassam of Brighton. It would be valuable for Parliament—whichever House—to be told what the intention of any proposed modification is and whether it is intended to reduce or change EU law. That is a valuable proposal, though it goes in a slightly different direction to the other amendments, which are concerned with rather more concrete statements as to whether or not rights are being retained.

The noble Lord, Lord Low of Dalston, rightly referred to one aspect of the Bill that has been mentioned in Committee before. While the Government recognise that there needs to be special protection for rights protected by our Human Rights Act, which is drawn from the European Convention on Human Rights, it does not do the same for rights that come from other areas, in particular EU law. Again, we need to understand from the Government why they do not think the same sort of protection is necessary in relation to rights derived from EU retained law. One example is data protection. Nothing could be more pertinent at the moment, as we read today's newspapers. We see that data is a critical area that needs protection. Very important protection comes from the EU at the moment. This will come into law, but do the Government take the view that it is subject to much easier removal, or should it not be subject to the same degree of protection as rights under the European Convention on Human Rights?

For those reasons, I look forward to the Minister's response and I hope that it will promise change. I follow my noble friend Lord Bassam in hoping to see an amendment brought forward on Report by the Government to deal with these important points.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, the Government are committed to transparency before Parliament for the statutory instruments that will come under the Bill. We hope the statements we have already committed to in Schedule 7 will assist Parliament and deliver the due level of scrutiny required for secondary legislation. We have been listening to the debate and, for Report, we are looking closely at where these could be expanded to address some of the concerns raised in Committee.

Amendment 242A to Schedule 7, proposed by the noble Lord, Lord Low, would extend the requirement for Ministers making secondary legislation under the Bill to make statements in respect of all the powers in the Bill. With respect, these statements are designed to apply only to the key powers under the Bill, and for good reason. The other powers in the Bill are tightly limited to specific purposes, such as allowing for challenges to the validity of EU law or making provision which is consequential on the Bill. These other powers will not be making the sorts of changes to which these statements are applicable and are designed to be applicable. We will debate these other powers in more detail in due course but I hope that that will reassure the noble Lord as to why we have proceeded in this way on the matter of statements.

The noble Lord, Lord Low, also tabled Amendment 245A, which would adjust the equalities statement in Schedule 7. Let me assure everyone, including the noble Lord, Lord Cashman, that I understand and sympathise with the motivation behind this amendment, which I know is shared by many others on all sides of the Committee. The amendment looks very like the Government's existing political commitment. However, the language of a political commitment does not necessarily lend itself to the very different context of the equalities statute book.

In the equalities area, it is not always straightforward to determine what is deemed to be "protection"—the term used in the amendment—for one group of people when it may exist in tension or potentially conflict with the protection of other groups. To take a simple example, looking at the operation of domestic violence refuges or rape counselling centres taking account of the provisions in the Equality Act that relate to women, how does that also relate to gender recognition? These are quite complex areas that we have to bear in mind. That is precisely why, for example, the provisions of the Equality Act 2010 are so detailed and granular rather than creating high-level rights that would potentially raise more questions than they answer. I note that the 2010 Act dwarfs the mere 68 pages of the Bill.

In these circumstances, we are concerned about the limits of the statement that would be required. I hear what the noble Lord, Lord Low, and the noble and learned Lord, Lord Wallace, said about the scope of the public sector equality duty and the notion that perhaps only a part of that is expressed in Schedule 7. We will take that away for consideration before Report.

Amendment 246, tabled by the noble Lord, Lord Bassam, raises an interesting point regarding how further clarity can be provided on the effect of regulations made under Clauses 7, 8 and 9. As he observed, the point was mentioned in the recent report by the Constitution Committee. The Government want the Bill to provide certainty and clarity, and I have listened to his observations on this with some interest.

As we discussed on day five of Committee, Clause 6(3) provides that questions on the validity, meaning or effect of unmodified retained EU law are to be interpreted in accordance with retained EU case law. Clause 6(6) goes on to provide that modified retained EU law may still be interpreted under Clause 6(3) if that is consistent with the intention of the modifications. It is this point that the noble Lord's amendment strikes at. It seeks to impose an obligation on Ministers by adding to the explanatory statement requirements in Schedule 7 to explain the intention of any modification, and how that modified law should be interpreted under Clause 6.

I understand the aim, but we have to be cautious before adding to the explanatory statement requirements in Schedule 7. Requiring a statement for each modification as to its intent and instructions to the courts on whether Clause 6(3) should apply to them could complicate matters. In that context, I merely observe that it is important to bear in mind that courts themselves will already have the text of the modification itself

[Lord Keen of Elie]
together with a statement explaining the reasons for it, the law before exit day that is relevant, and any effect of the modification on retained EU law. It may be that this could complicate matters.

I have listened carefully to the points raised on that matter and I can confirm that we will reflect on what I appreciate is a constructive suggestion in order to bring further clarity to these parts of the Bill. I hope that with that reassurance, the noble Lord may not have to engage in sequential groups of amendments in Committee this morning.

11.45 am

Lord Low of Dalston: My Lords, I am very grateful to all those who have spoken in support of my amendments; there has been very heavyweight support, if I may say so, from the noble and learned Lords, Lord Wallace of Tankerness and Lord Goldsmith, and very valued support from the noble Lord, Lord Cashman. I also thank the Minister for his reply. Since he was kind enough to describe my amendments as "constructive", it would be less than gracious if I did not say that I regarded his response as constructive. The Minister has recognised the need to look further at the scope of the explanatory statements provided for in the Bill, and I welcome that.

There is room for further discussion about the extent of the enabling powers in the Bill, which are underpinned in this legislation. The Minister thinks that my amendments go too far in the enabling powers that we are seeking to include, while I suggest that the Bill does not go far enough, so there may be some scope for meeting in the middle. Since the Minister has kindly undertaken to review the scope of the provisions in the Bill before Report, I hope he might agree that it would be beneficial if we could have further discussion to see whether there is not some common meeting ground in the middle so that we can go forward to Report in a spirit of unanimity. On that basis, I am happy to beg leave to withdraw the amendment.

Amendment withdrawn.

Amendments 243 to 251 not moved.

Schedule 7 agreed.

Clause 17: Consequential and transitional provision

Amendment 252
Moved by ***Lord Liddle***

252: Clause 17, page 14, line 14, leave out subsections (1) to (3)

Lord Liddle (Lab): My Lords, I move this amendment on behalf of my noble friend Lord Adonis. He apologises for his absence this morning. I assure noble Lords that he is not having the well-deserved lie-in that many of us feel that we are entitled to; he is on a trip to Dublin with the noble Lord, Lord Heseltine, and Sir Nick Clegg to see what can be done about the question of the Irish border and how to resolve that particular trilemma.

The purpose of the amendment is to draw the Committee's attention to what is written in Clause 17. We hear lots of soporific, mellifluous legalese in these discussions, but I draw the Committee's attention to what Clause 17(1) of the Bill actually says. The Minister can perhaps then give me a little tutorial on why it is necessary and not as dangerous as it appears to be to my eye. The clause states:

"A Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act".

That is a sweeping enabling power for the Executive. The aim of the amendment is to establish from the Government the purpose of their having this sweeping power. This Bill is about Britain's withdrawal from the European Union. It covers, as we have seen in the debate about Brexit since the referendum, many different aspects of our national life, so what is meant by this clause?

To the extent that we have any bedtime these days, for my bedtime reading I am trying to read books that explain the rise of populism in Europe. In a way, Brexit is a general phenomenon of a rise of populism in Europe and the United States. One book that I am reading at the moment is Professor Richard J Evans's first volume on the rise of the Third Reich. One moment that makes me proud to be a social democrat is that it was the Social Democrats alone who voted against the enabling Act that set up Hitler's dictatorship. I am not for one moment of course suggesting that there is a parallel, but why do we as a House have to grant the Government this sweeping legislative power? Can the Minister please explain? I beg to move.

Lord Pannick (CB): My Lords, at the risk of the noble Lord, Lord Liddle, thinking that I am adding to the soporific legalese, I support what he said. It is not just the noble Lord who is concerned about Clause 17. Your Lordships' Constitution Committee addressed Clause 17 at paragraph 206 of its report on the Bill:

"We agree that the Government may require a power to make 'transitional, transitory and saving provisions'. However, we are concerned that the Bill creates a power to make 'consequential provisions' which is potentially very broad in scope, has the capacity to go well beyond what are ordinarily understood to be consequential matters and includes a Henry VIII power. If Parliament has approved, subject to detailed and appropriate circumscription, other broad delegated powers for ministers, it would be constitutionally unacceptable to undo these restrictions and protections by conferring a general power on ministers to make 'consequential provisions' to alter other enactments. We recommend that the power to make 'consequential provisions' in clause 17 is removed".

The concern is that this Bill will confer enormous powers on Ministers under, for example, Clauses 7 and 9 to make delegated legislation. It is difficult, in the context of such powers, however amended, to see why it is also necessary for Ministers to enjoy this broad power, as the noble Lord, Lord Liddle, described it, to make consequential provisions. The concern is that the restrictions that Parliament will impose on the other powers that Ministers will enjoy under Clauses 7 and 9 may be evaded by Ministers by the use of this consequential power.

I am particularly concerned about the risk of that, because if your Lordships focus on paragraph 17 of Schedule 7 to the Bill, on page 51, you see a quite extraordinary provision, which states the following:

"The fact that a power to make regulations is conferred by this Act does not affect the extent of any other power to make regulations under this Act".

Therefore, it seems to me, as a matter of law, that the fact that we spend hours—it seems like days—looking at particular provisions as we seek to restrict the power that Ministers will enjoy under Clause 7 will have no effect, by reason of paragraph 17 of Schedule 7, on the scope of the power that Ministers also enjoy under Clause 17.

I would welcome some reassurance from the Government that they are thinking about the Constitution Committee's recommendation. I would welcome some explanation of why Ministers need these consequential powers to make delegated legislation and some assurance from the Minister that he is thinking about whether it is also necessary to include paragraph 17 of Schedule 7, or whether the Bill could make it absolutely clear that any power in Clause 17 must be interpreted consistently with the restrictions that will be contained elsewhere in the Bill.

The Deputy Chairman of Committees (Baroness McIntosh of Hudnall) (Lab): My Lords, with apologies to the Committee, I should have made it clear when the noble Lord, Lord Liddle, moved his amendment that, if it is agreed to, I cannot call Amendments 253 to 256, by reasons of pre-emption.

Lord Cormack (Con): My Lords, I support strongly what the noble Lords, Lord Liddle and Lord Pannick, said. This is the underlying theme of the Committee stage of this Bill: what we are seeing is a proposed accretion of power to the Executive at the expense of Parliament. We have made this point numerous times over the past several days—it seems like years. It is crucial not only that my noble and learned friend the Minister gives some recognition and assurances today—we can ask for no less—but that the Bill is amended, preferably by government amendment, before Report. I have said this many times, but if taking back control means anything, it means taking back control for Parliament and not for the Executive. The Government have to recognise, in a way that, sadly, my noble friend Lord Callanan, seemed incapable of recognising the other day, that Parliament is supreme and that, in particular, the other place is where the ultimate decision should be made.

I do not want us to be on a collision course with government. I hope that the Government, recognising the fundamental constitutional importance of these issues, will agree to accede to your Lordships' Constitution Committee and delete this provision in Clause 17. It is incumbent on a Government who are concerned about the supremacy of Parliament to do precisely that and not to leave within the Bill a clause that gives, theoretically, untrammelled powers in many circumstances to Ministers. I hope that my noble and learned friend will be able to give us some comforting words today but, however comforting the words may be, they will not be enough until this provision is removed from the Bill.

Noon

Lord Lisvane (CB): My Lords, I shall add to the compelling citation by my noble friend Lord Pannick of the Constitution Committee's report on what the Delegated Powers and Regulatory Reform Committee said about Clause 17. It pointed out that, unlike the regulation-making powers in Clauses 7 to 9, there is,

"no time-limit on the making of regulations under clause 17".

It also said that the powers to make consequential provision,

"should be restricted by an objective test of necessity".

That is the golden thread of appropriateness and necessity that has been running through a number of debates and I hope that a constructive way forward can be found on that before Report.

The Delegated Powers Committee also points out that, although paragraph 100 of the delegated powers memorandum says that the Henry VIII powers are appropriately conferred, and that,

"a large number of 'fairly straightforward' changes, including to primary legislation, will be needed in consequence of this Bill … that does not explain why it is appropriate for the negative procedure to apply in all cases including those which are not 'fairly straightforward'".

The committee concluded:

"Where regulations under clause 17(1) amend or repeal primary legislation, the affirmative procedure should … apply in accordance with established practice".

Lord Newby (LD): It is a pleasure to follow the noble Lord, Lord Liddle, and others who have spoken. Normally, when something is about consequential and transitional provisions, your eyes glaze over, because what you are talking about is the sort of sweepings from the floor, in the legislative sense. But this is the most extraordinarily broad provision. It basically says that a Minister of the Crown can, by regulations, change virtually any provision in any Act.

As the noble Lord, Lord Liddle, pointed out, and as we have discussed, the effect of our membership of the EU has been like the tide rising across the legislative framework. It has gone into virtually every part of our legislative life. This provision, untrammelled as it is with any qualification at all, enables Ministers to amend by secondary legislation a whole swathe of legislation that is not directly covered by the earlier clauses of the Bill. No doubt the drafters of the Bill thought that this was a sort of belt and braces provision, because it covers everything else that might not have been covered by earlier clauses. However, as other noble Lords have said, it is surely far too broad.

The key definitional question is what the word "consequential" means. On a broad interpretation of it, any legislation that is consequential on our membership of the EU is covered by this provision, which is surely far wider than anybody in your Lordships' House would wish to see. I hope that the noble Lord will be able to reassure us that, first, that was not the Government's intention and, secondly, that they are willing to accept the recommendations of the two committees of your Lordships' House. As this stands, of virtually all the provisions in the Bill, this is the one that gives Ministers the broadest unfettered powers to change primary legislation by secondary legislation and it clearly is not the will of the House that that should be allowable.

Lord Bassam of Brighton: I was sort of reassured by some of the Minister's words when we were dealing with the last group. I had the feeling that at last we have found a Minister on the Front Bench who is

[Lord Bassam of Brighton]
actually listening to what noble Lords are saying about some of the delegated powers provisions in the legislation. I hope that he can offer us some reassurance, but I share the concerns of the noble Lords, Lord Newby, Lord Pannick and Lord Lisvane, and my noble friend Lord Liddle.

Ministers are seeking to take an astonishingly wide power. If we start to apply it practically to some of the legislation being carried over from EU to UK law and think of some of the fundamental rights that that involves, and if Ministers then have the sweeping ability to bring forward anything that they think is relevant to change one of those provisions, we are getting into the territory of a statutory instrument that goes far beyond its original intention. The Constitution Committee was absolutely right to raise concerns about this and we need rather more than reassurance this morning on it. I rather share the view of the noble Lord, Lord Cormack: this is one clause that is probably fit to be withdrawn. I think that that would satisfy your Lordships' House. We obviously have to listen to what the Minister has to say, but this is pretty profound, as I think he and the Government know. I hope that this is a try-on that we have seen off.

Lord Wigley (PC): My Lords, I had not intended to intervene in this debate—the devolution aspects will come later today—but if one looks at paragraph 17 of Schedule 7, on page 51, and the interplay that it has with Clause 17, on page 14, I read it that the powers exercisable by the Welsh or Scottish Ministers under Schedule 7 are subject to the orders that they can make but that, if they do not make them, they can be over-ruled by the provisions of Clause 17—paragraph 17 on page 51 gives a Minister the right to do that. Am I interpreting this rightly?

Lord Goldsmith: My Lords, the provision indeed looks a bit innocuous when one first looks at it. The noble Lord, Lord Newby, is absolutely right. But the more one examines it, as has been demonstrated by speeches from noble Lords in this short debate so far, it is much more than that.

Two ways have been proposed for dealing with this clause. One had been to follow the golden thread of "appropriate" and "necessity" that the noble Lord, Lord Lisvane, referred to. Amendments 253 and 254, which have already been debated, touched on that and we will have to come back to those important proposals in due course. But this amendment goes even further in proposing that the power should be removed. As it stands, the idea that the Minister can, by regulation, make any change that he or she considers appropriate under this Act is extraordinarily wide. I therefore share the hope of other noble Lords that we hear from the Minister—having seen, as I am sure he has, how wide this provision is—that something needs to be done: probably something more radical than simply changing the words "considers" and "appropriate".

We will listen to what he says. However, the powerful speeches by the noble Lords, Lord Pannick, Lord Cormack and Lord Wigley, and by my noble friends Lord Liddle and Lord Bassam, demonstrate that there is a real risk—as the noble Lord, Lord Cormack, put it—that this is another example of the accretion of power to the Executive at the expense of Parliament. It is our duty to put the brakes on when that sort of provision is put before us. Again, I look forward to what the noble and learned Lord will say; I am sure he has seen the point—in all languages. We need a clear commitment, not just to comfort, but to a change that will satisfy this House that it is not being asked to sanction untrammelled power to the Executive in such an important area.

Lord Keen of Elie: My Lords, the Government are always listening. The Government are concerned to ensure that we have appropriate powers to deal with the consequences of this Bill: to bring the statute book into line with the consequences of the repeals brought about—or intended to be brought about—by it.

The context is that the European Communities Act has been a central piece of legislation for the past 46 years and is spread throughout our statute book. So much current legislation stems from the ECA. Repealing the 1972 Act, and the other key EU-related Acts listed in Schedule 9, will leave many loose ends that need to be addressed.

The purpose of the consequential power is to deal with the consequences of the widespread changes to the statute book that may arise from the provisions in the Bill itself. I stress "in the Bill itself" in the light of the suggestion by my noble friend Lord Cormack that we are dealing here with "untrammelled powers". In that context, I understand the expressions of concern about particular provisions—which can sometimes be read out of context—but I stress again that these consequential powers can be used only in consequence of the provisions of the Bill itself, rather than in consequence of our withdrawal from the EU more generally. I see the noble and learned Lord, Lord Goldsmith, frowning, but if he feels that a different interpretation can be placed on this provision I would welcome discussion on it, because that is clearly its intention. If, in his view, it goes further, I would be happy to listen to him on that.

Lord Goldsmith: In the light of his invitation, I ask the noble and learned Lord to consider this question. I take his point that the words are "in consequence of the Act", but the Act includes the repeal of the European Communities Act and all that it has brought with it. He may not want to reply to this question now and I am very happy to have further discussions with him, as they are always useful and constructive, but does he not see that the repeal of the Act and the instruments under it may indeed give rise to very wide opportunities if all that is required is for the Minister to consider it "appropriate" to do something in consequence of that?

12.15 pm

Lord Bassam of Brighton: May I ask the Minister a further point? I am trying to help him. He seems to be suggesting that this provision is a mere tidying up facility that is available to a Minister as a consequence of this Bill. I understand that point, but will he describe the sort of tidying up that he envisages this power

being used for? I think that is what acts as a driver of our concerns. I can understand if it is a practical measure to do with something that is clearly a defect, but I want some reassurance, which perhaps should be placed in the legislation. I want to understand what the provision will be used for and its consequences.

Lord Keen of Elie: I am obliged to the noble Lord for his assistance, which is always welcome. I do not agree with the point made by the noble and learned Lord, Lord Goldsmith, regarding the breadth of the provision. This is a standard type of power contained in many Acts of Parliament to deal with consequential issues, such as those alluded to by the noble Lord, Lord Bassam. A very similar power can be found in the Scotland Act 1998, in the Northern Ireland Act 1998, in the Government of Wales Act 1998, and in the Legal Aid, Sentencing and Punishment of Offenders Act 2012—LASPO. All these statutory provisions have a similar consequential power for the same purpose, so this is not unique, exceptional or unusual.

However, I understand concerns being expressed about the scope of the power and the way it will be used. I notice the reference by the noble Lord, Lord Lisvane, to the use of the term "appropriate", which some, of course, often consider to be inappropriate in a statutory context. I hear what is said about making clear that this is a consequential power that will be needed to repeal provisions.

The noble Lord, Lord Bassam, asked for examples. If we look at the various statutory provisions for accession of other countries to the EU—the Croatian accession is the most recent—which amend the ECA, it is necessary to address that sort of primary legislation. If we look at the provisions of the European Union (Approvals) Act 2017—

Baroness Ludford (LD): I thank the Minister for giving way. He cited some other examples. I admit that I am not familiar with devolution statutes and the consequential powers in them, but we have to take account of the context in which this legislation is being made and the considerable worries about the potential use to which they could be put, which is surely more than the Croatian accession. The Government cannot ignore the worries that these powers—in the context of the Brexit negotiations, future relationships, trade deals and whatever—could be used in a way which could significantly affect existing rights and remedies.

Lord Keen of Elie: With respect, it appears to me that some of the fears being expressed are not about the use of these powers, but about their misuse. As the noble Baroness, Lady Ludford, observed, we have to see this provision in context. It is to be applied to the consequences of the Bill becoming law.

The noble Lord, Lord Bassam, asked for further examples. There are many examples in primary legislation of where consequential amendment will be required. I will not elaborate on them at this stage. For example, there are provisions in all the accession Acts that would have to be regarded as necessary to clear up in the context of the statute book. There are provisions in such things as the Legislative and Regulatory Reform Act 2006, which would again have to be addressed in this context as a consequence of our removal when the Bill becomes law.

What will be required is a meaningful indication of the type of change that is needed to keep the statute book in reasonable order after our departure from the EU. In my respectful submission, where there may be concern about the misuse of this consequential power we are of course alive to concerns that are expressed. It may be that it turns largely not on the way Clause 17(1) is presently framed, but on the use of a term such as "appropriate". We will give further consideration to the use of that language and whether that is the way this consequential—I stress "consequential"—power should be employed in this context.

I hope that gives noble Lords some degree of reassurance about the intention here. I suggest that the removal entirely of the consequential power contained in Clause 17 would have a materially adverse effect on the way the Bill can be properly implemented to bring the statute book into proper order following our exit from the EU. I hope at this stage that the noble Lord will see fit to withdraw the amendment.

Baroness Taylor of Bolton (Lab): The Minister has just used the phrase that it is "not our intention" to use these powers. That is one of the difficulties that the Committee has on many of the issues that we have raised. The Government repeatedly say that it is not their intention to abuse these powers, yet they are taking powers which clearly can be abused in the future.

Lord Keen of Elie: With respect to the noble Baroness, I do not believe that any responsible Government would contemplate abusing powers given to them by Parliament. Indeed, if they did, they would be brought up very short by a sovereign Parliament.

Lord Wigley: Could I press the Minister further on the point that I raised? Will he clarify whether the powers that are being accorded in this clause will enable a Minister at Westminster to overrule powers normally exercisable by Ministers in Cardiff or Edinburgh?

Lord Keen of Elie: I do not believe that they would be employed to overrule powers that are legitimately being exercised under the devolved arrangements. That is not their purpose. Their purpose is to make consequential amendments that will bring the statute book into line with our departure from the EU.

Lord Wigley: I am sorry, but those consequential amendments may well include the need to change an instrument that is being exercised in Scotland or Wales. If that does not happen, does it give the power for a Minister in London to exercise those powers?

Lord Keen of Elie: Ultimately, the UK Parliament would have the power to ensure that the statute book in the devolved Administrations also reflects our departure from the EU.

Lord Wallace of Saltaire (LD): When responding to amendments, the Minister has, on a number of occasions, said that the Government will give further consideration

[Lord Wallace of Saltaire]
to the points made. We are now coming towards the end of Committee and will then be preparing for Report. Could the Minister give us more of an explanation of what further consideration will mean on the very many points that have been made? When we come to Report we will have six days, and, as we all know, a large number of issues have been raised. Will the Government be consulting on these? Will they be able to tell us before we start Report what changes they wish to make or the date by which government amendments might be published? Otherwise, Report stage will be as lengthy and as difficult as Committee stage has proved to be.

Lord Keen of Elie: Clearly, when I say that we will give consideration to these matters, I mean that I am making more work for myself in that context. Of course we are going to discuss with officials how best to structure this legislation to meet the concerns that have been expressed. That may lead to amendments, in which case they will be available before Report, and it may not, in which case I will be happy to indicate at Report why such amendments have not been brought forward.

Lord Pannick: Will the Minister address the concern I expressed that the breadth of Clause 17(1) is such that it could be used by Ministers to evade the restrictions that will be contained in the other powers that Ministers enjoy under Clauses 7 to 9, particularly in the light of paragraph 17 of Schedule 7? Will he consider that point?

Lord Keen of Elie: I will certainly give consideration to that point, but it is not immediately clear to me that the clause could be used to evade those limitations. I will address it in due course.

Lord Judd (Lab): Before we conclude this part of our deliberations, I refer back to what my noble friend said. I have every respect for the Minister—I mean that. I am quite sure that he would never, with ministerial responsibility, go against the clear intention of Parliament with these residual powers. But are we absolutely certain, with all the unpredictability and turbulence of politics across the world today, that every possible Administration would act as responsibly as he would?

Lord Keen of Elie: I am not sure that I am in a position to answer that question. Nevertheless, when we legislate, we must also legislate as to what a future Administration would do with that legislation. I quite accept that point.

Lord Goldsmith: The Minister's self-effacing remark draws attention to the other aspect of this clause. It was helpful when he said—and I hope that we will see some concrete results from this—that the Government will look at the word "appropriate" and, I hope, change it to "necessary", but that is only part of the problem in this and other clauses. There are two elements. One is that the Minister "considers" and the second is what it is that the Minister considers. In this clause, it is "the Minister considers appropriate". Many of the amendments before the Committee want to see that it is changed to "is necessary"—an objective rather than a subjective test. Sharing, as I do, views as to the good will and intentions of the Minister who sits here at the moment, we need to have, as he says himself, more conviction about what might happen in the future. So will the Minister also consider in those circumstances not just changing the word "appropriate" to "necessary", but removing the subjective element so that we are satisfied that there has to be a clear objective statement before the Minister can actually exercise these powers?

Lord Keen of Elie: My Lords, I am not going to draft at the Dispatch Box and I will not give undertakings about any part of this clause at this stage. I am saying that we will look at it in the context of the observations that have been made in Committee, and we will do that responsibly.

Lord Liddle: My Lords, I welcome that assurance from the Minister. I have been surprised by the passion that this short debate has aroused. It raises many serious issues about what powers the Government are giving themselves as a result of this Bill. The Minister is aware of the concerns of the noble Lord, Lord Pannick, and my noble and learned friend Lord Goldsmith about this power. To my non-legal mind, when my noble and learned friend talks about the power that is in consequence of this Act because it repeals the European Communities Act 1972, the potential scope of what could be done is extremely large. When we come back to this on Report I hope that the Government will be able to provide us with some assurance that the scope will not be impossibly big. On that basis, I beg leave to withdraw the amendment.

Amendment 252 withdrawn.

Amendments 253 and 254 not moved.

Amendment 255

Moved by ***Lord Bassam of Brighton***

255: Clause 17, page 14, line 15, at end insert—

"( ) But the power in subsection (1) does not allow a Minister of the Crown to determine whether particular pieces of EU retained law should be designated as primary or secondary legislation."

Lord Bassam of Brighton: My Lords, this amendment and Amendment 364 follow the previous debate in the sense that they question powers that Ministers seek to take in the Bill which we in the Committee want to quiz and question and understand better. My concern is a simple one. Why do Ministers feel that they should have the right, and seek to have the right, to determine whether a piece of retained EU law should be designated as either, on the one hand, primary legislation or, on the other, secondary legislation?

12.30 pm

I understand primary legislation, because it is what we deal with all the time. It is what we debate, consider, seek to amend, improve and all of those things. It is something over which we have much more control. When it comes to secondary legislation, as I said

earlier, it is not so easily amendable. You have to either take it or leave it. Sometimes we can regret it, but we cannot do much else with it. The Minister is seeking a power in Clause 17(1) that is extraordinarily helpful to the Government. It says, "Let's just shove this into secondary legislation. They can't amend it there or tinker with it. They either have to take it or leave it".

That is an extraordinarily powerful thing to be able to do if you are a Minister. I have sat in the seat that the noble and learned Lord sits in, and I am quite sure that I would have liked to have had that power from time to time. It would have been extraordinarily convenient and enabled us more speedily to get on with what we were seeking to do. I can think back to several Bills and subsequently Acts that I participated in putting on to the statute book and I can see how pleasant it must be to be able to do something rather more simply with secondary than with primary legislation.

We need to understand better exactly why the Minister feels that that clause is appropriate. The Constitution Committee raised this as an issue. Similarly, Amendment 364 is also in this group and handily co-signed by my noble friend Lord Pannick. That amendment seeks to remove paragraph 19 of Schedule 8, again on the recommendation of the Constitution Committee, because it relates to retained EU law which has been assigned the status of primary legislation.

We are looking for some clarification and transparency from the Minister on this because it seems an extraordinary power. He has helpfully quoted other pieces of legislation in earlier debates in aid of his argument about whether or not the powers that the Government are seeking under this piece of legislation are reasonable. Perhaps he can give some examples and explain to us the circumstances in which this particular power would be of value to this and other Governments. Maybe he can explain to us when it has been used in the past because that would at least enable us to understand the circumstances under which what on the face of it seems extraordinary would be acceptable. I am not happy about the powers sought here and neither was the Constitution Committee. For those reasons, I beg to move.

Lord Mackay of Clashfern (Con): My Lords, I strongly support the amendment. It is essential that the status of retained EU law in our law should be determined by Parliament as part of this Bill. I supported an amendment that the noble Lord, Lord Pannick, moved earlier to say that retained EU law should be treated as primary legislation. It is so treated by the Bill for the purposes of the Human Rights Act. It is highly desirable that this should be fixed definitely as part of the arrangements and not left to be decided, as it were, ad hoc from time to time by the use of the power to which the noble Lord, Lord Bassam of Brighton, has drawn attention.

Originally, the amendment that the noble Lord, Lord Pannick, proposed covered the whole of this law. I am inclined to think that the Clause 2 provisions, which are already in our law, have the status given by our law already. Some of them are statutes and some are subordinate legislation. Having considered this a little further since we discussed this some long time ago, I am inclined to think it might be wise to restrict the provision that this should be regarded as primary legislation to the Clause 3 provisions.

Lord Pannick: My Lords, in the previous debate the Committee deliberated on the vice of Clause 17(1). The amendment proposed by the noble Lord, Lord Bassam of Brighton, identifies a specific reason why Clause 17 (1) is so objectionable. When the Constitution Committee put to Ministers our concern, to which the noble and learned Lord, Lord Mackay of Clashfern, has just referred, that the Bill should identify the legal status of retained EU law, the answer from Ministers was that if necessary or appropriate they could use the powers conferred by Clause 17(1) to designate what legal status retained EU law would have, and designate different parts of retained EU law for different purposes. The Constitution Committee made its view very clear in paragraph 69 of its 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".

We debated what legal status should be given to retained EU law earlier in Committee. I respectfully agree with the observations made just now by the noble and learned Lord, Lord Mackay of Clashfern. I emphasise, however, that it is the width of Clause 17 (1) that is so objectionable as it enables Ministers to assert that they could use it to make changes of such constitutional enormity to our legislation. I agree, therefore, with the concerns that the noble Lord, Lord Bassam of Brighton, has expressed.

Lord Cormack: My Lords, I will briefly add my support. I point out to my noble and learned friend, who gave a very sensitive reply to the previous debate, that a culture has grown up in Parliament in recent years: the proliferation of so-called "Christmas tree Bills", which include very few specific proposals, allowing Ministers to hang whatever baubles they like on them. Together with the deep suspicion, that we all have, of Henry VIII provisions, I hope that that explains to my noble and learned friend why, with all the far-reaching consequences of this Bill, we are most anxious that the prerogative should remain with Parliament and that it should not be for Ministers to determine what is primary and what is secondary. I hope that building on his sensitive and—I do not want to sound patronising—sensible remarks at the end of the last debate, he will take on board what has been, and is being, said on this point.

Lord Brown of Eaton-under-Heywood (CB): My Lords, I entirely agree with the noble and learned Lord, Lord Mackay of Clashfern, that one way or another it must be for Parliament to decide the essential ground rules that should apply in the future categorisation of retained EU law, certainly under Clauses 3 and 4, although perhaps not under Clause 2 as it is already domestic law. As I made plain some weeks ago—it seems like months—in an earlier debate, I do not, however, subscribe to the view of the Constitution Committee that all retained EU law should be designated as primary legislation. We discussed all this at the time. If what I may call in shorthand Professor Paul Craig's suggested solution to this problem is adopted

[Lord Brown of Eaton-under-Heywood]
by following the EU's own categorisation, under both the pre-Lisbon and post-Lisbon arrangements, somebody will have to apply that ground rule to this mass of 10,000, 20,000 or 30,000 instruments—however many they may be.

I suggested in an earlier debate, because this is what Paul Craig had said, that in fact four competent EU lawyers could carry out that whole process in a matter of three days. I may have those figures slightly wrong, but that is about it. But if that is left to be done after the passage of this legislation, some regulating power will have to be available to government to give effect to that process. The ground rules settled its application for regulation. I hold no particular brief for this being done under Clause 17(1); it may be that the better course would be to introduce the ground rules—as I say, Parliament's specification of how basically the process is to be completed—within the legislation, and have a regulation-making power attached to that for the sole purpose of applying the ground rules. But I would not wish to leave unchallenged the Constitution Committee's suggestion that the whole shooting match should be primary legislation.

Lord Goldsmith: My Lords, to some extent this is a continuation not just of the previous debate today but of previous debates that we have had on earlier days in Committee. That leads me to two observations, before I come to specifics on the amendment. One is on the very pertinent observation of the noble Lord, Lord Wallace of Saltaire, that if we do not advance at all before we get to Report we will have just as much time spent on Report as in Committee. Therefore, we very much hope that the Government respond to his suggestion or injunction to the Minister that we have some greater clarity on what the Government are going to do as a result of the consideration that they have been having for the last few days, when they have had time to consider some of these points. Indeed, I hope that it is not only the noble and learned Lord who is working on this—there are a lot more people in government who should and could be working on it. That is just one observation that demonstrates how much work there is to do, and how we need to move forward, hoping of course to do that in co-operation with the Government.

Secondly, I suppose people outside listening to this debate will wonder what on earth we are talking about. They expect that this Bill is about in or out and when and what the terms are, and the customs union. Those are important issues, too, but this debate illustrates how important some of the provisions in this Bill are. The question of whether something is to be regarded as a piece of primary legislation is fundamentally important; it has consequences for who legislates and how easy it is to amend that legislation, as well as for its effect in relation to other statutes. I draw this as a general view that has been expressed around the House, that it cannot be left simply for a Minister to decide. In previous debates, we have heard how many Ministers that could be. I made the observation—no one has yet contradicted it, although maybe it should be contradicted—that when you say that a Minister does something, under the Karl Turner principle that means that a civil servant can do it. I have the greatest of admiration for civil servants, but that would multiply the number very considerably. If we are talking about important constitutional provisions, about protection of rights and all the other things that the Bill is concerned with, it is not appropriate that decisions on who makes that decision should be left in this way.

I thank the noble Lord, Lord Pannick, for drawing attention to the fact, as others have too, that one consequence of this particular provision that my noble friend Lord Bassam of Brighton has dealt with touches on the question of who decides whether something is primary or secondary. The noble and learned Lord, Lord Mackay of Clashfern, made a very important observation, and so did the noble and learned Lord, Lord Brown of Eaton-under-Heywood. Today is not the day to decide which should be primary; what we are talking about is whether it should be simply for a Minister or for his officials to determine whether a particular piece of law should be treated as primary or secondary legislation. That is what the amendment raises, and it is important that we should have clarity on it, I hope before we get to Report.

The summary that is given in paragraph 69 of the Constitution Committee's report, already referred to by the noble Lord, Lord Pannick, puts it in clear terms, including the last sentence that, as it stands:

"This is a recipe for confusion and legal uncertainty".

We cannot afford this Bill, when it has completed its passage through this House and the other place, to leave the country in a state of confusion and legal uncertainty.

12.45 pm

Lord Keen of Elie: My Lords, as has been noted, this is in a sense a continuation of a lengthy debate we had in Committee in response to, I think, Amendment 33, tabled by the noble Lord, Lord Pannick. I will not repeat all that was said from the Dispatch Box in the context of that debate but I hope the noble Lord, Lord Bassam, will not think that, because I am taking this amendment relatively briefly, I am taking it relatively lightly. Indications were given at the time of that earlier debate as to our consideration of this matter.

EU law is of course comprised of many things, including domestic primary and secondary legislation, converted EU regulations, decisions and EU legislative and non-legislative provisions. Due to the breadth of retained EU law, it is therefore unique in its nature. That is why the Government deliberately chose to tread carefully and not simply to assign this new category of law, retained EU law, to a single category of domestic legislation. Treating all retained EU law as primary legislation may be possible but such a broad approach will inevitably raise unforeseen and uncertain consequences—the very thing we want to avoid. If one looks at an EU provision that deals with the content of a particular chemical and those contents are to change, are we to address that only by way of primary legislation? I suspect that if that were the case, we would be sitting much later than we have in the last few days of this Committee.

Again, treating it all as secondary legislation may also pose considerable difficulties because of the interaction between retained EU law and other domestic

legislation which is in the form of primary legislation. This is not a straightforward exercise, which is why it was thought fit to identify certain areas where it should be treated as primary—for example, in the context of human rights—and other areas where Ministers would be allowed the opportunity to consider how best to deal with the issue, albeit as cases arise.

I notice that there is a concern about how the matter is to be approached but it is not one that identifies a universally approved approach. I noted what my noble and learned friend Lord Mackay said about the treatment of retained EU law in the context of a qualification with regard to what is brought into domestic law by way of Clause 2, for example, and what the noble and learned Lord, Lord Brown of Eaton-under-Heywood, said about Professor Paul Craig's solution, which we discussed previously in Committee in reference to Amendment 33.

We have taken that on board and we believe that at present, the position we have adopted is the correct one for achieving maximum legal certainty after exit day and for ensuring the most appropriate outcome across the domestic statute book. Equally, we recognise the need to look at alternatives in the context of, for example, Professor Paul Craig's proposals, and perhaps to look at it in a different context altogether: that of outcomes rather than, in the first instance, identification of whether it is primary or secondary. That is what we indicated we would do when this matter came up for debate before in Committee, and what we are doing. In that context, I hope the noble Lord will see fit to withdraw his amendment at this time.

Lord Bassam of Brighton: My Lords, I am intrigued by the Minister's reply. I guess I shall have to look back at the debate on Amendment 33, which he referenced earlier, but I am far from satisfied on this point. While I have been sitting here, I have been thinking of an example of what Ministers can actually do with pieces of primary and secondary legislation, and one comes to mind.

Towards the end of our time in government, an amendment was passed in this House very much against my better judgment; I was rather horrified by it. It basically had the effect of enabling the Secretary of State to bring forward an order to give effect to the particular amendment. I went back to the department and said, "Look, this is terrible. We lost this vote in the House yesterday and it means that you will have to do something that we really do not want to do and that would be quite wrong". The Secretary of State very simply said to me, "Don't worry about it: I simply won't bring forward the order". That is a powerful position to be in if you are Secretary of State. The order was never forthcoming. I am sure there are many examples of a similar nature that will be adopted by Secretaries of State, not just now but in the future.

That makes me think that we may be giving a Secretary of State—a Minister—far too much by enabling them to decide what is and is not secondary and primary legislation. I do not know whether that was in the mind of the Constitution Committee when it particularly picked this out, but it was right to be alive to that concern. I was grateful for the support for the amendment from the noble and learned Lord, Lord Mackay of Clashfern, because he is long experienced in these matters. He has a very wary and thoughtful eye on legislation and what it is.

I accept that we are in somewhat exceptional circumstances in that we are dealing with EU retained law, but the Minister will have got the message that we are very concerned and the concern is rather broad. In the end, what we put in primary legislation makes a difference and has the effect of changing people's lives. Giving too much power to Ministers to determine what they can sneak in through secondary legislation, where we can do far less about it and do far less to improve its quality, is a proper constitutional concern that this House might express. For the moment, I beg leave to withdraw my amendment.

Amendment 255 withdrawn.

Amendments 256 to 260 not moved.

Clause 17 agreed.

Amendment 261

Moved by ***Lord Patten of Barnes***

261: Before Clause 10, insert the following new Clause—

"Northern Ireland: the Belfast principles

(1) In exercising any of the powers under this Act to make any provision affecting Northern Ireland, a Minister of the Crown or any devolved authority must have regard to the requirement to preserve and abide by the principles and obligations contained within the Belfast Agreement and given effect by the Northern Ireland Act 1998 ("the Belfast principles").

(2) The Belfast principles include, but are not limited to—

(a) partnership,

(b) equality, and

(c) mutual respect,

as the basis of relationships within Northern Ireland, between the North and South of Ireland, and between the islands of Ireland and Great Britain.

(3) In particular, in relation to this Act—

(a) a Minister of the Crown must not give consent under paragraph 6 of Schedule 2 to this Act before any provision is made by a Northern Ireland department except where the Secretary State has considered the requirement to preserve and abide by the Belfast principles and considers the provision is necessary only as a direct consequence of the withdrawal of the United Kingdom from the EU, and

(b) the powers under paragraph 16(b) of Schedule 7 to this Act to make supplementary, incidental, consequential, transitional, transitory or saving provision (including provision restating any retained EU law in a clearer or more accessible way) may not be exercised to do anything beyond the minimum changes strictly required only as a direct consequence of the withdrawal of the United Kingdom from the EU.

(4) Section 11(3) of this Act does not permit the Northern Ireland Assembly to do anything which is not in accordance with the Belfast principles."

Lord Patten of Barnes (Con): My Lords, this amendment is in my name and that of a number of other noble Lords. For many years, there has been a panel game on Radio 4 in which people are asked to speak about a subject of which they have not been

[Lord Patten of Barnes]
given notice for a minute without deviation or repetition. I have sometimes thought how that would cut short our debates in this House and down the Corridor. I have managed to avoid listening to this programme for the several decades that it has been broadcast, but others may know the one I am talking about.

That may be a relevant point, given that we had an excellent debate on most of the issues that we are covering this morning only a week ago. It was an excellent debate in which we talked about the Northern Ireland border, the relationship between the Northern Ireland border and the Republic border in terms of economics and other issues. We talked about that border and its overall relationship with the European Union and the United Kingdom because it would be the only land border between the EU and the UK. And we talked about that whole issue in relation to the Good Friday agreement, which everybody accepts is one of the coping stones of the peace that has, thank heavens, returned to Northern Ireland for the past few years. There were a couple of notable speeches in that debate. The former most reverend Primate Emeritus of All Ireland made an extremely moving speech. I do not want to ruin his career, but the noble Lord who wound up the debate made an important and interesting speech as well. It reflected what has been said elsewhere. The noble Lord said in replying to that debate: "Let me be frank". That is not always something that one expects Ministers to say and it sometimes invites the reply, "caveat emptor". I certainly speak confessionally on that subject. He said "Let me be frank" and then he was. He said that,

"the Belfast agreement remains the cornerstone of the United Kingdom Government's policy as they approach Brexit. Further, the Belfast agreement is enshrined in international law, so it has a basis that is broader than simply membership of the EU. A number of noble Lords have made the point that it is our membership of the EU which was a factor in the agreement, and I do not think that that logic can be faulted".—[*Official Report*, 14/3/18; col. 1703.]

He pointed out that in the light of that there was a great responsibility on our Government, on the Government in the Republic and on the EU to do all they can to sustain the Good Friday agreement and to find a solution to the question of the border.

In saying that, I am sure that the noble Lord was aware that he was repeating what has been said by Mr Blair, Sir John Major, the former Taoiseach Bertie Ahern, and Senator George Mitchell, all of whom played a very important role in the Good Friday agreement, which is one of the biggest achievements in post-war British politics without any question at all. There are Members of this House who played a role in securing that outcome.

Why is there a problem as we move down this path, like the chorus in "Fidelio", into the sunlit realm of post-EU global Britain? There is a problem, for reasons which were explained very clearly. Some noble Lords used this quotation in the previous debate—quite simply, it is because of the challenge which the then Home Secretary referred to two days before the referendum when she said in reply to a question:

"Just think about it. If we are out of the European Union with tariffs on exporting goods into the EU there'd have be something to recognise that between Northern Ireland and the Republic of Ireland. And if you pulled out of the EU and came out of free movement, then how could you have a situation where there was an open border with a country that was in the EU and has access to free movement?"

I could not have put it better myself. Others have put it on both sides of the European referendum. It is the problem that the Government now have to address with some difficulty, because after the referendum result it was decided—I have read this in a book by the political editor of the *Sunday Times*, so it must be true—without any discussion or debate in Cabinet that whatever happened we would leave the single market and the customs union. So here we are, facing this very difficult problem.

Some people have said, "Well, you can deal with it quite easily because there's no need for a border". We have been told that there are technological solutions. They do not yet exist. They are somewhere down the road. Most of the people who suggest them have never been to Northern Ireland and have no idea what Fermanagh, South Armagh and that borderland are actually like. They point to other countries that they say manage without borders or any of the infrastructure of borders, or customs controls. Curiously, they sometimes mention America and its borders. Tell that to President Trump. It does not feel border-free if you are building walls or trying to get goods from Canada into America or from America into Canada. They talk about Sweden and Norway. We know what the Swedish Minister said about that the other day when she said that it was easier to get to the moon than to get goods into Norway.

Most experts have said very much the same thing, underlining the fact that borders, as we said during the earlier debate, are not principally about geography; they are partly about identity but they are also about the difference between legal regimes and regulatory regimes. I have to be careful about bringing a Frenchman into this debate, but somebody who perhaps knows more about trade negotiations than almost anybody—even more than Mr Fox—and who was Secretary-General of the WTO and before that a European Commissioner is Pascal Lamy. In giving evidence in this House and in the House down the street, he said that,

"at the moment the UK exits the customs union, there has to be a border".

He went on to say that "frictionless, invisible borders" are a "fairy tale", and that a virtual border does not exist anywhere in the world.

1 pm

So we have an issue, and it is an issue that the British Government have not so far managed to resolve in our discussions with the European Union. Last week, we signed up to a backstop agreement on regulatory alignment, which we had signed up to in December and then denounced between when the European Union tried to put it into legal language earlier this week and the "consensus"—I think that is the word used by one of the Ministers for these things—in December.

There is a real issue about this, and perhaps it is worth recalling why the Minister thinks that this is relevant to the Good Friday agreement. It is not because anybody

seriously believes that, if we do not resolve this, we will go straight back to the Troubles and see the sort of violence that some of us experienced in the 1960s, 1970s, 1980s and 1990s. However, the chief constable of the Northern Ireland Police Service does think that if there is a hard border of any sort and there are customs officers, they will become a target for violence. That is not condoning that, it is just pointing out reality in the context of Northern Ireland and the Republic. Of course any sort of border would have an impact on the trade between Northern Ireland and the Republic, and we know what the Good Friday agreement says about the importance of that economic relationship.

There is another area in which a border would have a profound effect on the continued integrity of the Good Friday agreement: the question of identity. As was said in our last debate, at the heart of the Good Friday agreement is a proposition that is difficult to put into practice—and it says a great deal for the negotiators of the Good Friday agreement that they managed it. People who had previously condoned and taken part in violence to try to change the constitutional arrangements in Northern Ireland accepted that, from now on, those arrangements could be changed only through the ballot box by constitutional means and with democratic accountability. In return for that, they were assured that their own sense of identity and loyalties could be expressed with the encouragement and endorsement of the authorities. For example, if they were republican, they no longer had to sign up to all the manifestations and symbols of a unionist state. They could be Irish or British, or they could be Irish, British and European, and they would not have a border as a symbol between the Republic of Ireland and Northern Ireland or between Britain and the Republic of Ireland. The Good Friday agreement is profoundly affected by what happens to the border.

Presumably recognising that, the Secretary of State for Brexit said after the negotiations the other day that it is,

"our intention to achieve a partnership that is so close as to not require specific measures in relation to Northern Ireland".

Well, I can help him. There is a partnership that is available straightaway: go back to the customs union; join the single market. That will solve the question of the Northern Ireland border.

I am rather nervous about predictions. My favourite English footballer was Paul Gascoigne, who, having been asked on one occasion at half time to say what the result of the match would be, said, "I never make predictions, and I never will". But one prediction I make is this: before this political jihad is over, before we have finished with this, we will be back in the customs union. We will get back into the customs union partly because I think that is what we will vote for in this House, but, even more so, because that is what enough people will have the courage to vote for down the Corridor.

But let us suppose that that does not happen, solving the problem of the border, as they say, at a stroke. Then there is a very strong case for belt and braces. If you are the emperor with no clothes, belt and braces may seem a little curious. But there is a very strong argument—just in case we do not find other ways of solving the border, the technology is not available or the blue skies are a little clouded—to write into the Bill the terms, provisions, values and objectives of the Good Friday agreement. What is not to like? It would not damage anything or anybody. It is an assertion of what, apparently, we all believe—that the Good Friday agreement has to be kept at all costs—unless you are a former Conservative Secretary of State and think that the Good Friday agreement could be changed, thrown out or forgotten about, which I do not think is the view of this House, even it is the view of a couple of Brexiteer former Secretaries of State. It should be easy for the Minister, who was so frank and helpful in his last intervention, to simply say that we will write the Good Friday agreement, as Amendment 261 suggests, into the Bill.

There may be some reason why the Minister does not have the authority to do that this morning. I was going to say that we have not had any of the duty privy counsellor Bench of Brexiteers here today, but I can see one. I am glad that they still do morning shifts. Even with just one here, he may have some difficulty in giving us the sort of assurance that we might like. But I very much hope that, if that is the case, the majority of Members of the House will come back on Report and make absolutely certain that we write the terms of the Good Friday agreement into the Bill if, by then, we have not had a satisfactory response on the border. I beg to move.

Baroness Lister of Burtersett (Lab): My Lords, I will speak to Amendment 308ZA in my name and that of my noble friends Lord Judd and Lord Cashman. I also express my support for the other amendments in this group and for everything that has just been said in the thoughtful and amusing speech by the noble Lord, Lord Patten of Barnes. My amendment would alter the existing limitations on the powers of the Northern Ireland Assembly, departments and Ministers to act incompatibly with EU law so as to include restrictions that protect the linkages between the rights, safeguards and equality of opportunity protections within the Belfast/Good Friday agreement and the human rights and equality protections of EU law as they apply in Northern Ireland.

I tabled the amendment at the request of the Northern Ireland Human Rights Consortium—I am grateful for its helpful briefing—because it felt that we needed something more specific than the more generalised commitments in other amendments on the agreement, valuable as those amendments are. My amendment, in contrast, focuses specifically on the protections of existing EU-derived human rights safeguards that link to the agreement and peace process. It seeks more precisely to ensure that a key element of that peace process agreement continues to be protected, specifically that the human rights safeguards that exist in EU law, including the Charter of Fundamental Rights, continue to bind Northern Ireland institutions.

The amendment reflects the grave concerns of human rights bodies in Northern Ireland, both civil society organisations and the Northern Ireland Human Rights Commission. Indeed, the commission published a joint statement last week with the Irish Human Rights and Equality Commission under the auspices of a joint

[Baroness Lister of Burtersett]

committee established under the Belfast/Good Friday agreement, which voiced their concerns about the impact of the loss of the Charter of Fundamental Rights. The statement underlines:

"The equivalence of rights, on a North-South basis, is a defining feature of the … Agreement".

It warns of a "diminution of rights" within Northern Ireland and a potential,

"divergence in rights protections on a North-South basis".

It therefore calls for the safeguarding of,

"North-South equivalence of rights on an ongoing basis".

At the risk of sounding like a broken record and being thrown off the panel show to which the noble Lord, Lord Patten of Barnes, referred, I ask for the fourth time how the Government will ensure that equivalence in the absence of the Charter of Fundamental Human Rights. I have yet to receive a satisfactory reply. I believe that this amendment would do the job, which was why I was pleased to table it on behalf of the consortium.

In its briefing, the consortium makes the point that the complex web of EU-derived human rights and equality safeguards has had an important function in ensuring that people in Northern Ireland have access to remedies that would otherwise not be available in Northern Ireland law. This amendment is about shoring up those safeguards in the face of an unprecedented threat from the Brexit process. In addition, it reminds us that, unlike in the rest of the UK, the Equality Act does not extend to Northern Ireland and gives an example of how EU human rights law has provided alternative protection. For example, it ensures that carers for disabled people are not discriminated against in terms of how they are treated. In a recent local case, McKeith versus Ardoyne Association, a woman's manager sent her home and denied her the opportunity to work because of her ongoing caring responsibilities for her disabled daughter. The tribunal stated that, in her manager's mind,

"because the claimant had a disabled child, her position was not properly in the workplace. Her daughter was 'her priority'".

As there was no other satisfactory explanation for the dismissal, the tribunal concluded that Ms McKeith was dismissed specifically because she was the primary carer of her disabled daughter and that, therefore, she had been subjected to discrimination.

The consortium also reminds us that, under the terms of the Belfast/Good Friday agreement and subsequent agreements, there was a commitment to a Bill of Rights for Northern Ireland. It writes that,

"the purpose of this was to build on the ECHR to create a strong and inclusive rights framework to build confidence in our institutions. In the absence of a Northern Ireland Bill of Rights binding our Assembly and our Ministers, EU human rights law has provided both an important limitation on power and a point of access for an extended set of rights. Those rights will not be available to the same extent under the current draft of the Bill (removal of the Charter etc) and the devolved competencies and restrictions will also be weakened (Henry VIII powers and Clause 11 changes etc)".

When we discussed Northern Ireland issues on 14 March, I referred to how a number of organisations, including the Northern Ireland Human Rights Commission, are arguing that, in the light of the risks to the human rights framework, now is a key moment to renew discussions on a Bill of Rights for Northern Ireland. I asked the Minister whether he would undertake to consider that. I know that he did not have time to deal with all the questions raised that evening—time was getting on—but I would be grateful for a response now.

The amendment reflects key elements of the phase 1 joint report of the EU and UK and the draft withdrawal agreement text as it applies to human rights in Northern Ireland. The approach that it takes is compatible with the principles of protecting the Belfast/Good Friday agreement "in all its parts", to quote from the phase 1 joint report, including its "practical application", protecting,

"subsequent implementation agreements and arrangements, and … the effective operation of each of the institutions and bodies established under them",

as well as the commitment to non-diminution of rights.

I am sure that the Minister is aware of the deep anxiety felt by human rights organisations in Northern Ireland in the face of withdrawal from the EU while the rest of the island of Ireland continues as a member. Indeed, some members of civil society groups in Northern Ireland are coming over on Tuesday to meet us to discuss those concerns. We have heard nothing yet to quieten those anxieties. I urge the Minister to undertake to consider these concerns and, failing a more general change of heart on the charter, either to take away the amendment or to come forward with other proposals to protect the equivalence of rights—identified, as I said, as a defining feature of the Belfast/Good Friday agreement. As the noble Lord, Lord Patten of Barnes, reminded us, the Minister told us that the agreement remains the cornerstone of the United Kingdom Government's policy as we approach Brexit.

1.15 pm

Lord Murphy of Torfaen (Lab): My Lords, I very much support the points made by my noble friend Lady Lister with regard to human rights issues. Before I speak about those, however, I congratulate the noble Lord, Lord Patten, on an outstanding and powerful speech this morning.

We discussed much of this last week: the relationship between the Good Friday agreement and the European Union and how the membership of both Ireland and the United Kingdom underpinned everything in the agreement. I will concentrate on a couple of points on how equality and human rights affect this Bill and the Good Friday agreement and the relationship between the two.

The Good Friday agreement, and the negotiations leading up to it, concentrated heavily on the issues of equality and human rights. When I took the 1998 Northern Ireland Bill through the House of Commons, a great part of it dealt with them. As your Lordships will know, the current impasse or deadlock between the parties in Northern Ireland rests partly on disagreements about human rights and equality issues. This is, however, no academic matter; it is central to the progress of the talks in Northern Ireland and the integrity of the Good Friday agreement.

My noble friend Lady Lister referred to the joint committee between the Republic and Northern Ireland on human rights and equality issues. Indeed, she referred to the European Union Charter of Fundamental Rights, which is common to both parts of the island of Ireland. It does not take a genius to work out that, if we leave the European Union, what happens to the relationship between a country that remains in the European Union and one that has left is a considerable problem.

There is also the issue of the equality of citizens in Northern Ireland. This really is a difficult one. For many years, anyone born in Northern Ireland, or whose parents or grandparents were, has been entitled to an Irish passport. Under the new arrangements, they would still be entitled to an Irish passport but, in gaining it, would also be entitled to citizenship of the European Union. What about the unionist who is British? It is said that perhaps 35% or 40% of the unionist community in Northern Ireland voted to remain in the European Union. Would someone want to become a citizen of the European Union while regarding themselves as British? They will certainly not identify themselves as Irish.

This goes against a fundamental principle of the Good Friday agreement: parity of esteem between the parties in the northern part of Ireland. It means, for example, that many people in Northern Ireland are entitled to citizenship but—effectively—many people are not. That goes fundamentally against the principle that the noble Lord, Lord Patten, referred to when he talked, quite rightly, about the issue of identity.

Again, what about the relationship between the north and the south in criminal justice and policing? The big issue is that 75% of those people who flee Northern Ireland because they are criminals end up in the south. What happens to the European arrest warrant? What happens to the remarkable co-ordination and co-operation between the two police forces on the island of Ireland? Special arrangements have to be made.

Those are particular points that we did not touch on in our debate last week. I know that the Minister, a firm supporter of the Good Friday agreement who understands its significance in bringing about peace in Northern Ireland over the past two decades, will take these issues away and come back to us on Report, at which point we will have reached the 20th anniversary of the agreement. I hope that that anniversary will be commemorated by recognition of these amendments.

Lord Cashman: My Lords, I will speak to Amendment 308ZA, to which I added my name to those of my noble friends Lady Lister of Burtersett and Lord Judd. I am extremely pleased to follow the other noble Lords who have spoken, particularly the noble Lords, Lord Patten and Lord Murphy.

The amendment is concerned with the equivalence of rights between Northern Ireland and the Republic of Ireland. The approach outlined would allow for continued institutional alignment in Northern Ireland with the EU-derived safeguards and frameworks that underpin the Belfast/Good Friday agreement. The protection of the Good Friday agreement needs to be considered in its detailed implementation as well as in its broad principles.

As I said, the amendment focuses on the protection of existing EU-derived human rights—safeguards that link to the Good Friday agreement. The equivalence of rights on a north-south basis is a defining feature of the Good Friday agreement. A further signal of the expectation of long-term north-south equivalence is seen in the duty of the joint committee established under the agreement to consider,

"human rights issues in the island of Ireland",

as well as,

"the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland".

The joint committee welcomed the commitment in the draft withdrawal agreement that the UK,

"shall ensure that no diminution of rights, safeguards and equality of opportunity … results from its withdrawal from the Union".

However, it stated that the Government's approach would only ensure equivalence of rights on exit day from the European Union and said:

"There is a risk that … a growing discrepancy between UK and EU law will emerge, thus eroding the North-South equivalence of rights in Ireland".

That would be as a consequence of either the UK or the EU adopting higher standards. The joint committee called for the withdrawal agreement to provide for continuing north-south equivalence of rights post Brexit, as established under the 1998 Good Friday agreement.

Furthermore, the joint committee is concerned that the failure to retain the European Charter of Fundamental Rights and EU equality legislation within the United Kingdom will result in a diminution of rights in Northern Ireland and potentially cause a divergence of rights on a north-south basis. The joint committee—it is worth restating this—calls for,

"the text of the Withdrawal Agreement to commit the UK to retaining in UK law the Charter of Fundamental Rights of the EU and to enable the UK to keep pace with its evolving protections over time".

For that reason and for so many more, I support the amendment and the other amendments in the group.

Lord Jay of Ewelme (CB): I support Amendment 261 in the name of the noble Lord, Lord Patten. I regret that I was unable to take part in the Second Reading debate, because I was with your Lordships' EU Committee in Dublin, Belfast and Londonderry and on the border between Northern Ireland and Ireland. Just a little while ago, I was standing on a bridge across the border with traffic thundering past in both directions—EU lorries, Irish lorries and British lorries. It seemed to me inconceivable then and it seems to me inconceivable now that any kind of barriers could be put in the way of traffic moving freely across that lengthy and complicated border. It is extremely hard to see how we can avoid such controls if we are outside the customs union; that seems an extraordinarily powerful and logical reason why the right course for us to take is to stay within the customs union. It is equally clear that the continuing process of peace in Ireland—north and south—depends on the Good Friday/Belfast agreement, and that the

[Lord Jay of Ewelme]
strength of that agreement will be greater if it is included in the Bill. For that reason, I support the amendment proposed by the noble Lord, Lord Patten.

Lord Eames (CB): My Lords, the temperature of our debate this afternoon reflects again the emotions expressed so recently in this House by those of us who live, work and have our being in Northern Ireland. We are sensitive as a people to the fact that your Lordships' House is hearing on repeated occasions references to "our" problems and "our" difficulties. But this is taking on a different dimension, because what was traditionally our problem is becoming a problem on a much wider scale, for it is becoming the crux of the debate on the withdrawal of the United Kingdom as a nation from the EU.

The problems to which the Good Friday/Belfast agreement has done so much to provide an ongoing solution are so often taken to be not just a matter for the people of Northern Ireland but now central to what people are considering. The difficulty of the border, community relations, human rights—all that long list of human problems was once contained within the borders of Northern Ireland but, as the noble Lord, Lord Patten, so rightly reminded us a few minutes ago, it is becoming crucial to the debate on the future of our withdrawal. None of us wants to apologise to this House for the fact that our local problems now take on international significance. When we listen once more to the experience of former Secretaries of State for Northern Ireland, we are reminded that the problems to which I have referred have taken on a dimension that we never envisaged, even at the height of the Troubles.

For that reason, when I read Amendment 261 in the name of the noble Lord, Lord Patten, I began to wonder whether we were stating the obvious yet again. Are we stating the fact that the importance of the Belfast agreement is such that it is welcome to see it suggested as a part of the Bill? I began to wonder whether other issues deteriorate the importance of reference to the Belfast principles, et cetera. Then I listened a few minutes ago to a debate on another amendment, when we concentrated on giving what someone said were excessive powers to Ministers to look at secondary legislation and have wide-ranging powers to alter the details of policy without addressing the power and supremacy of Parliament. I began to wonder: whether it is possible to visualise the situation in years to come when something as sensitive as the Belfast agreement—something as sensitive as all that the agreement has achieved—could possibly be affected by what we listened to in that previous discussion.

1.30 pm

At the back of all the detail we are looking at are the fundamental questions of what a devolved Administration is and what should be the relationship between the mother of Parliaments and the devolved Administrations. For that reason, I found I had sympathy for the wording of this amendment, for it is a safeguard to the sensitivities mentioned by the noble Lords, Lord Patten and Lord Murphy, which are very close to my heart having been through the whole process of the peace movement in Northern Ireland.

The noble Lord, Lord Patten, attributed me as an "emeritus" this morning—a new description. Many things have been said about me in the past, but I thank him for this new honour. Emeritus I may be, but I am also speaking from my heart and from my experience of a lifetime working, I hope, in the building of bridges in Northern Ireland. For that reason, I find myself supporting the thrust of what this amendment seeks to do. I urge sensitive expression and appreciation of the amendment by your Lordships' House.

Lord Cormack: My Lords, I am delighted, and privileged, to be able to follow the noble and right reverend Lord, Lord Eames. I had the great good fortune of chairing the Northern Ireland Affairs Committee in another place between 2005 and 2010, working very closely with the noble Lord, Lord Hain, when he was Secretary of State, and with his successor. I saw at first hand the invaluable work that the noble and right reverend Lord, Lord Eames, did, particularly on the commission which he jointly chaired with Mr Denis Bradley.

An enormous amount of work was put into making the Belfast agreement work. It is one of the significant achievements of post-war British politics, as my noble friend Lord Patten said in his magnificent speech. I will always remember private meetings that I had with the late Lord Bannside—better known as Ian Paisley—who, together with Martin McGuinness, breathed new life into the agreement. It would be a tragedy—I use the word deliberately—if we put the agreement at risk, because it would also have the effect of shattering the integrity of the United Kingdom itself.

The noble Lord, Lord Murphy, for whom I have great respect, talked about the co-operation between the two police forces. One saw that at first hand with my committee, travelling throughout Northern Ireland and in the Republic. Many things have been said recently about the fact that the border issue can be easily solved. However, talking as I did last night with a group of colleagues and with two Norwegians, one realises that it is not as simple as that. A proclamation that it is simple never makes anything simple. We really must be extremely cautious about dismissing on the basis of a slogan the one thing that can guarantee the continuance of the Belfast agreement and the integrity of the United Kingdom. That is some sort of customs union, be it the present one or another, because that alone can preserve a border that is soft and the opportunity for people to travel from one part of the island of Ireland to the other without impediment.

My noble friend Lord Patten did a great service to the Committee and to your Lordships' House, not only in tabling his amendment but by what he said in moving it. I believe that nothing is at risk if we in effect, as he has suggested, write the principles of the Belfast agreement into the Bill. My noble friend the Minister will of course proclaim his firm allegiance to the Belfast agreement, and we will all be delighted when he does so because we know that, as he did last week, he will do that with total commitment and integrity. We know also that he will say he speaks for Her Majesty's Government. So if that is the position of Her Majesty's Government—and we all believe

that it is—and there is no difference in this House between any party on this issue, why cannot it be put on the face of the Bill, as my noble friend Lord Patten so powerfully and movingly argued?

The noble and right reverend Lord, Lord Eames—who is definitely emeritus—said that this was the crux of the problem that we face; I fear that he is right. It is therefore crucial that there is flexibility in government to allow an arrangement that preserves the agreement by ensuring that the border remains as it is. In my view, that can only be in a guaranteeable form if we have a customs arrangement. I hope that when my noble friend Lord Duncan comes to reply, he will accept the logic of that argument and once again proclaim the Government's commitment to the Belfast agreement. I hope he will also agree to commend to his colleagues, since we cannot expect him to do it on the Floor of the House this morning, that the Patten formula—there have been good Patten formulas in the past—that the agreement should be in the Bill is adopted by government.

Lord Hain (Lab): I agree with everything the noble Lord, Lord Cormack, has said, particularly about the customs union. However, would he reflect on the fact that the customs union deals with the visible border but the invisible border of services can only really be dealt with by a common single-market arrangement? That is of course the majority of both economies on the island of Ireland. If we are genuinely to have an open border, visible and invisible, to put it in that language, then the single market has to apply across that border as well.

Lord Cormack: Tempted as I am by the noble Lord's seductive words, we must realise what is achievable and what is not achievable. With both major political parties proclaiming that the single market cannot remain, we have to concentrate on what can remain or can be replaced by something essentially similar—a customs union. As I said, I am tempted. I am not unsympathetic, but we have to be realistic.

Baroness O'Neill of Bengarve (CB): My Lords, who wills the ends wills the means. The Government committed themselves to an open border, to my knowledge, some 20 months ago. I was very happy to hear a previous Secretary of State make that commitment quite explicit in a public space. I then asked: how? We are still waiting for any answers as to how, and cynicism is growing. It does not seem that the Government are thinking about the answer to that question.

It is, of course, a number of questions. Borders do different things for the movement of goods, the movement of people, the movement of animals and many other things. But I point to three things that are important. First, on goods, the Government have suggested that there may be a technological solution by which tariffs do not require a hard border—meaning installations at the particular line of demarcation—but are dealt with, quite handily, by electronic means and previous preparation of detailed dossiers on the content of each, in this case, lorry rather than container. It is a seductive view, but it is radically incomplete.

The Government have also on occasion suggested that they would be happy to see small traders, as it were, fall below the radar for enforcement. In the island of Ireland we are quite good at subcontracting the movement of things to small traders if that is advantageous. It has been done for various commodities. One need only think of diesel for a good example. It has also been done to my knowledge for various other things such as getting double subsidies on animals—I will come back to animals in a moment—by having the headage payment both north and south of the border. We have to expect that, as we get divergence of legislation and regulation north and south of the border, the incentives for what I believe are these days called "imaginative arrangements" will grow and will be a matter of subcontracting to the small traders. I do not believe that the electronic fantasy is more than part of the solution to the movement of goods, which speaks directly to whether we expect a customs union or the customs union to continue or whether it does not. I suppose these small traders might be looking forward to the latter solution, but I do not think they really are.

The movement of peoples seems very important. We have entirely free movement of peoples on the island of Ireland. That has not always been so, but we have it again. It is fundamental to life. But if people enter from the European Union into the Republic of Ireland, where they will have freedom of movement, they can then go to the north—to the UK—and come over here without passports. I find that quite a lot of my noble friends are not really aware of that, probably because, when they go to Ireland, they go by air and have to show a passport. It is not necessary, however, to show a passport when crossing the Irish Sea. That is one of the meanings of the phrase "common travel area" and has been with us since the 1920s. It is, incidentally, much stronger than the Schengen arrangements because, in the common travel area, when we move across from one jurisdiction, the UK, to another, the Republic of Ireland, we can vote and we can serve in the armed services. These are real differences. This is a deep and long-standing arrangement. However, it means that people will have to identify themselves—for example, when taking a job or when going to a National Health Service hospital for an operation—to be sure that they are entitled. That is what that one word, "passport", meant.

1.45 pm

Passports are quite expensive, but we have to accept that these days they will have to be biometrically enabled. I think, however, of all the families who live in cities on either side of the Irish Sea and who travel to and fro, often with quite a large number of children. It is a non-negligible matter to think about the movement of people. There is another factor here. It is not only people who live in the north and in the Republic who will have to have passports or ID; it is all our fellow citizens on this island, because you cannot enforce entitlements unless the good guys as well as the bad guys are checked. That means passports for everyone. That means ID cards.

I am not against ID cards, and I think I even have a suggestion about how it might be done, taking a leaf out of the arrangements in a number of states in the

[Baroness O'Neill of Bengarve]
United States, where they have invented a delicious document called the non-driving driving licence. The non-driving driving licence enables people who are non-drivers in, say, the state of Connecticut to get an equivalent licence in another state, which does not entitle them to drive but enables them to have a drink—so it is really important. One of our better bureaucracies is the DVLA, and it might perhaps be able to think out how a system of non-driving driving licences could be a model for the driving licence that has served as an ID card over here.

One obstacle to this is that many, but not all, on the Conservative Benches have a thing about ID cards. But one has to get real and get up to date. Many of my friends on the Conservative Benches carry smartphones, which give away far more details about what they are up to at any given moment than any driving licence, passport or ID document does. We need to start talking about these things and not just making gestures towards passports or electronic tariffs.

Finally, I want to talk about the movement of beasts. When I speak on this topic, I always come back to beasts because they are notably mobile. Much more importantly, plant health does not recognise borders. We must have arrangements for plant and animal health that will not depend on the enforcement of a border. I hear no discussion of this. For example, have the Government considered delegating what Brussels likes to call phytosecurity, and we prefer to call biosecurity, to Stormont—let us hope it is up and running—with the proviso that it may not go below EU or UK standards? That would put, as it were, a double lock on animal and plant safety and standards in Northern Ireland, which would not be the worst of worlds.

These are the sort of problems that need addressing soon and urgently if people are to have confidence in the Government's commitment to the Belfast agreement and the principles that underpin it. I do not wish to be alarmist, but I do not think we should take for granted anything that might happen if we do not address these questions. Recently, I have been reading about events just before and during the First World War, when we saw the Home Rule debacle, the Easter Rising, the Irish war of independence and the Irish civil war—possibly the most terrible of them all. We are playing with fire. I hope the Government are listening and I hope they will take the principles of the Good Friday agreement as setting a demand for action and not just for rhetoric.

Lord Judd: My Lords, I am very privileged to have had the insights of those who really are part of the Irish community and to hear how they see things. That is invaluable. It has also been powerful to hear the words of the noble Lord, Lord Patten, with all his experience and integrity.

I emphasise one point: those of us associated with the amendment brought forward by my noble friend Lady Lister of Burtersett are very struck by how deeply perturbed those who are standing for, working in and developing the concept of human rights in Northern Ireland are about the absence of equivalence in the legislation, as things stand. The people of the Republic will have the reassurance of the charter. We are told that the charter is impossible in our future. What will be the equivalence of protection for the people in Northern Ireland—those who belong to the minority and are currently confident, having the concept of the charter behind them? We really must have an answer to this question. My noble friend has pursued it on at least three occasions in Committee without getting any convincing response whatsoever.

I do not mind saying that I was very moved by the words today of the noble and right reverend Lord, Lord Eames. I will never forget him standing at the Cross Benches last Wednesday, when he implored all of us involved in legislation, and the Government, to remember that we were dealing with the most sensitive issues—ones that went right to the hearts of ordinary people as they went about their lives. It is not just a fix—a management arrangement—that we are about, it is about being able to relate to people, their fears and anxieties, their hopes and aspirations.

In that context—I do not want to overplay it, but it is true—since Wednesday last week I have been thinking of the two words that the noble and right reverend Lord emphasised in his peroration. He spoke of the indispensability of consent and trust. We cannot build a future worth having in Northern Ireland—and in the Irish Republic—if something has been foisted on the people as part of a solution to a very complex political issue. It has to give them the feeling that they can develop their lives together in confidence. It has been very exciting for those of us outside Ireland to witness the amount of good work between the different communities in the context of the Good Friday agreement. I ask the Government to take these points seriously and I hope we will get an answer to my noble friend's question.

Lord Alderdice (LD): My Lords, I am very grateful to the noble Lord, Lord Patten of Barnes, not only for the passionate and articulate way in which he introduced the debate on this group of amendments—particularly Amendment 261—but also for the lifetime of commitment that he has given to the issues of Northern Ireland. That length of commitment speaks a great deal to me, as someone from that part of the United Kingdom.

As the fourth musketeer, as it were, I want to say something slightly different about why I think this amendment is not just important but critical. On 6 December last year, on the fifth day in Committee, Lady Hermon, the honourable Member for North Down, spoke about the key principles of the Belfast agreement in an amendment almost identical to this one. When the Parliamentary Under-Secretary of State for Exiting the EU, Mr Robin Walker, responded, he kept talking about the agreement, the commitment to the agreement, and the way the agreement was backed up. Lady Hermon came back to him saying that the issue was not the agreement but the principles, and he really did not seem to get it, because he kept coming back to saying that they were committed to the agreement and would ensure that the agreement was there.

I want to say why I would go even further than the noble Lord, Lord Patten of Barnes, in saying that it is not just a question of whether this would be a problem or harmful but why this is absolutely essential not that

the precise wording of all the amendment is included, but that the principles of the Belfast agreement are included. I shall explain why.

We have had many decades of trying to get agreements in Northern Ireland. We have had them before, and they did not work as a peace process because they did not address the key disturbed historic relationships in these islands. In many ways, this was the understanding that the European project stepped out with, with Monnet, Schuman, Adenauer and so on. They understood that it was the relationships between the different countries and communities that were essential—and, as we know, the whole complicated edifice was created in which there could be co-operation.

One frustration for me is that colleagues who, like myself, are committed to remain, have failed to address the question of why, after 40 years, one of the parties is seeking divorce and many others are very uncertain about whether they want to stick with it. My own view is that, as time went on and we moved from the first generation of those who were committed to those who were there later, we moved from the things that were put in place as the instruments to ensure the fundamental purpose of the project, which was to stop war and build relationships. The instruments were things such as the market, the common currency, and the opportunity for European political leaders to be at the top table of global affairs. Those instruments became the purpose of the exercise for many of those who were involved. When in any set of relationships the instruments of the relationship become a substitute for the purpose of the relationship, the relationship is already beginning to fail.

My concern is about the commitment to the Belfast agreement, a legislative agreement with a commitment to certain kinds of constitutional and institutional matters and a commitment, as the noble Lord, Lord Patten, knows well, to changes in the administration of justice and changing policing—all the important things, including the things that are mentioned in the other amendment about human rights. Those things will not keep the relationships alive if we forget that the relationships are the key issue. That is why I want to see the principles written into the Bill.

When I was involved in the process, we came to a point of understanding this in a very long and painful way. Most of those with whom I was involved are no longer involved politically, or even around at all. As I look around, I see those political leaders who represent the three key relationships not understanding what it was about—the relationship between political leaders in Northern Ireland. We are a long way from the relationships between David Trimble and Seamus Mallon, never mind those between Ian Paisley and Martin McGuinness. Let us not forget that Dr Paisley was not too keen about the Belfast agreement when it came out in the first instance. But the relationship between the political leaders in Northern Ireland does not have the same constructive engagement now. In the relationship between north and south, we are being pulled apart—sometimes by those who say that they want to unite the island. What about the relationship between London and Dublin, between the British and Irish Prime Ministers? Think back to the kind of relationship there was between John Major and Albert Reynolds, or between Tony Blair and Bertie Ahern. We do not have that kind of relationship in either direction.

The European Union itself was the model and the inspiration; it was the container for the relationships that kept the British and Irish Governments together and working, so that when John Major and Albert Reynolds became Prime Ministers, they had already been Finance Ministers and worked together, and they said, "We know it's impossible but we're going to have a go".

2 pm

Another thing is that, if many of those in Brussels, and indeed in London and Dublin, who are saying that this and that is impossible had been around in Belfast 20 years ago, there would have been no Good Friday agreement, because they would have said, "It doesn't fit in with our understandings of sovereignty". Even on the rule of law, think of the people who would never have been let out of prison if others had simply stuck with the understanding of the rule of law as it was then. We had to be more adventurous and creative, just like you have to be in any relationship if it is to evolve, change, develop and, frankly, survive. When a Minister says, "But we are committed to the Belfast agreement", I do not doubt that. Even when he or she says, "It's implied in the legislation", I do not disagree with that. But I do disagree with the idea that we do not have to put it in black and white, firmly and clearly, that the principles of the Belfast agreement and the relationship approach are critical and they need to be in the Bill.

I have spent a lot of my life going to other parts of the world. I am not long back from Colombia, where they have a peace process; just before that I was in India, and in a week or so's time I will be out in Peru. In all those places, they are not looking to the Northern Ireland arrangements and the Irish peace process because they want our particular constitution or institutions, or our way of dealing with policing and the administration of justice. They are looking at the underlying fundamental principle, which was our discovery that these problems were ones of relationships—historic, disturbed relationships between communities of people—and that we had to find ways of addressing that creatively. Whatever kind of mechanisms we used, that was what it was about.

As I look around at home, coming up to the 20th anniversary, I see a whole generation of young political leaders who do not get that. They think it is all just about doing politics, like people do everywhere, and it is not. We need to put this into the Bill to make it absolutely clear to anyone who comes back to the question that, in the absence of that containing environment of the EU, which made it possible for us—I say that because it is very doubtful that we would have got the Belfast agreement without the context of the EU—we have to emphasise with even greater clarity than before the fundamental basis on which that agreement was reached. We have to hope and pray that we can work to find a way of maintaining those relationships and developing them through the stormy waters which undoubtedly lie ahead.

Lord Carswell (CB): My Lords, I had not intended to intervene in this debate, partly because I was not present at Second Reading. I apologise to your Lordships for that but there were certain problems that I had at home. But I am impelled to do so by what has been said so very eloquently by many of your Lordships today.

I have lived the whole of my life in Belfast and been through a considerable amount in that time. I have lived there even longer than my noble and right reverend friend Lord Eames, whom I have known, liked, respected and admired—no less so today—for many years of that time. I have known the noble Lord, Lord Alderdice, and I like and respect what he has had to say. I am very happy to support the principles of what they have both said. I will come back to what I mean by "the principles" in a moment.

I was very close, personally and professionally, to what we have referred to by the usual euphemism of the Troubles. It was a dreadful time and I would hate with every fibre of my being to think that we might go back to that. The fact that we have had peace—maybe not perfect, but a great deal better than what we had before—for 20 years now has been of great importance in the life of the Province. That it should continue is also of great importance, not merely because it gives a better approach to normal life in the Province but because it conditions people to feel that that is the proper way to conduct their lives, which of course it is. If the continuance of the Belfast agreement helps in that, then I am emphatically on the side of those who say that it should be taken account of.

The only caveat I have is on the wording. The Belfast principles include certain things, uncontestably, but what else? A great deal of my professional life, both at the Bar and on the Bench, was spent in interpreting statutory wording and attempting to find its proper and expressed meaning—the way in which statutes should be approached—while trying to see either loopholes or where other people would look for loopholes. That is the great problem in drafting anything, particularly something as important as this. Therefore, that is the only reason I issue a note of warning. I would be perfectly happy to see a clause of the nature proposed on the statute book. But if it is to be done, I simply warn that defining the Belfast principles, or leaving them undefined, could allow the wording to be put to purposes which we might not think of today but which some other people will think of at some time. I leave this thought with the Minister who is replying and with your Lordships.

Lord Mackay of Clashfern: My Lords, I have not spoken on this subject but today I am moved to do so: first, because I had the honour of serving in government with my noble friend Lord Patten of Barnes before he was a Member of this House; and, secondly, because I held the responsibility for most of the justice arrangements in Northern Ireland for about 10 years in the middle of the Troubles. Therefore, I am extremely conscious of the difficulties of Northern Ireland and of the immense privilege of it having had a great degree of peace since the Belfast agreement and since John Major initiated the first talks, which was quite difficult to do, during my term of office.

I am convinced that the only real solution for the Northern Irish and Irish border is in some form of treaty to deal with customs matters and with trade. At the moment, we have a law under the jurisdiction of the European Union for these two matters. The Government have said, and I understand this, that we are leaving both arrangements. But it is possible to make similar arrangements under a treaty: we would not be part of the EU but part of a treaty arrangement with the EU, which would reflect that. I believe something of that kind is absolutely essential. The Belfast agreement did a terrific amount for the peace of Northern Ireland and long may it continue.

Lord Bassam of Brighton: My Lords, I have a few words to add to what has been a hugely interesting and entertaining debate, led off by the eloquent and entertaining noble Lord, Lord Patten of Barnes, who speaks with great knowledge and experience on this, as do many others. My amendment was stimulated by anger at those former Ministers who decided that it was worth the price of Brexit to suggest that we should rethink the Belfast agreement, which has brought so much peace, tranquillity and good order to governance in Ireland, and the north of Ireland in particular.

Amendment 316 seeks simply to ensure that, when this Bill passes, there should be some further thought because I do not think that much thought has yet been given. This is one of those debates that happen simply because of the unintended consequences of Brexit, and not enough was thought of by the Brexiteers in the run-up to the leave vote on 23 June 2016. That is why that amendment is there, although the one proposed by the noble Lord, Lord Patten, is far superior, because it takes us to the principles that are fundamental and lie behind it.

I can see that both Front Benches want to get on, so I shall speak only briefly to my amendment, but it is right that we have these things at the forefront of our minds. Perhaps when we come back at Report, we will have something there enabling us to focus on this and give it further thought, as well as enabling the Minister to say something better than what has been said before—that instead of the Bill being merely about transposing one set of legislative rules into a new set, we recognise what has happened before and the impact of the Belfast agreement on the future governance of our country post-Brexit.

Baroness Smith of Basildon (Lab): My Lords, as my noble friend Lord Bassam said, this has been an immensely interesting debate. I know that other noble Lords have referred to this as the second debate that we have had on Northern Ireland, but all the amendments in this group reflect the concerns that we have had, the degree of concern around the issue and the fact that we have not really had the answers to satisfy those concerns yet. The impact of Brexit on the Good Friday or Belfast agreement is profound. I understand that the Minister has a weariness about saying the same things as last time, but I hope that he will understand, from comments that I shall make now and that other noble Lords have made, why there is a need to return to these issues.

My noble friend Lord Bassam sums up in his amendment—which is entirely reasonable, and I hope that the Minister can accept it—that this is about the Government assessing the impact and publishing that. I go back to the speech made by the noble Lord, Lord Patten of Barnes, and his amendment, to which I have added my name. He referred to the radio programme "Just a Minute", and I think that that is quite apt: this issue deserves "repetition", and the Government should show "hesitation" and reflect, and perhaps come back with some "deviation", moving from their current position and giving us some answers as to how the issue can be addressed.

There has been some journey from the Government to clarify the status of the December joint report on the progress of phase 1. Where the Government stand on regulatory alignment has been almost like a political hokey-cokey, and the current position, which is a backstop for what could happen, is probably fair. But the impact of a hard border in Northern Ireland would be profound and deep and have implications for the peace process. It is not just about the physical border—it is also about the psychological impact that it would have, and I think all noble Lords who have spoken today have understood that. The noble Lord, Lord Patten, referred to the security implications, as I did last week, of what would physically happen if there were a hard border and how those border points would be guarded.

Look at the logic of the issue of trade and the hard border. The Government accept that there should be regulatory alignment between the Republic of Ireland and Northern Ireland. However, if you move on from that, the Republic of Ireland obviously has regulatory alignment with the EU, and Northern Ireland has regulatory alignment with the rest of Great Britain, so, surely, that means that there has to be regulatory alignment throughout the whole of that area, which to my mind sounds something like a customs union. I really do not understand why the Government have set their face against this and made it one of their red lines.

2.15 pm

I discussed this with a senior government Minister recently and said that the lack of detail on this issue to your Lordship's House and generally is why it has become such an issue. His view was that the statements made by the Minister and the Prime Minister about the need for a soft border, the absolute commitment from the Government to the Good Friday agreement, and the total rejection of a hard border are clear. I agree, but the noble Baroness, Lady O'Neill, hit the nail on the head with exactly the point that I made to that Minister at the time—how will it be done? Until the Government can say how, we remain in a sort of no-man's land or Alice in Wonderland situation as to how it will happen. I was told that the Government could not say how they would do it until negotiations take place. But if it is a matter for negotiation, how are the Government able to make that commitment? I must say to the Minister that it is an unacceptable position to be in.

This may not satisfy all noble Lords, but to remain in a customs union would be part of the solution to this. The Government reject that and say that it is a red line that they cannot go beyond, but if they maintain that red line, I still cannot understand—trust me, I have tried really hard to—how the Government can achieve their objectives alongside it. We heard suggestions in the debates last week and from other noble Lords this morning about how that can be done, but I say to the Minister that it is the Government's responsibility to tell us how it can be achieved. We need clarity and detail and to move beyond the warm words. We want something to happen and we have to make it happen.

The Minister and the Prime Minister have been clear and I do not doubt their sincerity in the statements they have made, but why are we having this debate? It is because saying something does not make it true or make it happen. There has to be legislative certainty around this issue. It is that legislative certainty that we are still waiting for and need to see. The amendment in the name of the noble Lord, Lord Patten of Barnes, is one way forward. If the Minister has a better suggestion and wants to bring forward a government amendment to address the issue, I shall be very happy to see it. But in the absence of that, we will have to press this through our own amendment.

My noble friends Lady Lister, Lord Judd and Lord Cashman raise in their Amendment 308ZA the issue of the equivalence of rights on a north-south basis as being a defining feature of this agreement, and they referred to the essential nature of the Charter of Fundamental Rights. Again, we have a government red line about that charter. I fail to understand that. Some red lines, such as the one about the agencies and the involvement of the ECJ, have been smudged a little pink now. Is this another red line that needs to be smudged pink? The Charter of Fundamental Rights is, bizarrely, the only specific exclusion in terms of the existing rights of citizens. That has a huge impact on those in Northern Ireland. My noble friend Lady Lister has raised this question before, but how can the Government ensure equivalence of rights without that charter? She gave examples of real people, problems and issues. Unless we can give real answers to those people, we will find ourselves again in a vacuum of being able to give assurances.

My noble friend Lord Murphy of Torfaen brought to his comments not only his knowledge and experience but the great affinity he has with Northern Ireland through his service, both as Minister of State and—I would say this as one of his junior Ministers—a first-rate Secretary of State. He focused on the equality and human rights issues and backed up entirely what my noble friend Lady Lister was saying. These are central to the integrity of the agreement. We cannot fudge that or move away from it. We have to respect that integrity. The agreement was hard-fought, as those who were there at the time and involved would say. The Government have to respond to the details that he provided and the specific points around the fundamental principles. If the Minister cannot respond, there has to be discussion so that we get to a point that is in the right place.

[Baroness Smith of Basildon]

I finish on the comments of the noble and right reverend Lord, Lord Eames, on Amendment 261. As always, he brings to these debates both his life experience and a passionate commitment. I recall—as did the noble Lord, Lord Cormack—the Eames-Bradley report, by the noble and right reverend Lord, Lord Eames, and the great Dennis Bradley. Both of them, in taking it through, were prepared to think the unthinkable, to do the right thing and to take on those challenging and difficult issues for the greater good. At times that was uncomfortable and not easy, but he did it. He is due the respect of this House: it should heed his words on these issues today.

The Minister has been clear on his commitment—which I do not doubt—to the Good Friday agreement, but I doubt that we have what the House and the legislation needs: the legislative certainty on the issue that gives us the confidence that the commitment will be not just in words but in deeds and legislation.

The Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office (Lord Duncan of Springbank) (Con): My Lords, this has been a wide-ranging debate and I begin by thanking the noble Lord, Lord Patten of Barnes, for facilitating it. It will be almost impossible for me to respond without some form of repetition, I am afraid, and I am nearly certain that I cannot do it within one minute—I am very aware of that. Last week, too, we had a wide-ranging debate that touched on a number of issues and I hope that noble Lords will have an opportunity to examine some of the answers and discussions. I will try to be as focused as I can in the time available.

One of my first repetitions—one that I cannot make often enough—is that the Belfast agreement is the cornerstone of the UK Government's policy and so it will remain. It is important to stress that the United Kingdom Government and the Ministers in the devolved Administration are already bound in statute and treaty under international law as an obligation of that Belfast agreement. That binds not just the United Kingdom Government but also the Irish Government, so this matter rests comfortably in that space.

Amendment 261, in the name of the noble Lord, Lord Patten of Barnes, would require both Ministers and Northern Ireland departments to have regard to the Belfast agreement and the wider principles when making any provision under this Bill that affects Northern Ireland. Those wider principles have been mentioned a number of times, not least by the noble Lord, Lord Alderdice.

Subsection (3) would require the Secretary of State to refuse consent to reserved provisions under devolved legislations unless the provision was necessary only as a direct consequence of the UK's exit from the EU. This would place a much greater constraint on a provision that could be made for Northern Ireland compared to the rest of the UK, even in circumstances where there was no impact whatever on the Belfast agreement. In the same vein, the Secretary of State would be prevented from making any consequential provision affecting Northern Ireland beyond the minimum strictly required only as a direct consequence of exit. That would substantially constrain what could be done to update the statute book in Northern Ireland, putting the jurisdiction at a disadvantage compared to the rest of the UK. That is why we would not be able to move forward on the amendment as it has been tabled.

I am conscious as we approach the 20th anniversary—the noble Lord, Lord Murphy, stressed this—that we wish to see major progress, not least in the formation of an Executive. However, the noble Lord and other noble Lords raised wider issues, not least criminal proceedings and the European arrest warrant. In this context, I am conscious of the "beasts" of the noble Baroness, Lady O'Neill. Each of these elements will form part of the ongoing sector-specific elements which we will be discussing and which will come before your Lordships' House for that thorough examination.

Amendment 316, tabled by the noble Lord, Lord Bassam, relates to an issue that has also been raised by your Lordships' Constitution Committee. I say to the noble Lord that we will take on board his thoughts and give due consideration both to the committee's report and to the issues that he has raised. We are conscious of that as a factor.

As to the Charter of Fundamental Rights, the noble Baroness, Lady Lister, has raised this wider issue on a number of occasions, as she reminded us, and I feel ill-equipped compared to those who responded to the point in the past. I will make two statements in direct response. The noble Baroness mentioned that next week there will be a delegation from Northern Ireland. I will be very happy to meet them, if that can be facilitated. I also give a commitment that I will take away her remarks from today and give them due consideration.

I could be repetitious at this point and say the lines that noble Lords have previously been given in response. I can give them again, but I think that noble Lords will appreciate that they will broadly stand where they did in the past. However, I am happy to engage directly with the noble Baroness and the noble Lord, Lord Cashman, on these matters going forward. I hope that that will give some comfort, if not contentment, on this matter.

I am always aware of what the noble and right reverend Lord, Lord Eames, brings to the debate. I think that he has captured the mood of the Committee as I do not doubt he has captured the mood of the entire island of Ireland in the past. His points are none the less correct. There is no doubt that the issues that we are facing now on Ireland will be the crux of the ongoing discussion. It is right that the noble Baroness, Lady Smith, should have raised these points again in her remarks. She is absolutely correct when she says that we have a responsibility to tell this House what we will be moving forward. We will fulfil that responsibility. It will not be in the withdrawal Bill per se. The purpose of the withdrawal Bill is to create a functional statute book for day one after Brexit. However, for each of the elements that has been raised, not least those that are sector-specific, we will come back to the House with clear statements, which all noble Lords will have the opportunity to address. I hope that we can make that point going forward as best we can.

I am aware that a number of other noble Lords have raised important issues, not least my noble friend Lord Cormack, the noble Lord, Lord Jay of Ewelme, and the noble Baroness, Lady O'Neill of Bengarve. This has been a wide-ranging debate. I hope that there will be some comfort in my words, but I appreciate that they may not be as comfortable as the Committee would like them to be. On that basis, I hope that the noble Lord will feel able to withdraw the amendment.

Lord Patten of Barnes: The Minister began his remarks last time by speaking from the heart. He spoke on that occasion without doing what I fear he did on this occasion, which was to deal as rapidly as possible with the "it says here" part of his brief. I commend the Brexit department for producing it, although I did not agree with the argument, which seemed to be more or less that if we accepted the amendment we would be treating Northern Ireland differently from the rest of the country. What does he think the Good Friday agreement is? The Good Friday agreement is about the fact that Northern Ireland unfortunately has been a casualty and a victim of our inability to share these islands peacefully together for centuries. I assure the Minister, whom I much admire, having seen him at the Dispatch Box being charming and on the last occasion reasonably convincing, though I think not on this occasion, that when we get to Report, Deo volente, if we are here, many of us will want to come back to this subject and, I hope, take it as far as a vote. I beg leave to withdraw the amendment.

Amendment 261 withdrawn.

Amendment 262 not moved.

Clause 10 agreed.

Amendment 263 not moved.

Schedule 2: Corresponding powers involving devolved authorities

Amendments 264 and 265 not moved.

House resumed.

2.30 pm

Sitting suspended.

Police: Undercover Officers

Question

3 pm

Asked by ***Baroness Jones of Moulsecoomb***

To ask Her Majesty's Government what communications they have had, over the last 30 years, with police forces regarding the tactic of undercover police officers forming sexual relationships to develop their cover stories.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, as part of its terms of reference the undercover policing inquiry is investigating the state of awareness of undercover police operations of Her Majesty's Government since 1968. The Home Office is a core participant in that inquiry and is in the process of making disclosure to the inquiry of material relevant to the terms of reference. The inquiry will report its findings once all the evidence has been reviewed.

Baroness Jones of Moulsecoomb (GP): I thank the noble Baroness for her response, which of course was not an answer to my Question. Is she aware that, over a period of 24 years from 1985 to 2009, almost every single year there was a state-sponsored sexual relationship between a police officer and a woman who at no point was accused of doing anything illegal—not arrested, not accused? I just do not understand how the Minister can think that this is all right. This strikes at the heart of the ethics and integrity of our police forces and our security services. I stress that the cases we know about are only the ones we have heard about: those are the only police names in the public realm. Until we know all the names of the undercover police we will not know how many victims there were. I am also concerned about the inquiry. The Minister may know that there was a walkout today by the whole legal team of the women involved and the women themselves. How will the Government restore the credibility of that inquiry?

Baroness Williams of Trafford: The noble Baroness says "state-sponsored". I refer her to the terms of reference of the inquiry, which state that it will,

"ascertain the state of awareness of undercover police operations in Her Majesty's Government".

That is precisely what the inquiry was set up to do. As for the walkout today, I have been made aware of that and I am aware that the hearings are still ongoing. I encourage all core participants—indeed, anyone impacted by undercover policing—to participate fully in the inquiry so that we can learn the lessons and get to the truth.

Lord Kennedy of Southwark (Lab Co-op): My Lords, will the Minister confirm that this is a very serious matter? Notwithstanding anything that comes out of the inquiry and the recommendations that follow, can she confirm that she is absolutely confident that robust procedures are now in place and that it can never happen again?

Baroness Williams of Trafford: My Lords, I would love to stand at the Dispatch Box and say that certain things could never happen again, but nobody can legislate for the odd rogue undertaking or the malicious intent of people. Therefore, one cannot be absolutely certain that it could never happen again. What one can do is put measures in place to ensure, as far as possible, that it never happens again.

Lord Mackenzie of Framwellgate (Non-Afl): My Lords, does the Minister agree that undercover policing is an essential tool in the fight against terrorism and crime and that, provided it is properly regulated and standards are adhered to, we should not judge the majority of very brave police officers who go undercover by the misdeeds of a few?

Baroness Williams of Trafford: I completely concur with the noble Lord. He is absolutely right; much crime has been unearthed by the use of undercover policing. As I say, there are now strict rules in place to prevent unacceptable behaviour going on and I could not agree more with him.

Baroness Burt of Solihull (LD): My Lords, we know that this inquiry has already taken three years, and it is expected that it will take another year before the victims get answers—campaigners walking out in protest today notwithstanding. We also know that the Special Demonstration Squad has been disbanded. But it would be naive to think that all embedded undercover work has ceased. What assurances can the Minister give that the culture, practice, instructions to and supervision of undercover officers have already changed to ensure that, as far as is humanly possible, no man or woman will ever be subjected to these practices again?

Baroness Williams of Trafford: The noble Baroness makes a very helpful point, because the policing *Code of Ethics* makes it clear that police officers should not use their professional position to,

"establish or pursue an improper sexual or emotional relationship with a person with whom you come into contact in the course of your work".

The Regulation of Investigatory Powers Act 2000 provides the legal framework for the lawful deployment of undercover officers as covert human intelligence sources. We also have the 2014 CHIS codes of practice.

In relation to the length of time that the inquiry has taken, the slight extension to that is purely due to the sheer number of pieces of information it has to look at.

Lord Faulks (Con): My Lords, I understand that the walkout from the inquiry was because of a sense that it was important that the individual police officers were identified by name. Will the Minister confirm that, by definition, undercover police officers have a cover name, and that, whatever the importance of getting to the bottom of what went on in this inquiry, it is important that they retain anonymity, because that is a pre-eminent part of what they do?

Baroness Williams of Trafford: My noble friend is absolutely right—of course, it protects the safety of those people as well.

Lord Soley (Lab): Will the Minister also confirm that this is not just a matter of rules and regulations? If it went on for so long, there must have been a serious management failure, because the relationship between a senior officer and the person doing the job is crucial in terms of keeping a check on their behaviour. That seems to me—as an outsider—not to have happened, and it is what we ought to focus on.

Baroness Williams of Trafford: I would not like to speak for the chair of the inquiry, but I am sure that some of the institutional failures that happened way back in the day will be looked at.

Lord Scriven (LD): My Lords, in the walkout today, the leading QC representing the victims said that it was due to the legal teams not being able to participate in a meaningful way. How have we got to a position where this has been going on for three years and cost £9 million but senior QCs feel they cannot participate in a meaningful way?

Baroness Williams of Trafford: My Lords, the people who walked out will have their reasons for walking out, but I know that the Home Secretary has full confidence in the chairman to carry out the inquiry in a way that gets to the truth of what happened.

Commonwealth Summit: Human Rights

Question

3.08 pm

Asked by ***Baroness Berridge***

To ask Her Majesty's Government what are their human rights priorities for the communiqué of the Commonwealth Summit in April 2018.

Baroness Berridge (Con): My Lords, I beg leave to ask the Question standing in my name on the Order Paper. In doing so, I draw attention to my interests as outlined in the register.

The Minister of State, Foreign and Commonwealth Office (Lord Ahmad of Wimbledon) (Con): My Lords, Commonwealth member states are meeting, as I speak, in London to negotiate the communiqué. While it would be inappropriate to comment on those negotiations or speculate on specific outcomes, the UK believes that the promotion and protection of human rights should be of central importance. Encouraging member states to uphold the values enshrined in the Commonwealth charter, which include democracy, freedom of expression, the rule of law, and opposition to all forms of discrimination, will be an important part of April's summit.

Baroness Berridge: My Lords, on 28 February of last year the Prime Minister stated:

"We must reaffirm our determination to stand up for the freedom of people of all religions to practice their beliefs in peace and safety. And I hope to take further measures as a government to support this".

That commitment, of course, is also outlined in the Commonwealth charter. While I am grateful for the Minister's Answer, could he please provide details on how the Prime Minister's commitment will be manifested in practical terms during the UK's period of chair-in-office of the Commonwealth?

Lord Ahmad of Wimbledon: First, I acknowledge the formidable work my noble friend does, along with other noble Lords across this House, in the area of freedom of religion and belief. It remains a key priority for Her Majesty's Government to focus on freedom of religion and belief in the context of the Commonwealth summit. During the summit week, various fora will be

held, including the Commonwealth People's Forum, where civil society groups will have an opportunity to directly raise issues, including freedom of religion and belief, and there will be an opportunity for Foreign Ministers and leaders to hear about the outcomes of those fora. The UK will be chair-in-office for two years. I assure my noble friend that we have received various bids and we will certainly be focusing on all elements of human rights, including—

Lord Chidgey (LD): My Lords—

Lord Anderson of Swansea (Lab): My Lords—

Lord Harries of Pentregarth (CB): My Lords—

Lord Ahmad of Wimbledon: If I may finish, including freedom of religion and belief.

Lord Harries of Pentregarth: I want to ask the Minister about two groups of people whose human rights are sadly violated. The first is LGBT people in many African countries, who are treated most shamefully, and the second is the Dalits and Adivasi or tribal peoples in India and other south Asian countries, who by every indicator are discriminated against most cruelly.

Lord Ahmad of Wimbledon: On the latter group, I totally agree with the noble and right reverend Lord. We continue to raise these issues in the context of the Commonwealth but also bilaterally where those groups are discriminated against. On LGBT rights, I assure noble Lords that the Prime Minister herself has committed to raising issues around LGBT rights during Commonwealth Week. As I have also made clear on a number of occasions, we continue to raise these issues, particularly with those nations across the Commonwealth which still criminalise homosexuality. We continue to raise this both in the context of the Commonwealth and bilaterally.

Lord Anderson of Swansea: Does the Minister agree that the Commonwealth has been strong on declaration —Harare and the charter—but less strong in practice? For example, of the 58 countries in the world where capital punishment is legal, 36 are in the Commonwealth. The recent report of Open Doors shows that, of those 50 countries in the world where it is difficult to be a Christian, seven are in the Commonwealth. Is this a priority of the Government?

Lord Ahmad of Wimbledon: I assure the noble Lord that, on all issues of human rights and opposing the death penalty, the Government remain very clear and firm, including in the context of Commonwealth visits. For example, most recently I visited the Gambia and raised LGBT rights and the death penalty directly with the appropriate Ministers. We will continue to do so. I agree with the noble Lord that declarations from the Commonwealth are always strong but the actions have perhaps not delivered on those declarations. Together, working with the Secretary-General, it is our aim to revitalise and re-energise the Commonwealth.

Lord Chidgey: My Lords, the Commonwealth Human Rights Initiative's latest report will be launched in London by the Secretary-General of the Commonwealth a week before the Commonwealth summit. The ambition is to make human rights, including modern slavery, a core concern of the summit by leading the international efforts to try to achieve this. I note the Minister has already pointed out that he cannot comment on the outcomes of the Committee of the Whole, currently meeting in London, but can he tell us whether he supports the work of the Human Rights Initiative and whether he will raise this issue with the Committee of the Whole to make sure that it does go forward into CHOGM?

Lord Ahmad of Wimbledon: On the first point, yes I am committed to that. On the Committee of the Whole, the UK's position, including on the broad spectrum of human rights, will be raised during the discussions, which, as I said, are taking place right now.

Lord Collins of Highbury (Lab): I welcome what the Minister said in relation to the fora, and the voices in the fora actually being heard by the leaders. But can we do more to ensure that voices on human rights are not simply the British Government's but that we work with other allies, particularly in Africa? For example, we will have the new President of South Africa—and I have raised this point with the Minister before—who wrote the constitution of South Africa, ensuring that LGBT rights were guaranteed in the constitution. Can we not do more to ensure that other voices are heard?

Lord Ahmad of Wimbledon: The noble Lord is of course quite right to remind me that he has raised this with me before. We have followed up on this, and I assure him that, although there is always more to do, we will continue to do so on LGBT rights, and more broadly across the human rights spectrum.

Lord Howell of Guildford (Con): My Lords, my noble friend Lady Berridge is quite right to focus on the promotion of human rights, as are the noble and right reverend Lord, Lord Harries, and the noble Lord, Lord Chidgey. But can we make sure that promotion is done more by example than by lecturing—let alone by hectoring—which does not achieve the results we want at all? My noble friend has played a leading part in this forthcoming summit, which is full of opportunities. Would he not agree that prosperity and security are the best gifts we can contribute to the gigantic Commonwealth system across the world? In return, they can contribute to our welfare and our finding a role in the world.

Lord Ahmad of Wimbledon: The noble Lord speaks from vast experience in this respect, and I agree with him. I would add that we can learn from the valuable experience of all 53 nations. The approach of Her Majesty's Government, and indeed mine as a Minister on human rights, has never been one of pointing fingers. It is about learning from experience. Our own journey on gender equality, LGBT rights and the

[Lord Ahmad of Wimbledon]
broader spectrum of human rights has been one where we have learned from example and through sharing experiences, whether we do it with other countries or countries do it with us. That is the value of the Commonwealth network.

Health: Medical Respite for Children

Question

3.16 pm

Asked by ***Baroness Brinton***

To ask Her Majesty's Government what guidance is provided to Clinical Commissioning Groups in exercising their duty to provide medical respite care for seriously ill and disabled children, following the High Court decision of 21 February.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, although there is no specific statutory duty on clinical commissioning groups to offer respite care, under provisions in the National Health Service Act 2006, CCGs must ensure that they secure health services to meet the needs of disabled children to a reasonable extent. Furthermore, the statutory framework introduced in the Children and Families Act 2014 requires CCGs and local authorities to work together to support all the needs of children with a special educational need or disability.

Baroness Brinton (LD): I thank the Minister for his Answer. Despite the High Court judgment in the case being brought by the amazing Nascot Lawn parents, which made it absolutely clear that the very disabled children involved are entitled to individualised NHS support, it has now emerged that the Herts Valleys CCG's so-called assessment for each case was a five-minute pre-assessment box-ticking and that the child was not even present. The CCG is still trying to dictate its contribution to the county for the care and is not consulting the families. Can the Minister explain what steps the Government and NHS England can take to ensure that Herts Valleys CCG makes appropriate provision for each of these children, when it appears it remains determined not to?

Lord O'Shaughnessy: I congratulate the noble Baroness on her tenacity in raising the issue and thank her for giving me the opportunity to meet parents whose children use these services. First, it is incredibly important to be clear that there are rules for how the consultations that the judicial review said should be held should take place, and they must be abided by. More importantly, as I have just set out, there are legal obligations under the 2014 Act for joint commissioning between the CCG and the local authority. That is not one telling the other what to do; it is joint commissioning. Most important of all—the point that the noble Baroness makes—is that whenever these bodies are planning for the future, they have to keep the needs of the children in mind. That is what we, whether it is NHS England or the department, are imploring them to do through this process. Indeed, they are obliged to do that.

Baroness Royall of Blaisdon (Lab): My Lords, legal obligations are all fine, and of course the Government and everybody else have to comply with them, but unless there is adequate funding for local authorities, health services and commissioning groups, it is impossible for these authorities to comply with the legislation. What are the Government going to do to ensure that enough money is available to provide respite care for these children?

Lord O'Shaughnessy: The noble Baroness makes an important point. That is the reason we are providing more funding, both through social care budgets and through the NHS itself. More money was found at the Budget as well, but I do not think in this case the issue is necessarily funding. It is a case of the parties involved working together, as they are obliged to do, to find the right outcome and the right solution for these children.

Lord Blair of Boughton (CB): My Lords, I join the noble Baroness, Lady Brinton, in this case and declare my interest as the chair of Helen & Douglas House in Oxford, which was the first children's hospice in the world. It covers a vast area of the Thames Valley and provides end-of-life care and respite care for children with life-limiting diseases, but the Oxfordshire CCG has completely refused to supply any funds to it. Would the Minister meet with me to discuss that situation?

Lord O'Shaughnessy: Yes, I would be happy to do so. I am disturbed by the picture that the noble Lord has painted. He will know, I am sure, that the Government have set out our commitment to end the variation in end-of-life care, and of course this is a co-commissioned service. I would be very pleased to meet him to investigate that.

Baroness Hollins (CB): My Lords, what measures are being taken by the NHS to check that CCGs have the range of specialist expertise available to be able to make assessments individual by individual? These children's needs are complex. From my experience, often the assessors may be expert in one area but not necessarily that of the case they are assessing.

Lord O'Shaughnessy: The noble Baroness is quite right. Many of the children we are talking about are receiving continuing care to meet all their needs, and delivering that is very complex. A national framework for continuing care is being revised at the moment, and it will provide the picture for the skills mix that is needed at local level to ensure that these children are properly served.

Baroness Wheeler (Lab): My Lords, my question is on the specific issue of parent carers, for whom funded respite care is vital to both themselves and the children they care for. The Minister mentioned the continuing healthcare framework guidance coming into force in October, which makes clear CCGs' responsibilities to fund respite care for parent carers and breaks for families of severely disabled children. The High Court judgment clarifies the law and makes this duty clear now. What action have the Government taken to ensure that CCGs act on the Nascot Lawn judgment now?

Lord O'Shaughnessy: The noble Baroness is quite right. Local authorities and CCGs have a number of responsibilities. We are applying pressure and making clear to all bodies that they have those responsibilities. We have of course provided funding through local authorities and CCGs for that to happen, and we expect it to.

Lord Foulkes of Cumnock (Lab): My Lords, further to the question from my noble friend Lady Royall, I have great respect for the Minister but how can we believe what he says about enough money being available when health authority after health authority throughout the country says that not enough money is available and some of them are forecasting deficits? Who is right, the Minister or those who are running our health service?

Lord O'Shaughnessy: I do not deny for a minute that the health sector is under pressure—I have never once pretended that that is not the case. There is growing demand in all areas, whether that is children, adults or older people. We have provided more funding year on year during a difficult time of fiscal retrenchment, and indeed the Budget provided more money. Of course there is more to do, but I think that what I have said shows our commitment to funding the NHS as much as we can.

Gender Equality: Pay

Question

3.22 pm

Asked by ***Lord Dubs***

To ask Her Majesty's Government what further action they intend to take to reduce gender inequality in pay.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, the Prime Minister has made clear that tackling injustices such as the gender pay gap is part of building a country that works for everyone. In 2017 the Government introduced ground-breaking regulations requiring large employers to publish the differences between what they pay their male and female staff in average salaries and bonuses. Greater transparency will help to identify barriers to achieving gender equality in the workplace so that employers can take action to address them.

Lord Dubs (Lab): I welcome the Minister's reference to greater transparency. Is it not time to be bold on this issue? If we are really going to tackle such inequalities as the gender pay gap, should we not do what is done in some Scandinavian countries and put all income tax returns into the public domain?

Baroness Williams of Trafford: My Lords, certainly Norway has done this. The unintended consequence of doing so was that it was seen as a snooper's charter, a way for people to snoop into the information of people that they did not like. I think publishing the gender pay gap will give employees a greater sense of the company that they are going to work for and whether there is gender equality across pay, as opposed to a huge database that cannot have the granular detail that the gender pay gap reporting will have but can perhaps be used with other intent from how it was designed.

Baroness Hussein-Ece (LD): My Lords, transparency is of course very important, and the reporting of gender pay gaps by organisations and companies is going to be valuable. However, what comes after that? Once we know the disparity between pay in these organisations, when can we expect the gender pay gap to be closed, and when can women expect to reach pay parity with men once we know what the problem is?

Baroness Williams of Trafford: The noble Baroness asks an interesting question about what comes next. What will come next is that this will shine a light on which companies take their gender pay obligations seriously and which simply do not. If I were a graduate going to a company with a huge gender pay gap, I would start to think about what that company would mean for me as a woman. I think it will draw into sharp focus those companies that take their obligations seriously and shame those companies and public sector organisations that do not.

Baroness McIntosh of Pickering (Con): Will my noble friend undertake to look into the position at the BBC, where sick pay and maternity leave are being eradicated by the move to freelance contracts? Is that right? Surely employers should not be able to sidestep their employer obligations in such a radical fashion.

Baroness Williams of Trafford: I think what my noble friend refers to with sick pay—I am going slightly beyond my brief here—is the practice whereby people are not employees but freelance, more often than not, for companies. Given the press reporting that there has been on this, I am sure that this issue will be drawn into sharp focus.

Lord Kennedy of Southwark (Lab Co-op): My Lords, what does the noble Baroness think needs to be done on legislation on other matters to deal with this issue? The Equal Pay Act came on to the statute book 47 years ago. The gender pay gap is 14.1% and there is little evidence to suggest that it will close. I note what she said about shining some light on these issues, but I am conscious that with the statements under the Modern Slavery Act, many companies had a light shone on their activities but have done very little about the issue.

Baroness Williams of Trafford: My Lords, the full-time gender pay gap is 9.1%; I would like it to be nought. The noble Lord talks about the Equal Pay Act. Yes, it has been on the statute book for decades now—47 years. I recall as leader of a council that many councils at the time had to sort out the issue of women doing the same jobs for less money than men. I think most local authorities have got to grips with that and, as I say, I look forward to the day when the gender pay gap is nought.

Lord Brooke of Alverthorpe (Lab): My Lords, where does the Minister suggest that we look for the next steps and action to be taken in those areas where equal pay still does not exist? Returning to our backyard, the public service—she just mentioned local government—is it not true that there are still significant elements of unequal pay within the Civil Service, the public service and local government? This is an area where we have control. What do the Government intend to do there?

Baroness Williams of Trafford: I am almost certain that most local authorities will have settled equal pay claims with their employees—mine certainly did. On what more is there to do on equal pay, if women think that they are not being paid the same as men for the same job, they are perfectly entitled to—and should—bring claims forward.

The Countess of Mar (CB): My Lords, when I joined the Civil Service in 1959 as a clerical officer, we had equal pay, and I was horrified to read that this no longer persists in Whitehall. Can the Minister explain why, given that the Act came in in 1970, Her Majesty's Government and previous Governments have not done something about it?

Baroness Williams of Trafford: As I explained, Her Majesty's Government have done something about it and encourage people who feel that they have equal pay claims to come forward. That certainly happens at local authority level, and in the Civil Service, we are looking closely at and continue to monitor people whose pay is not equal across the sexes.

Baroness Manzoor (Con): My Lords, there are regional variations in gender pay, with London women in particular earning about £15,000 less than men. What action will the Government take once the audit is issued in April to ensure that those variations are reduced?

Baroness Williams of Trafford: My Lords, we are encouraged by the number of companies that have so far registered for gender pay gap data: 90% in the public sector and 70% in the private sector. There are remedies if companies have not complied. If London is seen to have a particular problem then that will be thrown into focus when the figures are published.

Lord Laming (CB): My Lords, does the Minister agree that the issue is not so much about the difference at the individual job level as about the fact that, relatively speaking, so few women get to senior positions in those organisations? That is where we need to put the main emphasis, to help women to be confident enough, and to be mentored and supported to get into the most senior positions in those organisations.

Baroness Williams of Trafford: I totally agree with the noble Lord, which is why the Government—through Women on Boards, moved by the noble Lord, Lord Davies of Abersoch—have managed to increase the proportion of women on boards of the FTSE 100 from just over 10%, which was pitiful, to 28% now. I am pleased to report that there are no FTSE 100 boards without female representation. Of course, we have much further to go. We need BME representation on boards, and women need to see role models that encourage them to go for jobs for which they are capable and to get to the top if they can.

Northern Ireland Budget (Anticipation and Adjustments) Bill

First Reading

3.31 pm

The Bill was brought from the Commons, read a first time and ordered to be printed.

European Union (Withdrawal) Bill

Committee (9th Day) (Continued)

3.31 pm

Amendment 266

Moved by ***Lord Hope of Craighead***

266: Schedule 2, page 17, line 32, at end insert—

"( ) Sub-paragraph (4)(b) does not apply to regulations made under this Part by the Scottish Ministers or by the Welsh Ministers with regard to matters that are within their devolved competence."

Lord Hope of Craighead (CB): My Lords, Amendment 266, which is in my name, is in a series of groups dealing with devolution. It is in the first of five groups dealing with rather technical points arising out of Schedules 2 and 8. They precede a lot of government amendments which are in the group following my groups. I suggest that the main discussion about devolution and its consequences is best reserved for the government amendments which are focused on Clause 11 and other clauses. I am afraid my groups are rather boring, because I am dealing with a whole series of little technical points which need adjustment to some extent in the light of progress that is being made in discussions with the devolved authorities, among other points.

The theme that runs through all my amendments is the need to respect the devolution settlements in Scotland and Wales. I am confident that the Government share that sentiment. It is all a question of how the matter is worked out in points of detail. The basic rule following our withdrawal from the EU, I suggest, is that returned EU competencies in the devolved areas should be distributed among the devolved authorities in accordance with the devolution statutes. That means that what falls within devolved competence should be treated as devolved, with all that that means, and what falls within reserved matters should be treated as reserved, with all that that means.

The statutes that form the foundation for the devolution settlements—the Scotland Act 1998 and Government of Wales Acts, the latest of which was in 2017—were all built on the foundation of our membership of the EU. In each of these statutes, it was taken as accepted

that it would not be within the competence of the devolved Administrations to legislate on matters relating to EU law or indeed to take executive action in relation to these matters either.

What we have in the Bill, in place of EU law, is a new creature called "retained" EU law, which is the law that comes back to us either because it is already present in the United Kingdom or is direct EU law that is coming back to us and is not yet built into our laws but requires being built in using the mechanisms described in the Bill. In the original drafting of the Bill, retained EU law is treated as simply a mirror image of EU law, so that in that original drafting—which can be seen in Clauses 11(1) and (2)—the same restriction on competence which applied in relation to EU law is applied to retained EU law. I am delighted to see that, in developing their thinking on this matter, the Government recognise that this really is not acceptable within the devolved arrangements. A much more nuanced approach to that topic can be seen in the government amendments that we will come to later this afternoon.

What I seek to do in the preliminary groups is to draw attention to various other passages in the Bill that need to be corrected in order to be compatible with the devolution settlements. In some of the groups—but not in the first—it is already clear from the government amendments that they are in almost the same position as I am as to what needs to be done.

I turn to Amendment 266, in the first of these groups, and also mention amendments 278 and 292, which raise exactly the same point in relation to different parts of the Bill. Amendment 266 deals with the power to deal by regulation with deficiencies arising from the withdrawal from the EU, which is the subject of Clause 7. It appears in Part 1 of Schedule 2 in the form that is appropriate for the activities of the devolved institutions in carrying out the exercise to which Clause 7 refers.

Amendment 278 deals with the power by regulation to prevent breaches of international obligations, which is the subject of Clause 8. The devolution mechanism for this is dealt with in paragraph 13 of Schedule 2. Amendment 292 relates to the power by regulation to implement the withdrawal agreement and the mechanism for the devolved Administrations is set out in paragraph 21 of Schedule 2.

The point to which these three amendments draw attention is a qualification that is to be found in each of these contexts on the power of the devolved authority to make provision by regulations regarding these three matters. The particular provision that I am concerned about is found in paragraph 1(4) of Schedule 2:

> "Regulations under this Part, so far as made by a devolved authority … (b) may not confer a power to legislate (other than a power to make rules of procedure for a court or tribunal)".

At first sight that qualification cuts across the concept of devolution, the effect of which is that if a matter is within devolved competence, it is for the devolved authority to take its own decisions as to how to deal with that matter, in whatever way it regards as appropriate. Under the devolution statutes, the qualification that we find in this provision and its equivalents in paragraphs 13 and 21 is new: in my experience it has not been encountered before. To an extent, therefore, these three amendments are probing, to enable the Minister to explain why this qualification has been inserted in these paragraphs and, if no reasonable explanation is given, to suggest to her that maybe the qualification should be removed, on the ground that when it comes to exercising powers within the devolved area, it should not be there.

It is right to add that Part 1 of Schedule 2, for perfectly understandable reasons, contains qualifications. For example, paragraph 2 states that:

> "No regulations may be made under this Part by a devolved authority unless every provision of them is within the devolved competence of the devolved authority".

That is a perfectly sensible provision, and consistent with the devolution scheme. What troubles me is why the qualification that I have mentioned should be there. My question is: should it be there at all? And if it should not be there, should it not be taken out? I beg to move.

Lord Wallace of Tankerness (LD): My Lords, the Committee is indebted to the noble and learned Lord, Lord Hope of Craighead, for his detailed analysis of the Bill as it originally stood, and the points arising. My name is on the amendment, but I would be happy to deal with the important issues of principle that prompted me to sign some of these amendments, in an attempt to honour the spirit of the original devolution settlement, when we deal with the group containing the government amendments. Obviously, however, I support the amendment that the noble and learned Lord has moved.

Lord Wigley (PC): My Lords, I too support the noble and learned Lord's amendment, and I entirely agree with his approach—that it is best to focus on a couple of larger debates rather than going through all the minutiae at this point. However, it is important to underline the principle—that matters coming back from Brussels that deal with devolved subjects should go to the devolved authorities. It is on that principle that I hope we shall concentrate as we move forward.

Baroness Finlay of Llandaff (CB): My Lords, I too thank my noble and learned friend Lord Hope of Craighead for introducing this set of amendments, to which I have added my name, so concisely and well. I start the afternoon by placing on record my thanks to Ministers, especially the noble Lord, Lord Bourne of Aberystwyth, and the Secretary of State for Wales, who have been trying to keep us—certainly me—up to date in relation to Wales. I have had correspondence during the morning. I hope that the spirit of the debate today will recognise the importance of the devolved competences, and the need to respect them and find a way forwards. Like others, I will reserve my main remarks for later, in the larger debates.

Lord Morris of Aberavon (Lab): My Lords, I too support the noble and learned Lord, Lord Hope, and I too will reserve my remarks until we come to the government amendments. This is new ground; it needs an explanation, and unless the explanation is reasonable I will certainly oppose the provision.

Baroness Hayter of Kentish Town (Lab): My Lords, this debate will be an easy one for the Minister to respond to. I entirely agree with what has been said, and all I want to add is that although these are technical changes, they need to be dealt with in the spirit that we shall move on to later. Our worry, particularly at the beginning, was that it took some time for the Government to recognise that the expectation that not everything retained was devolved was a legitimate one from the devolved Administrations. Perhaps now there is that willingness to engage. We may regret that it took a little time but we seem to have got there. Perhaps one of the issues was that the Joint Ministerial Committee has not worked in the way we might have expected in the past. Brexit showed that up in a sense, but this is bigger than a Brexit issue. Therefore, any changes to the status of that body are probably not for this Bill to deal with. However, I hope that at some point the Government can revisit whether it needs to be given either statutory authority or some greater authority in the future. Although these amendments may be technical in the words of the noble and learned Lord, Lord Hope, with his, as ever, diplomatic use of the phrase, "They need adjustments", I think he means that we want the Government to move on them. I hope the spirit that I think is now abroad will enable us to do that.

3.45 pm

Lord Thomas of Gresford (LD): My Lords, I do not agree that these are simply technical amendments. The issues arise from Clause 7, headed, "Dealing with deficiencies arising from withdrawal", which gives a Minister of the Crown power to,

"make such provision as the Minister considers appropriate to prevent, remedy or mitigate",

deficiencies. Clause 8 of the Bill that we have discussed at such length deals with a Minister of the Crown making regulations as he considers appropriate,

"to prevent or remedy any breach, arising from the withdrawal of the United Kingdom … of the international obligations of the United Kingdom".

Clause 9 is headed, "Implementing the withdrawal agreement", and similar powers are given to a Minister of the Crown. Schedule 2 is headed, "Corresponding powers involving devolved authorities". Part 1 of that schedule deals with deficiencies and Part 2 with international obligations. Part 3 is headed, "Implementing the withdrawal agreement". One would have expected corresponding powers for Welsh Ministers and Scottish Ministers in those areas within their own competences, but each of those parts of Schedule 2 says that regulations may not,

"confer a power to legislate".

Therefore, unlike the powers granted to a Minister of the Crown in the UK Parliament, the powers to legislate are withheld from Ministers in the devolved Assemblies. That is the critical issue, which is a matter of principle and not at all technical.

Lord Hennessy of Nympsfield (CB): My Lords, I regret that I was unable to speak at Second Reading. I promise that I shall not make up for it this afternoon; I shall be very brief.

With the clauses before us this afternoon and evening, we have reached a truly load-bearing piece of the Bill. In my more anxious moments I sometimes think that the very weight of the kingdom is resting upon it, and that, if it is misjudged, the chances of the union eventually crumbling would be worryingly greater.

I do not doubt the Government's good faith in the negotiations within the Joint Ministerial Committees but, as other noble Lords have already mentioned, the devolutionary spirit of 1998 needs to suffuse the discussions in those committees' deliberations, and, indeed, ours in both Houses of Parliament.

If the European question infects and envenoms the union question, the country will suffer a self-inflicted blow of immense proportions. Of course, there is a need to retain an effective internal market within the UK. That is absolutely crucial, but the sustenance of the union—the essential quiddity of our nation—is paramount, which is why I express my wholehearted support for the thrust of the amendments in the name of my noble and learned friend Lord Hope of Craighead.

Baroness Goldie (Con): My Lords, first, I both echo and reaffirm what the noble and learned Lord, Lord Hope, said: there must be respect for the devolved Administrations. I emphasise that as emphatically and cogently as I can at this Dispatch Box, and I confirm that the Government are wholly committed to demonstrating that respect.

As a number of your Lordships observed, the Government have tabled amendments to Clause 11, and we will give them our full consideration shortly. We have to acknowledge that the position we ultimately reach on Clause 11 will have implications for related policy on devolution in the Bill. Indeed, the noble and learned Lord, Lord Hope, acknowledged that. I can reassure your Lordships that we are mindful of the need to revisit the approach we have taken for the Schedule 2 powers in the light of that forthcoming debate on Clause 11. I therefore thank the noble and learned Lord Hope for instigating this debate on whether the devolved Ministers should be permitted to sub-delegate their Schedule 2 powers.

Amendments 266 and 278 would remove this restriction from the correcting power and the international obligations power for Scottish and Welsh Ministers and for Northern Ireland departments. Amendment 292 relates to the withdrawal agreement power and would have a wider effect, but I understand that the intention is the same. I should be clear that we do not oppose in principle the idea that these powers should be able to be sub-delegated to and by devolved authorities where appropriate cause is shown. This is already evident in the Bill. Noble Lords will see that this restriction—for instance, in paragraph 1(4)(b) of Schedule 2—is already qualified to allow for the sub-delegation of a power to make rules of procedure for a court or a tribunal. This ensures that the power can be sub-delegated where appropriate to ensure judicial independence. We have invited the devolved Administrations to offer any examples of where sub-delegation would be needed, and we have made clear that where they identify such examples we shall consider drawing further exceptions to the restriction. So far, no examples have been given.

It has been our intention—this may surprise the Chamber—not to make the powers in this Bill any wider than is appropriate. Opening up the possibility of sub-delegation by devolved Ministers in all cases where no prior need has been demonstrated does not align with this intention. However, I have listened to the contributions made this afternoon and have heard the concerns that your Lordships have expressed today. I have taken particular note of the question of respect as it relates to the perceived unfairness of a possible disparity between the devolved ministerial powers and the corresponding powers for UK Ministers.

Lord Thomas of Gresford: I do not understand the expression "sub-delegation" that the Minister uses. Does she suggest that when powers are given to Ministers in the devolved Administrations, that is "sub-delegating"? I do not think that is the appropriate term.

Baroness Goldie: It is merely a generic description of the power to exercise delegated power-making by regulation, as encompassed by these provisions in the Bill.

I reiterate that I accept that these are serious points. They deserve serious consideration, and I can confirm that the Government are prepared to look again at where such a change may be merited for the use of the powers by the devolved Administrations in this way.

Lord Morris of Aberavon: May I pursue the intervention made by the noble Lord, Lord Thomas? "Delegated" is not an appropriate term here; they are devolved powers, not delegated powers.

Baroness Goldie: I accept the distinction drawn by the noble and learned Lord. I am trying to address the amendments of the noble and learned Lord, Lord Hope, in the context of what the provisions do and his concern that they appear to cut off what he considers an entitlement of the devolved Administrations. I have tried to explain why, inevitably, these aspects are interlinked with the wider debate we will have on Clause 11.

The Government are prepared to listen to what has been said. I have indicated that we are prepared to look again at these provisions. I thank the noble and learned Lord for bringing forward his amendment, but in the circumstances I urge him to withdraw it.

Lord Hope of Craighead: My Lords, I am grateful to the Minister for her remarks. The use of the expression "sub-delegation" gives some insight into the thinking of the Government. As was pointed out, "delegation" is not an appropriate word to use where matters have already been devolved—by the statutes to which I referred earlier—to both Wales and Scotland. "Sub-delegation" is a very odd word to use. We are talking about a power within the devolved competencies for the devolved authorities to legislate, or confer a power to legislate, by whatever means they think appropriate. So I am encouraged by the fact that the Minister is prepared to look at this again. I think that she will agree with me that much of what we will be discussing in this little group of amendments is work in progress, as we try to work through the detail of the scheme that the Bill sets out. I am encouraged by her reply.

I also thank all those who have contributed to this brief debate. On the word "adjustment", I refer to what the noble Baroness, Lady Hayter, was saying. The Minister will remember, from her early days in the law in Scotland, that the word "adjustment" is sometimes used to take things out as well as to put things in. It is a word that came naturally to me as a means of dealing with bits in the statute that require to be trimmed, perhaps by removal, as well as by refining the language. I am grateful to the noble Lords, Lord Thomas of Gresford and Lord Hennessy of Nympsfield, for their emphasis that we are dealing with matters of great significance and importance. When I said that these were just technical points, I did not mean to suggest otherwise; rather, I was suggesting that the main thrust of our argument will be reserved for when we come to look at the Government's amendments.

Lastly, on the contribution of the noble Baroness, Lady Finlay of Llandaff, I join in her tribute to the efforts that the noble Lord, Lord Bourne, is making to discuss matters with us and to reach as much common ground as possible. I, too, have had useful meetings with him and I am grateful to him and to his team for the attention they have given to the points I have been raising. As I have said, this is work in progress; I am encouraged by what the Minister said and, in the light of that, I beg leave to withdraw my amendment.

Amendment 266 withdrawn.

Amendment 267 had been withdrawn from the Marshalled List.

Amendment 268

Moved by ***Lord Hope of Craighead***

268: Schedule 2, page 18, line 39, at end insert—

"( ) This paragraph does not apply to regulations made under this Part by the Scottish Ministers or by the Welsh Ministers with regard to matters that are within their devolved competence."

Lord Hope of Craighead: My Lords, this is the first of another group of amendments, all of which are in my name. Amendment 268 refers to a provision in paragraph 4 of Part 1 of the schedule, which states that no regulations made under that part by a devolved authority prevent it from conferring functions that correspond to functions under EU tertiary legislation. Amendment 296 relates to the same restriction which we find in paragraph 24. Amendments 280 and 294 deal with another restriction—that no regulations may be made under that part by a devolved authority which modify any retained direct EU legislation or anything which is retained law by virtue of Clause 4.

These are rather complicated matters to explain, but they are all examples of restrictions on the power of the devolved authorities to do what they are supposed to do under Part 1 of the schedule in the two respects mentioned in these passages. The whole point is the same one I mentioned before in regard to the previous group—that these are restrictions on actions which otherwise would be taken within devolved competence.

[Lord Hope of Craighead]
The fact that there are restrictions at all is contrary to the philosophy on which the devolution system has been based. It is a given—as we have seen already in the passage I read out earlier—that, if the powers are exercised, they can be exercised only within the devolved area. There is no question of their moving into the reserved areas as that is not within their competence; if the matter is within their competence, the argument is that they should not be inhibited from doing what they consider to be right.

Tertiary legislation is an animal that has not been referred to much in our debates in this Committee. A fairly lengthy definition of it is to be found on page 10 of the Bill, but it is not obvious to me why the devolved authorities should not be able to deal with tertiary EU legislation in the same way as any other EU retained legislation. So, with that rather brief introduction, directed particularly to Amendment 268, I beg to move.

4 pm

Baroness Finlay of Llandaff: My Lords, again I am grateful to my noble and learned friend for the way in which he has introduced this group of amendments. It is absolutely essential that we remember the principles of legislative competence and what has been devolved, and that we try to cut across the technicalities. It is also important to remember that the devolved Governments of Scotland and Wales should not be faced with any implementation framework in which they will have no decision-making power in negotiations and which intrudes on their area of competence.

Our withdrawal from the EU seems to be quite a tangled web. The job of those sitting in Cardiff and Edinburgh is to serve their constituents and defend the rights that they fought so hard to earn in the first place; it is not to return such rights in legislation to Westminster without being sure that it serves their populations well. That is why it becomes so important to make sure that there is an equality of voice in working out these different aspects of legislation.

When it comes to tertiary legislation, it is even more difficult to understand why there would not be such an equality of voice—I find that quite bizarre. I am afraid that, as the noble Baroness, Lady Hayter, said, the way that the Joint Ministerial Committee has worked to date has not been as good as it might have been, and I hope that today will mark a watershed and a complete change in those relationships.

It is important to remember that EU law was in place when we went to devolution. Therefore, as things come down from Europe, they should drop equally into the three Governments of Wales, Scotland and England, and, where they affect the whole of the UK, they should be looked at on a UK-wide basis. However, that does not mean that all of a sudden Parliament has a complete say over what goes on in the devolved Administrations. There is an equality of voice that must not be eroded by the process.

Therefore, these amendments are really important and I am glad that the Minister said that she will look at them carefully. It is very difficult to know which bit we should look at in great detail and tweak—although it will be more than tweaking; it will probably need a massive rewrite. It is not for the Committee to do that; it should simply raise the concerns, with the rewriting to be done afterwards. We will come to the main debate soon.

Lord McConnell of Glenscorrodale (Lab): My Lords, I want to reinforce the important points made by the noble and learned Lord, Lord Hope, and the noble Baroness, Lady Finlay. I have spoken before in your Lordships' Chamber about the importance of clarity in the devolution settlement and the difference that it has made to the relationships between the Scottish Government, the Scottish Parliament, the UK Government and the UK Parliament over these last 19 years. The lack of serious or unresolvable dispute about where the legal powers lie has been the result of that initial clarity in 1998.

The one area where there were problems, particularly in the early years, related to the fact that the Scottish Parliament and the Scottish Government had responsibility under the Scotland Act in relation to EU law. The difficulties and legal challenges, both inside Scotland and to the European Court in relation to the actions of the Scottish Executive, the Scottish Government and the Scottish Parliament, were in relation to that relationship.

Therefore, clarity is required as part of the debate and discussion on the Bill—perhaps not today, given the assurances from the noble Baroness, Lady Goldie, on the Government's behalf, but certainly following the debate on Clause 11. It is vital that we have greater clarity and the right principles behind whatever replaces the current wording in the Bill on the matters raised by the noble and learned Lord, Lord Hope.

Lord Thomas of Gresford: Your Lordships should appreciate that the devolved Administrations can make law but have been constrained by EU law in the areas of their competencies. If EU law is taken away, we would expect the devolved Administrations to carry on without that constraint. Previously, there had been no constraint on their making law within their competencies from Westminster, only from Brussels. Taking away Brussels suddenly imposes Westminster constraints on the devolved Administrations in areas such as agriculture, which have been devolved to them, but it also means that the devolved Administrations cannot make any changes to the law at all—even when it is, for example, an agricultural matter. It is not simply taking away the constraint of Brussels, but imposing something entirely new. Westminster politics comes into it then; considerations that have not emerged into the arena before suddenly become important. That is why these are matters of principle and deeply difficult to resolve.

I was so pleased to hear the noble Lord, Lord Hennessey, say that this was such a difficult area because I suggested in my Second Reading speech that we should have taken devolution completely out of the Bill. At that point, the Government would have had no problem in getting legislative consent from Scotland and Wales and could have sorted out devolution issues as a completely separate matter. Now, your Lordships are listening—in the context of the EU withdrawal Bill—to a very difficult issue.

Baroness Randerson (LD): My Lords, I want to add to what my noble friend just said by making reference to the politics of all this. The reality is that powers that came from Europe were seen as politically very neutral, in a party-political sense; but once those powers and restraints are placed with Westminster, raw party politics immediately become a key issue. The tension therefore increases. The Minister will be aware of this from her own experience. Whereas a power that was passed from or constrained by Europe is seen on a pan-European basis—where party politics could not possibly be applied in a local sense—when it becomes a decision by Westminster, party politics are inevitably written into it, whether in favour or against. I am sure the Minister will understand the point I am making from the Scottish experience; it certainly applies to my Welsh experience.

Baroness Goldie: My Lords, I thank the noble and learned Lord, Lord Hope, for tabling these amendments. They would have a significant effect because they seek to remove the restrictions on the ability of these powers to modify direct retained EU legislation and to confer functions that correspond to the making of what is termed EU tertiary legislation. I am grateful for the thoughtful and considered contributions that have emanated from a wide range of experience, not least of the devolved Administrations. As noble Lords have noted in their speeches, this issue is again closely tied to the final policy position on Clause 11.

These amendments concern the question of parity, as the noble Baroness, Lady Randerson, has just pointed out, between Ministers in the devolved Administrations and UK Ministers. They also address the matter of who should be responsible for fixing EU legislation in areas that intersect with areas of devolved competence which currently have uniform application across the UK. I apologise again for emphasising the point, but we need to consider how all of this will work in relation to the wider changes we have tabled in Clause 11. It is important to recognise that the answer we reach on that question in the subsequent debate will necessarily inform the answer to the questions posed in this one.

The Government have been clear that the powers are conferred on the devolved Administrations so as to ensure that we do not disrupt the common frameworks currently provided for by EU law in areas where a framework will need to be retained. That might be to protect our internal UK market, our common resources or any of the other criteria that we have agreed with the devolved Administrations and published in the Joint Ministerial Committee communiqué in October last year. These are laws that apply directly, exactly as written, across every part of the UK, and indeed at the moment across every part of every member state. As such, these are by their nature laws that the devolved institutions currently have no power to modify or to diverge from. As we consider where we shall and shall not need frameworks, it is clear that in many of these areas, competence will pass to the devolved Administrations on exit day.

However, I would suggest to noble Lords that before we get to that point, we have to ensure that these laws function properly. We owe that to our communities and businesses and to individuals—that there can be certainty as to the laws that will apply to all those groups on the day we leave the EU. Carving up the effect of these laws in different parts of the UK or expecting to have different laws to achieve the same effect for different parts of the UK might undermine that certainty. It is the Government's view that where in the first instance these laws apply at the UK level, we should also consider the corrections to those laws at the UK level. But let there be no doubt that the devolved Administrations will be an integral part of this process. We shall consult them on any and every change to retained direct EU legislation in an otherwise devolved area made under the powers in this Bill. We shall need to reflect on this alongside the debate on Clause 11.

Whatever the outcome in relation to devolved competence more widely after exit day, at a minimum we must retain this limit in those areas where, working with the devolved Administrations, we have identified that we need to retain a framework. Otherwise, we put at risk some of the issues to which I have referred, such as the internal market, the management of our common resources and even our ability to strike the best possible trade deals.

I hope that this provides some reassurance to the noble and learned Lord, Lord Hope, that we are alive to the interaction of this policy with Clause 11. We are considering it in parallel as our discussions continue with the devolved Administrations. The end result must be that both Clauses 10 and 11 dovetail and that they are not in conflict. On that basis, I commit to continuing to keep the noble and learned Lord and this House up to speed on how our policy thinking is developing in these areas. In those circumstances, I would ask him to withdraw his amendment.

4.15 pm

Lord Hope of Craighead: My Lords, I am grateful to the Minister for her very helpful reply. Perhaps this is an example of another kind of adjustment—to return to the noble Baroness, Lady Hayter, picking up my use of that word. Rather than taking out or adding in, it is a case of refinement. I appreciate exactly what the noble Baroness meant in her reference to frameworks. In regard to tertiary legislation, it might be that a slightly less blanket provision could be used; that is, replacing the blanket restriction on competence with something more targeted to the particular needs to create and preserve the internal market that we are all looking forward to within the UK. What I take from what the Minister has said is that she will look carefully at this and consider to what extent she can come back on Report with something which meets the points that I have been making.

The noble Lords, Lord Thomas and Lord McConnell, referred to the reasoning behind the reference to EU law in the original statutes. EU law shared something in common with rights under the European Convention on Human Rights. In both cases, when the Scotland Act was being designed, it was appreciated that the obligations which gave rise to convention rights and rights and obligations under EU law were based on treaties. So far as those treaties were concerned, in the framing of the Scotland Act and the Wales Act it was thought necessary to preserve the obligations that the

[Lord Hope of Craighead]
United Kingdom had under the treaties and make sure that they were protected in the way that we found in the statute as originally framed; in other words, there was no competence to deal with matters which were the subject of those important treaties. The point made by the noble Lord, Lord Thomas, was that once we leave the EU, that treaty fetter disappears completely; what we have is retained EU law, which is a completely different creature from EU law as we know it today. That is why it is important to appreciate that retained EU law is not a mirror image of EU law, although the subject matter and the detail are no doubt exactly the same.

I shall come back to that in the next group of amendments, to which I shall speak in a moment, because they raise the same issue. For the time being, I beg leave to withdraw the amendment.

Amendment 268 withdrawn.

Amendment 269 had been withdrawn from the Marshalled List.

Amendment 270 not moved.

Amendment 271 had been withdrawn from the Marshalled List.

Amendment 272 not moved.

Amendment 273 had been withdrawn from the Marshalled List.

Amendment 274

Moved by ***Lord Hope of Craighead***

274: Schedule 2, page 21, line 29, leave out "and retained EU law"

Lord Hope of Craighead: My Lords, this is the first amendment in a very much larger group, not all of which is composed of amendments in my name. Although the matter is lengthy and rather complicated, I can deal with it comparatively briefly and, I hope, in a way that is intelligible to your Lordships and in particular to the Minister.

Amendments 274 and 275 are related to paragraphs 9 and 10 in part 1 of Schedule 2, the former dealing with Scotland and the latter with Wales. I am concerned about the provision which states:

"A provision is within the devolved competence of the Scottish Ministers for the purposes of this Part if … (a) it would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament (ignoring section 29(2)(d) of the Scotland Act 1998 so far as relating to EU law and retained EU law)".

As I understand that provision, it excludes from competence provisions relating to retained EU law. That is a theme that runs through most of the amendments in this group. It is exactly the same point as we have been discussing in the earlier groups, the question being whether it can possibly be right that the devolved institutions should be prohibited from dealing with retained EU law when they work through the exercises with which part 1 of Schedule 2 is concerned. All the amendments in this group that are in my name raise that issue, except Amendment 363, which I will come back to in a moment. Some of them will require to be superseded in light of the Government's amended version of Clause 11. I would have thought it was a fairly simple exercise for the Minister and her team to go through these various amendments, which I need not enumerate, just to be sure that the various passages to which I have drawn attention are corrected in light of the revised version of Clause 11.

Amendment 363 relates to the right of the Advocate-General to take part as a party in criminal proceedings so far as they relate to an issue as to whether legislation or an act of a Scottish Minister is incompatible with convention rights or EU law. Of course, the interest of the Advocate-General, if he wishes to enter the proceedings, is to ensure that the devolved institutions act within their competence in relation to these matters. What we have in paragraph 18 is a simple substitution of a reference to "retained EU law" for the reference that is in the statute at the moment to "EU law". The competence restriction on EU law will of course be removed when we leave the EU, but once again I make the point that simply to substitute a reference to "retained EU law" is not the right thing to do: it is not a mirror image of EU law. Indeed, the fetter that applied to EU law should not apply to retained EU law. The amendment is simply designed to delete from the relevant section of the Criminal Procedure (Scotland) Act 1995, which would no longer have any relevance. I leave that point with the Minister to look at along with all the others.

Lord Foulkes of Cumnock (Lab): I have been listening very carefully. Can the noble and learned Lord explain again, in simple terms, why retained EU law on a particular area, such as agricultural support, is different from current EU law? I do not understand why he says it is different.

Lord Hope of Craighead: In a sense, retained EU law is simply repeating what is to be found in EU law. The point is that the treatment of it, from the point of view of the competence of the Parliament and the Ministers, is different. Under the Scotland Act as it is, Ministers have no power to legislate or deal with EU law, because that is subject to the restriction in Section 29 of the Scotland Act, and also in Section 53, so far as Ministers are concerned. My point is that that restriction disappears because we are no longer bound by the treaty arrangements that gave rise to the restriction in the first place. I think the noble Lord is pointing out that much of retained EU law is already part of our law because it has already been built in to our legal system. The point is that I am suggesting that the Parliament and the Ministers should be able to deal with retained EU law in the same way as they can deal with any other domestic law, as long as it is not reserved.

Lord Foulkes of Cumnock: I understand that—these debates are very useful. However, I am getting worried: as the noble and learned Lord knows, I am a strong devolutionist and a former Member of the Scottish Parliament, but in the last hour I have come to understand and sympathise with what the UK Government are arguing, which is a bit worrying.

Noble Lords: Oh!

Lord Foulkes of Cumnock: No, it is a serious matter. Surely there are areas that are dealt with now by the European Union because we have all thought that it was right to have standards for the European Union Common Market. Are the UK Government not arguing that if we have a UK common market—which we will in certain areas—it is sensible to have the same standards throughout the United Kingdom? Is that not a valid argument?

Lord Hope of Craighead: If the noble Lord will forgive me, I was suggesting that we deal with that issue when we look at Clause 11 and the government amendments. The noble Lord raises a very important point, but it does not really relate to my amendments. I think it is much more fundamental and we will need to discuss it in light of the discussion of the reform of Clause 11. I hope I have answered the noble Lord's question. There is a basic difference between the competence arrangements relating to EU law, which does not apply once we leave the Union, and retained EU law, either domestic or direct, as it comes in under Clauses 2 or 3.

Having digressed somewhat in my reply, I again thank the Minister for her helpful reply. I will be happy to withdraw the amendment in due course; however, there are others in the group that others may wish to speak to.

Lord Wigley: My Lords, I will strike a different note as I put forward what are perhaps the substantive arguments—as we see them—in relation to these issues.

Amendment 304 has for some reason been grouped with these amendments, which does not make an awful lot of sense. It stands in my name and that of my noble friend Lord Hain, and is based on one of the key amendments drafted by the Welsh and Scottish Governments ahead of the Bill's passage through the other place. That amendment is also covered by part of Amendment 303, which surprisingly will not arise until very late tonight. None the less, Amendment 304 goes to the heart of the widespread criticism of Clause 11 as it currently stands—I am aware that amendments may come forward later—and lifts the restriction it places on the devolved parliaments in relation to EU retained law.

My fear—and that of all parties in the National Assembly—is that giving UK Ministers control in the EU withdrawal Bill over areas of retained EU law relating to matters which fall under devolved competences will, in effect, tend to normalise direct rule from Westminster in these areas. Given the powers under this and other recent legislation which enable Ministers at Westminster to amend devolved legislation by order, this will, in effect, undermine Welsh sovereignty in areas which are devolved to Wales and blur the responsibility of the National Assembly. Furthermore, there is a fear that this will set a precedent for this and future UK Governments, who may well be tempted when a devolved Government act in a way with which they disagree, to find a justification to intervene. This would be particularly galling if it were on issues where Welsh interests were seen to be in conflict with England's perceived interests—perhaps validly so. The Prime Minister has, of course, pledged never again to "devolve and forget". That can be interpreted in more than one way, and in this context it has generated quite a few ripples of unease.

In order to persuade the devolved parliaments to agree to legislative consent orders—which are currently not forthcoming from either the Scottish Parliament or Welsh Assembly—the UK Government have tabled a set of amendments to Clause 11 which we will consider later. The Government's proposals would provide a power to make regulations in certain devolved areas currently subject to EU law, and would prevent the devolved legislatures from taking action in the areas covered by those regulations. Whether noble Lords in this Chamber like it or not, this is regarded by members of all parties in the National Assembly as reflecting a growing approach by the UK Government—namely, in areas where devolution may be a nuisance or a hindrance to the UK Government's agenda—to roll back devolution, or at the very least to attenuate it, and to centralise certain powers in London. The Welsh and Scottish Governments share this fear. That is why, in the Senedd—thanks largely to the lead of my inspirational colleague Steffan Lewis AM—the Welsh Government have introduced a continuity Bill to safeguard Welsh devolution. That Bill is currently progressing through its legislative steps with all-party support. Assembly Members are taking such a step not as a threat but as a safeguard: they still hope that there may be a meeting of minds between them and Westminster, and I understand they have even drafted a sunset clause which could be triggered if such an agreement were achieved. They look to this Chamber today to take a stand in facilitating that meeting of minds and to ensure that the centralist direction to which they feel they are being subject is brought to an end.

Alongside the amendments which the UK Government have tabled, they have published a list of 158 areas of intersection of devolved competences with EU law, noting that they envisage regulations temporarily restricting devolved legislatures' competence—in advance of more substantive arrangements in primary legislation—in up to 24 of those areas. Taking such steps is, rightly or wrongly, widely perceived as a power grab. These 24 areas, all of which apply to both Wales and Scotland, cover a significant part of devolved responsibilities, including agricultural support, fisheries management, environmental policy, public procurement and food standards. These areas are vital for industries and businesses in Wales, and for the Welsh economy. The amendments would allow the UK Government to make regulations in any or all of these devolved areas.

4.30 pm

I wholeheartedly agree that common frameworks are appropriate in some cases, given the current role of EU law in regulating action in all parts of the UK—

Lord Foulkes of Cumnock: Hear, hear.

Lord Wigley: Indeed—the very point that the noble Lord, Lord Foulkes, was making earlier; I agree. Given the current role of EU law regulating action in all parts of the UK in such subjects, partly to facilitate a

[Lord Wigley]
single market with a level playing field—the point that the noble Lord was making—and partly to ensure that in matters which by their nature cannot be constrained by political borders, there is a coherent common approach. I accept this. Indeed, last week I proposed an amendment to provide a framework agreement for environmental policy—which, quite amazingly, the Government rejected. However, if there are to be such frameworks, the devolved Administrations and the devolved legislatures, whose legislative competence is being constrained by such frameworks, must surely agree the proposed steps jointly with the UK Government. I have tabled an amendment to an amendment in the name of the noble and learned Lord, Lord Mackay, providing a mechanism to this end. That will be debated later so I will not anticipate that debate now.

Let us be clear: unless there is agreement between Westminster and the devolved Governments on these matters, the continuity Bill will be enacted by the Assembly and will take precedence in Wales. Surely it is time for the UK Government to reconsider what is seen as an obdurate stance and agree a sensible, balanced and respectful way forward.

Lord Wallace of Tankerness: My Lords, I had not intended to speak in this debate because in many respects government Amendment 302A answers the initial point of concern—that the current limitation on competence in the Scotland Act under European Union law would be replaced by a restriction on retained EU law. Of course, under the new amendment that has gone, but there is a wider point on which the Minister could perhaps assist the Committee, which arises from the draft agreement on the transitional period.

As I understand it, during the transitional period basically the acquis will still apply. I have looked at Articles 4 and 82 of the draft agreement. Article 4 says:

"Where this Agreement provides for the application of Union law in the United Kingdom, it shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States".

Article 82 says:

"The Court of Justice of the European Union shall continue to have jurisdiction for any proceedings brought before it by the United Kingdom or against the United Kingdom before the end of the transition period".

We will have a lot of debates this afternoon about whether UK Ministers, Scottish Ministers or Welsh Ministers will be exercising powers after exit day, but can the Minister indicate how the United Kingdom Government see the position? If we are going to have to abide by European Union law having the same legal effect as it produces in the Union, is there any room for movement at all? How is effect going to be given to that if, under Clause 1 of the Bill, the European Communities Act 1972 has been repealed?

Lord Thomas of Gresford: My Lords, I cannot allow the noble Lord, Lord Foulkes, to continue with his heresy that the Government are right in what they are doing. I noticed the shock that passed over the face of the noble Lord, Lord Forsyth. What I think the noble Lord, Lord Foulkes, does not appreciate is that the proposal of the Government is to introduce frameworks into this country to save the internal market of the UK, whether or not the devolved Administrations consent. All they are prepared to do, as the noble Baroness the Minister said in response to something earlier, is to consult—they are not necessarily seeking agreement. That is where he has it wrong.

Lord Foulkes of Cumnock: No, I have it absolutely right. I know that that is precisely what it is. I have said that on previous occasions. But, with respect, it was the couple of speeches that the noble Lord, Lord Thomas, made earlier on that moved me in the Government's direction.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, I am obliged for all the contributions at this stage of the debate. I appreciate, as do other Members of the House, that when I move the government amendment to Clause 11, we will embrace a debate about the consequences of that amended clause and the significant change it makes to the way in which we are going to deal with, among other things, devolved competences. But as the noble and learned Lord, Lord Hope, observed, his amendments are consequential in a sense on what is going to happen with regard to Clause 11. In that context, I point out that we had already indicated our intention to move the amendment to Clause 11 and then withdraw it, in order that the consequences for the schedules to the Bill can be addressed more properly when we reach Report. However, there is a more fundamental issue underlying this, which has been highlighted by the use of the terms "consult" and "consent". It is really rather fundamental. Because these are probing amendments, I will just outline the Government's thinking with regard to this area of the Bill and how it will work. I am sorry if I am going to appear somewhat repetitive about some matters of history that have been touched upon already, but perhaps your Lordships could bear with me, if but for a moment.

In 1972, the UK Parliament of course transferred certain competences to the EU. Having done so, it limited its competence to legislate for the United Kingdom. When it came to the Scotland Act 1998 and the Government of Wales Act 2006, that Brussels competence, as I will term it, had already gone. When it came to considering the scope of the divorce settlement, the matter of the powers held by the European Union in Brussels was not in scope for consideration as part of devolution. They had gone, by virtue of an international treaty implemented in domestic law pursuant to the ECA 1972. The devolved settlement was determined by reference to the competence that remained in Westminster in 1998 and in 2006.

Baroness Hayter of Kentish Town: My Lords—

Lord Keen of Elie: I am going to elaborate on what happens to the competences in Europe. I wonder whether the noble Baroness will bear with me just for a moment.

Baroness Hayter of Kentish Town: But I wanted to challenge what the Minister just said. The competences were not actually removed from us. We agreed to

operate within the framework, but the idea that we actually gave up those competences in the way described would perhaps not be accepted, as such. We agreed that the EU had rights to make laws in certain areas, but that is not the same as saying, "This is no longer our responsibility".

Lord Keen of Elie: With respect, pursuant to our international treaty obligations, we bound ourselves at the level of international law to allow the EU to exercise competence in areas where previously the UK Parliament would have exercised it. That was then implemented in domestic law by virtue of the 1972 Act. Of course a sovereign Parliament is always able to repeal the 1972 Act, as it is now doing, but so long as it remained in place, and so long as we remained party to the relevant treaty—which became treaties—we were bound in that context. I do not entirely agree with the analysis, but I do not believe it is material for the present purposes, if I may respectfully say so.

Once Brussels had certain competences, it then exercised them. It was important that Brussels should exercise them in one area in particular, which was the development of the EU single market, as no one else could have exercised jurisdiction over a single market in the EU. The idea that 12—now 28—individual jurisdictions could have maintained the single market is self-evidently untenable, so Brussels exercised that jurisdiction, for very good reason. When we leave the EU, we will find ourselves in the position where we want to maintain an internal single market in the United Kingdom; the noble Lord, Lord Foulkes, referred to that, while the noble and learned Lord, Lord Hope, said we are looking forward to the internal market in the United Kingdom. We have to bear that in mind. What Parliament is in a position to legislate for a UK single market? The answer to that is the Parliament that has jurisdiction for the whole United Kingdom. I will come on to the issue of devolved competence in a moment, but generally speaking if you are going to maintain a single market you need a legislative power that is able to do that for the single market.

Lest anyone interrupt just yet, I add that of course by their very nature the devolved Administrations, parliaments and assemblies have responsibility for devolved powers in their respective nations. We respect that, of course, but there is an issue here that has not yet been mentioned. We identified, on the basis of analysis that was carried out with the devolved Administrations, that there were some 153 areas of competence where—

Lord McConnell of Glenscorrodale: Before the Minister moves on to the detail of those competences, I want to challenge the analysis that he has given about the comparison between the UK single market and the EU single market. No one would have suggested at any time in the last 26 years that the relationship between the United Kingdom and the EU single market, and the decision-making around the EU single market, would have been such that the decision-making on the EU single market would have been left solely to the European Parliament and the European Commission. It was not. The decision-making around the EU single market was done primarily by the Council of Ministers, and in the Council of Ministers some aspects of that single market were determined by absolute consent, where the UK had a veto, while some areas were determined by qualified majority voting. We cannot replicate that arrangement with one that leaves the sole decision-making power after consultation, without consent, with the UK Parliament and the UK Government in relation to areas where currently the Scottish Parliament, the Welsh Assembly or the Northern Ireland Assembly would have legislative competence.

Lord Keen of Elie: I do not entirely agree with the noble Lord's analysis but for the present purposes I am not sure that it is particularly relevant. What is relevant is this, if I can continue: we have identified about 153 areas in which, upon our leaving the EU, competences will return and touch upon areas of devolved competence. These are areas that the devolved parliaments and assemblies previously had no engagement with because they lay in Brussels, but they are coming back and touching upon these areas of devolved competence and we recognise that.

However, some of these areas of competence are critical to the maintenance of a single market in the United Kingdom, as I will illustrate in a moment. Those therefore had to be addressed. We did that by engaging with the devolved Administrations and assemblies in the context of the Joint Ministerial Committee negotiations. I take the point made by the noble Baroness, Lady Hayter: there may be criticisms of that process but I respectfully suggest that that is not for this Bill. It is important to notice the achievements made by that committee in this context. In particular, noble Lords may have received a copy of the communiqué of 16 October 2017 from the Joint Ministerial Committee, which was attended by Mark Drakeford, a Cabinet Secretary in Wales, and Mr Russell, a Minister from the Scottish Government, among others, including senior civil servants from Northern Ireland in the absence of their Executive. I shall quote briefly from it, although some aspects are referred to in some of the proposed amendments:

"Ministers noted the positive progress being made on consideration of common frameworks and agreed the principles that will underpin that work".

The definition of those principles includes the line:

"A framework will set out a common UK, or GB, approach and how it will be operated and governed".

Then there is a list of principles:

"Common frameworks will be established where they are necessary in order to … enable the functioning of the UK internal market"—

for example, to,

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

United Kingdom.

4.45 pm

One can readily understand why we want to maintain these as essentially UK-based frameworks—why we need to ensure that there is a means of maintaining commonality in these areas for the United Kingdom. The document continues:

[Lord Keen of Elie]

"Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore: be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent".

Your Lordships will notice an echo of what is sometimes referred to as the Sewel convention. It is not an absolute: we must consent. It is not a case of "We will just consult", or anything of that kind. It is simply saying that there will not normally be adjustments without consent.

A great deal of work has been done since October 2017 by officials in Whitehall, Edinburgh, Cardiff and Belfast. As a consequence, on 9 March, we were able to publish the provisional frameworks analysis on returning EU powers, which indicated that in only 24 areas of the 153 was it anticipated that we will need to keep having legislation that works across the whole United Kingdom. There is some difference of opinion on one or two additional areas—as referred to by Mr Russell before one of the Scottish parliamentary committees. State aid is one. There are a number of areas where we consider that the issue is reserved but others consider that it touches on devolved competence. That is not of any immediate moment in the present context, if I may say so, because generally speaking we are agreed what those 24 areas will be.

If we are to maintain commonality for the United Kingdom in these areas, we must be able to legislate uniformly in them. That includes, let us say, pesticides in the context of agriculture—not the whole of agriculture but sub-areas where Brussels and the devolved Administrations would have exercised competence in which we realise that it is necessary to maintain commonality in the United Kingdom. Let me give a very simple example. If the Scottish Government legislated in respect of agricultural pesticides for Scotland—not extending beyond Scotland's own borders, of course, and only within the area of their devolved competence—and other parts of the United Kingdom did not replicate those regulations, we could find that a Welsh farmer could not sell his corn to an Edinburgh baker simply because he had used pesticides that he was quite lawfully entitled to employ in Wales, and which were quite lawfully used in England and Northern Ireland, but had been banned in Scotland by the Scottish Government. As a consequence, there would be a breakdown in the internal market that is so critical to us.

I give another simple example: food labelling. If the Scottish Government decided to make regulations as soon as they had the power, when these 153 competencies returned, to change the provisions on food labelling only for Scotland, within their devolved competence, a manufacturer of jam in York would find it very difficult to sell his product north of the border, or he would have to label it in two different ways.

Lord Wigley: Will the noble and learned Lord give way?

Lord Keen of Elie: No, perhaps I can finish this point. I am just trying to explain why in these 24 areas it has been identified as very material that we should retain and then develop frameworks.

Lord Wigley: I just wanted to intervene on this very point about pesticides. The Minister will be aware that the Welsh Government did in fact legislate on the question of genetically modified crops, and it was forecast that the roof would fall in. It did not; it was quite possible to have a different regime in Wales from that in England. As he addresses the rest of the points that have been raised, will he tell us how the regime will be allowed or not allowed to work in the context of agricultural support? Sheep farmers may well want and be entitled to get support from the Welsh Government. The Welsh Government may want to give them that support but, if it is argued that that distorts the UK market, they would not be able to do so. That is the sort of issue that causes concern.

Lord Keen of Elie: As regards agricultural support, that is another subspecies of agriculture. I am dealing with those matters that fall within the 24 identified areas where we find it necessary to retain and operate the single internal market. Not all areas within those 24 competencies are going to have to be retained for the purposes of that market. There are areas which we will devolve.

Lord Purvis of Tweed: The Minister is making a very strong case for how a single market can operate effectively. Does he not believe that the United Kingdom could operate under a frictionless trading or regulatory arrangement with managed divergence across the four nations?

Lord Keen of Elie: That is not what is in contemplation, and that is why I am trying to explain the Government's thinking with regard to maintaining effectively a single market, not frictionless borders between nations within the United Kingdom, which is a different issue altogether and one that does arise in a different context.

Lord McConnell of Glenscorrodale: I will not take this opportunity to contest some of the points that have been made about, for example, fertilisers, although I think there is a debate to be had about the way in which the Government describe that issue. It is not helpful to the heat generated around this debate when the examples the Government give for the need to retain the power imply that decisions that would be made in Scotland or Wales would be stupid. The Government need to think hard about the fact that when they describe the need for these single market frameworks in the UK, they should do so in a positive way in terms of the UK having regulations that work together.

On the substantive point about the frameworks, the issue is not the list of 24, but how they will be agreed and who will have the ultimate decision-making power. It is not about what is or is not on the list. That is a matter for negotiation and determination within the existing settlements. The issue here is who agrees the frameworks, how they are agreed and who ultimately has the power to veto them or otherwise. That is the substantive issue I would ask the Minister to address.

Lord Keen of Elie: I wholly reject the implication that we are suggesting that any of the devolved Administrations are going to proceed to legislate, with any of the competencies returned to them, in a way that

would be regarded as stupid or unacceptable. That is a most unfortunate gloss to put on the matter. It is, however, very helpful that the noble Lord, Lord McConnell of Glenscorrodale, has raised the question of how we are going to deal with the issue in this context. The framework agreements have been the subject of ongoing negotiation among all of the Administrations, but in order to achieve that it is necessary to retain competencies in those areas so that there is not the prospect of legislation within the devolved areas which impacts upon areas outwith their competence. To give a simple example in that context, the Scottish Government are entitled to exercise devolved competence and powers within Scotland for the Scottish people, but if we allow all of the additional competencies to go back to the Scottish Government and they legislate in an area such as food labelling, that impacts on the people not only of Scotland but of England, Wales and Northern Ireland. There is therefore, in a sense, a veto over proposals for the internal market, with one devolved Administration saying, "No, we don't like your proposals on food labelling. We know everybody else likes them but we've decided we don't like them, we're not going to consent to them, so you can't have them." That is the problem that we want to ensure does not arise.

Coming more particularly to the point that was made about how this is decided, we do ring-fence, as it were, the 24 competencies—or elements of them—that have been identified following the consultation process with the devolved Administrations and which are reflected in the principles that I quoted from the Joint Ministerial Committee on 16 October last year. Then, we have to formulate framework agreements, essentially, in each of these areas for the United Kingdom.

Taking up the noble Lord's point on how we are going to implement those, we will do so by way of primary legislation. And where do we find ourselves? Back in the relevant devolved legislation, which says that we will not normally legislate in respect of these devolved areas except with the agreement of the relevant devolved Government. So the relevant safeguard is exactly the same as the one that exists at the present time. What we propose will not intrude on the devolved competence in Scotland, Wales or indeed Northern Ireland. It retains 24 areas that are coming back from the European Union in order that we can work out what is required for the purposes of maintaining a single UK market. However, what would alter the devolved competencies quite fundamentally would be a provision that said that we could retain those areas of competence only with the consent of each of the devolved Administrations. That would give them a veto over matters that went beyond their present devolved competence and a veto over matters that impacted on England, Wales, Northern Ireland or Scotland, depending upon who was doing it. That is why we have set out matters in the way that we have. When we come on to the amendment to Clause 11 in due course, I hope that, having essentially flipped Clause 11, we can reflect on the great progress that we have made to date in these areas. It is in that context that I simply invite the noble and learned Lord to withdraw his amendment.

We will return to these matters under reference to the government amendments but I wanted to set out, I hope with a reasonable degree of clarity, the Government's thinking in this area. This is not, with respect, a power grab—on the contrary: if we consult, if we agree and if we achieve this, there is no question of a power grab. It is certainly not a derogation from devolved competence. A great deal of competence will be laid on the devolved Administrations, because so many of these competencies coming back from the EU, and under the amended Clause 11, are going straight to the devolved Parliaments and Assemblies.

Lord Forsyth of Drumlean (Con): Before the noble and learned Lord sits down, may I just tempt him? He has given a very clear exposition of the Government's position and why it is in the interests of the devolved Administrations and the United Kingdom as a whole to proceed in the manner that the Government describe. He has also talked about the great efforts that have been made by the officials and the work that has been done. Why, then, do we have such opposition, in particular from the Scottish Administration?

Lord Keen of Elie: I am not going to rehearse the rhetoric that has been used by some members of the Scottish Government to feed populism. Terms such as "power grab" may have their place, but they do not have a place in the context of our looking at this legislation. Of course, it has been asserted that consultation is not enough—even though it may lead to agreement—and that there has to be consent and only consent. But if it is consent, that is, let us remember, a very material change to the devolved settlements. That will result in the devolved Parliaments and Governments being able effectively to veto matters that impact upon those outwith their area of devolved competence.

Baroness Hayter of Kentish Town: The Minister used a phrase—which is used also either in the Explanatory Note or in a letter, I cannot remember which—about the retention of this for the purpose of the internal market. It might be helpful if that wording appeared on the face of the Bill.

Lord Keen of Elie: I note that comment. The noble Baroness will appreciate that the amendment to Clause 11, which I will move in due course, seeks to ring-fence these powers to ensure that they are limited. Indeed, the noble and learned Lord, Lord Wallace, has also tabled an amendment regarding a sunset clause in that context. It is perfectly clear from the proposed amendment to Clause 11 that they are meant to have a very limited function—but I note what the noble Baroness said and I will take it forward.

5 pm

Lord Wigley: Does the Minister not realise that the Labour Government in Cardiff feel as strongly as the SNP Government in Scotland about this matter? This is not a matter of party politics; it is a question of where power lies. That is why the term "power grab" has arisen. When he says how outrageous it would be if Scotland, Wales or Northern Ireland had a veto, does he not realise that the structure that he is advocating gives England a veto? It gives Westminster a veto; that is what is causing so much trouble.

Lord Keen of Elie: No. With great respect—

The Archbishop of York: My Lords—

Lord Keen of Elie: One moment. I am terribly sorry, Archbishop, but I must reply to that. This does not give England a veto. Essentially, England has no voice. This is the United Kingdom Parliament: it legislates for the United Kingdom.

The Archbishop of York: The point I was going to make is exactly the same. As I have listened to the debate, it seems to me that the issue is probably what the noble Lord, Lord Hennessy, tried to address. When we leave the EU, the state of the United Kingdom and Northern Ireland will still be the United Kingdom and Northern Ireland. Therefore, there are areas that are for all four nations and others that are just for one nation. Devolution was a good thing, but it does not mean that powers that affect other nations can simply be devolved. I have listened again and again, and I think the point is that, of all the powers that are coming back, 23 have been identified which, if they were simply handed over without clear legislation, would leave us in a real mess. There would be no coherence, no sense that this would be the United Kingdom; it would be something else. So may I plead with those who come from nations with devolved Governments to realise that, for the benefit of the whole of the United Kingdom and Northern Ireland, there are some areas that affect all of us together, not separately, and that those need to be retained? Of course there could be negotiations and conversations—but I get a little concerned that the message is not getting through. This is not grabbing power: some areas are returning to the United Kingdom and we must sort out which bits really need to go straight to the devolved Administrations. The 23 areas that we have heard about require very careful consideration; otherwise some might think that leaving the EU equals independence for them.

Lord Keen of Elie: I am not going to indulge in party politics at this stage; I do not think that that is necessary. We all know the ultimate objective of the Scottish National Party. It is not to have a United Kingdom; it is to break up the United Kingdom and have an independent Scotland. Although Scottish nationalists talk about all these powers coming back from the EU, let us remember that they do not want them. If they get them, they want to give them back to Brussels, because they want Scotland, as an independent country, to remain in the EU—and, if it leaves, they want it to join EFTA and the single market. Therefore they will return all the powers they are talking about if they get their ultimate aim.

Lord Morris of Aberavon: The noble and learned Lord has distinguished between "consult" and "consent", and has described consent as a veto. Does he not accept that over the years the normal use of "consent" by both the Scottish Parliament and the National Assembly has been exercised responsibly, and that there is no basis for that fear? How would he define the word "consult"? What does it mean?

Lord Keen of Elie: Consultation has been going on in the Joint Ministerial Committees on a regular basis since October of last year. As regards respecting the constitutional settlement on devolution, I entirely agree with the noble and learned Lord—with one qualification. A convention has arisen out of the memorandum of understanding between the Scottish Government and the UK Government about how we ensure that legislation put before the Scottish Parliament is competent. That convention has operated since 1999 and involves an exchange of a note of competence. Prior to a Bill being introduced to the Scottish Parliament, a copy is passed to my office—the Office of the Advocate-General for Scotland. That is always done.

I then confer with the Lord Advocate and his officials—the noble and learned Lord, Lord Wallace, will be familiar with this—and we iron out any differences and come to a view on what is competent and what is not, and consequently these matters are resolved. For the first time in nearly 20 years, that convention was departed from by the Scottish Government in respect of their EU Continuity Bill, which I first heard about after it was introduced to the Scottish Parliament. They did, however, give it to the Presiding Officer of the Scottish Parliament in time for him to take legal advice. Therefore, while I accept the generality of the point the noble and learned Lord made, particular exceptions have arisen very recently.

Lord McConnell of Glenscorrodale: I was the Minister who negotiated the memorandum of understanding. I think I am the only Minister involved in the negotiation at the time who serves in your Lordships' House. I agree that the Sewel convention and the arrangements for considering the competence of legislation have worked very well. That concerns the point I made earlier—two debates ago, I think—about the clarity of the legislation and of the memorandum of understanding, which have worked well over many years. I am encouraged by the Minister's comment that these frameworks would all be subject to the Sewel convention. It would certainly be very helpful for the debate that we are about to have on Clause 11 for the Minister to say that, if these 24 areas are indeed the final 24 areas that are agreed for common frameworks, in each of the 24 areas the establishment of the common frameworks would be subject to the Sewel convention, as I think he hinted at a few minutes ago.

Lord Keen of Elie: In so far as they are carried forward by primary legislation—and I rather anticipate that that will be the case—they would engage not only the Sewel convention but the provisions of DGN 10, the devolved guidance note, because there may be areas where these matters impact on the competence of Scottish Ministers. That is what is anticipated and I have no difficulty with that.

I keep trying to answer a question raised by the noble and learned Lord, Lord Wallace, about what happens with regard to the transition period. Clearly, that will have to be addressed in the context of the withdrawal agreement Bill—and that, as has been indicated before, may result in some amendment to the existing provisions of this exit Bill.

Lord Thomas of Gresford: As I understand what the Minister is saying, ultimately everything has to be settled by primary legislation, so there will be a single

market in the United Kingdom that is settled by primary legislation—for which legislative consent will be sought and no doubt given. What we are talking about is an interim period when Ministers take powers to themselves. Over a temporary period they will in effect dictate what the framework agreement will be until there is a final agreement in a number of years—that is what I understand the Minister to say.

Lord Keen of Elie: With great respect, I do not think the noble Lord, Lord Thomas, has understood what I said. It is not a case of us dictating anything to the devolved Administrations; it is a case of ring-fencing these limited competences until we have reached agreement with the devolved Administrations as to what the framework agreements will be. They will then be put forward for the purpose of legislative consideration in the usual way. But it is not suggested that we are going to start regulating agriculture in Scotland in the meantime—that is not what is comprehended by this at all. I do not know whether I asked this earlier, but will the noble and learned Lord withdraw his amendment so that I can sit down again?

Lord Thomas of Gresford: Before the Minister does, how long will this ring-fence last? I believe the Barnett formula was temporary; how long does the Minister envisage the ring-fence will last before there is a proper legislative framework?

Lord Keen of Elie: It will last until we have managed to implement all of the framework agreement. That will be a finite period—there is no question about that. Indeed, if the noble Lord looks at the proposed amendment to Clause 11, he will see that there are various checks and balances, including the requirement that Ministers report to Parliament if they retain the powers for any longer. So that is already addressed.

Lord Hope of Craighead: My Lords, this debate has ranged a good deal wider than was necessary for the Minister to deal with my points on this group of amendments. With respect to him, he has not given me the kind of reassurance that the noble Baroness, Lady Goldie, gave me on earlier groups. My point is that this very disparate group contains a number of points that I raised with regard to Schedules 2 and 8, which need to be reconsidered in the light of the reformed Clause 11. A simple example is on page 56, where there is a reference to a fetter on the power to,

"make, confirm or approve subordinate legislation",

which extends to the wording of Section 57(4) of the Scotland Act as in the Bill. However, that section is reworded by the proposed new Clause 11.

Lord Keen of Elie: I just remind the noble and learned Lord that I said that when we come to Clause 11, we will move and withdraw the amendment. We appreciate that although we want Clause 11 in its present form, to put it forward in a form that covers all these matters we will have to address the impact it has on Schedule 2 in these contexts.

Lord Hope of Craighead: I am grateful for that. Not every one of my amendments is a Clause 11 point—there are other points of detail which need to be looked at. If the Minister would be kind enough just to say that these will be looked at, I will be happy to withdraw my amendment. Can he give me that assurance?

Lord Keen of Elie: I am content to indicate that we will look at these points.

Lord Hope of Craighead: On that basis, I am happy to beg leave to withdraw Amendment 274.

Amendment 274 withdrawn.

Amendments 275 to 278 not moved.

Amendment 279 had been withdrawn from the Marshalled List.

Amendment 280 not moved.

Amendment 281 had been withdrawn from the Marshalled List.

Amendment 282

Moved by ***Lord Hope of Craighead***

282: Schedule 2, page 25, line 15, at end insert—

"( ) This paragraph does not apply to regulations made under this Part by the Scottish Ministers or by the Welsh Ministers with regard to matters that are within their devolved competence."

Lord Hope of Craighead: My Lords, this is the last of my little groups of amendments. I will also speak to Amendments 284, 298 and 300 in this group, which all relate to what one finds in Schedule 2. This point goes back to what we discussed a little earlier about the difference between "consent" and "consult". In the existing provisions in paragraph 16 in Part 2 and paragraph 25 in Part 3, which deal with the power of devolved authorities to make provision,

"for the purpose of preventing or remedying any breach of the WTO Agreement",

that power may be exercised only with the consent of a Minister. The simple point I make in my amendment is—I am sorry: it is rather important that the Minister hears what I am going to say. I will be happy to wait for a moment, if the noble Lords would like to confer. Would it help? I can wait for a second.

Lord Taylor of Holbeach (Con): Please continue. We have said all that we need to say.

Lord Hope of Craighead: Thank you very much.

I want to explain to the Minister that the point is a very simple one about the difference between "consent" and "consult", which we have already been discussing. I do not need to elaborate on the point that each of these amendments seeks to substitute in a revised formula a consent mechanism in place of the provision in the Bill, which is all about consultation. In a sense it is a probing amendment because I do not see why, for the moment, the existing situation where these things are done with consent should not operate in these contexts too. I moved the amendment so that the Minister can explain the position—I hope quite briefly—so that we can move on to what we are all looking forward to: his amendments on Clause 11. I beg to move.

5.15 pm

Lord Keen of Elie: My Lords, I will respond briefly, without repeating what I said on the immediately preceding group, but this raises essentially the same issue. On these provisions, the circumstances in which consent applies to the powers—which are the obverse of some of the others—are those where the devolved Ministers could use powers in ways that have implications outside of their devolved jurisdiction, for example when making provision regarding the World Trade Organization obligations. That is why we have framed it in this way, but it raises the wider point made by the noble and learned Lord and I appreciate that that might be addressed in more detail when we come to Clause 11 and the government amendments. I wonder if, in these circumstances, the noble and learned Lord will, at this stage, withdraw his amendments.

Lord Hope of Craighead: I am glad we have not provoked a longer debate on this group of amendments. There is a reason for being concerned about this; the provision I am concerned about deals specifically with something within competence—in other words, it deals with regulations made for the purpose of preventing or remedying any breach of the WTO agreement. It does not deal with the WTO agreement itself; it simply exercises the power given under paragraph 7(2)(b) of Schedule 5 to the Scotland Act 1998 to deal with these matters domestically. Since it is within competence under the Scotland Act, it is hard to see why the position should be regulated in the way proposed. However, I have listened to what the Minister has said and—on the understanding that we can look at all this again when we get to the revised formula for Clause 11—I am happy to withdraw this amendment.

Amendment 282 withdrawn.

Amendment 283 had been withdrawn from the Marshalled List.

Amendment 284 not moved.

Amendment 285 had been withdrawn from the Marshalled List.

Amendments 286 to 292 not moved.

Amendment 293 had been withdrawn from the Marshalled List.

Amendment 294 not moved.

Amendment 295 had been withdrawn from the Marshalled List.

Amendment 296 not moved.

Amendment 297 had been withdrawn from the Marshalled List.

Amendment 298 not moved.

Amendment 299 had been withdrawn from the Marshalled List.

Amendment 300 not moved.

Amendment 301 had been withdrawn from the Marshalled List.

Schedule 2 agreed.

Baroness Goldie: My Lords, I beg to move that the House be now resumed.

The Deputy Chairman of Committees (Viscount Ullswater) (Con): The Question is that the House be now resumed. As many as are of that opinion will say Content.

Noble Lords: Content.

The Deputy Chairman of Committees: To the contrary, Not Content.

Lord Foulkes of Cumnock: Not Content. As we are all here, we might as well get on with it.

The Deputy Chairman of Committees: I think I will put the Question again. The Question is that the House be resumed. As many as are of that opinion will say Content.

Noble Lords: Content.

The Deputy Chairman of Committees: To the contrary, Not Content.

Lord Foulkes of Cumnock: Not Content.

The Deputy Chairman of Committees: I think the Contents have it.

Lord Taylor of Holbeach: My Lords, perhaps I may explain. An Urgent Question has to be repeated at about 6 pm. Rather than have that at a ridiculously late hour, we will adjourn the House until 6 pm. That will provide an opportunity for noble Lords to get refreshment and then we will be able to deal with the next group in toto and without interruption. I think that is the right way to go about it. I have discussed it around the Chamber, as the noble Lord will know.

Lord Foulkes of Cumnock: My point is that we are all here. We have been taking part in a debate. Everyone who wants to take part in the next group is here and it seems sensible to continue. I do not understand.

Lord Hope of Craighead: The Chief Whip did not discuss the matter with me but I support the position he is taking because it is very obvious that, once we get into Clause 11, we will be discussing it for some considerable time. I would have thought that the sensible thing would be to break now and to come back and deal with it in one go, rather than break up the debate, which we will be forced to do otherwise.

Lord Wigley: My Lords, as a party of one, I do not expect to be consulted on these matters—I realise that there are limitations. However, on Monday night we sat here until after 1 am, and I spoke after 1 am. Earlier we had a break of 20 minutes for food. Why on earth, when there is time available now, can we not carry on with the Bill, certainly if the implications are that we might go on until late again tonight?

Baroness Goldie: My Lords, I beg to move that the House do adjourn during pleasure until 6 pm.

House resumed.

5.21 pm

Sitting suspended.

NHS: Staff Pay

Statement

6 pm

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, with the leave of the House, I will repeat as a Statement the Answer to an Urgent Question given by my right honourable friend the Secretary of State for Health and Social Care in the other place. The Statement is as follows:

"Mr Speaker, the whole House will want to pay tribute to the hard work of NHS staff up and down the country during one of the most difficult winters in living memory. Today's agreement on a new pay deal reflects public appreciation for just how much they have done and continue to do.

However, it is much more than that. The agreement that NHS trade unions have recommended to their members today is a something for something deal, which brings in profound changes in productivity in exchange for significant rises in pay. It will ensure better value for money from the £36 billion NHS pay bill, with some of the most important changes to working practices in a decade, including a commitment to working together to improve the health and well-being of NHS staff to bring sickness absence in line with the best in the public sector. We know that NHS sickness rates are around a third higher than the public sector average, and reducing sickness absence by just 1% will save around £280 million. The deal will put appraisal and personal development at the heart of pay progression, with often automatic incremental pay replaced by larger, less frequent pay increases based on the achievement of agreed professional milestones. It includes a significantly higher boost to lower paid staff in order to boost recruitment in a period when we know the NHS needs a significant increase in staffing to deal with the pressures of an ageing population.

Pay rises range from 6.5% to 29% over three years, with much higher rises targeted on those on the lowest and starting rates of pay. As part of this deal, the lowest starting salary in the NHS will increase by over £2,500, from £15,404 this year to £18,040 in 2020-21, and a newly qualified nurse will receive starting pay 12.6%—nearly £3,000—higher in 2020-21 than this year. But this deal is about retention as well as recruitment. It makes many other changes that NHS staff have been asking for—such as shared parental leave and the ability to buy and sell back annual leave—so they can better manage their work and family lives, work flexibly and balance caring commitments.

The additional funding that the Chancellor announced in the Budget to cover this deal—an estimated £4.2 billion over three years—cements this Government's commitment to protecting services for NHS patients while also recognising the work of NHS staff up and down the country. This is only possible because of the balanced approach we are taking: investing in our public services and helping families with the cost of living while at the same time getting our debt falling. Rarely has a pay rise been so well deserved for NHS staff, who have never worked harder".

6.03 pm

Baroness Thornton (Lab): I thank the Minister for repeating the Statement. I agree with his final statements, but never has it taken so long to get to this point of a pay increase. I do not wish to sound ungracious but the pay increase is too little, too late. The cap has meant that NHS wages have fallen by 14%. Last summer, the Prime Minister told a nurse on television that a pay rise would need a "magic money tree"; I am very glad that it seems to have been found.

The NHS is now short of 100,000 staff. In part, that must be because of this Government's neglect of the NHS workforce. Exacerbating this situation is the chronic shortage of nursing and other staff in nursing care homes, with a 16% decrease in the number of registered nurses in the care sector since 2012. Then, there is Brexit and its damage to NHS staffing. Given that the Secretary of State now has responsibility for social care as well as health, will we see a joined-up staffing strategy for NHS and care workers? Can the Minister assure the House that, to pay for the proposed increase, the Treasury has said that it will fully match any proposed rise with new money?

Lord O'Shaughnessy: I thank the noble Baroness for her perhaps less than fulsome welcome for what is a fantastic deal, not least for the lowest paid staff in the NHS, some of whom will see very significant pay rises. They certainly deserve them; I do not think anyone disagrees with that. We have been able to find the additional money in the NHS budget to do this precisely because of good economic stewardship, rather than relying—as others would—on trees, magic or otherwise. That stewardship has meant that we have been able to provide the money while taking our fiscal responsibilities seriously.

The noble Baroness mentioned the joined-up staffing strategy. She is absolutely right that it is very important. I hope she knows that Health Education England has included work on the social care workforce in its draft strategy. We all understand that we need increasingly to view these workforces together—not just people such as nurses, who can work in both sectors, but carers and allied health professionals and so on. Frankly, there is more work to do on the social care workforce strategy. In the health service, we are starting from a lower base in terms of having a national picture, precisely because it is generally delivered locally. However, we are providing that strategy. I would encourage all parties who want to make sure that the strategy is joined-up to contribute their ideas, because there is a genuine willingness to make sure that we can do it.

Baroness Jolly (LD): My Lords, I echo the Minister's remarks about NHS staff working hard all year round. I welcome this agreement. The RCN and Unison must have worked very hard with the DoH to get this nailed, but the devil is in the detail and we have yet to see the detail.

Agenda for Change was implemented in 2004 when I was chair of a primary care trust. It was really difficult to get the various levels of NHS staff in the various strata. Can the Minister confirm that *Agenda for Change* will be revisited along with the skills and

[Baroness Jolly]
knowledge framework? The Secretary of State also talked about putting appraisal and continuous professional development at the heart of pay progression, so that may indicate that the skills and knowledge framework might need to change. On the same topic, echoing what was said just a moment ago, can the Minister shed light on whether care workers' salaries will be included in the Green Paper on social care? At the moment, they are feeling very undervalued and underpaid.

Lord O'Shaughnessy: Like the noble Baroness, I think it is right to pay tribute to all the organisations involved in striking this deal. These things are never easy but it is a true partnership agreement that tries to work for everybody.

The Statement is explicit about linking pay progression with appraisals, which indeed means higher skill levels. I will write to her with the specifics of the skills and knowledge framework; I am not cognisant of that specifically, but clearly the intention is to move away from automatic progression to skill-based progression. One of the advantages of that is that it not only works for patients, but puts the onus on employers—she will see more detail of that—to make sure that there is proper professional development to help skill levels rise, so that staff can go through those gateways and progress.

Baroness Redfern (Con): My Lords, in welcoming the Government's response and the 6.5% pay rise for 1 million NHS staff, particularly in recognition of their dedication and hard work, I am pleased that the Government have recognised that the lowest full-time salaries are paid to cleaners, porters and catering staff. These groups will receive a 15% increase—£2,500—bringing their salaries up to £18,000. The fact that this is backed with new money is welcome.

Lord O'Shaughnessy: I thank my noble friend for making that point. It is not only about the lowest paid staff whom she has described. It is also worth dwelling on the fact that a newly qualified nurse will see a significant increase in his or her pay, which will be 12.6% higher in 2020-21. This is a package which takes account of the fact that starting salaries have been too low. We are trying to address that because it is one of the ways we can attract more people into the profession.

Baroness Watkins of Tavistock (CB): My Lords, I welcome this Statement as a sign that the Government have at last recognised the effect that the pay cap has had on recruitment and retention, in particular in nursing. I hope that this pay increase will lift many nurses out of hardship and improve morale. It is a sign that the Government value NHS staff and I especially welcome the significant increase for newly qualified nurses for 2020-21. These new recruits, who commenced their training in 2017 without bursaries, will be in a far better position—comparable with other graduates in terms of starting pay—as they proceed to repay some element their salary after achieving an income of more than £25,000 a year. My only concern is that the charitable and social care sectors, which employ nurses, will need to match these salaries. How can we ensure that they will be able to do so?

Lord O'Shaughnessy: I thank the noble Baroness for her welcome for the Statement. We, along with all Members of the House, value NHS staff and this is a proper recompense after what have undoubtedly been difficult years for them. Regarding what this means for funding for charitable and social care staff—I did not address the point when the noble Baroness, Lady Jolly, asked me about it—we will obviously make sure that any staffing issues, including salaries, are part of the Green Paper discussions. They will clearly have to take into account the higher pay that is coming down the stream for these staff.

Lord Clark of Windermere (Lab): My Lords, of course we welcome this, but I must say that the Minister was selling it a bit hard when he said that the Government have managed the National Health Service well when they have made cuts in training which have exacerbated the situation.

My question is a simple one. The Minister has said that the Treasury will meet all the costs. Is that an absolute assurance? I ask that because many local hospital care trusts have found that there are hidden costs. For example, the Government are pushing apprenticeships, but what they never mention is that it is the local care trust which has to pay the university thousands of pounds a year for the apprenticeship training. Will everything be covered in this pay rise?

Lord O'Shaughnessy: I thank the noble Lord for giving me the opportunity to provide that confirmation. In the 2017 Autumn Budget we set aside in the reserves £800 million a year, which will fund the first year of the *Agenda for Change* pay deal, and obviously if the members of the NHS trade unions accept the agreement, that funding will be released. The Chancellor will also provide the additional funding required to fulfil his commitment through the 2018 Autumn Budget and make available £4.2 billion over three years to fund the deal. I hope that gives the clarity the noble Lord and others seek.

Baroness Bottomley of Nettlestone (Con): My Lords, the Government have every reason to be proud of providing for this very substantial pay increase. However, can my noble friend remind NHS staff that, as would be the case for any other staff, with increased pay has to come change? There are no groups of employees in any enterprise anywhere who do not have to change, restructure or change the skill mix. Appraisal and training mean doing more and achieving greater productivity. We have a heroic mission to provide care free at the point of delivery to all. This can be achieved only with a much more positive attitude towards changing the skill mix, team working, and through the many other ways of delivering cost-effective care.

Lord O'Shaughnessy: My noble friend is right and she speaks from great experience. I emphasise that, as the Secretary of State has said, this is a something for something deal which will deliver greater productivity in return for higher pay. That absolutely has to be the right way of doing this. I also point out that there will be an explicit focus on improving the health and well-being of NHS staff, so that they are not only happier and more likely to stay in post, but more productive as well.

European Union (Withdrawal) Bill

Committee (9th Day) (Continued)

6.13 pm

Clause 11: Retaining EU restrictions in devolution legislation etc.

Amendment 302 not moved.

Amendment 302A

Moved by ***Lord Keen of Elie***

302A: Clause 11, page 7, line 25, leave out subsections (1) to (3) and insert—

"(1) In section 29(2)(d) of the Scotland Act 1998 (no competence for the Scottish Parliament to legislate incompatibly with EU law) for "with EU law" substitute "in breach of the restriction in section 30A(1)".

(2) After section 30 of that Act (legislative competence: supplementary) insert—

"30A Legislative competence: restriction relating to retained EU law

(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

(2) But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the legislative competence of the Scottish Parliament.

(3) In addition—

(a) a Minister of the Crown must (unless the regulations only relate to a revocation of a specification) consult the Scottish Ministers before laying a draft of a statutory instrument containing regulations under this section before either House of Parliament, and

(b) see paragraph 6 of Schedule 7 (duty to make explanatory statement about regulations under this section)."

(3) In section 108A(2)(e) of the Government of Wales Act 2006 (no competence for the National Assembly for Wales to legislate incompatibly with EU law) for "with EU law" substitute "in breach of the restriction in section 109A(1)".

(3A) After section 109 of that Act (legislative competence: supplementary) insert—

"109A Legislative competence: restriction relating to retained EU law

(1) An Act of the Assembly cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

(2) But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the Assembly's legislative competence.

(3) In addition—

(a) a Minister of the Crown must (unless the regulations only relate to a revocation of a specification) consult the Welsh Ministers before laying a draft of a statutory instrument containing regulations under this section before either House of Parliament, and

(b) see section 157ZA (duty to make explanatory statement about regulations under this section).

(4) No regulations are to be made under this section unless a draft of the statutory instrument containing them has been laid before, and approved by a resolution of, each House of Parliament."

(3B) In section 6(2)(d) of the Northern Ireland Act 1998 (no competence for the Northern Ireland Assembly to legislate incompatibly with EU law) for "incompatible with EU law" substitute "in breach of the restriction in section 6A(1)".

(3C) After section 6 of that Act (legislative competence) insert—

"6A Restriction relating to retained EU law

(1) An Act of the Assembly cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

(2) But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the legislative competence of the Assembly.

(3) In addition—

(a) a Minister of the Crown must (unless the regulations only relate to a revocation of a specification) consult the relevant Northern Ireland department before laying a draft of a statutory instrument containing regulations under this section before either House of Parliament, and

(b) see section 96A (duty to make explanatory statement about regulations under this section).

(4) In subsection (3)(a) "relevant Northern Ireland department" means such Northern Ireland department as the Minister concerned considers appropriate.

(5) Regulations under this section may include such supplementary, incidental, consequential, transitional, transitory or saving provision as the Minister making them considers appropriate.""

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, I shall speak also to the other government amendments in this group. We have put forward these amendments to facilitate scrutiny of the Government's current position on Clause 11. They reflect the status of our discussions with the devolved Administrations, and noble Lords will be aware that our discussions with the Scottish and Welsh Governments are continuing. We remain convinced that this Bill is the right vehicle for providing legal certainty across the UK and that we should reach agreement with the Scottish and Welsh Governments. As such, the Government do not seek a vote on these amendments today and we will withdraw or not move them at the conclusion of the debate, but we will reflect seriously on the points made and incorporate them into our discussions.

The Government have been clear that the Bill is about continuity, certainty and control. That applies equally and without exception to people and businesses across all parts of the United Kingdom. Our approach has always been guided by two principal aims; namely, that we have a fully functioning statute book on exit, and that there are no new barriers to people living and doing business across the United Kingdom. These amendments have been tabled, in line with our commitment made in the other place, to address the concerns raised regarding the current Clause 11. They represent a substantial movement from our original position and reflect the sincerity of our commitment to finding a mutually agreeable position.

[Lord Keen of Elie]

We have had lengthy discussions on this issue at official and ministerial level, including at the Joint Ministerial Committee. Noble Lords will well know that the Scottish and Welsh Governments have not yet agreed these amendments, but we will continue to work with them to try to find a way through. I am confident that all parties to this discussion are invested in trying to reach that agreement, as was demonstrated by the constructive tone set at the JMC by the Prime Minister and the First Ministers. This is a crucial piece of legislation in the national interest. It must work for all parts of the United Kingdom and we are sincere in our hope that we will find a way for us all to come together in support of it.

Noble Lords spoke at length at Second Reading and in previous debates of the importance of the "presumption of devolution" and have debated the principle that if there is not a good reason for a matter to be held in common, it should be devolved. That is what these amendments aim to deliver. They would take the existing Clause 11 and effectively turn it on its head. Their effect is that by default on exit day any decision-making powers currently held by the EU in areas that are otherwise devolved would pass directly to our devolved institutions without first being diverted through Westminster. The amendments then give UK Ministers powers to apply targeted and temporary limitations on competence to modify retained EU law, which would in essence have the effect of maintaining existing UK frameworks. We envisage that they will be used in those specific areas where we have identified that a future framework for the United Kingdom may be needed. That would ensure that in those areas the current common approaches established by EU law will continue to apply until we—the United Kingdom Government and the devolved Administrations—can together determine the form that the new bespoke UK framework will take, if one is ultimately required for the benefit of both our communities and our businesses.

I should be clear that the limits that would be applied by these powers are not new limits or constraints. They would merely preserve existing competence in relation to EU law after exit as it stood in relation to EU law immediately prior to exit. Therefore any decision that the devolved institutions could take before exit day will continue to be a decision that they can take after exit day in areas where they have exercised their powers. There is no encroachment into existing devolved areas, and of course in areas where we have not exercised these powers there will be an immediate and significant increase in the decision-making powers of the devolved institutions upon exit. I should also be clear that these limits apply to an area only to the extent it is covered by EU law and not to the entire subject matter. They will not limit competence to make any provision in relation to a subject matter where this does not involve the modification of retained EU law. I urge noble Lords to refer to the Government's frameworks analysis, published on 9 March, to see the kind of areas where we envisage that the temporary powers may need to be exercised.

Noble Lords will also want to be aware of the additional limits placed on the exercise of these powers. Not only would the powers be subject to the affirmative procedure but the amendments also apply a reporting duty, a duty to consult the devolved Administrations and a duty to produce explanatory statements.

Ministers will be under a duty to report at regular intervals on the steps taken to implement future frameworks; the way in which the framework principles that underpin that work are applied; steps taken to apply or remove restrictions on devolved competence under the powers; the progress towards removing restrictions and repealing those powers altogether once they have served their purpose; and any other information they deem relevant. All this serves to demonstrate that this mechanism is a temporary means to achieve our end state on frameworks.

Before laying an instrument under these powers, UK Ministers will also be required to consult the relevant devolved Administrations and make a statement on the effect of the instrument and any representations made by the devolved Administrations in response to consultation. Further, since these limits are but a temporary means to preserve existing EU frameworks until they are replaced by a UK framework, the amendments also provide a power to repeal the constraining powers so that they will not be retained for longer than is necessary. Ministers would be under a duty to consider periodically whether it is appropriate to repeal the powers. In doing so, they would be required to have regard to the intended temporary nature of these arrangements and to any progress in putting lasting arrangements in place.

Through this, we have sought to emphasise that these powers and restrictions are not to exist in perpetuity or as a permanent feature of the devolution arrangements. Rather, they provide a short-term fix for our longer, more detailed work on the development of long-term future common arrangements. I note in relation to this the amendments in the name of the noble and learned Lord, Lord Wallace, which would subject the current Clause 11 and any regulations made under the new Clause 11 power relating to Scottish legislative competence to a sunset limit. I understand why that suggestion has been put forward; we have of course been clear that these are temporary arrangements and I am interested to hear the debate on this point.

I must be clear that the temporary nature of the constraints is not the same as proceeding to a fixed timetable. We need to ensure that these complex matters are given due consideration, and there is a risk that the creation of a sunset merely prolongs the cliff edge.

Noble Lords: Oh!

Lord Beith (LD): Might noble Lords be referring to the mixed metaphor they have just heard?

Lord Keen of Elie: May I proceed to split an infinitive?

The new arrangements must be achieved in partnership with the devolved Administrations. Crucially, that takes time to work through.

We must proceed with caution in considering any form of sunset which would change the purpose of our discussions from designing and implementing frameworks that are fit for purpose to ones that can be achieved in the time allowed. Our priority must be to continue to provide legal certainty on how these laws

will work in that interim, but this could risk uncertainty where the provisions may lift before their replacement is known.

This is a substantial and significant amendment to Clause 11. It reflects the progress that we and the devolved Administrations have made on frameworks and in our discussions on Clause 11. It strikes the right balance, delivering for the devolved Administrations and for businesses and people across the United Kingdom. I am grateful for the consideration that this House will provide on this offer as we continue to refine and consider the policy in coming weeks.

The amendments in the names of the noble Lords, Lord Stevenson, Lord Griffiths and Lord Thomas, would amend elements of the amendments that we have put forward. We have heard much on the question of the consent of the devolved institutions for the use of the proposed new Clause 11 powers that would "freeze" existing UK frameworks. As I indicated earlier, I wish to be clear on two fundamental points. The first is that this will be a collaborative process. There is no suggestion or intention that we want to cut our devolved institutions out of these decisions. We have put in place a set of shared principles that the Scottish and Welsh Governments have agreed and which guide our work on frameworks—I referred earlier to the statement following the Joint Ministerial Committee in October last year that sets out those principles in detail. Departments across Administrations are now working together to consider frameworks. Devolved and UK Ministers continue to discuss these matters regularly at Joint Ministerial Committee meetings. The limits on the powers make it clear that the views of the devolved Ministers must be heard and the United Kingdom Government in exercising the power must set out what those views are for Parliament's consideration. That is not a power grab. As we have heard today, this Parliament will rightly hold us to account on how the Government act on devolution policy. The second point is that we must be clear about the implications and outcomes of this work. These decisions affect every part of the United Kingdom. It is the United Kingdom Government and the United Kingdom Parliament that are responsible for matters that affect the whole of the United Kingdom.

We must therefore be very careful about the impact of a hard-edged legal requirement, not because we do not want the Scottish Government and the Welsh Government and, once restored, the Northern Ireland Executive to be part of these decisions but because it cannot be for an Administration in one devolved nation to exercise what amounts to a veto over something that would be in the interest of the other nations of the United Kingdom as a whole. That is not and never was the purpose of the devolution settlement.

I thank my noble and learned friend Lord Mackay and the noble Lords, Lord Foulkes and Lord Wigley, for their proposals to bring the United Kingdom Government and devolved Administrations together. These are constructive suggestions for a middle way that deserve serious thought. I am encouraged by the effort being made to reach agreement.

At present, we believe that the JMC will be the right forum for engagement, working under the principles agreed for the work on frameworks in October last year, but I would like to take away the ideas that have been brought to the table here today by way of the further proposed amendments and consider how these matters might be incorporated into our policy thinking, while continuing to meet our two stated objectives on legal certainty and respect for the devolved settlements.

I thank my noble and learned friend Lord Mackay of Clashfern for his amendment, which seeks to find a way forward in the context of Clause 11 and the frameworks. Again, it is an attempt to ensure engagement between all the interested Administrations to achieve consensus at the end of the day. My noble and learned friend's amendment highlights the importance of clarity as we develop frameworks. As we have discussed during earlier debates, the work on frameworks will have to be a collaborative effort designed to ensure maintenance of a single internal market for the United Kingdom after we leave the EU. Our intention remains to reach agreement with the devolved Administrations. However we approach it, we have that as a goal.

The approach that we have put forward for Clause 11 in these amendments is, I venture, an entirely reasonable proposition. By default, and unless further action is taken, the returning EU powers in the 153 areas identified will become devolved matters. We should perhaps take pause to remind ourselves that these are entirely new powers for the Scottish Parliament and National Assembly for Wales, expanding devolved competence into areas previously held and exercised by the EU and, prior to that, by the United Kingdom Parliament.

We believe that what we propose addresses the points raised by the Scottish and Welsh Governments in their legislative consent memorandums. I hope that noble Lords will recognise that we have moved a considerable way on this, but that we continue to see the importance of providing as much certainty as early as possible for businesses across the UK in order that we can avoid, or indeed manage, divergence between the individual nations of the United Kingdom. While we have not yet reached agreement with the devolved Administrations, discussions will continue and we are extremely keen to maintain our engagement with them. But we consider that it is right that noble Lords have the chance to consider these amendments—the Government committed to that on Report and we brought them forward for consideration by this Committee. I hope noble Lords whose amendments are in this group will feel able to withdraw them at this stage; we, as I indicated earlier, will do similarly with the government amendments at the end of this debate. I beg to move.

Amendment 302B (to Amendment 302A)

Moved by ***Lord Griffiths of Burry Port***

302B: Clause 11, in subsection (2), in inserted subsection (3)(a), leave out "consult the Scottish Ministers" and insert "obtain the consent of the Scottish Parliament"

6.30 pm

Lord Griffiths of Burry Port (Lab): My Lords, in moving Amendment 302B I shall speak also to Amendments 302C and 302G, which seek to amend the government amendments to Clause 11 and Schedule 3.

[Lord Griffiths of Burry Port]

I recognise and appreciate the tone of the Minister's speech, as well as the letter that I received this morning from the noble Lord, Lord Bourne of Aberystwyth. Clearly a great effort is being made, and we acknowledge that. Perhaps it will not be a surprise that it is my task—and I consider it my task—to look at those areas where we have perhaps not yet reached agreement, but it is significant that efforts are being made. Yet I must make the point, in sorrow rather than in anger, that the way in which the Government have handled the whole issue over months of inactivity from the autumn onwards leaves much to be desired. Indeed it would not be wholly inappropriate to describe it as lamentable. There was a lot of time lost there.

There is no doubt that we agree on the two main points—indeed, my own interventions earlier in these debates said so very explicitly. We know that a Bill must be enacted and that we must avoid chaos in our legal system. On day one, things must work. As the leader of my party has said more than once, we are totally committed to achieving that. The Welsh and Scottish Governments made it clear as long ago as the White Paper on what was then known as the great repeal Bill that they could not and would not give consent to the approach embodied in the original Clause 11: an emasculation of the devolution settlements by upsetting the balance of the distribution of powers between the UK and the devolved institutions.

There are some in this Committee who will attribute any criticism of the way things have proceeded to a narrow, political sectarianism on the part of an SNP Government in Scotland and a Labour Government in Wales. In my view, such opinions will be more likely to emanate from the narrow, political sectarianism of those who give voice to them, for the repeated expressions of good will from the First Ministers of Scotland and Wales, working together for a satisfactory outcome to these questions, are entirely in line with a whole host of opinions coming from highly respected sources of a totally objective nature. I handpicked just a few for illustrative purposes in an earlier contribution, but I list them again now: our own Select Committee on the Constitution, the Bar Council, the Delegated Powers Committee, the Bingham Centre for the Rule of Law, and the list could go on. Add to that the eloquent contributions from, among others in an earlier debate, the noble and learned Lords, Lord Morris of Aberavon, Lord Wallace of Tankerness and Lord Hope of Craighead, and it should be clear that we can state with confidence that the case being made has widespread and expert backing. But the Government for months stuck their head in the sand and just ignored the growing chorus of voices that has echoed this concern. Indeed, as we have noted insistently and repeatedly, despite the Secretary of State for Scotland giving an assurance in Committee in the other place that an agreed amendment to Clause 11 would be put forward on Report there, far from realising that modest objective, discussions on the matter with the devolved Administrations did not begin until the new year. Now, after all this time, we are presented with an amendment, or set of amendments, that has still not been agreed by the devolved Administrations.

The Chancellor of the Duchy of Lancaster, a nice, approachable man who serves a decent cup of coffee, has proved himself a master of spin. He has told the whole world about the great success he has had in bringing the peoples of Wales, Scotland and Northern Ireland out of their wandering times in the desert to the very edge of the Promised Land. Perhaps I should remind him that the leader in those wandering days died before he could enter the land flowing with milk and honey. There is still a distance to travel, for Mr Lidington's skilful PR onslaught fails to address the fundamental issue at stake—the issue of consent, which was referred to in the speech we have just heard from the Minister, and which our amendments seek to underline.

Even if amended as now proposed by the Government, Clause 11 would give Ministers of the Crown very wide, unilateral powers to use regulations to place new constraints on the legislative competence of the devolved legislatures. The claims of the Government that this would entail no restrictions on the scope of the legislatures to act that are not now in place ignore the fact that the current EU law restriction falls away on exit day, as does the constraint on our own freedom to pass laws in contradiction of EU law. Let there be no doubt: Clause 11 allows for the imposition of new restrictions, ones that will, if the Government have their way, be controlled and policed by Whitehall. We have heard plenty of discussion of the possibility of this in earlier debates. This is a very different constraint to the one that currently applies to the whole of the UK to respect EU legal frameworks painfully negotiated by 28 member states, with a clear role for the devolved Administrations in developing the UK negotiating position.

The amendments as drafted do not even contain the safeguards that the Government would have us believe. While they say that the restriction will apply to areas where future UK frameworks would apply, and have tried to throw sand in our eyes by simultaneously publishing a list of such potential framework areas, the regulation-making power they seek is not circumscribed in this way. In theory at least, Ministers could simply specify all of those areas of retained EU law that would otherwise be in devolved competence. Of course, I would hope that our House, presented with the requirement for an affirmative resolution to support such regulations, would refuse. But can it possibly be right that it is only Parliament that would have any input into this decision, not the legislatures whose rights would be circumscribed? I mean, it is only the Executive that would have Ministers, not the legislatures. The only requirement in respect of the devolved institutions is one to consult the devolved Administrations.

What the Government have brought forward at this late stage is far too weak.

Lord Forsyth of Drumlean (Con): I am following the noble Lord's argument very carefully. Will he explain why he is content with the position under the current arrangements by which these matters are determined at European level? The Welsh Assembly or the Scottish Parliament do not have a veto and their consent is not required for Ministers' negotiating positions in the

Council of Ministers, which, after all, can respond only to regulations or proposals brought forward by an unelected Commission.

Lord Griffiths of Burry Port: While I will have a word to say in a moment about the use of the word veto, I will not claim to know the detail relating to the Council of Europe, to which reference has been made.

Lord Stevenson of Balmacara (Lab): It was the Council of Ministers.

Lord Griffiths of Burry Port: I beg your pardon. I think the mistake is evidence of the fact that I am not qualified to answer that particular part of the noble Lord's question.

Lord Hain (Lab): With due respect to the noble Lord, Lord Forsyth, not for the first time he is wrong about this. Welsh Ministers, for example, and Scottish Ministers often attend the Council of Ministers with the permission of our own UK Government to make sure that their voice is heard. It has been done on a collaborative basis and is nothing to do with his anti-Europeanism: it is actually about how devolution has worked.

Lord Griffiths of Burry Port: I am delighted to receive that help from behind me, and also to hear from alongside me that, when my noble friend used to attend such meetings, he did not feel part of the furniture or not very welcome. Perhaps that in some way goes towards an answer.

Lord Forsyth of Drumlean: What the noble Lord, Lord Hain, is saying is perfectly correct. My question to him was why they were content with a system where people were consulted and involved but which did not require their consent as to the United Kingdom's position, which is exactly what is being proposed here.

Lord Griffiths of Burry Port: I thank the noble Lord. I have long since learned that perfection is not my strongest suit. I remember once asking everybody in a congregation of mine if anybody was perfect and a man at the back put his hand up. I did not believe him, and he said, "No, it's not me; I am speaking proxy for my wife's first husband".

Baroness McIntosh of Pickering (Con): Perhaps I could help the noble Lord. In the circumstances my noble friend Lord Forsyth expresses, consent is given when the devolved legislature applies the directive and implements it there.

Lord Griffiths of Burry Port: I am very grateful to the noble Baroness. Because I am where I am, I am equally certain that the points being raised will be addressed later in this debate.

What the Government have brought forward at this late stage is too weak. If the purpose is, as the Government claim, simply to give breathing space to negotiate new UK frameworks, which is fair enough, where it is agreed by the devolved Administrations that these are necessary—that is an important part of it—then we should be sure that the devolved legislatures agree that these are indeed the policy areas where restrictions are needed. It does not seem to be very difficult to come to these conclusions. Indeed, there has been no attempt to engage with the proposals put forward by the Welsh Government in their policy paper *Brexit and Devolution* some nine months ago, arguing for a system which would address precisely this issue. Perhaps the Minister could explain this egregious omission.

Over the last week, I have come across an intriguing poem by Waldo Williams, one of the dominant Welsh writers of the last century. He asks a series of questions and gives succinct, almost gnomic answers to them. As I conclude my remarks, I cannot forbear from quoting one couplet in Welsh, in order to forestall an intervention by the noble Lord, Lord Forsyth—though he might surprise me yet again. I will quote it with a translation by the noble and right reverend Lord, Lord Williams of Oystermouth—I do not want to frighten the *Hansard* horses. Just listen:

"Beth yw trefnu teyrnas? Crefft
sydd eto'n cropian".

That is:

"What is it to govern kingdoms? A skill
still crawling on all fours".

We must urge the Government to stand up, to withdraw their amendments and to go back to the discussions with the devolved Administrations before returning with an approach which gives an appropriate role to the devolved legislatures to agree the areas—indeed, perhaps to go further and to put a list of frameworks into a schedule to the Bill—in which new restrictions on their legislative competence will operate. This may well turn out to be a test of whether the Government have the competence to lead us out of the mess they have so tidily put us in. I wish to move the amendments.

6.45 pm

Lord Mackay of Clashfern (Con): My Lords, my Amendment 318A is in this group. As your Lordships know, I am a lawyer, but I have already got limited support from the noble Lord, Lord Wigley, who has repeatedly explained that he does not suffer from this disadvantage—I will do my best to take him along with me.

As I have indicated, I was first introduced to this matter in a discussion with a very distinguished SNP Member in the other place, when we were travelling together from the north. I mentioned to him that I had had no briefing of any sort from the Scottish Government. The next day I got a message from the Scottish Government to say that the Lord Advocate and Mr Russell, the Minister, were very willing to speak to me. I was able to speak to the Lord Advocate that afternoon and to Mr Russell in the early afternoon that Wednesday. I was very emphatically assured by Mr Russell that the Scottish Government were keen to reach an agreement. I am quite satisfied that there is no indication in the attitude of the Scottish Government that this is an attempt to further their ultimate political aim, and that they are seeking to solve this matter in a way that accords with the dignity of the Scottish Government. I said that I did not want to do or say anything that would impede agreement, and I now hope to show how agreement can be reached.

[Lord Mackay of Clashfern]

Before I explain the amendment, I will say a word or two about the law that lies behind it—I will take Scotland as an example, as the other Administrations have similar provisions. The devolution settlement in the Scotland Act is subject to EU law. That considerably restricts what the Scottish Administration can do at present, but when Brexit comes along that limitation will disappear. Included in those limitations are the legislative powers of Brussels to legislate in the United Kingdom. From one point of view, it is wise to analyse these powers in this way: a power that can be made effective within a single area of legislative competence in the United Kingdom should go straight to that level—in other words, to the devolved Administration. That is, if the power does not require more than one of our legislative areas in order to be effective, it should go straight to the devolved Administration.

But there are EU powers which can be effective only when they cover more than one of our legislative areas. The one that is of most relevance in this connection is that which provides for the single market. As your Lordships know, and as the Scottish Government certainly know, the single market is quite an important feature of the present negotiations. Part of that single market is the single market in the United Kingdom. It is 100% obvious that, if you are going to legislate for the single market in the United Kingdom, it is legislation that affects all of the countries within the United Kingdom and the legislatures that support them. Therefore, it is absolutely plain that the ultimate power to settle the single market provisions lies with the United Kingdom Parliament.

But—and this is an important consideration—it is extremely wise to proceed by agreement where it is at all possible. A good deal of agreement has already been reached. As I said, I was assured by Mr Russell when I first spoke to him—and again when he later saw my amendment, which he welcomed subject to qualifications such as the noble Lord, Lord Wigley, will propose—that the Scottish Government are very anxious to reach agreement.

Lord Forsyth of Drumlean: I am very interested in this concept, which my noble and learned friend is putting forward, that powers which affect the single market that is the United Kingdom should be taken at a United Kingdom level. Does he see that operating both ways? For example, the Scottish Parliament has the power to set unit pricing for alcohol, which of course affects the single market that is the United Kingdom. Does the proposition that powers which affect the single market should be taken at the UK level mean that, as well as the powers which will come from the European Union when we leave it, powers might also be returned to Westminster from the Scottish Parliament? He might find that Mr Russell is less enthusiastic about that.

Lord Mackay of Clashfern: I am not suggesting that for a minute. I am suggesting that what is required is a single market which is the necessary concomitant of having cross-border trade. I do not think that the price of alcohol in Scotland would necessarily affect that. It might be wise for me, if I wanted to buy alcohol, to do it when I was here rather than in Scotland. I may say at once that I am not particularly keen to do that either. That is not an example of the need for there to be no obstacle at the border, because if I have to pay for the whisky in Scotland, I can take it with me, subject to not coming on an aeroplane, I suppose. It is a matter of what is required.

It is realised by various people who were at the meeting of the Joint Ministerial Committee that framework agreements will be required in certain areas. That is because, for the single market in the UK to be effective, there must be agreement across the legislative areas. It follows, as night follows day, that the legislative vehicle for dealing with a market which is across the whole of the UK is a vehicle which has jurisdiction over the whole of the UK. It cannot be otherwise. That seems to be common sense and you do not need to be a lawyer to think that.

My next point is the "but" I was coming to before I was helped by my noble friend. I stress that it is highly desirable, when you are seeking to get a single market, to get the agreement of the components. They have different interests, but there is a very strong pressure to secure a single market. I am sure the Scottish traders do not wish to have something at Berwick-upon-Tweed which requires them to pay out money to English customs. It is absolutely clear that there is a very good pressure to reach agreement. As I say, I am assured by the White Paper that the Welsh Government put forward some considerable time ago, which was referred to earlier. I say in passing that that paper addresses itself to wider constitutional issues about future government in the United Kingdom and how it is not working very well and what-not. But I need something that will work now for the very limited purpose of getting the single market arrangements secure before Brexit comes into effect.

I have suggested in my amendment that there should be set up a group which consists of representatives of all four countries. I think it is wise to specify who they are. I have also specified, to try to reach agreement, that the chairman of the group should be decided on by the group. The Lord Advocate mentioned to me that one of the features of the present committee is that it is always a UK Minister who presides. There will be a certain amount of interest in the skill of the chairman in reaching agreement. It is often quite an important position—I have not been chairman of many committees that have not reached agreement—and it is an important aspect of the matter. I have therefore suggested that.

Of course, the details of this are very much matters for your Lordships to consider, but that is the ultimate thing: that the group should look at all these questions. If, as I am assured, they are very keen to reach agreement, I have no doubt whatever that there is a very high prospect that they will reach agreement—I emphasise that—when you consider that new rules must come into operation at the point of Brexit or the end of the implementation period, whichever is the later, and that if there was failure to reach agreement it would require the action of the United Kingdom Parliament. I am prepared to limit the amount of time for that to three months to emphasise my confidence that agreement will be reached and that therefore a

formal legislative enactment in the United Kingdom with full consent from all four members of the committee would be the result.

This is a simple way of dealing with the matter, which is dealt with in a rather complicated way by the government amendment. The government amendment appears to inject powers into areas which may be devolved in fact. Mine makes it absolutely clear that the devolved powers are to be immediately made available to the Governments of the devolved legislatures; it is only the single market power that I consider needs to be reserved.

My very good supporter, the noble Lord, Lord Wigley, has suggested in his amendment that there should be some extraordinary—I do not mean that in a pejorative sense—tribunal to decide when there is disagreement. I certainly hope that there will not be disagreement, but I have provided that if there is disagreement the group itself must specify what that disagreement is, to make the issue for the United Kingdom Parliament as small and definite as possible. In my analysis, the single market is within the legislative competence of the UK Parliament. All the four countries are represented there. I remember that the Scottish party that got many seats in the 2015 election said that one of the purposes was to provide a strong voice for Scotland in the Parliament of the United Kingdom. I have no doubt there is a pretty strong voice for that purpose. Having all four countries represented is as good as any kind of remarkable thing with Speakers. I am not sure if my noble supporter has asked the Speakers whether they want to take this on, but I think that is not in their competence. That is a job for the legislative assembly of the United Kingdom which is set up under our constitution and which I believe would reach a very good agreement on this point, if it had to. In the meantime, I sincerely hope it will not be necessary for it to do anything except legislate with a form agreed by the four constituents.

Lord Wigley (PC): My Lords, I tabled Amendment 318AA as an amendment to the amendment in the name of the noble and learned Lord, Lord Mackay. I did so with due deference and with considerable temerity to be trampling on the legal pastures in which he has such expertise and I am a layman. None the less, I confirm that I have had conversations not only with Mr Mike Russell, to whom the noble and learned Lord referred, but with people from the Welsh Government—and, as he raised the question with me, yes, I have discussed it with the Presiding Officer of the National Assembly, Elin Jones, who sees no difficulty at all with such a mechanism.

With that prelude, I thank the noble and learned Lord, Lord Mackay of Clashfern, for tabling Amendment 318A, which he did following the earlier debates in Committee. Those debates pointed to a crying need for a sensible mechanism to be found for dealing with the vexed issue of securing agreement between Westminster and the devolved legislatures regarding those matters which the UK Government feel must be handled on a UK level, even though they deal with areas that may be of devolved competence.

7 pm

I was encouraged by the Minister's words, relating to these amendments, that there is a possibility of looking at this between now and Report. That is something that will be welcomed in Cardiff and Edinburgh. Indeed, as the noble and learned Lord, Lord Mackay, said, there is a yearning in both those cities for this issue to be resolved by a sensible mechanism that is acceptable to all sides. That is the point of view from which I approach this question and it is why I put forward the amendment I have on the Order Paper.

I agree very much with what the noble and learned Lord, Lord Mackay, said. The reason I tabled Amendment 318AA is that the system of adjudicating whether or not the powers should be exercised on a UK level must be recognised and accepted as fair by all sides—there should be no political connotation running into it. The final provision of Amendment 318A is for Westminster to have the last word—which I understand that technically and constitutionally it would have, because ultimately the sovereignty is here. However, I fear that, if that was the case, it would inevitably be seen as a facility to overrule the devolved Governments. Having that power in reserve, Westminster would not be encouraged to negotiate on an even-handed basis. It would have the ultimate trump card, and as such the legitimacy of the whole process could be undermined.

As the noble and learned Lord mentioned, my amendment provides for a mechanism whereby, in the event of disagreement, the issue can be considered for a ruling by a panel comprising the Speaker of the House of Commons and the presiding officers of the devolved Parliament and Assemblies. It also provides that, if they so choose, they can refer the matter to the Supreme Court. In this way, we would be providing an equivalence to the European system that we are replacing, in that the European court currently can have a role in resolving such matters.

Incidentally, in response to the intervention by the noble Lord, Lord Forsyth, as I understand it, Scottish whisky now sells very effectively throughout the whole of the European single market—but that does not imply that there is a single tax regime in all the countries of the European single market.

Lord Forsyth of Drumlean: Will the noble Lord allow me to remind him that the Scottish Parliament had great difficulty in passing that legislation, because it was contrary to the European Commission's views on the single market?

Lord Wigley: I have no doubt it had difficulty in passing it. None the less, the objective was a very valid one—to address the problems perceived in Scotland with regard to the level of alcohol consumption et cetera. The proposal was supported by many people in the social sector who wanted to see that sort of change. This is arguable, but the point is that you can have different tax regimes within a single market, as you have within the European single market. You can within the UK single market.

Lord Hain: I am sure my noble friend will agree with this point. Mention has been made of Scottish whisky—Scottish single malts and so on—but the best single malt in Britain comes from the Penderyn distillery in Wales.

Lord Wigley: Not only do I agree with my noble friend but I will surprise the Committee by reminding him that Penderyn whisky was in fact formulated as a result of devolution itself. It was on the evening of the setting-up of the National Assembly that people came together and thought, "Now we have to start doing something to help ourselves in Wales. What shall we do?" They concluded that a whisky would be one way forward. As they say, the rest is history—a very enjoyable and successful history. I thank my noble friend for reminding me of that.

Lord Wallace of Tankerness (LD): The noble Lord, Lord Forsyth, correctly said that the European Commission objected. But in fact the Court of Justice of the European Union found that the Scottish Government's proposals were actually consistent with the rules of the single market, principally because the minimum unit price was based on health reasons.

Lord Wigley: Indeed—which shows the importance of the health and social agenda that underpinned the initiative.

Lord Grabiner (CB): The amendment includes the proposition that if the panel "consider it necessary", they may refer the matter to the Supreme Court of the United Kingdom. I am not aware that there is any mechanism that could possibly enable that to happen. Moreover, even if it were possible, I suspect that the court would not be very grateful to receive what essentially would be a highly political rather than a purely legal question. If I may respectfully say so, it is rather an unrealistic proposal.

Lord Wigley: I note what the noble Lord says. All I would say in response is that, in the context of a single market such as the European single market, it has been necessary and sometimes highly useful to have the legal mechanism there in order to resolve difficulties that have arisen—as we heard from the noble and learned Lord a moment ago. My amendment is a constructive attempt to ensure that the amendment tabled by the noble and learned Lord, Lord Mackay, is acceptable to the devolved legislatures, which I believe it can be. I believe that it needs to be tweaked, if not by this wording then along these lines.

The core of the argument that the noble and learned Lord is putting forward in his amendment is very important indeed—and I think there is a similar amendment coming forward from the noble Lord, Lord Foulkes. The fact that these amendments are coming forward from different sides of the House is in response to the need to resolve this issue. We cannot have this going on and on in the way that it has. It has gone on for far too long now. There needs to be a resolution that is recognised and accepted by all sides and seen to be even-handed. I believe that there is, as he himself has indicated unofficially, a feeling in both Cardiff and Edinburgh that, if the amendment could be incorporated, along with my proposed addition or something along those lines, it could be seen as breaking the logjam. For that compelling reason, I invite the noble and learned Lord, Lord Mackay, to accept Amendment 318AA, and then for the Committee to accept his amendment.

Lord Foulkes of Cumnock (Lab): My Lords, I speak to Amendments 318B, 318C, 318D and 318E, which, it does not take a lot of working out, follow on from Amendments 318 and 318A. In fact, as the noble Lord, Lord Wigley, said, it is interesting that what I suggest in three of those amendments in many ways corresponds exactly with what the noble and learned Lord, Lord Mackay, suggested—as amended by the noble Lord, Lord Wigley. Yet we came to the conclusion separately. We may have been inspired by the same people, the same thinking and the same ideas, but we came to draft them separately, which is interesting.

It is also really helpful that the noble and learned Lord, Lord Keen, has said quite clearly that the Government are willing to look at these amendments and at some way of getting out of the impasse in which they find themselves. That is a really helpful way forward. However, the Government are the architects of their own misfortune. As my noble friend Lord Griffiths of Burry Port said, the Joint Ministerial Committee should have met more frequently and earlier. We were sent just the other day details of the fifth ministerial committee—on 16 October. It is extraordinary that we had only four ministerial committees dealing with this issue before then. It really is a dereliction of duty by the Government, which I think comes from the fact that, within Whitehall—as I found when I was a Minister—there is no understanding about devolution and what it involves. The Minister responsible was perhaps Oliver Letwin or Chris Grayling, so you can understand why they did not understand—but what worries me is that the noble and learned Lord, Lord Keen, has been the Advocate-General for some time, and he should have alerted the people around Whitehall and others to this problem a lot earlier. Indeed, the Secretary of State, David Mundell, who I will concede is a very nice man—

Lord Hain: In spite of being a Tory.

Lord Foulkes of Cumnock: In spite of being a Tory; that is right. He has been constrained by Whitehall in getting decisions. I remember well sending notes around every Whitehall department to try to get some agreement. It is very difficult. However, I would have hoped he would have flexed his muscles a little earlier.

Lord Forsyth of Drumlean: My Lords, the noble Lord is clearly very expert on this process and when these meetings were held. Could he tell us how many of those meetings were cancelled by the Scottish Government?

Lord Foulkes of Cumnock: I have no idea; maybe the Government can help. What I can tell the noble Lord is that when I was Minister of State for Scotland we had a number of meetings. As my noble friend Lord McConnell can confirm, there were a lot of bilateral meetings between the Scotland Office and Ministers in the Scottish Government. That is the kind of thing that should have been happening but has not been.

I am not known for praising the Government, as Members who have heard me from time to time, particularly the noble Lord, Lord Callanan, know

only too well. However, we should acknowledge—I say this as a strong devolutionist and a former MSP who really believes in devolution and argued for it for years, long before other people in Scotland were arguing the case—that the UK Government have moved on this. We have to concede that, under pressure and looking at the argument, they have moved.

We also have to be realistic. I say this to some of my Labour colleagues from England and, with respect, from Wales: the SNP has a clear agenda. It is concerned with only one thing, and we have to remember that. If it sees that it is to its advantage to concede then it will, and it may be able to make it to its advantage, but let us not be naive about what the SNP is up to—and let us hope that Welsh Labour is not naive about that either.

There is an advantage in the UK single market having the same kind of regulations on some of these issues, some of which the Minister has mentioned, and we ought to recognise that. We have an institutional and constitutional problem in the UK in that our devolution is asymmetrical. I have said on a number of occasions that this creates problems in a range of areas, and we can see that it does here. This Parliament has to speak for England as well as the UK and that creates structural, philosophical and other problems. Some of us believe in a federal UK—the Liberal Democrats certainly do, as do a number of Labour people such as myself—and in the longer term I hope we will deal with that. In the meantime, though, we have to recognise that it is a dilemma for the Government to be able to look after the interests of England. The Minister pointed out, and this is something that we have to take account of, that decisions made by the Scottish Parliament or the Welsh Assembly can have an impact on England. We have to accept that and look after the interests of England as well as the whole of the UK. The Minister has said there is an advantage in a number of aspects being uniform throughout the whole of the UK, and I concede that. I was going to mention some more examples but I am conscious of the time.

I turn to the amendments. Serious thought needs to be given to the amendments that the noble Lord, Lord Wigley, the noble and learned Lord, Lord Mackay, and I have tabled. We need some form of mediation and that is what we are suggesting in these amendments—certainly in my first three. I am suggesting something similar to what is suggested by the noble and learned Lord, Lord Mackay: a ministerial council that would deal with that. Then, as a fallback if it could not come to an agreement, I have suggested an advisory panel, and have suggested that it should be the Speakers and the Presiding Officers who would set it up so we would get to a very similar conclusion. Some Members opposite will be pleased to hear that I do not refer to the Supreme Court.

For once, I am in agreement with the noble Lord, Lord Thomas of Gresford. I suggest in Amendment 318E that there should be a sunset clause. He and the noble and learned Lord, Lord Wallace, have suggested two years and I have suggested five, and that is open for debate, but it would be very good to have such a clause so that all sides would know that it had to be resolved by a particular time.

I hope, and I think the Minister indicated this at the start, that the Government consider these to be positive suggestions. If I can recognise that the Government have moved after all the awful things I have said about them over the last few days, months and years, I hope others will recognise that as well and give them at least just a little credit.

7.15 pm

Lord Wallace of Tankerness: My Lords, I shall speak to Amendments 302BA, 312 and 318 in my name, but I shall start by speaking more to the generality by responding to the government amendments moved by the Minister. It is fair to acknowledge that much has happened since Second Reading when I and many others criticised the architecture of the original Clause 11, not least because it showed scant regard for the spirit and structure of the original devolution settlement. It had a system of conferred powers that was totally alien to how devolution had performed and been structured until this point.

However, I give credit to the Government for tabling these amendments. They have thought to recast Clause 11 and the related schedules, and I think it was acknowledged earlier that there is more work to be done. When you get legislation like this and new situations arise, it is amazing how new words come into the vocabulary. The Government have claimed that most of the powers at the so-called intersects will go directly to Cardiff, Edinburgh and Belfast on exit day, subject only to relatively few remaining—they emphasise that this will be temporary, though I shall return to that—to secure the UK single market until such time as that framework is put in place.

As has been acknowledged, that is a welcome step. It shows a lot of progress and, I think, a lot of good will towards seeking an agreement. However, it has clearly not yet been sufficient to allow the Scottish and Welsh Governments to recommend the Legislative Consent Motions to their respective Parliament and Assembly. Indeed, the letter from the First Ministers of Scotland and Wales to the Lord Speaker that was circulated to all Members of your Lordships' House says:

"In being asked to give legislative consent to the EU (Withdrawal) Bill on this basis"—

that is, on the basis of the new amendments—

"the devolved legislatures would be being asked to agree to the creation of this power with no certainty about where frameworks will be established, how these will work, how they will be governed and how we will go from temporary restrictions to longer term solutions".

It is also arguable that the amendments do not do precisely what the Government claim they are seeking to do. The Government have said—indeed, the Minister has said today—that the intention is that the vast majority of powers identified at the intersects will go directly to the devolved institutions. The noble and learned Lord, Lord Mackay of Clashfern, rightly said that that is the proper thing to do. However, if one looks at the amendments before us, while much has

[Lord Wallace of Tankerness]
been said about a figure of 24, one sees that there is nothing in the Bill that restricts it to 24. Technically, and I think this was a point made by the noble Lord, Lord Griffiths of Burry Port, all 158 could be subject to this freeze and this restriction. They could all be subject to regulations made under the powers in the revised Clause 11 and there would be no provision for consent from the Scottish or Welsh Ministers, let alone from the Scottish Parliament or the Welsh Assembly.

It would help considerably if, in the body of legislation, it was made clear in some way which powers would go directly, or if there was a schedule concerning which powers would be the subject of framework agreements. I do not doubt for one minute that there will be some negotiation about what should be in frameworks and what should or should not be a UK framework. That is perfectly proper for negotiation. I welcome what the Minister said earlier: agriculture is set out as a broad heading but he accepts that agriculture has to be subdivided and not all aspects of it would be the subject of frameworks. Indeed, it is worth noting that NFU Scotland identifies in a briefing paper animal welfare and traceability, public health, pesticides, regulation and food labelling as examples of overarching areas of regulation that would be best suited to being managed on a commonly agreed framework basis. There is lots of scope for talking to stakeholders about what the framework should be, but it would be very helpful if that could be in the Bill.

I do not underestimate for one moment that there will be work to do, but we should perhaps reflect that it will be at least four weeks until we come to deal with these issues on Report. It is worth reminding ourselves that the House of Commons Select Committee on Scottish Affairs recommended back in November that there should be clarity on this before the Bill reached Third Reading in the House of Commons. I do not take away from the work that has been done by officials, but if there is a will to get there, I am sure it could be done.

One other reflection on this point is that earlier today, in response to an intervention from me, the noble and learned Lord said that, given that we are now to have a transition period, we will have to accommodate that transition period in future legislation, a withdrawal and implementation Bill, so we may not need these frameworks until 31 December 2020 or 1 January 2021, which provides further time to sort out what should be in later legislation. But I would rather strike while the iron is hot and seek what can be done in this Bill.

It has also been said that these measures are temporary. The Chancellor of the Duchy of Lancaster went out of his way to emphasise that in the letter that he sent to all Peers. The Government have, to their credit, included several extra provisions to buttress their position that they should be temporary by reporting requirements, and these are all welcome, but, unlike some other parts of the Bill, there is no sunset clause. That is why, in Amendment 312, which was tabled before the new amendments, my noble friend Lord Thomas of Gresford and I recommended that there should be a sunset on the whole power after two years and, in Amendment 302BA, I suggest that any regulations brought forward under the new powers should themselves lapse after two years. The noble Lord, Lord Foulkes of Cumnock, said that it should be five years. We could have a debate about that but, again, the principle is trying to build confidence to get an agreement between the Scottish and Welsh Governments and the UK Government, and to have a sunset clause would go a considerable way to help that.

As we have heard in the previous three contributions, there could be dispute about the frameworks. Our Amendment 318 would put the Joint Ministerial Committee on European negotiations on a statutory footing. In October 2016, to much fanfare, we were told that this new committee had been set up,

"to ensure that the interests of all parts of the United Kingdom are protected and advanced, and to develop a UK approach and objectives for the forthcoming negotiations".

That has probably been more honoured in the breach than it has in practice. We know that in recent weeks there have been more concerted efforts in the committee to try to gain agreement on what we are discussing tonight, but there might be a lot of advantage in putting it on a statutory basis so that there could not be any backsliding on when it meets, as has happened before.

I welcome the initiative taken by the noble and learned Lord, Lord Mackay of Clashfern, and the amendments proposed by the noble Lords, Lord Wigley and Lord Foulkes of Cumnock, because they constructively try to address how we resolve some of the difficulties. There clearly are difficulties and differences, and we must try to start thinking outside the box and creatively. The noble and learned Lord, Lord Mackay of Clashfern, picks up very well one difficulty: the United Kingdom Parliament is also the Parliament for England—England does not have a separate legislature, as Scotland, Wales and Northern Ireland do.

I was reminded of my colleague Mr Ross Finnie, Minister for the Environment and Rural Development in the first Scottish Administration. His experience of meeting counterparts from Wales, Northern Ireland and Defra was that some Secretaries of State saw their role as to be the UK chair of the meetings, with the English Minister of State arguing England's case, whereas other Secretaries of State could not see the difference between an English position and a UK position. He said that, clearly, they made far more progress when they had a Secretary of State who saw him or herself as holding the ring as the UK Minister with an English Minister of State arguing the English position.

We must recognise that, as the noble Lord, Lord Foulkes, said, it is asymmetrical.

Lord Dykes (CB): I am most grateful to the noble and learned Lord for giving way. He referred to the noble Lord, Lord Foulkes, who said in his speech that he hoped that one day there would be a federal constitution and, I think, implied that the noble and learned Lord supports the same idea. There are other Members, including Cross-Benchers, who feel that that is a very good idea.

The tragedy is that with the constant muddle we have, with our inability to have other than fairly chaotic governance for various reasons, including the lack of a written constitution—which most people would not agree with, of course, but I think is a growing field of thought—how does one get that without first having a constitutional convention to launch it, and how on earth would you get agreement on a constitutional convention in Britain?

Lord Wallace of Tankerness: There are lots of questions there from the noble Lord, Lord Dykes. First, as a member of a party that has supported some form of federal United Kingdom since the days of Asquith, I have no difficulty in saying that I believe in federalism. Equally, I do not diminish the difficulties and challenges in getting there. I rather suspect that, with what we have at the moment, we do not have time for a constitutional convention. That is why, as with so many other aspects of our constitution, we must move incrementally.

A lot of this has hinged on consent. Interestingly, the report from your Lordships' European Union Committee on Brexit and devolution states:

"Any durable solution will need the consent of all the nations of the United Kingdom, and of their elected representatives … A successful settlement cannot be imposed by the UK Government: it must be developed in partnership with the devolved Governments".

The Scottish Affairs Committee also referred to the fact that it would require the consent of the devolved Administrations.

On the issue of legislative consent Motions, as the noble and learned Lord the Advocate-General for Scotland knows, there is concern that frozen areas of EU retained law might well be seen to be beyond the legislative or executive competence of the devolved institutions, and therefore no legislative consent Motion would be required, at least under the enunciation formulated by Lord Sewel in the Scotland Act. I accept that devolution guidance note 10 could kick in. I think that the Minister said something to the noble Lord, Lord McConnell, in a previous debate, but it would be very helpful if he could clarify that, in the event of subsequent primary legislation in pursuance of the common UK framework, legislative consent Motions would indeed be expected.

Finally, we are moving into uncharted waters. Arguably, if we had not been in the European Union in 1998, the Scotland Act would have been constructed differently. The single market of the United Kingdom, which I certainly value and numerous other Members of your Lordships' House have said they value, has been maintained since 1999 by the single market of the European Union. We are now into new territory with, for example, trade agreements. Negotiating international agreements is a function of the United Kingdom Government, but the detail of these trade agreements could well impact on devolved competences. How will that be accommodated? Canada, for example, when it negotiated its agreement with the European Union, had representatives of the provinces and territories in the room at the table during those negotiations. It would be very welcome if the Government were to make a similar commitment. That, again, would be a confidence-building measure.

At a later date, we will no doubt have to consider how frameworks operate when we have them. I welcome the suggestion of the Welsh Government of a council of UK Ministers with qualified majority voting to operate the frameworks. That would take us much further down the road towards federalism. In the meantime, the challenge is to find workable arrangements in the interim.

We do not really have a concept of shared competence. Perhaps that is something that we should work up. It was something which we discussed in the Calman commission back in 2008-09. It did not have much traction then, but we are in a new situation.

There is also the question of consent and trust. It has been said that constitutional propriety does not really allow for anything like consent. Those of us who argue for a written constitution are often told of the benefits of having a flexible, unwritten constitution. We are in a new situation. The Government responded to the campaign for English votes for English laws by bringing out a new device which, arguably, undermined the sovereignty of Parliament, because the House of Commons and the House of Lords can vote for an amendment, but if English MPs, a subset of one House of Parliament, say no, it does not become law. That is a move away from the sovereignty of Parliament.

Those who were in the Chamber earlier today heard my noble friend Lord Alderdice talk about the Good Friday agreement. He talked about the need to be adventurous and creative and suggested that if that process had involved some of what we have been hearing in the EU debate—people not willing even to entertain the idea of any differences or of how you work with sovereignty—we would never have had the Good Friday agreement. I would encourage the Government to be adventurous and creative; to be willing to think outside the box; to be willing to compromise; and to be willing to seek pragmatic solutions, even at the expense of 100% constitutional purity. What we are discussing, at the end of the day, is not about institutions. It is about people, businesses and the certainty they want in the law and their rights when we move out of the European Union. We should keep that firmly in our minds. In that spirit, I hope that the Government can come to successful negotiation with the devolved Administrations and that, by the time we come to Report, we can have amendments that we can all support.

7.30 pm

Lord McConnell of Glenscorrodale (Lab): My Lords, I have been very critical of the way that both the Government and the Scottish Government have conducted these discussions over the past 12 months, but I want to start by being very positive in your Lordships' House this evening. I think the Government have moved considerably; I think the reversal of the principle behind the new clause is very welcome indeed; and I think it is now very likely that we are close to an agreement on the different categories of responsibility and competence in the different sections. I very much welcome the assurances from the Minister in the earlier debate that legislative consent Motions will be required for any primary legislation that would enact these new frameworks. I also welcome the tone of the debate

[Lord McConnell of Glenscorrodale]
tonight and the fact that the Minister is welcoming the different amendments that have been put forward and the ideas that have been suggested and is willing to look at them with his team over the coming weeks, before we get to the stage of having to vote on any specific proposals.

However, I want to make one specific point, in the interests of brevity and concentrating on what I think is most important here this evening. The way in which these frameworks are established is perhaps critical to getting the agreement to the stage of the frameworks in the first place. Whatever opinions each of us might have about the taking back of control to the UK from the European Union, in that exercise of taking back control to the UK I think the Government could be much more ambitious in setting out a new way of working inside the United Kingdom. Frankly, the joint ministerial committees have never worked, from the very first year. They were chaired by UK Ministers; they were sometimes consultation exercises; they were more often a brief, cursory discussion around a table. They were very occasionally brought together to reach agreement on a specific item, but those agreements were always much better reached in other forums or bilaterally. Tony Blair and I both tried to get rid of them. We did not succeed, but I wish that we had.

The Government need to think way beyond the joint ministerial committees. Perhaps the noble and learned Lord, Lord Mackay of Clashfern, has started to point us in the right direction for a way in which we can build a new relationship among the four Governments. What we need to look at is not a joint ministerial committee but a new form of ministerial council within the United Kingdom that might perhaps have a rotating chair, rather than being chaired by the UK Secretary of State, and that would have some sort of procedure for resolving disputes. It obviously could not use qualified majority voting, and it might or might not have a veto, but at least each case would be agreed properly among the different sets of Governments. If the Government could do some radical thinking on this over the next few weeks, before we get to the stage of finally voting on this Bill and agreeing the way ahead on frameworks, then I think they would be on much firmer ground to get agreement on the individual competencies and then to get consent. Although not necessarily required legally or constitutionally, it would be better for the United Kingdom if consent is acquired for this Bill and for the subsequent actions that will take us forward to the next steps. I urge the Government to think more ambitiously about the way these frameworks will look in the future, while I welcome the steps that have already been taken to put in place restricted time scales, which might yet include a sunset clause—that might be very wise—to be clear about the reversal of the principle; to devolve things unless they have to be reserved; and to be willing, tonight, to listen to all the amendments.

Lord Lang of Monkton (Con): My Lords, after roaming around the various amendments to the government amendment, I would like to steer us back to the government amendment itself, which I support and which I hope will form a pathway to getting this matter resolved. I am afraid my remarks will be mainly focused on Scotland, where the battle has been fiercest, but I will refer to the other devolved Administrations in the context of the generality.

We have got here by a tortuous route of JMC meetings, consultations, arguments and a lot of delay. I acknowledge the willingness of the Government, in particular, to try to follow this approach of constantly being willing to participate in discussions and consultations. Much reference has been made in earlier debates to the spirit of devolution, to which the intergovernmental relations paper published by the Constitution Committee some time ago referred—indeed, we argued for many things, including some just referred to by the noble Lord, Lord McConnell. Given where we are in this farrago of committee meetings and consultations and rebuffs and demands and arguments about "consent" and "consult", it is a relief to have an amendment to the Bill which we can debate and, I hope, remove the deadlock.

I prefer to start by reference to a component of the debate that seems to have been notable by its absence in discussion until my noble and learned friend Lord Keen raised it in the last debate, namely the Sewel convention. When the Scotland Act 1978 was going through Parliament, I asked my lamented and good friend Lord MacKay of Ardbrecknish what it was all about. It was not called the Sewel convention at that stage. He said, "Oh, it's a good-will measure. When we and the Scottish Government both want to legislate on the same subject, we'll offer to do it for them to avoid duplication". If only. The spirit of devolution may have been alive then, but it has taken a battering since. The finished version has turned out a bit differently. Far from being a good-will gesture to foster harmonious relations, it has become a battleground on which Parliament seems under constant challenge, with one visit already to the Supreme Court and another allegedly brewing. That is not the spirit of devolution.

The Government deserve credit for endless trust and courtesy, but their patience has gone unrewarded. It seems that they are left with no alternative but to act as they now propose. The noble Lord, Lord Thomas of Gresford, who I am glad to see in his place, said in an earlier debate that it is a pity that devolution has got tangled up with the Brexit Bill. I absolutely agree with him—I wish they could have been taken separately—but it obviously is not possible. We are where we are. In the much larger arena of the Brexit negotiations, the challenge of this Bill is full of difficulties and complex issues. No solution is easy, but the Government have to make progress to keep to the timetable. In that context, I think reference to the Sewel convention makes clear that Parliament can legislate on devolved matters. That is an important point to remember and one that could have been prayed upon at the very outset as an alternative route to securing a satisfactory conclusion. Of course it is not something to do lightly, but we in the devolved Administrations need a solution. The word "normally" offers a key to this. There can surely be nothing less normal in the world of law-making than legislation to retrieve to our shores from the European Union over 40 years of legislative activity against a tight deadline and in advance of the moment

of transfer—a retrieval that is vital to the maintenance of the rule of law as Brexit takes place. If that is not abnormal as an event, I do not know what is.

The Scotland Act and the Wales Act, as amended, and the convention are the nearest we can get to a stable base on which the devolution settlements can have some hope of harmonious survival, provided all parties respect that base. Enoch Powell's dictum that power devolved is power retained has to prevail or the centre cannot hold, but sovereignty can be courteously delivered and received. The Government's record on that is good. The Bill respects it and the guarantees that the Government have given. It specifically guarantees that no existing devolved power will be changed. Everything already devolved stays devolved. The area of dispute is a narrow, temporary and reducing one. As the Government's amendment concerning EU powers being brought into the UK for the first time demonstrates—under the EU treaties, those powers must be transferred to the nation state in the first instance—the vast majority will go straight through to the devolved Administrations. Only those powers temporarily reserved that affect national frameworks, on which the devolved Administrations reached agreement in principle as long ago as last October, will be frozen en route until the frameworks can be decided upon. My noble and learned friend the Advocate-General covered that matter very effectively in his speech in the previous debate.

I respect the principles advanced by noble Lords and their sensitivity over matters that they point out are devolved, but there are other factors that again, in the spirit of devolution, could be deemed worthy of some movement by the devolved Administrations. These competencies and my noble and learned friend's speech were very helpful on this—indeed, it makes my own speech almost redundant from now on, but I will make it anyway. These competencies coming home from the European Union were not ours to devolve before and do not necessarily fit in under the headings of what is claimed as devolved. They were not ours to devolve before; they are in many ways new and additional and reflect the changed legislative priorities that have evolved over the past 40 years. I just give one simple example of that change in agriculture: 40 years ago, we had a Ministry of Agriculture; now we have a Department for Environment, Food and Rural Affairs—a very much changed animal. Virtually all these new powers will as soon as possible end up with the devolved Administrations.

I do not know how the Government could do more without jeopardising their obligations to the United Kingdom as a whole. This Parliament is the only one that can negotiate the Brexit deal—the outcome will after all form part of an international treaty—and this Parliament is the Parliament of Scotland, Wales and Northern Ireland, as well as of England and the United Kingdom. I sometimes think that Scotland's First Minister occasionally forgets that the Prime Minister is also her Prime Minister and that the Westminster Government—as the SNP derisively refers to us, as though we were a foreign power—are also Scotland's Government as well as that of the other parts of the UK. It is the Prime Minister who can protect the First Minister from herself by ensuring that Scotland remains in the UK, as its people decided only three years ago, and thus in the United Kingdom's single market, which is the mainstay of Scotland's economy. As I think all your Lordships now know, it takes four and half times more exports than the entire European Union does.

Yet still they rage against the light. The intransigence shown by the Scottish Administration was always likely to emerge. I diverge here from my noble and learned friend Lord Mackay of Clashfern—though fortunately not on a legal point—as I believe it was always going to emerge, and it is what the Scottish Government mean by "negotiation", because they are working to a different agenda, an agenda with only one item on it: independence. Everything in every area of government in Scotland is subservient to that, hence the neglect that we see of education, the economy and all the other matters that are their responsibility. If they can find of way of turning everything that happens into a source of grievance, they will do so. Grievance is their default position. They would make a grievance out of a ray of sunshine if they thought it would help their cause. Where in that Administration is the spirit of devolution? There is no power grab in the measures proposed in the government amendment, quite the reverse; it is a power bonanza. The devolved Administrations should welcome it as a ray of sunshine.

Lord Hain: Even accepting the noble Lord's criticism of the nationalist Government in Edinburgh, can I just remind him that the Welsh Government—a Labour Government and a pro-union Government—are just as critical of the stance that the Government of the UK have taken up to now? His remarks do not take account of the depth of feeling that there is in Wales and the Welsh Government about this matter and I caution him about that point.

Lord Lang of Monkton: I take note of what the noble Lord says, though I have to say that I have heard information from other sources which suggests that the opposition in Wales is nothing like as strong as it is in Scotland, but it feels obliged to go along in the wake of the Scottish attitude. We will have to disagree on that.

7.45 pm

Lord Thomas of Gresford (LD): With respect, I am saddened to hear the noble Lord get on to this grievance and feeling against the Scots nationalists. They are elected by the people of Scotland. He has to accept the voice of the people there. They represent the interests of the people of Scotland and if they act against those interests they will be kicked out. Maybe he wants that—maybe we all want that—but the tone that is being struck by him just at this moment, after a very constructive speech, unhappily does not help to resolve the outstanding issues. I join the noble Lord, Lord Hain, in saying that that is not the feeling that one should have, certainly with regard to the attitude taken by the Welsh Government. I believe that they represent the feelings in Wales that there is a suggestion that the United Kingdom Government may enter into a position that we would regard as unfortunate. It is unfortunate that this anti-Scots nationalist—they are not represented in this House at all; maybe that is their fault that they choose to do that—language should be used.

Lord Lang of Monkton: My Lords, I too regret having to refer to the behaviour of the Scottish National Party and its constant attempts to find issues on which it can exercise grievance, but that is what is happening. It is because of that attitude that we are where we are now and that the consultations that were allegedly going extremely well throughout the earlier months have run up against a time limit. We are blinding ourselves to reality if we do not take account of the fact that the Scottish Administration have a completely different agenda from this one—notwithstanding the bonhomie of Mr Russell, which my noble and learned friend Lord Mackay of Clashfern was fortunate enough to encounter. I regret having to say it, but it has to be said, otherwise we are blinding ourselves to reality.

I do not dismiss the Government's past willingness to consult patiently and, again, I respect their willingness to withdraw this amendment so that it can be further debated and discussed. That is entirely in line with the path that they have pursued, which is creditable and desirable. How I wish the other participants in these discussions could unanimously take the same approach. It is a tribute to the constitutional proprieties that we all like to see, seeking as the Government did to negotiate in good faith, to find a route that would not require them to assert the sovereignty of this Parliament. But it did not work in this context and I do not think it was ever going to work. In the end, the supremacy of the union must come first, as another Constitution Committee report, *The Union and Devolution*, recently suggested.

Lord Beith: My Lords, the noble Lord is a former chairman of the Constitution Committee, but he is perhaps doing a disservice to its present members by not reflecting that the committee felt that progress had to be made in this area, not least because the parliaments in both Edinburgh and Cardiff, across the parties, were unhappy with the Government's original proposals.

Lord Lang of Monkton: I agree that progress has to be made, but progress is not made by constantly agreeing to give legislative consent on so many different issues, as so many amendments that we have debated in the last few days suggest. That is not progress; that goes towards unsettling the existence of the devolution within the United Kingdom parliamentary structure. We have to be realistic about these matters.

The Government's approach of endless patience and consultation did not work. In the end, the supremacy of the union must come first. So I support the government amendment. By protecting the sovereignty of this Parliament we are best able to deliver the overall outcome, both for the devolved Administrations and for the United Kingdom to which they belong.

Lord Foulkes of Cumnock: My Lords, before the noble Lord sits down, I am slightly confused. He said that he supports the government amendment, but the noble and learned Lord, Lord Keen, said that he would not press his amendment; he is going to withdraw it and look at some of the other proposals. Does the noble Lord not agree with his Front Bench?

Lord Lang of Monkton: Of course I agree with my Front Bench, and I have already commended it for its willingness to withdraw the amendment. It was tabled so that it could be discussed and Ministers could hear soundings from the Committee. I have given my sounding; perhaps the noble Lord would like to add to that by giving his. He spoke about his own amendment, but I hope that in the last resort he will support the amendment that the Minister will bring forward.

Lord Campbell of Pittenweem (LD): I shall speak briefly to the amendment proposed by the noble and learned Lord, Lord Mackay of Clashfern. I do not do so because I once enjoyed the privilege of being one of his deputies when he was Lord Advocate for Scotland—as did the noble and learned Lords, Lord Hope and Lord Cullen, both of whom are in their places this evening. I do so without detracting in any way from the amendment in the name of my noble and learned friend Lord Wallace of Tankerness. What attracts me to the amendment proposed by the noble and learned Lord, Lord Mackay, is its simplicity and practicality. It is easily understood, and coming, as it were, from a Scottish source, it pays due regard to economy. For those reasons it is well worthy of consideration. Its simplicity makes it easily capable of being understood not just by those who will have responsibilities under it, but by members of the public.

It is for those reasons that I am, with due deference, rather doubtful about the amendment tabled by the noble Lord, Lord Wigley. The problem with it is that, apart from the reference to the Supreme Court turning into some kind of court of arbitration, and I know of no process or procedure that would allow for that—

Lord Hope of Craighead: Will the noble Lord allow me to take the opportunity to say that, as he will remember, there is provision in the Scotland Act and in the Government of Wales Act for a reference to the Supreme Court on issues of law—about the competence of legislation and whether something is within the competence of the legislatures? The problem with the situation that we are contemplating now is that the issues that remain in debate are not really issues of law, and I do not see how the Supreme Court could possibly deal with them. In fact, it is very anxious not to get involved in politics. There was a germ of good sense in the scheme suggested by the noble Lord, Lord Wigley, but it breaks down at that point. I am sorry to intervene, but it is worth mentioning that issue.

Lord Campbell of Pittenweem: The noble and learned Lord's intervention is most helpful. Of course, the language of proposed subsection (17), in Amendment 318AA, to,

"refer any question to the Supreme Court",

supports the view that the use of the Supreme Court in such circumstances would be, to put it mildly, doubtful.

My difficulty with the proposal of the noble Lord, Lord Wigley, is that it is bound to encourage delay. His amendment says:

"The Panel may call witnesses or take legal advice".

If witnesses are called they may have to be cross-examined, and if there is to be cross-examination there may have to be representation by counsel, or something of that

kind. It is not difficult to imagine what is proposed in the amendment turning into something of a full-blown hearing, rather like, for example, industrial tribunals.

Under suggested subsection (15)(a), regard must be had to whether something,

"is reasonable, in all the circumstances".

As soon as the concept of reasonableness appears in a statute, it opens up the possibility of judicial review. Even if it were not to be granted, none the less an application for judicial review could obviously, and unfortunately, delay the outcome of a decision that might be of considerable economic as well as political importance. For those reasons, however well intentioned the noble Lord's proposal is, I do not think it stands any proper comparison with that of the noble and learned Lord, Lord Mackay. I therefore urge the Government to give serious consideration to that, for the reasons the noble and learned Lord set out, which I have tried to follow.

Lord Wigley: I concur entirely, in that I hope the amendment tabled by the noble and learned Lord, Lord Mackay, gets the attention it deserves and that it is adopted. However, does the noble Lord not accept that in order to assuage some of the feelings that, perhaps unfortunately, have been built up over recent months about there being a will here to impose solutions, we need a mechanism that people at both ends of the telescope can see as balanced and even handed?

Lord Campbell of Pittenweem: It is a question of judgment. The mechanism that the noble Lord suggests may achieve the objectives that he sets out, but it will almost certainly encourage delay, and perhaps even more controversy. What is required here is very quick resolution, in an uncontroversial way, of issues that lie at the very heart of the economies, perhaps, of the United Kingdom—and those of Scotland, Wales and Northern Ireland. It seems to me that the noble and learned Lord, Lord Mackay, has pretty well hit the target.

Baroness Finlay of Llandaff (CB): My Lords, I feel a bit like somebody from Relate. I am a Cross-Bencher, I am not a lawyer, and I do not now have an interest in Scotland—although I do have an interest in Wales. I just want to make a few brief comments, to assure the noble and learned Lord, Lord Wallace of Tankerness, that I tried to write a schedule for the Bill to set out the frameworks—but for all kinds of reasons I did not, and felt it would be a waste of massive effort to try to achieve something that I could not. However, I think the idea is commendable that we should put on the face of the Bill the matters that will go to the devolved Administrations, which would then not be for dispute. That may go a long way to assuaging some of the concerns.

I remind the Committee that the noble Lord, Lord Wigley, spoke about the need to be even handed, based on what has gone on before. The amendment tabled by the noble and learned Lord, Lord Mackay, is an enormous step forward. The fact that the Government have agreed to invert Clause 11 is also a major step forward, but there is still more to be done. We need to look at what will happen in the event of deadlock. Having a rotating chair, which has been suggested, would certainly help to establish some sense of equality. The frameworks need to include some sort of equal partners in resolution. I hope that some of the negativism of what has gone before may be laid to rest, because we have to move forwards into the new world. At least we have had some positive suggestions tonight. I repeat my thanks to those who have been communicating with us to try to achieve that—but we cannot just say, "Right, we're there". There is more work to be done.

The suggestion of a sunset clause could be helpful too, because that would concentrate the mind, and would provide some reassurance. I had put my name to Clause 11 stand part, but it is now to be replaced anyway, which is a great relief. I hope that we shall recognise, and not forget, the need for equality of voice and equality of representation. The failure to do that in the past should be a lesson to us as we go forwards.

Lord Forsyth of Drumlean: My Lords, I have never known a Government make such efforts to meet the arguments that have been put against their first intentions. If it had been up to me I would not have tabled an amendment at all; I thought the Bill as it originally stood was perfectly able to provide for what was required. Instead the Government have listened to the representations from Scotland and Wales. I think the representations from Wales have been a little more constructive than those from Scotland, for the reasons that my noble friend Lord Lang spelled out. I agreed with every word in his excellent speech, although it unsettled one or two people.

I have enormous respect for my noble and learned friend Lord Mackay, and I usually agree with him. I do not know whether he, like me, is a fisherman—but if he were, I would say that the fly he cast should be called the federalist option. What he is proposing is to change our constitution. This is a Bill to put in place the powers that have been lost to the European Union; it is not a Bill in which we should be remodelling our constitution, or reassessing the devolution settlement that was agreed, in the case of Scotland, in the latest Scotland Bill. Therefore, I do not support the amendment of my noble and learned friend Lord Mackay of Clashfern. I have noticed that those people who would like to see a federal arrangement and would like us to remain in the European Union have endorsed it with great enthusiasm, and I can see why.

Noble Lords: Oh!

Lord Forsyth of Drumlean: That is an open admission of it. As I look at the amendment, I think, "Who will speak for England?".

Lord Mackay of Clashfern: It tells you.

8 pm

Lord Forsyth of Drumlean: My noble and learned friend says that it tells me. Yes, it tells me that it is the Secretary of State. The Secretary of State's responsibilities are for the whole of the United Kingdom, not for England. To suggest that there should be a rotating chair, as the noble Baroness, Lady Finlay, did, is a nonsense in terms of our constitution. Ministers in the Government have a responsibility to act for the whole of the United Kingdom.

[Lord Forsyth of Drumlean]

I have to say that I thought that the speech of the noble Lord, Lord Wigley, was absolutely hilarious. Here he was making an impassioned plea for democracy in Wales while at the same time arguing that all the powers that he was concerned about should remain in Brussels, where the ability to bring forward legislation rests with an unelected Commission and where our ability to influence it is one of 28 in the Council of Ministers. It is a complete distortion of the word "democracy". What is being offered here to the Welsh Parliament and the Scottish Parliament by the Government is the ability to take back control of a whole range of issues and policies over which they have hitherto had no influence at all.

Lord McConnell of Glenscorrodale: I have heard the noble Lord, Lord Forsyth, say on several occasions in these debates on Brexit in your Lordships' House that other noble Lords around this House have tried to revisit the arguments around the referendum, that that is wrong, that time has moved on and that it is time to debate the process of withdrawal and not revisit those debates of two years ago. However, it seems to me that he does exactly the same thing on devolution. To take fishing as an example, the reality is that the Secretary of State for the United Kingdom Government is responsible for fishing in England and the relevant Minister and the First Minister in Scotland are responsible for fishing in Scotland. We have an equality of representation, duty and competence. That is what should be reflected in any common framework for decision-making. It is not the case that the United Kingdom retains an overarching power over these. There may be a constitutional hold over sovereignty at the end of the day, but the reality for 19 years has been that, once these powers were devolved, the Ministers in the UK Government became the Ministers responsible for the way in which those responsibilities were exercised in England, not in Scotland, or, on many occasions, in either Wales or Northern Ireland.

Lord Forsyth of Drumlean: The noble Lord is talking nonsense—codswallop in fact—in the context of fishing because the position has been that the Secretary of State with responsibility for fisheries, agriculture and everything else had no authority whatever to determine these matters; that rested in Brussels. I have been to Fisheries Councils, which are always held near Christmas and always go into the middle of the night, where we struggled to get a deal, and where we were invariably overruled by other member states. Then clever people such as the noble Lord, Lord Kerr, who I am not sure is in his place, would write press releases explaining how the talks had been a triumph and we had secured a brilliant deal for the United Kingdom. But we did not have the power to determine that.

As to the point about the position of the Secretary of State in the United Kingdom Government and the Scottish Ministers with responsibilities in respect of fisheries, the noble Lord makes my argument for me. The position is pretty clear: once we have regained control of our waters and our fishing policy, we will make international agreements with other parties. That has to be done on a United Kingdom basis. Despite the noble Lord's efforts to advance the cause of the nationalists in Scotland, with disastrous results for his own party, his former leader now says that he regrets having done devolution at all. The noble Lord shakes his head. If he reads Mr Blair's own autobiography, he will find that he lists two things that he regrets doing, and devolution is one of them. Devolution has had a disastrous effect on Labour in Scotland, as he well knows, because Labour has sought to appease nationalism and refused to stand up for the role of the United Kingdom in the way that my noble friend Lord Lang argued so brilliantly. When we regain power over fishing and so on, the Secretary of State will be responsible for organising and arranging access to our waters for fishermen throughout the United Kingdom on the basis of international treaties which can be made only by a sovereign state, and that is the United Kingdom. It is not Scotland, it is not Wales and it is not Northern Ireland.

Lord McConnell of Glenscorrodale: Plenty of countries around the world that enter into international treaties have internal mechanisms which allow different parts of those countries to come together to make a decision by either consensus or a formal agreement, so there are plenty of examples around the world of where that works in practice. It should be able to work in this country as well. I correct the noble Lord, Lord Forsyth: there is no evidence that the former Prime Minister Tony Blair regrets bringing in devolution in this country. In fact, it is one of the things he is proud of having done for this country and is a major constitutional change that made a real difference. If the noble Lord reads the book properly, he will understand that.

Lord Forsyth of Drumlean: I will return to my copy of this important text and will be in touch with the noble Lord in that respect. I completely agree with his point that there are plenty of countries where people are able to consult on these matters. However, there is a difference between seeking to consult people and seeking their consent. This is where this debate has gone off the rails in that people have confused consultation with consent. Consent, in effect, gives a veto, as has been explained by my noble and learned friend Lord Keen and by my noble friend Lord Lang. It has been explained that, if we have a situation where one devolved legislature is able to have a requirement for consent, as opposed to being consulted, we have one part of the United Kingdom able to use its veto to subvert the wider interests of the rest of the United Kingdom, and that was never ever part of the devolution settlement.

Lord Wigley: Does the noble Lord accept that some of the frustration that has built up, certainly in Cardiff, and, I can well imagine, in Edinburgh, arises where there was supposed to be consultation but often that was no more than a letter and the reply was ignored? Unless there is meaningful consultation that leads to a coming together of minds, it can be just a façade for there to be continued rule from London ignoring the needs of Scotland, Wales and Northern Ireland.

Lord Forsyth of Drumlean: I do not know the detail. I do know that a number of the joint ministerial meetings were cancelled, but not by the Secretary of

State or the UK Government. I am entirely prepared to accept that the process could be improved. Certainly, when I was a Secretary of State and we had differences of view on policy in respect of Scotland compared with other parts of the United Kingdom, we had a joint ministerial committee, sorted out the issues and reached agreement, not always to our advantage but sometimes to our advantage and to the disadvantage of others. I had an amendment down, which I have withdrawn in the interests of making progress, which suggested that there should be some kind of statutory arrangement for consultation. I can see that. But I am seeking to argue against the noble Lord, who wishes to elide consult with consent.

Lord Thomas of Gresford: My Lords—

Lord Forsyth of Drumlean: May I just answer the noble Lord before I deal with the noble Lord, Lord Thomas?

I understand that. If I were a Welsh nationalist, or someone who did not accept the result of the referendum, I can see why I might table amendments of this kind and cause maximum disruption to the Government's programme.

Lord Thomas of Gresford: The noble Lord has just outlined a dispute resolution system of which he was part. He said that the council would get together and it would thrash out an agreement. Is that not precisely what the noble and learned Lord, Lord Mackay, is suggesting?

Lord Forsyth of Drumlean: If the noble Lord had listened to the first part of my speech, I explained who would speak for England, and that this is a matter for the United Kingdom. The difference, of course, when I was Secretary of State was that there was one Government and one party in power. I do not speak for Wales but the difficulty we have in Scotland is that the party in power is determined to destroy and break up the United Kingdom. That is its agenda. As my noble friend Lord Lang said, every single issue is turned into a constitutional crisis and is a source of dispute.

If I may, I will turn to the substance of the government amendment. I started by saying that I have never seen a Government work so hard to try to achieve consensus and agreement. They have tabled an amendment which turns on its head the original proposals in the Bill to reflect the architecture of the Scotland Act. They should be given great credit for that. I welcome the conversion of the noble Lord, Lord Foulkes, who is not in his place; I do not know which road to Damascus he has been on, but it is good to see his conversion and that he now sees that what the Government are trying to do is sensible. The noble and learned Lord, Lord Wallace, also responded positively to this, and made some quite interesting suggestions as to how the amendment might be improved. It is to the Government's credit that they have brought forward this amendment—and not just brought it forward; as everyone around this House knows, the Secretary of State, David Lidington, has gone to great lengths to meet people, despite all the other things on his agenda, to take this forward. Nobody can say that the Government have not tried to move forward in the interests of getting an agreement.

My noble and learned friend Lord Mackay says that he has had a generous conversation with the Scottish nationalist Minister, and that he thinks he will take a positive and constructive view. Anyone who had that attitude of mind would see that this was a huge leap forward and would embrace it. The Government have not only tabled an amendment which meets any reasonable person's aspirations but have even said, "We're not actually going to move the amendment; we going to withdraw it in order for people to have a further opportunity to consult on it". I cannot think of another occasion when that has happened on a matter of such substance.

A noble Lord: Oh!

Lord Forsyth of Drumlean: I hear tittering in the background. Does the noble Lord wish to intervene?

It is a huge step forward, and we should all support the way in which my noble and learned friend Lord Keen—there are so many lawyers in this debate—has explained the thinking behind that and the Government's ability to try to meet the anxieties, which have been stirred up unnecessarily, in a constructive and forward-looking manner while maintaining the integrity of our United Kingdom constitution.

It is a matter of regret that agreement has not been reached with the Scottish nationalists and the Welsh. I hope that the Welsh Government will take a different view. I doubt very much that the Scottish Government will want to do anything other than continue this dispute, and if that happens, my advice to my noble friends on the Front Bench is to get on with it, because they have gone as far as any reasonable person could expect them to go. I very much welcome this government amendment.

Lord Morris of Aberavon (Lab): My Lords, I will make a few comments in this somewhat bizarre debate on the government amendments that the Government propose to withdraw. I have no experience of this situation; it must have happened before, but it is rather unusual, to say the least. I have emphasised before, and will not repeat, the need for "consent" as opposed to "consult". That is what the Welsh Government want and what all the other parties in Wales want. I already dealt with the history of the Government's excessive slowness to agree to legislative consent at all in my speech on Clause 5, and I do not wish to repeat that. But I ask the Government: what does "consult" mean? What is the definition? Is it a chat on the telephone or a face-to-face meeting between the First Minister and the Prime Minister? I think that we would like to know before the end of this debate so that we can consider where we go from here and what the Government's intentions are regarding "consult".

On Wales, Carwyn Jones has been trying diligently—he is a good advocate—to reach an agreement with the Government. I welcome very much the fact that, in addition to the meetings with the Chancellor of the

[Lord Morris of Aberavon]
Duchy of Lancaster, he has had a face-to-face meeting with the Prime Minister. That is how it should be. These are now grown-up Governments in Cardiff and Scotland, and it shows how redundant the role of the Secretary of State now is, because Prime Ministers deal with First Ministers—and likewise, on Treasury matters, it is Treasury Ministers who should seek an agreement.

8.15 pm

I have written on this, but I wish to emphasise again that I welcome very much the approach of the Welsh Government, where I believe the will is there to reach an agreement. There are quite a few issues left to be tied up, and I hope very much that we can, in the interests of the Bill as a whole, do that.

The Government have moved—considerably—and I welcome that, too. However, there is not enough here not only to bring the horse to water but to make him drink. Therefore, there must be, I hope before Report, serious consideration of the points of difference between the devolved institutions and Westminster.

The Government claim in their treatment of the proposals that there would be an immediate transfer of the "vast majority" of so-called returning powers to the devolved institutions. Let us examine this claim. First, in the view of the Supreme Court in the case of Miller, they are not returning powers. In fact, these powers would rest with the devolved institutions in the absence of statutory amendment by the Westminster Parliament. The authority is the Miller ruling, which states quite clearly:

"The removal of the EU constraints on withdrawal from the EU Treaties will alter the competence of the devolved institutions unless new legislative constraints are introduced. In the absence of such new restraints, withdrawal from the EU will enhance the devolved competence".

That is the legal reality. In fact, the government amendments do not generously gift new powers to the devolved institutions, which in the absence of legislative intervention they would not enjoy. They simply loosen somewhat the new shackles that the original Clause 11 sought to impose.

The Government assert that the "vast majority" of powers that are currently exercised by the EU and which impact on devolution will not be intercepted in this pre-emptive strike by the Government. It is sheer hyperbole to assert that 40 out of 64 of the subheadings is a "vast majority". The reality is that it is a majority, but it should not be expressed in this way, which is far too big a claim about what the Government are doing.

My third point is that the unilateral calculation has the smell of creative accounting in the way the Government count the 24 powers retained and the 40 out of 64. It is quite clear that it is a huge segment of powers that are sought to be retained. We should look at the quality of the areas listed by the Government under the headings, "No action required" or "Legislative framework may be required". The overall numbers are meaningless. Areas such as "Agricultural support" and "Fisheries management & support"—both of which are likely to require legislative frameworks—are significantly broader and have a greater impact on devolved competence than important but narrower areas such as "Electronic road toll systems" and "Blood safety and quality". This is self-evident. With equal force, some areas which the Government regard as wholly reserved, including "State aids", are absolutely central to devolved powers such as economic development. Is it any wonder that there has been a failure to agree?

I The fundamental weakness of the Government's proposals as they now stand—and which undoubtedly need changing—is that there is nothing in the Government's amendments to limit the exercise of this power to the areas where frameworks are agreed as being needed. Neither is there a timetable put on such powers. The Government have made progress and I welcome it. But a great deal more needs to be done before we can get the assent of the Welsh Government.

Lord Hope of Craighead: I do not want to detain the Committee for very long; I will make just one or two points. First, I congratulate the Government on the steps they have taken to amend the original structure of the Bill so that it fits better with the architecture of the devolved statutes. If you look at the list of amendments, there are not just one but 22. That gives an idea of the scale of the exercise that has gone into preparing what we are discussing this evening. I congratulate the team that has been working behind the scenes to put this together. There are one or two loose ends, as I mentioned earlier this afternoon, but this has gone a very long way and—apart from on the one issue of consent, about which perhaps enough has been said—I support entirely the structure and wording of these amendments.

As far as the solution put forward by the noble and learned Lord, Lord Mackay, is concerned, one feature that is worth noting is paragraph 11, which is the requirement that, if there is disagreement—a failure to reach unanimous agreement—reasons must be given. I have sat for a long time in court where, if you want to dissent, you have to explain yourself, and it is quite extraordinary; once you start writing these things out, you begin to wonder whether the dissent was justified. It is an extremely good discipline, when somebody is in disagreement, to force them to sit round a table and express themselves in writing as to what the nature of the disagreement is. The disagreement may remain, but at least it focuses the mind and makes it easier for the dispute to be resolved by the final body that has the responsibility of resolving the issue.

Regarding the three solutions offered as to how we might deal with this, there are three different solutions for resolving the issue. I have already suggested that the solution put forward by the noble Lord, Lord Wigley, would not work because the Supreme Court could not deal with that kind of issue. As for the suggestion of the noble Lord, Lord Foulkes, I believe that the panel he is talking about has four members, three of whom are from the devolved institutions and one from the United Kingdom. It is a simple majority decision and the United Kingdom would be in the minority—and I am not sure that that is an entirely satisfactory solution to have arrived at. So I am brought back to the solution offered by the noble and learned Lord, Lord Mackay, which, at the end of the day, is to

refer to the United Kingdom Parliament. I am not quite sure what procedure would be adopted, but it seems to offer a fairer and better solution than the other two. Broadly speaking, I endorse the thinking behind what the noble and learned Lord suggested.

We have made a great deal of progress. My final point is to comment on the fact that the Government have undertaken to withdraw the amendments. I was arguing for that some days ago, because it seemed to me that if we had to vote on it tonight that would give a rather different flavour to the debate. It is a way of enabling us to talk around the subject and the way in which we on the Back Benches have to operate all the time. It may be unusual but it is part of the constructive way in which the Government are approaching this issue and I commend it.

Baroness Randerson (LD): My Lords, we sit here week after week and, wherever we started our careers, we cannot help but look at them now from the Westminster and London perspective—the UK perspective. As I have been sitting here this evening, I have done a head count. More than 10 of us in the Chamber during this debate have been Members of the devolved legislatures as well as here. We have First Ministers, Deputy First Ministers—a huge band of people here who have experience of seeing these things from the devolved perspective. It is important to bear in mind—and I say this to the noble Lord, Lord Lang, who said that there had been much too much emphasis on the importance of legislative consent in these debates—that legislative consent is the firm foundation on which confidence in the devolved system lies, in the absence of a full federal system, which of course we do not have in this country. I am a fierce unionist, but demonising the SNP does not help to bind the UK together. I assure noble Lords that there is a firm cross-party determination in Wales to insist on significant improvements to this Bill. The Government's amendment is extremely welcome—but, so far, it is too little. It is a great pity that it is so late, because it means that people have not been able to give the full attention to it that it deserves. But I am sure that it is a good foundation upon which to build.

As noble Lords may remember, nearly two hours ago the noble Lord, Lord Forsyth, intervened to ask the noble Lord, Lord Wigley, why the devolved legislatures and Administrations had been content to accept EU power but were not content to accept the UK Government's power on these issues. I can assure the noble Lord that I went to a number of JMCs and, sitting as a Minister in the UK Government, there was never a time when I felt for one minute that the devolved Administrations did not question the need for more power to go to them. They have persistently and determinedly asked for greater powers and a greater say in negotiations with the EU. This is not something that has come out of nowhere; it is a persistent requirement from the devolved Administrations and legislatures that they should have a stronger voice. As the noble Lord, Lord Hain, said, devolved Ministers could go to those meetings—and, indeed, often go to meetings of the European Council. I give way.

Lord Forsyth of Drumlean: I am grateful. I think the noble Baroness might have misunderstood me. The point I was making was that, in the case of Wales, Welsh Ministers have been consulted and involved, but United Kingdom Ministers did not need to seek their consent. They were consulted, but the responsibility in the European Union rested with UK Ministers. She is quite right that sometimes Ministers from devolved areas would go to European Council meetings, but the difference is that whereas then we were one of 28 Members, now we will have all of that power, which will be transferred to Welsh and Scottish Ministers, as the Government have made clear. So it is a huge opportunity. It is not a power grab; it is a huge power injection into the devolved Administrations. The point I was making is that people who are opposed to us leaving the European Union are deliberately misrepresenting this and, characteristically and unfortunately, arguing that they want more power for the devolved Administrations while at the same time saying they wish that power to remain in Brussels. That is the point I was trying to make.

8.30 pm

Baroness Randerson: I resist the idea that I ever deliberately misrepresent anything. However, I am very aware that, although the numbers are different, the principle has always been that the devolved Ministers press the UK Government to require their agreement to a stance that the UK Government take in the Council of Ministers rather than simply consult them. That is not new.

I want to move on to the Minister's statement in support of his amendments and shall speak, first, about the principle of consent. I believe that consultation is inadequate and that what is needed is consent from the legislatures, not from the Administrations. It is important that the power should lie with the legislatures and not just with the Governments in the devolved Administrations. It is also essential that the list of powers where legislative competence is to be constrained is defined in the Bill. Those powers are not specified in these amendments. The Government must know what powers they have in mind. I accept that there is perhaps some work to do in turning them into a tidy list but they need to be specified.

I I support the calls that have been made for a sunset clause. The Minister said that this is a temporary situation but he also said that he could not be specific about the timescale. A sunset clause would certainly be realistic in that context. Such clauses appear elsewhere in the Bill and there is no reason why the Government should not specify what they regard as a reasonable period in which to deal with this issue. We need the effective powers specified in the Bill as a schedule, as the noble Baroness, Lady Finlay, said.

I I have a question for the Minister—and here I agree with the noble Lord, Lord Forsyth. Where does England fit into all this? We are speaking at great length about introducing a pause on most of the devolved powers of the devolved Administrations, but will there be a parallel pause in relation to England or will things go ahead there on a different timescale?

[Baroness Randerson]

Finally, I turn to putting frameworks into law. In principle, in the absence of agreement on the future framework for, let us say, agricultural support, the UK Government could seek to enact a framework and argue that, because agricultural support has been specified by regulations as being outside devolved competence, the devolved legislatures' consent is not required. I believe it should be made clear in the Bill that the specification of areas of retained law as being temporarily beyond devolved competence does not remove the application of the Sewel convention to new primary legislation. Is that interpretation the same as the Minister's?

I ask the Government to discuss this issue again with the devolved Administrations. I believe that real progress has been made and I am very pleased to see the amendments, but I believe that a further step is needed.

Lord Dunlop (Con): My Lords, the hazard of speaking late in a debate is that, in the interests of brevity, you have to shred your speech; none the less, I hope that what I am about to say is still coherent.

It would be hard to deny that since 2010 significant powers have been devolved to Scotland, Wales and Northern Ireland. As more powers are devolved from Westminster, it becomes ever more important to attend to the glue—the institutions and arrangements that hold together the United Kingdom—and Brexit brings that imperative into sharper relief.

At the heart of the Clause 11 debate is an apparent tension: on the one hand, the powers of the devolved legislatures should not be changed without their consent and, on the other, one part of the UK should not have a veto over legislation to protect the interests of the UK as a whole. I accept that resolving that tension is not an easy matter. Therefore, Clause 11 addresses a very real issue that needs to be recognised and dealt with. The status quo ante cannot simply be asserted because there is no status quo ante. Our exit from the EU creates what the noble and learned Lord, Lord Hope, recently described in a devolution debate in your Lordships' House as a "void", and he spoke of the need to create something new. If that is the case, it seems entirely sensible to pause and put in place a temporary mechanism for avoiding legal and regulatory divergence while the void is filled and new frameworks are discussed and agreed. Indeed, if I read it correctly, our own EU Committee recommended something similar in its Brexit devolution report. That is what Clause 11 is intended to achieve.

Of course, the clause could have been handled differently, and I think the Government have tacitly accepted that by agreeing to amend it. As has been recognised on all sides of the Committee this evening, real progress has been made. It has already been mentioned that the Joint Ministerial Committee has agreed six principles for establishing where common frameworks are necessary. Last Wednesday's Joint Ministerial Committee agreed that intergovernmental structure and the devolution memorandum of understanding should be reviewed to ensure that they are fit for purpose as we leave the EU. I think that everyone accepts that revision is overdue. The MoU was last updated in 2013 and has been under review since 2014, and some firm conclusions are now urgently required. I hope, therefore, that the Government and the Minister can help build confidence that this latest review will lead quickly to concrete results by going as far as they can to spell out the process and timetable for completing this work.

The other welcome development is the publication of the Government's own analysis of where common legislative frameworks may be required. To date, this has been a theoretical political debate, and greater transparency can only help to stimulate a practical debate in Scotland, Wales and Northern Ireland, informed by real businesses and individuals whose livelihoods depend on trade across the UK.

The Government have now tabled their own amendments to Clause 11 and Schedule 3. Again, I welcome their willingness to go the extra mile to find a resolution. Those amendments are not just tweaks; they represent a significant rewriting of Clause 11. Yet the First Ministers of Scotland and Wales say that they still cannot give their consent to the Bill on the basis of the Government's current amendments to Clause 11. They seek further amendments and reassurances. It is surely within the realm of possibility to bridge the remaining gap.

In the interests of striking a deal, what further reassurance can the Government provide to the devolved Administrations in the following areas? My noble and learned friend helpfully confirmed earlier that the Government anticipate that the existing consent conventions will apply for any subsequent legislation brought forward to implement common UK legislative frameworks where they engage devolved competence. Can he also confirm that the Government will observe what I might describe as a "self-denying ordinance" not to legislate pre-emptively for England in those areas where it is agreed that common UK legislative frameworks are necessary? To do otherwise would seem to defeat the objective of avoiding regulatory divergence and the very purpose of the Government's "holding pattern".

I ask the Government to look closely at the case that has already been made for applying a sunset clause of suitable length to Ministers' regulation-making powers in Clause 11. This would allow sufficient time for the frameworks to be agreed while providing the devolved Administrations with the backstop safeguard against the risk of powers becoming stuck indefinitely in the holding pattern.

I conclude by saying that there are two sides to every agreement and I hope the devolved Administrations will play their part by showing a willingness to compromise as well. A number of noble Lords have tabled amendments requiring Ministers to obtain the consent or secure the agreement of the devolved Administrations before exercising their regulation-making powers under Clause 11. This seems a step too far and, as the Minister set out so clearly earlier, to go beyond the current devolution settlements. It risks turning the Sewel convention from a political commitment into a legal obligation. Let us not forget that the Sewel convention has been faithfully observed for 20 years. This would represent a significant constitutional change and would surely have implications

for the sovereignty of this Parliament. It would also seemingly cross another important constitutional line, namely, as the Minister said, that one devolved institution could exercise a veto over the development of legislation affecting other parts of the United Kingdom.

I welcome the efforts the Government are making to secure a deal. Clearly, there is a balance to be struck here. All parties to the framework negotiations need similar incentives to reach agreement. Of course the devolution settlements need to be respected, but the unique responsibility of the UK Government and the UK Parliament is to guard the interests of Scotland, England, Wales and Northern Ireland—not just individually, but taken as a whole. That needs to be respected too.

Lord Hain: My Lords, I think that many in your Lordships' House will welcome the interesting and constructive contribution of the noble Lord, Lord Dunlop. I welcome the stance adopted by the Minister in his speech; it has made for a very different debate, as others have observed.

As the author of the 2006 Government of Wales Act, when I was the Secretary of State, I have been deeply alarmed by the Government's high-handed approach—hitherto at least. It seems to risk reversing the deepening of devolution, which the Government have progressed in their recent legislation, ironically. The principle at stake, which I hope the Minister and the Secretary of State, David Lidington, will adopt and take forward, is that the Government must not legislate in this area, provoked by Brexit, without the consent of the Welsh Government and the Scottish Government, in the sad absence of a Northern Ireland Government. I know that my noble and right reverend friend Lord Eames shares that frustration and sadness, as do my noble friends who represent the DUP. There is a serious crisis in Northern Ireland, which sometimes this Parliament takes too casually, to be perfectly frank, but that is another matter. If consent is not obtained, we face a real constitutional crisis, which should not be underestimated. The noble Lord, Lord Lang, spoke about the Scottish nationalists. The problem with the Government's approach until now—I welcome the fact that it seems to have changed—is that it feeds the separatist appetite.

I observed in the first incarnation of this Bill, and to some extent in the amendments on the Marshalled List, what I saw as Secretary of State for Wales, even under the last pro-devolution Labour Government, which was what I would call the "virus of Whitehall-itis". It was especially the case in the Home Office, but one saw it in other departments as well. The default position was that, when a new piece of legislation involving devolution was brought forward, there was a sense of needing at the official level to resist any real progression of the devolution process. As I say, that was the default position and it has crept into this Bill as well.

8.45 pm

Lord Lang of Monkton: My Lords, I am glad to agree with the noble Lord, Lord Hain, on the point that he has just made. It was reflected in a Constitution Committee report that came out a few years ago. We have to do more within departmental activity in terms of co-operation and cross-policy referencing between us and the devolved parliaments. The noble Lord also referred to what feeds the appetite for separatism. What feeds that appetite is the constant drip-feed of ceding further powers, which makes them hungry for still more.

Lord Hain: At this late hour, that is probably a debate for another occasion, but I welcome at least the first part of what the noble Lord said. As a passionate devolutionist and federalist, I believe that the unfinished business of devolution is the failure to give England a proper voice of its own at the regional level, with the exception, of course, of London. However, that is another matter.

I give a cautious welcome to the letter that I received just before coming in to the Chamber for this debate from the Secretary of State for Wales, Alun Cairns, which has been sent to me and, I would guess, to other Welsh Peers. I shall quote part of it, because it is interesting:

> "A small number of returning powers in devolved areas will need legislative frameworks in order to safeguard the UK internal market and enable the UK to strike international trade deals. These areas will be placed into a 'temporary hold' until the UK Government and devolved Administrations agree the detail of the framework and legislation is enacted to implement the framework".

He goes on to make an important point:

> "The consent of the devolved legislatures will of course be sought for any provisions in parliamentary Bills creating frameworks that are within devolved competence".

In welcoming that, I stress, at the risk of repeating myself—I will not take too long about it—that until now the Welsh Government have themselves been passionately opposed to the approach of the UK Government in this area. It is not the case that this is only the Scottish Government position. The Welsh Government want to achieve an agreement and the Scottish Government have said the same. We will see in the future, but certainly the Welsh Government want agreement and they have the support of Plaid Cymru, the Liberal Democrats and, I think, some Conservatives in the Welsh Assembly. That is a serious development. In the last few days, the Welsh Assembly have been taking through its continuity Bill, but I am not sure whether it has received assent at this point. However, it has certainly taken the Bill through, which is proof of the deep concern.

Baroness Randerson: My Lords, the Bill received assent today.

Lord Hain: With the help of the noble Baroness, Lady Randerson, we can put on the record the fact that the Bill has received assent. That is a serious situation. There is the potential for direct confrontation, which I hope we can avoid. I also welcome the proposal of the noble and learned Lord, Lord Mackay of Clashfern, which deserves serious attention.

In supporting the amendments tabled by my noble friends Lord Griffiths and Lord Stevenson, which again stress the need for consent, I want to highlight an alternative and perhaps more constitutionally appropriate way forward, which reflects a point touched

[Lord Hain]
on by the noble and learned Lord, Lord Wallace of Tankerness, and the noble Baroness, Lady Finlay. It is a way forward that would not give the Government yet another wide-ranging regulation-making power. We should ensure that a schedule is appended to this Bill containing a list of areas where the Government and the devolved Administrations agree that frameworks are needed, as they are, and hence where devolved competence needs to be constrained while such frameworks are negotiated. By doing this, the Government would be able to gain the legislative consent to this Bill of the Scottish Parliament and the National Assembly for Wales, and in future I hope the Northern Ireland Assembly, which they rightly regard as essential to avoiding a major constitutional crisis.

Lord McConnell of Glenscorrodale: I welcome the proposal just made by my noble friend Lord Hain, because two versions of it have been suggested during the debate, albeit perhaps not deliberately. One would specify in the Bill or a schedule to it those areas that will be part of the competence frameworks; the other would specify those areas that were devolved, which would be counter to the devolution settlement. It is important that we specify those areas that are not devolved rather than those that are. My noble friend's proposal is the right one. I hope that the Government will take that seriously and that the other option will not be taken forward.

Lord Hain: I completely agree with my noble friend; he spelled it out very clearly.

At the same time, this approach would provide transparency about the areas in which devolved competence would be affected, which is sadly lacking in the approach embodied, until now at least, in the Government's amendments. It would also enable the Scottish Parliament and the Assembly to agree to the list of retained powers—reinforcing my noble friend's point—through the very act of providing legislative consent to the Bill. Such an approach would thus reassure the devolved institutions that the regulation-making power proposed by the Government could not be used to specify areas of retained EU law not requiring frameworks. That is a very important point.

If the schedule idea is potentially a magic bullet, why might the Government resist it? I am informed that the first argument is that it cannot be done in time for Report. I am not sure that I buy this argument; Report does not take place until well after Easter, which is many weeks away. We are told that significant work has been done on potential framework areas and the list published recently by the Government—though not agreed with the devolved Administrations, I understand—comes fairly close to defining legally which current EU law restrictions may need to be continued while frameworks are negotiated. Surely if the Government need to specify these areas in regulations, they will need to do so sooner rather than later in any event.

Lord Wallace of Tankerness: Perhaps I may reinforce what the noble Lord said. He said that Report stage was still some time away. I am sure that it would be possible for the Government, if the will was there, to put down a marker at that stage and, if it needed another two weeks, to come back at Third Reading and fill in the gaps. I support him in saying that in those areas where they want a UK framework a schedule could be a constructive way forward and give reassurances.

Lord Hain: I welcome what the noble and learned Lord has said. If it really is not possible to work up such a schedule before Report—for the reasons that he has explained, I do not see why it should be the case—might not the Government find another legislative opportunity to do so? We know that in the autumn we are likely to have to consider a withdrawal agreement implementation Bill. That might provide an opportunity, although it would be better to do it in this Bill.

The second objection that the Government might make is the need to account for unforeseen circumstances. Since Brexit appears to be a process where every stone turned over reveals yet another problem lurking beneath it, there is some validity to this argument. But if, exceptionally, a new area where a framework is required is identified even after the passage of this Bill with the proposed schedule, there is an easy solution that is wholly consistent with the approach to devolution adopted to date—namely, a power to amend the schedule by Order in Council with the express agreement of Parliament and those devolved legislatures affected. That could be included in the Bill as well.

In reality, if the Government resist this proposal, we would be right to suspect that they have an ulterior motive in wishing to press ahead with such a wide regulation-making power as that encapsulated in the current amendment, although I accept that it is about to be withdrawn. I commend to the Government the idea of putting in the Bill a list of areas agreed with the devolved Administrations—I stress, agreed—where the constraint on devolved competence will apply and ask them to consider bringing forward an amendment that does that at Report stage.

Baroness McIntosh of Pickering: My Lords, I applaud the spirit in which the Government have brought forward the amendments before the Committee this evening and the eloquence with which they were brought by my noble and learned friend Lord Keen. However, on balance I think that Amendment 318A, brought by my noble and learned friend Lord Mackay, has much to commend it.

There are a number of points I would like to raise in the hope that my noble and learned friend Lord Keen might reflect upon them before Report. As my noble and learned friend Lord Mackay of Clashfern explained, the regulation-making power in these amendments would appear to be intended to be used only where the United Kingdom Government consider that it would be necessary for the purpose of protecting the UK common market. My question therefore is: would it not be clearer if that was expressly stated in the Bill? The explanatory statement could also explain why the regulations are required for this purpose. Also, do the Government envisage the power in new Section 30A in the government amendment being

used only once, or do they intend it to be used more than once? It would be helpful for the Committee to know.

Although it is stated that the regulation-making power is intended to be temporary and that Ministers are required to have regard to that fact, there is nothing presently in the Bill that expressly provides for the regulation-making power to be temporary. Would it not therefore be helpful if such a provision made that clear? I believe that that is covered in my noble and learned friend Lord Mackay's Amendment 218A.

Does it not also make sense that the Bill be amended so that the regulations and restrictions set out therein take effect at the same time that the new Section 30A comes into force? While it is expressly stated that the regulations are subject to the affirmative consent of both Houses of Parliament, there is nothing in the amendments that expressly requires the consent, as expressed by so many noble Lords this evening, of the Scottish Parliament. This contrasts with the accepted way of making amendments to the legislative competence of the Scottish Parliament through an Order in Council under Section 30 of the Scotland Act 1998. I respectfully ask my noble and learned friend Lord Keen that the Bill be amended to require Ministers to explain the need for regulations under new Section 30A.

On the question of consent, I was trying to help the noble Lord, Lord Griffiths, earlier by stating, as the noble Lord, Lord Hain, set out, that Ministers from devolved Assemblies currently sit next to the Ministers at meetings of the Council of Ministers and advisers. I also suggest that consent is currently expressly given by the devolved Assemblies and by their Ministers when the EU directives are agreed and then implemented by the devolved Assemblies. The point I was trying to make is that it is consent at both levels that is being removed.

Lord Hain: Sometimes devolved Ministers are there on their own.

Baroness McIntosh of Pickering: I accept that and I stand corrected.

Lord McConnell of Glenscorrodale: I absolutely endorse the description by the noble Baroness of the way consent works in that situation: whether or not devolved Ministers lead the delegation, sit on the delegation or are consulted in advance of the delegation to the Council of Ministers, it is the case that the responsibility for implementing the directives agreed transfers directly to them, not through the UK Government, and they then implement those directives. The noble Baroness is right when she says that that means that the consent is given, but it also reinforces the argument that that responsibility lies there and not through the UK Government any more—that is the result of the devolution settlement.

Baroness McIntosh of Pickering: That is the point I am trying to make. It may be helpful if I conclude by asking the Minister a question: he talked about all retained legislation being primary legislation—if the Committee were to agree that, would it not resolve many of the difficulties we have been discussing?

9 pm

Lord Thomas of Gresford: My Lords, the veterans of devolution legislation—and I have sat through all the Acts, both Scottish and Welsh—know only too well that the architecture of devolution takes two forms: conferred powers and reserved powers. For many years, Wales had conferred powers; that is to say the power was held in the centre and handed down to the Welsh Assembly. Scotland has always had the reserved powers model, whereby it has all the powers subject to those that are retained. Clause 11, as it was originally drafted, had the flavour of the conferred powers model—namely, that powers would be taken back from Brussels and handed down piecemeal. What is so encouraging is that the Government have in this amendment put forward something that has the flavour of the reserved powers model; in other words, everything goes to the devolved legislatures, and the Government want to hold back or recover some of those powers through the machinery set out in the amendment. The essential feature of the reserved powers model is that the powers that are reserved are spelt out. That is why I support the suggestion that there should be a schedule setting out precisely what powers Ministers wish to retain or recover for the UK Government. This point was first raised by the noble Lord, Lord Griffiths, and has been repeated by the noble Baroness, Lady Finlay, the noble Lord, Lord Hain, and the noble and learned Lord, Lord Wallace.

Parliament can legislate on devolved matters, and has indeed done so, but always with consent. My amendments suggest that when the UK Government wish to bring back powers from the devolved Administrations, that ought to be with consent. We have a strong common interest in a UK single market. There will be divergence, no doubt: a Welsh Government may want to support lamb and a Scottish Government barley—I do not know what they will want to support, but there all sorts of possibilities of divergence; that is what devolution implies. But we have this strong common interest, and if we work at it and show some trust, which has been so lacking in the negotiations that have taken place so far, then we may come to a solution. That is why I protested at the attacks made upon a democratically elected Scottish Government. I have great Scottish interests and do not support the SNP in any way at all, but nevertheless the Scottish Government, rightly or wrongly, represent the voice of the Scottish people and should be treated with respect—you have to treat them with respect if you are to deal with them.

I urge the Government to take the necessary steps to put some trust into these institutions, and to try to gain the consent of the devolved Administrations for what they want to do. If ultimately consent cannot be obtained, let us have as a safeguard a mechanism such as that proposed by the noble and learned Lord, Lord Mackay of Clashfern, which resolves any disputes. Ultimately, the final decision could be left to the United Kingdom Parliament, as the noble and learned Lord's amendment suggests, but surely there are many steps to which the devolved Administrations can and will want to consent before we ever got to that stage. I urge the Government to put consent and a positive dispute resolution mechanism into the Bill.

Lord Purvis of Tweed (LD): My Lords, I know the Committee wants to move on but I will make just a couple of brief points—in support of the Government moving on this issue; on the contributions made by the noble and learned Lord, Lord Mackay of Clashfern, and my noble and learned friend Lord Wallace of Tankerness; and on the anxiety that perhaps yet again we will be making constitutional measures on a temporary basis late in the day as a result of decisions by two Executives. While we have to take the Government at their word that these will be temporary measures, many procedures in this House and many elements of our constitution started off as temporary measures but have become almost permanent features of our constitution. In the absence of some changes which will provide a sunset element, we may well be in a similar situation.

Two years ago I brought a Bill to this House for a British constitutional convention, as a result of the Scottish referendum, to try to proactively discuss some of these issues. But, as the noble Lord, Lord Lang of Monkton, said, we are where we are now with this Bill so we have to address what may be constructive ways forward. I think the contributions made so far are good suggestions for what is a very complex situation because we are extracting ourselves from a single market at the same time as seeking to create one with the powers that will be coming back from the European Union. By definition, many of those powers are designed to be cross-border.

Many elements of European legislation are as a result of international agreements that the EU itself has made to implement global agreements, such as on climate change or safety in aviation. These are complex. Interestingly, as the Government's own framework paper shows, most of that legislation has come into place since devolution. The evolution of the markets within the European Union does not entirely predate 1999. Whether on animal welfare, safety or aviation, many have developed not only since we established devolution in the UK but since the single market has developed. These are going to be very important for our future trading relationships, not only between us and the EU but in our arrangements with third countries.

Most of those areas concern non-tariff barriers, regulations and legislation in domestic law. These are going to be relevant for every single trade agreement that the UK will negotiate and will be at the heart of our relationship with the European Union. Although I have a degree of sympathy with the Government on a temporary basis, we will have to come back not only to the legislation for the implementation period but to that for the new relationship with the European Union. That adds even more weight to the fact that the discussions taking place now will have to be time-limited.

We are also discussing blind how we would expect a framework or a common market to operate within the UK. In many respects, you would argue that we do not have that at the moment. If you drive from where I live in the Borders to London and if you are selling cigarettes or bringing animals, you will be operating under three different road traffic systems. If it was cigarettes, you might have a different packaging system in Scotland. Certainly in Scotland, not only the language of road signs but road traffic speeds are legislated for differently. We operate within many barriers. The question is how damaging those barriers would be to the functioning of the United Kingdom.

That leads on to my second point. This is not simply going to be a relationship based in law; it is also about how the different component parts of the United Kingdom will operate. Since 1999, as noble Lords have said, there have been major changes to that legislation—changes that previous UK Governments said should not be made because they would be counter to the effective operation of the United Kingdom—and Governments have changed their position, usually as a result of consensus and cross-party negotiations.

Where I did slightly disagree with the comments of the noble Lord, Lord Lang, is that there have been now more than 150 LCMs in the Scottish context, and in many respects devolution has been working extremely well when you take away the rhetoric of the wider nationalistic argument. But it does show that there needs to be a degree of flexibility within this set of arrangements. That flexibility will have to come not just with a government-to-government relationship but also with the other elements that are necessary to determine how effectively a common market operates. Who provides the statistics? What is the dispute resolution mechanism? Who provides the data? We saw this in all the discussions that the noble Lord, Lord Dunlop, had during negotiations on the fiscal framework between the UK Government and the Scottish Government. In the end, many of the discussions were not about the legislative element but about the non-legislative element, such as who provided the information, whether there was an independent source of data on fiscal revenue and who did the forecasting going into the future. These are all going to be very important.

Noble Lords perhaps thought I was making a glib comment in the previous discussion when I intervened on the Minister and spoke about managed divergence, but that is part of the parlance in our discussions with the European Union. We have that within the UK, and the question is how divergent we can be in the UK for that common market to operate effectively. Part of this discussion will have to be about the existing offices that consider the markets within the UK—our office for energy, our office for communications, the Competition and Markets Authority—which are now going to have to be covered.

That leads me to my final point, which in a way is to address the point made by the noble Lord, Lord Forsyth. The choices that we have made about our relationships within the UK—whether nations were consulted and whether or not consent was provided—have been addressed by our European colleagues in different ways. The noble Lord referred to consent in the German federal structure, under which the Bundesrat provides, under the constitution, a decisive opinion when the federal Government bring forward measures that would impact the interests of the Land parliaments. This House is not a federal House; the House of Commons is not a federal Chamber. We will have to have some forms of institutions which bring this together.

In the first instance, however, I strongly support this legislation and the temporary measures being time limited. We will need a schedule of the specific areas which are, in effect, reservations, because we will have to make sure that those areas are resolved before we go over to the next stage. We will be in a kingdom of divergence and will need new institutions. It is not just about frameworks, but a new relationship across them. As many noble Lords have said, including the noble and learned Lord, Lord Hope, in his Second Reading speech, all of this will have to be underpinned by trust. It is the non-legislative relationships which in many respects will be more important than the legislative relationships in this Bill, in the next Bill, in the final agreement Bill and in all the different measures that come subsequent to it.

The Earl of Kinnoull (CB): My Lords, I will speak very briefly indeed, in strong support of the government amendments, to make one observation and one point.

My observation follows on from something that the noble Lord, Lord Dunlop, said in his speech concerning the memorandum of understanding. The current memorandum of understanding, which is dated October 2013, is only a draft—it was never finally signed off. Since that date, of course, we have had the Scottish referendum and very serious Bills in this House that have given more and more powers to the devolved Administrations. I have said before in this House, as others have, that it is frankly not fit for the purpose of acting as the constitutional glue that the structure it controls should be. A well-functioning memorandum of understanding would breed a healthy atmosphere and the ability for the differing nations of the United Kingdom to talk together. Instead of the C words that we have been discussing today, "consult" and "consent", there may even emerge—from my experience of international companies, where quite often you have the French arguing with the Germans or whatever—a third C word, "consensus", which would be enormously helpful in this situation. My observation is that this situation is much to be regretted, and I hope the Government are going to put a lot of weight behind getting it resolved and getting a proper memorandum of understanding structure sorted out so that we are not in the position that we are in today where we have a fractious and pretty horrible discussion going on about these issues.

9.15 pm

I move on to my one point, which is about the ability of the devolved parliaments to exercise the powers. I have spent quite a lot of today, which has been long and interesting, looking at this wonderful frameworks analysis. I congratulate whoever has prepared it because it has taken a lot of work. It sets out very clearly what is being handed out and what is being discussed, so that one is not talking about the numbers of policy areas but one actually has an idea about what those areas are.

I am lucky enough to be on the European Union Select Committee. Last year we had serious visits discussing these issues to both Cardiff and Edinburgh. They were very helpful days in both places, and we made a lot of progress and eventually produced our devolution report, which several noble Lords have referred to in the debates today. What is always interesting at these events is what happens in the margins, and on both these days the margins were at lunch. In Wales, the discussion at lunch focused very much on the shortage of numbers of Members of the Assembly—I think there were only 56—so they simply did not have the capacity to look at legislation in the way that they would like to. That was an interesting discussion and it lodged in my mind. I worry terribly; I think this House has responsibility to have regard to whether the structures to which we are trying to give powers have the ability reasonably to exercise them. We must have regard to that when we make our decisions.

I turn to what happened at lunch in Edinburgh. There we were entertained by the Presiding Officer, and the conversation came around to whether or not the Edinburgh Parliament should have a second Chamber so that it could look in detail at legislation. Again, the conversation was about resource shortages and the lack of ability of the Scottish Parliament to properly exercise the powers that it had been given.

Lord Foulkes of Cumnock: The noble Earl may know that the Scottish Parliament rejected my suggestion that it should have a house of lairds.

The Earl of Kinnoull: I did. I will send my job application in.

I feel that we must have regard to that issue. I have been through the document pretty carefully, and I feel—this is why my support for the government amendments is so strong—that a good balance has been struck in those amendments regarding the point that I have just made. There is a chance that the devolved assemblies can exercise those powers properly, but if we tip too many in then I feel we will be letting down the citizens of Wales and Scotland.

Lord Campbell of Pittenweem: Before the noble Earl sits down, I would like to pick up the point that was made to him at lunch. He will be aware that when the Scottish Parliament was established, a great deal of store was set by the form of the committee system, which it was hoped would be independent and would provide the kind of scrutiny that a second Chamber would afford. I do not think it is challengeable that the committee system has unfortunately become very political, to the extent that it is very difficult for Members on the committee to strike the kind of independence that we sometimes see in Select Committees in the other place and here. A consequence is that an effort to introduce a principle of "holding to account" has not been maintained in the way that it was in the beginning. If that continues, it makes the case for a second revising opportunity—I do not describe it as a Chamber—overwhelming.

The Earl of Kinnoull: I am very grateful to the noble Lord for making a jolly good point very well. At the lunch, that was hinted at, with rather less force. I wholly accept his reasoning and agree with what he said.

Lord Stevenson of Balmacara: I join many noble Lords in congratulating the Government on the way

[Lord Stevenson of Balmacara]
they have handled this issue and reinforce what was said by the noble Lord, Lord Forsyth: I have not seen any such movement from any Government in my time here in terms of trying to reach out to the points being made and accommodate them. That is terrific; long may it last. The test will be whether the noble and learned Lord in fact withdraws his amendment before the end of tonight—but I trust him in this case.

I also think that the idea of a probing government amendment is pretty good. It is nice to know that there is an open mind on the other side, and no better way of showing it than saying: "We haven't got the faintest idea here, but here's something you might want to consider and discuss and we will listen hard and take away the best bits". It is good in the sense that it builds trust and engages debate. We have had a terrific debate—possibly a little overlong, but it has been very interesting—and I am sure that many points will take us forward. I recognise that the idea of probing your own ideas may not work unless we can actually come up with some ideas, so it behoves us all to think very hard about the advice that we want to give to the noble and learned Lord and his colleagues.

What do we want? There are five things that I would like to see in revised amendments. We should be looking for an agreed amendment among the various interests around the House as much as possible. There has been enough evidence about where the central points are—we may differ on the nuances, but there is enough there. It would be really good if we could have some informal discussions and meetings before Report—and Third Reading, if it goes that far. By that stage, I hope that we will have a firmer view of what we are going to do in Northern Ireland. I agree that the situation is beyond the power of this House to do anything about, but it is a real gap when we are trying to address our longer-term constitutional position. If we have nothing to say, that says more about us than about the situation in Northern Ireland. I hope that that will be taken into account.

My first point is a negative. The Bill has raised debates, ideas and thoughts that are really important, but they are far too time-rich and need more discussion before they go into the Bill. The Bill is at heart limited to ensuring that we have a legal framework if and when we leave the EU—as the noble and learned Lord said, a fully functioning statute book. We are wrong to try to overload it with too much. I hope that, in offering our advice either privately or in meetings, we will focus on the minimum necessary to get the Bill on the statute book in a way that will be effective and efficient, and will achieve what we are trying to do.

On the other hand, the debate should not be curtailed by the question of what is and what is not in the Bill. We must accept—some noble Lords were ahead of me on this point—that transfers of this amount of responsibility to admittedly mature Parliaments and Assemblies will start a new chapter in the devolution story, and it would be remiss of this House if we did not think through some of the implications of that.

I have no particular remedies here, but it is inconceivable that the current arrangements, under which we determine through a Board of Trade how we conduct trade policy, can accommodate the new arrangements. They will have to be expanded and thought through again. We will have to think about how we deal with treaties and how our ongoing relationship with the EU and its regulatory and other official operations will continue in a devolved situation where trade responsibility and policy is at a level other than national. There may well be a set of rules that will accommodate that. They will not fit into this Bill, but they need to be considered as we go forward.

We have to think also much wider—certainly much wider than this idea that somehow this paves the way to independence for any or all of the parts of the United Kingdom. We have to think about the opportunities that will exist as these things are devolved in terms of such matters as what happens to state aid rules when they are changed. This will raise a lot of concern and interest much more widely than in this House. We will do ourselves a disservice if we do not take that into account as we think this through. For the moment, though, let us think very narrowly about this Bill.

At the heart of it, we want an agreement that, on the face of the Bill, the underlying principle in play is that everything is devolved unless it is reserved. We also want a clear understanding of why certain things are reserved. The noble and learned Lord, Lord Mackay of Clashfern, gave a very good example of one way into this argument by saying that it was a question of when powers were in consideration which applied in more than one geographical area; however, I put it to him and to the Ministers who are working on this that this is not quite the full story. If you look at the note on the common frameworks that accompanied the full list of them, it goes much deeper than that. These are principles, as I understand it and as I think the noble and learned Lord confirmed, that were agreed by the UK, Scottish and Welsh Governments at a meeting of the Joint Ministerial Committee in October 2017, so they are not in dispute. The principles make clear that,

"common frameworks will be established where they are necessary in order to: … enable the functioning of the UK internal market, while acknowledging policy divergence;"

—the coda about "acknowledging policy divergence" is really important, and we need to know more about that—

"ensure compliance with international obligations;"

—I think that is fairly clear—

"ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;"

—I have already said I do not know whether that will necessarily be the only way into that debate—

"enable the management of common resources;"

and then two rather important issues that we have not touched on but that surely have to lie at the heart of this:

"administer and provide access to justice in cases with a cross-border element;"

and,

"safeguard the security of the UK".

It has always been the case that national security is the primary concern of all governments, but surely that plus the geographical "bite", as indicated by the noble and learned Lord, give us—together with the other points I have raised—a much richer context

within which the decision to reserve an item can be placed. It is important that this is on the face of the Bill. That is the key issue. There must not be a sense that something has been hidden or held back. We have to be open and trust those who are concerned about this that this will be the way forward. I hope that when the Minister comes to respond, he will be able to confirm that this is an issue that he might look at with some sympathy, because I think it will be the key to it.

I also think, as suggested by the noble and learned Lord, Lord Wallace of Tankerness, and others, that we should see the 24 policy areas included as a Schedule to the Bill. The point made by my noble friend Lord McConnell of Glenscorrodale is very important: we are talking about those things that will have to be reserved for a reason. We should list them, and we should also understand the reasons why they are reserved.

There are two smaller points—in the sense that they are less full of implications; they are still very important—that I will tag on to the end of this. The noble and learned Lord, Lord Hope, raised a number of points that will need to be picked up and that we must not forget, because the change to the existing Clause 11 will affect other aspects of the area. He made that point well. There have also been calls from all around the House for a sunset clause, which I absolutely support. That is the right thing to do. If that all comes together, however—and I think we are confident that it is possible—what we are signing up to is an agreement to agree on process, but that agreement will be able to get the consent of the devolved Administrations. That combination is vital to the way forward, and I recommend it very strongly to the Ministers.

Finally, if we are going to avoid the veto problem, which I think is a real issue that we have not really bottomed out, we are going to need a dispute resolution mechanism. There is no doubt about that. You cannot just go into this hoping that it will somehow be all right on the night. We need to know what happens when one area, for whatever reason—whether it is a political reason or truly an issue of conscience—wants to put down a veto and hold out. I do not think there has been any dispute, but we have not said it enough: at the end of the day the UK Parliament has to have a backstop power to legislate in cases that meet the criteria for why things are reserved. I think we should keep saying that until it has become part of the fabric of our lives. It is not said enough, as the noble Lord, Lord Lang of Monkton, mentioned.

But we also need to achieve the consent that is necessary to establish the agreements that will underpin trust and support for this in the long run. I absolutely think that the amendment proposed by the noble and learned Lord, Lord Mackay, has something in that regard. I am grateful that the Minister has said that he will take this away; we need to workshop it—what we should have is a hackathon—in order to work out together where we might go with it.

Noble Lords: Minister.

9.30 pm

Lord Keen of Elie: My Lords, are you sure? I do not think there is any need to rush this. We have covered a lot of ground and we have a lot more ground to cover now.

This amendment was put forward as a catalyst, and there has been a reaction. I leave others to judge whether it was contained or uncontained. As the noble Lord, Lord Stevenson, just observed, this is not the vehicle for major constitutional change in the United Kingdom. If we attempt to bolt that on to this Bill, it will sink without trace. Some may prefer that that should happen; nevertheless, that is not a sensible way forward. I am obliged to all those who have contributed to this debate, because it was our intention in putting forward this amendment to judge the mood of the Committee with regard to the quite radical change and approach that we have taken with this proposed amendment. It may be that I approach the matter with an open mind; it may be that I approach it with an empty mind; but at the end of the day we will have to make a decision that works for the whole of the United Kingdom.

I will take up one or two points. There is an appreciation—it may not be universal, but it is almost universal—of recognising the benefits of maintaining a single market in the United Kingdom. We already enjoy that single market by virtue of our membership of the EU, and it is something we want to retain after we leave the EU. In order to do that, there has to be agreement in principle as to the areas that underpin such a single market. The noble Lord, Lord Stevenson, alluded to the principles set out in the Joint Ministerial Committee minute of 16 October 2017. That is essentially what underpins our seeking agreement; there was consensus. That is what we need to do.

Ultimately, if we are to have a single market for the United Kingdom, we require a body to have jurisdiction over that single market. Again, as the noble Lord, Lord Stevenson, and others have acknowledged, that ultimately has to be the Parliament of the United Kingdom. There is no other way of addressing that issue. If we look to the issue of consent, rather than consultation, let us be clear that it is not a question of trust but of constitutional propriety. If we have a black and white, sharp-edged consent mechanism for the devolved Administrations, then we have the basis for what has been termed the veto problem. We have the situation in which, beyond the existing devolved competence, any one of these Assemblies could—it is at that level that it must be judged; not would, but could—proceed to legislate within its devolved competence in a manner that impacted upon those in another country within the United Kingdom, whether it be England, Wales, Scotland or Northern Ireland. We cannot go down that road. That would be a fundamental change in the devolved competence that we created in, and have indeed developed since, 1998.

It appears that we have, at times, merged two issues. The noble Lord, Lord Griffiths, apart from criticising Ministers for not getting on and doing any work on

[Lord Keen of Elie]
this, pointed out that there had to be a breathing space. Indeed, that point was developed by the noble Lord, Lord Hain, when he quoted the letter from my right honourable friend the Secretary of State for Wales. Just to put that into context—and if I may briefly go back to a point I made in an earlier part of the debate—the first stage of this process is to identify those competences coming back from the EU that will be required to operate a single market in the United Kingdom and to effectively ring-fence them on a temporary basis; thus the breathing space that the noble Lord, Lord Griffiths, referred to.

That is all that is involved in the first stage. That process has carried on in great detail since the principles were established last October. It has been the work of officials not only in Whitehall but in Edinburgh, Cardiff and Belfast. They have all come together to do what is termed in Civil Service-speak as "deep dives" into these matters. The product has now been published. It is the table that identifies 24 areas where it is considered there will have to be some temporary ring-fencing so that we can establish the next stage of the process for the single market—the framework agreements that will then form the basis for that single market.

Let us be clear: that is a separate stage. The ring-fencing is merely to hold those competences for the time required to put the framework agreements in place. We have agreed the principles on which the competences can be identified, and we have now carried out a process that identifies those competences. There is an element of disagreement about that, but only in two or three areas, so far as the Scottish Government are concerned. State aid is one of them. We regard it, for reasons I find fairly obvious, as a reserved competence, but they say it touches on a devolved competence. We will therefore have to address that, and potentially have a framework agreement in those areas as well. That is why there are a further 12 areas of competence that we are confident are in reserved areas, but which may be open to debate. None the less, there is a very substantial element of agreement on the ring-fencing.

Now let me go to the next stage. We then require the framework agreements. To the extent that those agreements will be implemented by primary legislation—it is anticipated that in many of the areas that will be the case—the primary legislation will be carried on in accordance with the constitutional conventions that we already have, and with the respect for the devolved settlement that we have always shown in the past. That includes the Sewel convention as now expressed in the Scotland Act 2016, which amended the Scotland Act 1998. It also includes those areas where, pursuant to DGN 10, such matters will touch upon the competence of Scottish Ministers.

That is where we seek the true element of consent—but ultimately, of course, if we cannot get agreement, we have the Sewel convention. Normally we proceed with the consent of the devolved assemblies, and that remains the position. That is the political understanding that underpins the devolved settlement, and has done for a very long time.

Can we just remove that dichotomy of consultation or consent? I know that within some Administrations, for reasons we do not have to explore, there is a determination to push for consent. Consent, as such, is constitutionally very difficult; I indulge in understatement when I say that. But there is still room for agreement, and the process overall should result in what somebody termed consensus—that is, a belief that we are all doing the same thing for the same reasons, with an expectation of the same result. That involves an understanding of what these frameworks are.

It has been suggested that the 24 areas of competence that require to be ring-fenced on a temporary basis should be expressed in a schedule to the Bill. I hear what is said about that, but whether it can practically be done in the context of the Bill may be another matter. As was observed, I believe by the noble Lord, Lord Stevenson, that may have to be expressed elsewhere. We can look at that, but in the first instance we have to understand what needs to be ring-fenced for the purposes of the framework agreements.

A sunset clause has been suggested, and I have already expressed a view about that. Clearly, we are listening to the idea that a sunset clause might run for five years. But the more we have gone on about this, the more we realise that what it all comes down to is two questions. One: can we have an appropriate forum in which to negotiate agreement with the devolved legislatures? Yes; that has been carried on in the joint ministerial committees. They have been criticised, but they have been successful, as can be seen by the agreement in principle in respect of these matters. Can we achieve that? The answer is yes.

Secondly, can we then express, in a manner that will satisfy the devolved Administrations, what the framework agreements will be? The answer to that is again yes because we will follow the normal and usual constitutional principles that involve embracing the Sewel convention in cases where primary legislation is required.

I hope that goes some way to reassure noble Lords that we are making progress here because underneath the concern about consent versus consultation there has been considerable movement. We not only have the principles that we will apply to the ring-fencing of competences but we will also have the means to bring forward framework agreements in a manner that will satisfy the devolved competence, as I say. It may be that it will go beyond the 24 areas already identified but work can continue on that matter. What is ultimately of importance is that we retain the means for uniformity of regulation in those critical areas that touch on the principles enunciated in October 2017. That is what has to be achieved. There may be more than one road but ultimately they all lead to Rome, and that is where we want to be at the end of the day, so with that—

Lord Newby (LD): They go to Brussels.

Lord Keen of Elie: I reassure the noble Lord, Lord Newby, that the roads do not go to Brussels any more. However, he is welcome to go and hack a path there, if he wishes. With that, I seek to withdraw the government amendment.

Amendment 302B (to Amendment 302A) withdrawn.

Amendments 302C to 302G (to Amendment 302A) not moved.

Amendment 302A withdrawn.

Amendments 303 and 304 not moved.

Amendment 304A had been withdrawn from the Marshalled List.

House resumed.

House adjourned at 9.43 pm.