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PARLIAMENTARY DEBATES
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HOUSE OF LORDS

OFFICIAL REPORT

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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

Monday 23 April 2018

2.30 pm

Prayers—read by the Lord Bishop of Norwich.

Oaths and Affirmations

2.35 pm

Lord Young of Graffham took the oath, and signed an undertaking to abide by the Code of Conduct.

Death of a Member: Baroness Gibson of Market Rasen

Announcement

2.37 pm

The Lord Speaker (Lord Fowler): My Lords, I regret to inform the House of the death of the noble Baroness, Lady Gibson of Market Rasen, on 20 April. On behalf of the House, I extend our condolences to her family and friends.

Retirement of a Member: Lord Hutton

Announcement

2.37 pm

The Lord Speaker (Lord Fowler): My Lords, I should like to notify the House of the retirement with effect from today of the noble and learned Lord, Lord Hutton, pursuant to Section 1 of the House of Lords Reform Act 2014. On behalf of the House, I thank him for his much-valued service to the House.

Birth of a Son to Her Royal Highness the Duchess of Cambridge

Announcement

2.37 pm

The Lord Speaker (Lord Fowler): My Lords, the House will have heard the announcement from Kensington Palace today of the safe delivery of a son to their Royal Highnesses the Duke and Duchess of Cambridge. I am sure noble Lords from all sides of the House will join me in congratulating their Royal Highnesses on this most happy of occasions.

Health: Online Services

Question

2.38 pm

Asked by ***Baroness Wheeler***

To ask Her Majesty's Government what action they are taking in response to the Care Quality Commission's report, *The state of care in independent online primary health services*, published on 23 March.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, the online provision of primary care is a development with the potential to improve patient outcomes. However, it is important that these services are regulated and inspected properly. The CQC will continue to hold online providers to account while sharing good practice. Following its report, we are considering what further action is needed to ensure that the right balance is struck between the provision of safe, effective care and encouraging further innovation.

Baroness Wheeler (Lab): I thank the Minister for his response. We are strongly in favour of technologies and innovations that help to provide the widest possible access to primary health services, particularly when getting a timely GP appointment is so difficult for thousands of patients. The CQC inspection role is crucial but there is no disguising the serious issues to be addressed and resolved. These include checking patients' identity, sharing information with the NHS GP and the safe prescribing of medicines. Some 43% of companies are failing to meet regulations for keeping patients safe and there are particular concerns about inappropriate prescribing of antibiotics and medicines and about managing long-term conditions. How will the Government ensure that the lessons from the first phase of the CQC inspection are learned, and will they pledge to take swift action on the problems now before the service is further rolled out?

Lord O'Shaughnessy: I thank the noble Baroness for raising this important issue. She is right that the CQC report identified some serious issues among this group of online providers, which of course operate in the independent sector. She mentioned safety and safeguarding, and I would add to that. It is worth saying that there were some positive responses, in terms of 97% of the providers being caring and 90% of them responsive, so some strengths were identified as well as weaknesses. Obviously the CQC retains the ability to take regulatory action. As it sets out in the report, it has done so to ensure that standards improve, and in general they improve from one inspection to the next. However, this is of course the independent sector. We are looking at the lessons for the provision of NHS services. The biggest one of those that comes out of the report is around data sharing: to ensure a clear flow of data between an online provider and a GP, if they are different, so that any problems can be spotted early on. That is particularly important for safety.

Baroness Jolly (LD): My Lords, as the Minister has just said, this is a picture of things to come. Could he give an indication of when the Government expect that GP practices would regularly be able to give an online service to the general public and their patients? What support, financially and developmentally, would they be sure to get from NHS England?

Lord O'Shaughnessy: On that specific point, NHS England is providing £45 million through the general practice forward view to promote online consultations. That is to ensure that they are available in general practice across the country. The noble Baroness will be aware of the GP at Hand practice, which is one

[LORD O'SHAUGHNESSY]
practice in west London offering these services, but we are seeking to expand them, and NHS England, the CQC and others are providing regulatory support during that process.

Baroness McIntosh of Hudnall (Lab): My Lords, can the Minister explain the process? If someone chooses to access an online GP service, what happens to their registration with the GP with whom they are already registered—if they are registered? Is the process clear to each patient?

Lord O'Shaughnessy: That is an excellent question. It is important to distinguish between the independent sector and the NHS. The CQC report was about the independent sector, so a patient would continue to be registered with their NHS GP practice and have an augmenting consultation, if you like. With GP at Hand, as it is an NHS practice, they would switch their registration. One issue that has come up is whether people have full enough information about that switching, which is one thing that NHS England is reviewing in the independent review that it has commissioned about the success or otherwise of that service.

Lord Leigh of Hurley (Con): What steps are the Government taking to encourage people—I appreciate that they cannot force them—throughout the UK to use only online medical services which are registered with the CQC?

Lord O'Shaughnessy: This is of course the way the economy is going in general and is a great passion of the Secretary of State. Indeed, he made a commitment at the NHS Expo conference last year that, by the end of this year, every patient would have access to an NHS app online which will enable them to do things such as book consultations, see who has viewed their medical record and set their preferences about things such as blood and transplant donations. A huge stream of work is going on to ensure that those services are available to all patients in the NHS.

Viscount Waverley (CB): My Lords, the Minister will be aware that Brussels is introducing the GDPR arrangement for registration of email addresses and the rest. Could he say a word about how that might impact both independent services and the National Health Service, and counsel doctors accordingly so that they do not get it wrong?

Lord O'Shaughnessy: That is an excellent point: the entire country is preparing for the advent of the GDPR on 25 May. We are engaged in a large programme of work with the Information Commissioner's Office and others to ensure that everyone working in the health and care services understands their obligations and informs patients accordingly.

Lord Winston (Lab): My Lords, a large number of reproductive clinics publish their wares by advertising on the London Underground, often at great cost, sometimes making claims about their treatments. If I did that as a doctor, I would be struck off the register. They get round it because they are private clinics. Is that appropriate? Does the Care Quality Commission have any involvement in this process, and should it?

Lord O'Shaughnessy: I would have to look at the specific clinics that the noble Lord is talking about. The subject of the report was those providing online services. One of the things it discovered was that certain regulatory issues are unique to the provision of online services, an example of which is when the data is held offshore and what that means for regulation. As the CQC says in its report, it is reviewing its regulations to make sure that it can account for the unique aspects of online provision, so that the critical aspects, whether they are about truthful advertising or other aspects, are dealt with properly.

Lord Patel (CB): My Lords, as the noble Lord is aware, there is an increasing number of independent primary care practitioners. What assessment have the Government made of the impact of that on the medical workforce of the NHS?

Lord O'Shaughnessy: I am not specifically aware of such an evaluation, but I know that there is a need for more general practitioners, which we are all aware of, and indeed for a plan to recruit many more to the service to ensure that all patients and citizens of this country can find a GP in the NHS when they need it.

Social Mobility Commission

Question

2.45 pm

Tabled by ***Lord Lennie***

To ask Her Majesty's Government what progress they have made on the appointment of the new Chair and members of the Social Mobility Commission.

Baroness Lister of Burtersett (Lab): On behalf of my noble friend Lord Lennie, and at his request, I beg leave to ask the Question standing in his name on the Order Paper.

The Parliamentary Under-Secretary of State, Department for Education (Lord Agnew of Oulton) (Con): My Lords, the recruitment of a new chair of the commission is well under way. Applications have now closed and I am pleased to report that we have had a strong response. We will recruit new commissioners as soon as possible after the appointment of the new chair to allow him or her to provide input. These are public appointments, and the process will be completed following the governance code for public appointments.

Baroness Lister of Burtersett: My Lords, it is now nearly five months since the commission resigned en masse because it had been reduced to a rump of four from 10, and felt that it was not being listened to. As the Conservative chair of the Education Committee

observed, this seemed extraordinary in light of the Prime Minister's concern to fight burning injustices, and given that the commission's final report warned that there is no overall national strategy to tackle the social economic and geographic divisions facing the country. What steps are the Government now taking as a matter of urgency to develop such a strategy and to reconstitute a strengthened commission to oversee it, as recommended by the Education Committee?

Lord Agnew of Oulton: My Lords, the national strategy for social mobility is focused on removing barriers to opportunity for all, including disadvantaged people and places—whether it is through education, using the pupil premium, in which the Government have invested £13 billion since 2011, closing the attainment gap, which has narrowed by 10% in the last seven years, or increasing the national living wage by 4.4% at the beginning of this month, and by £2,000 a year since April 2016. The recommendations of the Education Select Committee are being considered by the Government, but our commitment to improving the lot, particularly of the least advantaged, remains paramount.

Lord Lexden (Con): What are the Government doing to help break down barriers between children from different religious and cultural backgrounds?

Lord Agnew of Oulton: My Lords, we have an ongoing process of education. We announced the integration strategy a couple of weeks ago, using the schools linking programme to create sustained opportunities for children of different backgrounds to mix and socialise, and strengthening expectations on integration for all new free schools.

Lord Cameron of Dillington (CB): In light of the fact that the last report of the Social Mobility Commission indicated that intergenerational poverty and deprivation was as bad, if not worse, in rural England than anywhere else, including urban England, can we assume that an appointment to the commission will go to someone who truly understands the particular nature of rural poverty and deprivation? In other words, are these appointments being rural-proofed?

Lord Agnew of Oulton: My Lords, the Government govern for all of Britain, including rural areas, where I live, so I can assure the noble Lord that that will be an important part of the criteria in the interview process.

The Lord Bishop of Norwich: My Lords, greater social mobility was one of the drivers of the original academies programme set up by the last Labour Government, which was why some of us supported it so strongly. Does the Minister believe that that still holds true for academies now and that widening educational opportunities for the disadvantaged is the key factor in promoting social mobility?

Lord Agnew of Oulton: The right reverend Prelate is correct, and we ought to record our great debt of gratitude to him personally as one of the very first academy sponsors in Norfolk. I have seen the work that he has done. The short answer is yes. We have taken 1,950 previously largely failing schools into sponsored academy status. At the time they came in, only 10% of them were rated good or better. Today, 70% of those are good or better, which accounts for about 450,000 children. So I see the academy programme as a vital plank in social mobility.

Baroness Hussein-Ece (LD): My Lords, from the evidence that we have heard, social mobility inequalities are not narrowing or improving, despite what we have heard from the noble Lord and despite what the Prime Minister pledged—to make Britain a country that works for everyone. Can the Minister say why the Government are not prioritising this and why is it not improving—or is it that the Government are rather preoccupied with something else?

Lord Agnew of Oulton: My Lords, I assure noble Lords that it is a very high priority of this Government. If we look at some of the papers and initiatives that have been launched just over the past few months, we can see the 30-hours policy in December 2017, which was aimed at disadvantaged families. Then there was *Unlocking Talent, Fulfilling Potential*, aimed at improving social mobility, issued in December. I mentioned earlier the integration strategy, and we had a careers strategy in December 2017. These are all aimed at improving social mobility.

Lord Watts (Lab): My Lords, it is clear that social mobility in the UK is declining. Will the Government issue some clear priorities and set out some clear targets by which we can measure social mobility?

Lord Agnew of Oulton: My Lords, I respectfully disagree with the noble Lord; I do not believe that that is the case. The number of children living in poverty has actually declined since 2010. In the recent social mobility action plan that we issued in December, we reasserted our aim to focus on areas such as the word gap, which we know is one of the biggest areas of disadvantage for young children. We have put more emphasis on high-quality post-16 choices for all young people and, as I mentioned at the beginning, we have closed the attainment gap by 10% in the last seven years.

Baroness Berridge (Con): My Lords, in 2016 your Lordships' House had a one-year Select Committee looking into social mobility, on which I served as a member. We looked at social mobility for those young people who did not go to university. In fact, the majority of young people go into jobs, vocational training such as apprenticeships or into further education. Could the Minister please outline whether there is an intention by the department to ensure that some of the commissioners come from a non-university education background?

Lord Agnew of Oulton: My Lords, I certainly hope so, because I did, so I know that it is quite possible to have an interesting and fulfilling life without having

[Lord Agnew of Oulton]
gone to university. Our T-levels are very much aimed at that group of people who do not consider a university career as their priority. There is a growing awareness that there are other routes. There is an education and skills company that is also doing a lot of work with schools, providing mentoring and showing that there are routes other than just university.

Universal Credit

Question

2.53 pm

Asked by ***Baroness Sherlock***

To ask Her Majesty's Government what progress they have made in rolling out Universal Credit.

The Parliamentary Under-Secretary of State, Department for Work and Pensions (Baroness Buscombe) (Con): My Lords, we continue to roll out universal credit in a safe and controlled way, with an expected completion date of December 2018. Any changes to the rollout schedule are carefully considered, and we work together with local authorities and stakeholders to deliver universal credit. Universal credit is working and transforming lives across the country; it continues to deliver real improvements to people's lives and strengthens the UK economy.

Baroness Sherlock (Lab): My Lords, I thank the Minister for her Answer. The Welfare Reform and Work Act introduced the two-child limit to universal credit and most other benefits and credits. Noble Lords may recall the case I raised in December of Alyssa Vessey. She was 18 when her mother died suddenly and gave up college to raise her three younger siblings. When she later had a baby of her own, she applied for support and was turned down under the two-child policy. This House had secured an exemption for kinship carers, but Ministers applied it in such a way that, if Alyssa had had her own baby and then taken on her siblings she would have got help, but doing it the other way round she did not. Last Thursday, in a case taken by the Child Poverty Action Group, the High Court ruled that to be perverse and struck it down. Will the Minister confirm to the House today that the Government will act immediately to extend the exemption from the two-child policy to all kinship carers?

Baroness Buscombe: My Lords, the Government acknowledge the immense value of care provided by kinship carers. We are working to ensure that they are supported by enabling them to access benefit entitlement in the same way as parents. We have introduced a number of exceptions to the two-child policy—providing support for a maximum of two children—to protect claimants who are unable to make the same choices about the number of children in their family. These already protect certain groups, including kinship carers. Regarding the court case to which the noble Baroness referred, the department is now closely looking into the impact of this policy on kinship carers.

Baroness Meacher (CB): My Lords, under universal credit, claimants with mental health problems who are waiting for their work capability assessment and who may, therefore, be proved unfit for work, are nevertheless being required to look for work during that waiting period, and will be sanctioned if they fail to do so. Does the Minister accept that this is an entirely unacceptable and grossly unfair system? Will she assure the House today that the Government plan to take action to bring this system to an end? If she cannot do that today, will she write to me to explain what action the Government will take to give fair treatment to mentally ill people waiting for their work capability assessment?

Baroness Buscombe: I thank the noble Baroness for her question; I know that she has great interest in this area. As I have said before, we are continually working to improve the work capability assessment. As a result of our Budget announcements last autumn, it is now possible for people to have a 100% advance on their universal credit while they are waiting for that assessment. I emphasise that those with severe disability do not now have to go through further work capability assessments. I assure the noble Baroness that we are constantly looking at this, working to improve the training of our work coaches and all the professionals involved in work capability assessments, to make sure that we minimise the number of people for whom we fall short in terms of support and protection.

Lord Kirkwood of Kirkhope (LD): My Lords, coming back to the rollout of universal credit, surely the Minister's department's priority in the short term should be to improve the quality of services available to vulnerable applicants for universal credit at a local level. Will she commit to working with her local authority colleagues to establish a more widespread network of multi-agency hubs, which have proved so effective in getting people from disadvantaged families through the transition process? Does she agree that multi-agency hubs are a much better form of support than food banks?

Baroness Buscombe: My Lords, it is right to say that our focus is not necessarily on multi-agency hubs but on proper signposting by our work coaches to make sure that, working with local authorities, we protect those vulnerable groups. A particular example is prison leavers. We have made sure that they can now have up to 100% advances on their universal credit the moment they leave prison. Vulnerable groups are at the forefront of our minds.

Baroness Couttie (Con): My Lords, many of those on universal credit also struggle with debt, sometimes involving expensive payday lenders, because of their credit standing. Are the Government doing anything through universal credit to support people who find themselves in such difficulties?

Baroness Buscombe: Yes, they are, I am pleased to say. The Government have taken a number of steps to reduce the risk of problem debt, including capping

payday lending costs and promoting savings. In addition, we have outlined a firm timetable for taking forward the breathing space scheme, and we are progressing with policy proposals for this and a statutory payment plan, all through the single financial guidance Bill, under which overindebted individuals will continue to be protected from creditor action.

Baroness Primarolo (Lab): My Lords, will the Minister explain why the universal credit sanctions regime imposes multiple sanctions on claimants with mental health problems, damages individuals' health, causes unnecessary suffering and hardship, and does absolutely nothing to improve their ability to find paid work?

Baroness Buscombe: My Lords, I have to disagree with the noble Baroness. Putting aside the raft of additional support and improvements that come with universal credit, we can demonstrate that universal credit is a far better route than the old legacy system to giving much better support to the people to whom she referred. Sanctions are used only in a minority of cases where claimants fail to meet their conditionality requirements without good reason.

Baroness Hayman (CB): My Lords, I want to take the Minister back to the Question raised by the noble Baroness, Lady Sherlock. The Minister said that the department is "closely looking into" this grossly unfair and unjust case. Those are almost exactly the same words she used when this issue was raised some months ago. Since then, I raised it with the Minister, her noble friend Lord Bates, who promised that the Treasury would look at it. Given that we have now had a court ruling, and given the great interest in this issue on the part of Members on all sides of this House, who have written to the Secretary of State about it, can the Minister undertake to let us know within the next week what the department will do?

Baroness Buscombe: I well remember the noble Baroness asking me this very question probably about two months ago. I reassure all noble Lords that I continue to press on this point. However, as the result of last Friday's judgment, I am now able to say that we are again looking at this point. I cannot confirm within the week, but I can confirm whether we will be able to go forward and support these people, who rightly deserve our particular attention, within the month.

Windrush Generation

Question

3.02 pm

Asked by ***Baroness Benjamin***

To ask Her Majesty's Government what plans they have to make reparations for the harm and distress caused to the Windrush generation.

Baroness Benjamin (LD): My Lords, I beg leave to ask the Question standing in my name on the Order Paper, and declare an interest as a patron of the Windrush Foundation.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, the Prime Minister has been clear that we will do whatever it takes, including, where appropriate, payment of compensation, to resolve the anxiety and problems which some of the Windrush generation have suffered. The Home Secretary will make a further announcement in the other place later today.

Baroness Benjamin: My Lords, the British public are furious at the Government-created Windrush fiasco. It is a matter of national shame, and trust and confidence need to be re-established. So can the Minister reassure the House that the new task force is made up of experienced, compassionate immigration officers, whose objective is to ensure unconditional British citizenship for these vulnerable Windrush generation victims, and that it is not in the hands of a box-ticking outside agency? Can she also confirm that the records of cases dealt with by the task force will be open and transparent? Will the Government reimplement the legislation in the Immigration Bill that would have protected these British citizens?

Baroness Williams of Trafford: First, if I could go back to the 2014 legislation, which I assume the noble Baroness refers to, the Immigration Act 1971 already protected these people. The noble Baroness goes absolutely to the right point, which is that the public are furious with the Government. In fact, successive Governments have failed to deal with this, so this should not be an occasion—and she does not make it one—for political infighting. We need to deal with it, and we need to deal with it now. The noble Baroness is absolutely right to point out that we need experienced people in this task force, and there are. They are not dealing with this as a box-ticking exercise but in a compassionate and sensitive way, and are ensuring that people who come forward, not to apply for citizenship but to have it confirmed that they have always been citizens of this country, will have that dealt with very sensitively.

Lord Faulkner of Worcester (Lab): My Lords, is the Minister aware that on 18 January, on a Motion from the noble Baroness, Lady Berridge, the Grand Committee of your Lordships' House debated the centenary of the arrival of the merchant vessel "Empire Windrush"? In that debate, I raised the cases of Paulette Wilson and Anthony Bryan and asked the noble Lord, Lord Bourne of Aberystwyth, if he could reply to me about the way in which they had been treated. Not surprisingly, he passed the letter to the Home Office, and on 11 April—almost three months afterwards—I got a letter from the Immigration Minister in which she said that the Home Office had acted appropriately based on the evidence. Would the Minister like to revise that view and possibly offer the apology to these two people, and the others, which I asked for in the debate?

Baroness Williams of Trafford: My Lords, herein lies the issue the noble Lord has highlighted. I think the two cases he refers to were dealt with appropriately. However, what was deemed as, perhaps, a blip in the system is actually a far more systemic problem that

[Baroness Williams of Trafford]
needs to be dealt with. I had not been aware that the debate had taken place, but certainly this is a generation of people whose status now needs to be regularised and regularised quickly.

Earl Attlee (Con): My Lords, does the Minister agree that Members of another place regularly escalate immigration cases for ministerial attention irrespective of merit? There is no sift. Therefore, why is anyone surprised that we get a debacle like the Windrush episode when ministerial time is wasted on cases which have no merit?

Baroness Williams of Trafford: My Lords, I have seen the Immigration Minister's case pile—not case file—and it is true that many cases come in through the Immigration Minister's box. It is really important, particularly in a situation like this, that those with genuine cases are dealt with quickly. I hope that there are not people out there seeking to capitalise on this situation.

Lord Paddick (LD): My Lords, will the Minister comment on the staff survey results published in the *Independent* today which show higher levels of discrimination and harassment among staff in the Home Office than in any other government department? Does this not prove that the Government have created a hostile environment inside the Home Office as well as in the country as a whole?

Baroness Williams of Trafford: My Lords, as an immigrant working in the Home Office I cannot comment on the staff survey because I have not seen it. This Government want to create a hostile environment not for people who have every right to be here but for people who seek to pervert the system of legal immigration. Yes, we want to create a hostile environment for illegal migrants, but we want to make every effort to ensure that people who are here lawfully are supported, particularly the Windrush cohort in confirming their settled status in this country.

European Union (Withdrawal) Bill

Report (2nd Day)

3.08 pm

Relevant documents: 12th and 20th Reports from the Delegated Powers Committee

Clause 5: Exceptions to savings and incorporation

Amendment 15

Moved by ***Lord Pannick***

15: Clause 5, page 3, line 20, leave out subsections (4) and (5) and insert—

"( ) The following provisions of the Charter of Fundamental Rights are not part of domestic law on or after exit day—

(a) the Preamble, and

(b) Chapter V."

Lord Pannick (CB): My Lords, Amendment 15 is in my name and in those of the noble and learned Lord, Lord Goldsmith, the noble Baroness, Lady Ludford, and the noble Lord, Lord Deben. I will speak also to Amendments 18 and 19 in this group, which are in my name and that of the noble Lord, Lord Beith.

Amendment 15 seeks to include the European Charter of Fundamental Rights as part of retained EU law, with the exception of the preamble and Chapter V. The preamble contains no substantive provisions and Chapter V confers rights such as the rights to vote and to stand as a candidate in elections to the European Parliament, which plainly will have no application once the United Kingdom leaves the European Union.

Noble Lords will know that the charter sets out a number of important legal rights, from the rights of the child in Article 24 to the rights of the elderly in Article 25. It recognises the rights of persons with disabilities in Article 26, the right to healthcare in Article 35 and the protection of the environment in Article 37.

There are three reasons why I commend this amendment to the House. The first is that the Government's purpose in bringing forward this Bill has been made very clear from the outset. The Prime Minister wrote in the foreword to the White Paper that the Bill seeks to repeal the European Communities Act 1972 on exit day and to convert into our law the body of EU law which applies at that date. Amendments to the body of retained EU law are for another day. As the Prime Minister said in the White Paper,

"the same rules and laws will apply on the day after exit as on the day before".

The reason for that is very powerful. As the Prime Minister and her Ministers have repeatedly explained, it is to ensure certainty and continuity at exit date. That has remained the Government's general position in relation to this Bill. On the 11th and final day in Committee on the Bill, the noble and learned Lord, Lord Keen, made the same point. He said:

"The Government have always said that this Bill is not the place for radical policy change".—[*Official Report*, 28/3/18; col. 876.]

I agree.

Clause 5(4) conflicts with—indeed, it frustrates—that central purpose of the Bill. It would exclude an important part of existing law from the law which applies at exit date. In doing so, it would cause precisely that lack of certainty and continuity which the Bill is designed to avoid. Clause 5(5) would add to the uncertainty because it says that, although charter rights will not be part of retained EU law, fundamental rights and principles that exist in EU law irrespective of the charter will be retained. This is, quite simply, a recipe for confusion, especially when European Court of Justice judgments, which will become part of retained EU law on or after exit date, themselves rely on charter rights.

Perhaps I may give your Lordships one practical example of the problems that this will pose: the case brought by Philip Morris, the tobacco company. It challenged restrictions on tobacco labelling and packaging. In its judgment dated 4 May 2016, the Court of Justice in Luxembourg relied, in dismissing the claim by

Philip Morris, on Article 35 of the charter, which confers a right to a high level of human health protection in EU law. That is an absolutely fundamental right.

3.15 pm

As that case demonstrates, one purpose of the charter is to provide a guide to the human rights principles that should inform the interpretation of the body of EU law. If Clause 5 remains in its present terms, good luck to British judges in future cases, who will not be able to refer to Article 35 of the charter but will be asked by parties to infer such a principle of a high level of human health protection from other EU legislation and case law, and will then be asked to use that principle to interpret other provisions of retained EU law. This is not going to promote legal certainty—although it will be very good for lawyers.

The legal position will be even more complex, because paragraph 3(1) of Schedule 1, which is the subject of Amendment 19 in this group, says that although the general principles of EU law will be part of retained EU law, no right of action can be based on them. Amendment 19 seeks to remove paragraph 3 of Schedule 1, because it is simply unacceptable and unprincipled to recognise rights but then to deny a remedy if the principles are breached. So the first reason I commend this amendment to the House is that the exclusion of the charter conflicts with the central purpose of this Bill: to read across EU law rights at exit date to ensure continuity and to avoid legal uncertainty.

The second reason is that the exclusion of charter rights from the scope of retained EU law will have a detrimental effect on the content of our law. During our debates in Committee, the Government presented two mutually inconsistent arguments. They have said both that the provisions of the charter do not need to be retained because they can be found elsewhere in retained EU law, and that to read across the charter would do immense damage to our law. They cannot have it both ways.

On 21 February, the much respected Bingham Centre for the Rule of Law published a report on this Bill. Paragraph 127 states that,

"it is clear beyond doubt that non-retention of the Charter will lead to a loss of the current level of rights protection available to individuals and businesses under EU law".

I also commend to the House a valuable published opinion on this subject by Jason Coppel QC for the Equality and Human Rights Commission, explaining that the charter has created valuable new rights. In any event, as Mr Coppel explains, this charter is important because it states in simple terms the rights that EU law seeks to protect. Without this charter there will be considerable legal uncertainty, because litigants and their lawyers will need to identify these rights not from a statement such as the charter but by seeking to construct the rights from the mass of retained EU legislation and case law, and then use the principles they contain as aids to construction.

As this is Report, let me report on the concerns about the inclusion of the charter in retained EU law that were raised in Committee. It was said that the concepts in the charter were vague and would need judicial interpretation—but that is true of the vast majority of retained EU law that this Bill will read across into our law. EU law is not drafted with the precision that characterises the work of our parliamentary draftsmen; it tends to be drafted in the form of general principles that require judicial elaboration. So this is no basis for distinguishing the charter from all other retained EU law.

Concern has also been expressed that charter rights might be used to overturn statutes enacted before exit day—but that is what the Bill allows in relation to the whole body of retained EU law which, under this Bill, is given priority over statutes enacted before exit day. Clause 5(2) says that the principle of the supremacy of EU law continues to apply in relation to statutes and other enactments passed or made before exit day. I emphasise that Amendment 15 will not confer on the charter any greater legal effect than it already has—and has had for a decade. It will not give charter rights any effect in those parts of our law which are distinct from EU law.

The third and final reason why I commend the amendment to the House is that I fear that the Government have a bad reason for making an exception in this Bill for rights under the charter; I fear that it is because they are suspicious of the very concept of fundamental rights. I am puzzled as to which of the rights protected by the charter the Government take exception. Is it the freedom to conduct a business? Is it the rights of the child, the rights of the elderly or the rights of persons with disabilities, or the protection of the environment and of consumers? Or is that the Government are concerned about ECJ decisions applying the charter? If so, which decisions? The Government have not come forward to identify any decisions relating to the charter to which they take exception.

So will the Minister explain what the fuss is about? I ask that question because I suspect that the Government's concern is purely doctrinal. I ask this House to say to the Government that this Bill should not be used as an excuse to reduce the legal rights that we all enjoy against the state.

Your Lordships' Constitution Committee, of which I am a member, criticised the approach adopted in Clause 5(4) and 5(5) in paragraph 119 of its report on the Bill, HL Paper 69. We said:

"If, as the Government suggests, the Charter of Fundamental Rights adds nothing to the content of EU law which is being retained, we do not understand why an exception needs to be made for it. If, however, the Charter does add value, then legal continuity suggests that the Bill should not make substantive changes to the law which applies immediately after exit day".

The Constitution Committee added at paragraph 120 that the approach taken in the Bill would exclude charter rights and retain general principles, and then we would prevent courses of action based on those principles, but that the approach,

"risks causing legal confusion in a context where clarity is needed".

The exclusion of the European Charter of Fundamental Rights from the Bill is unprincipled and unjustified. I beg to move.

The Lord Speaker (Lord Fowler): My Lords, I should inform the House that if this amendment is agreed to, I will be unable to call Amendment 16 by reason of pre-emption.

Lord Beith (LD): My Lords, I agree very much with what the noble Lord, Lord Pannick, has said about the charter in his Amendment 15 and I agree with him in Amendment 19, to which I have added my name. I want to refer to Amendment 18, which deals with yet another area of legal uncertainty that will be created by this Bill. Paragraph 1 of Schedule 1 to the Bill asserts that there will be,

"no right in domestic law on or after exit day to challenge any retained EU law on the basis that, immediately before exit day, an EU instrument was invalid".

That was also quoted by the noble Lord a moment ago. However, having snatched away a citizen's right to seek redress through the courts, paragraph 1(2)(b) of the same schedule states that in some circumstances the Executive might allow you into the court with your challenge. A Minister can make regulations to provide for that, but on what criteria and when will the regulations be made? My attempts to get clarification have yielded incomplete results. In a Written Answer to my Question of 29 March, the noble Lord, Lord Callanan, referred to the fact that individuals and businesses may be individually affected by an EU instrument—indeed so. He added:

"This power could be used to enable a right of challenge in domestic law to the validity of retained EU law in such circumstances".

How will those circumstances be defined? I am particularly concerned about the repeated reference to "individual circumstances". Is the Executive to decide on a case-by-case basis which individual cases merit a judicial hearing and make regulations specific to individual cases? That is a quite extraordinary thought. Are Ministers to choose who is allowed the key to the courtroom?

There is a possibility that regulations which deal narrowly with an individual case could be challenged by another individual or organisation with a similar case but which did not fall within the regulation. It would be claimed that the regulation was hybrid. This House provides special procedures to protect and give a fair hearing to parties affected by hybridity in statutory instruments—parties who want to argue that they are being dealt with in a different way from others who are in the same circumstances as they are. However, these protections are removed by a provision in paragraph 23 of Schedule 7, which states that hybrid regulations under the Bill are to be treated as if they were not hybrid and that their hybridity is to be ignored.

The upshot of all this is yet more legal uncertainty. Companies and individuals claiming to be adversely affected by a retained EU law whose validity was open to challenge will not be able to take that challenge to court unless they are lucky enough to be covered by exempting regulations, but they cannot know that in advance because the regulations will not have been made or even published in draft. The Government made it clear in the same Answer to which I referred earlier that they have no plans to publish any such regulations at this stage. Parties will have no way of knowing which areas or issues might be exempted. It is not even clear whether there will be any regulations, since the Government could decide not to use this purely permissive power at all.

Given that, absent any criteria in the Bill for the scope of these regulations, I do not believe that the power to make them should remain in its present form. I would rather we solved this problem by permitting legal challenge, thus providing potential revenue for abused rights. If the general prohibitions on legal challenge were to be retained, which I would regret, Ministers should come back at Third Reading with an amendment that properly defines or provides the criteria for their potential scope so that they are not wholly subjective and Executive-controlled. If, however, noble Lords agree to Amendment 15 and are similarly disposed to agree to Amendment 19, also tabled by the noble Lord, Lord Pannick, to which I have added my name, I would suggest that this amendment becomes a necessary consequential amendment. With the scope for appropriate legal challenge reinstated, there will be no reason for the Executive to have powers to remove the prohibition in selective circumstances of their own choosing.

3.30 pm

Lord Brown of Eaton-under-Heywood (CB): My Lords, I am a remainer, but I am one despite—not because of—the charter. To leave the EU but nevertheless retain the charter as part of our domestic law would be the worst of all possible worlds, the very opposite of Panglossian.

Before explaining why I oppose Amendment 15 so strongly, let me acknowledge that getting rid of the charter represents an exception to the broad principle that the Government have stated as the central objective of this Bill: ensuring that our laws will be the same on the day after Brexit as on the day before. I accept that, in certain limited respects, the charter confers rights not available under either the European convention—to which we remain and intend to remain party—or our own, ever-dynamic, common law on human rights. Perhaps the best—certainly the most often cited—example of this is the Watson case, to which the Secretary of State for Exiting the European Union, David Davis, lent his name at one point. The case held that one part of the Data Retention and Investigatory Powers Act 2014 breached a particular charter privacy provision, which was found to go further than Article 8 of the convention. That has now been corrected in the Data Protection Bill, which is currently before the other place and will shortly come back to us on ping-pong. It is to that Bill, not the charter, that we will henceforth look in terms of data rights protection. Watson points up another aspect of the charter: although it applies only to the implementation of EU law—a real problem that I will have to come back to—where it applies it goes wider than the convention because it requires the courts here to strike down and disapply our primary legislation. I regard that as a minus, not a plus; it is a flaw, rather than a virtue, in the charter and it is of course inconsistent with the Human Rights Act approach.

Besides being a remainer, I am also a strong believer in parliamentary sovereignty and the supremacy of Parliament. Twenty years ago, when the Human Rights Act was enacted, the then Lord Chancellor, the noble and learned Lord, Lord Irvine of Lairg—who I am happy to see in his place today—incorporated, very wisely and skilfully, the rights accorded by the convention

into our law on the explicit basis that if our legislation is shown to be inconsistent with a convention right, the courts can and will declare so. They can make a declaration of incompatibility, leaving it to Parliament to adjust the position as it thinks right and proper. However, our courts cannot strike down primary legislation. That constitutional arrangement was carefully decided on; indeed, it has helped to keep our judges out of the firing line and out of conflict with Parliament. It is unlike the position in the United States where, as noble Lords know, Supreme Court Justices are highly politicised figures. Here, Parliament remains sovereign—but not in those rare cases where the charter applies.

The other case, besides Watson, that best illustrates this point is the Benkharbouche case, which has been mentioned once or twice in our debates and was decided by the Supreme Court here just 18 months ago. I shall briefly summarise. Two north African nationals, one of whom has given his name, Benkharbouche, to the case, following their dismissal from employment by two north African embassies here in London, brought claims against those states in the employment tribunal. Some of those claims were based on our domestic law—unfair dismissal, non-payment of wages, refusal of holiday pay—but others, particularly under the working time directive, were based on EU law.

On the face of it, all claims, domestic and EU, were barred by the State Immunity Act 1978—primary legislation—which denied claimants the right to sue embassies in this country. Barring access to a court is, unsurprisingly, a breach of the right to justice and therefore a breach of the European Convention on Human Rights at Article 6 and of the charter at Article 47. The result of the case, which I suggest was deeply unsatisfactory, was that the EU claims succeeded—the State Immunity Act was disapplied in their case—but the major domestic law claims of unfair dismissal and so forth failed because the court, under the Human Rights Act, declared simply that the State Immunity Act was incompatible with the convention.

This curious and regrettable anomaly in our law and its effect on the position of the judges has attracted very little attention because until recently the charter itself has been little noticed in litigation in this country. When, in a brief intervention in Committee on 26 February at col. 544, I put this problem to the noble and learned Lord, Lord Goldsmith, he suggested that the charter could be appropriately amended after this Act by delegated legislation. Opinions vary on whether that is possible but, either way, does it really make sense, given that we are now leaving the EU—regrettably, as I have indicated I feel—to carry over into our own law an instrument designed specifically for use only in the EU context, which, on occasions, requires our judges to disapply our legislation?

Thus far, I have focused on just the constitutional incongruity of the charter given the Human Rights Act, but there are other very powerful objections to our domesticating the charter. I will briefly touch on two real objections. I hope others hereafter will expand on these. One is the striking vagueness of the charter's many articles. Some of course provide for real rights and those almost entirely and substantially overlap and mirror the convention rights that we have anyway, but much of the charter is merely aspirational—statements of broad principle. Indeed, Article 52(5) of the charter makes the distinction between principles and rights, and limits the legal effect of the principles—not that that distinction is by any means clear. Many legal commentators have described it as entirely confusing. For example, the so-called rights of the elderly are given as an example of a principle as opposed to a right. The noble Lord, Lord Pannick, suggests that certainty and clarity would be advanced by his amendment. I respectfully suggest, on the contrary, that they would be very far from advanced. This would be wonderful for the lawyers, but frankly, for few others.

The other central objection is that the charter, as I indicated, can only ever be used when "implementing EU law". That in itself is a notoriously uncertain concept. The boundary between what is domestic law and what is the implementation of EU law is one that we are now sensibly intent on simply sweeping away. In response to another intervention of mine in Committee, at col. 549, the noble Lord, Lord Pannick, suggested that the charter would continue to apply just to EU law, which he identifies as all the law which is to be retained under this Bill. What if that law comes to be amended by Parliament or by secondary legislation, as some of it surely will? For example, if we were to consolidate all employment law provision so that in future Benkharbouche-type cases all claims would fall under a new UK statute. I suggest that it would be nothing short of absurd to perpetuate the distinction between EU law and domestic law, a distinction that will recede ever further into history, simply to continue to provide an area of law in which the charter would operate.

In short, I agree with everything that the noble and learned Lord, Lord Goldsmith, had to say back in 2009 when seeking to keep the charter out of the Lisbon treaty. But at least then the charter had the merit of constraining the exercise of legislative power by EU institutions, which were not subject to the constraints of the European convention. At least, too, we were then a member state and our citizens were citizens of the Union. What folly it would now be, as we leave the Union, quite unnecessarily to incorporate the charter as part of domestic law. I urge your Lordships to reject the amendment.

Lord Howarth of Newport (Lab): My Lords, two main arguments have been put forward today and in Committee for writing the Charter of Fundamental Rights into our law. One is that we must bring the charter across into our domestic law because it would be anomalous not to do so; it would be inconsistent with the Government's purpose in this Bill of transposing the whole body of EU law that presently binds us. It would be offensive for me to pray in aid Ralph Waldo Emerson's dictum,

"A foolish consistency is the hobgoblin of little minds, adored by little statesmen",

and peculiarly inappropriate when the noble Lord, Lord Pannick, is the most ardent advocate that consistency should be our guiding principle here, supported by his distinguished co-signatories. Nevertheless, consistency

[Lord Howarth of Newport]
is a poor justification for incorporating the charter. Schematic approaches will not serve us well in these impassioned and volatile political times.

I recognise the compelling practical reasons for transferring existing EU law into our domestic law, so that we are not sucked into a legal void at the moment we cease to be a member of the EU. However, it does not seem a necessary or desirable consistency to include in that transfer a charter which does not have value as the fountain-head of human rights and whose title, the Charter of Fundamental Rights of the European Union, portentously symbolises the very jurisdiction that the people of this country have voted to reject and which will be a diminishing element of our law as they are progressively released from it through their Parliament's future legislative work.

The other main justification offered is that we need to hold on to hard-won and precarious human rights. That is a good motive, which I share, but it does not follow that we should transpose the charter. People who want to do so say that our constitution has saddled us with an elective dictatorship, that Parliament cannot be trusted in these days of political extremes, and that the charter should be valued as a foundational document in a developing written constitution. It is suggested that we need more checks and balances, not so much against the Executive as against Parliament itself. Happily, for those of this cast of mind, the judges are available. They, it is hoped, will imbue our polity with a higher wisdom than that of the people's elected representatives, disapply statute when Parliament gets it wrong and rescue us from ourselves and our tendency to excess.

Have we, as parliamentarians, entirely lost confidence in the institution that we have the honour to serve and of which our country was once so proud? As we debate Brexit it sometimes appears that for many remainers almost anything is preferable to resuming full responsibility for our own decisions in our own parliamentary democracy. "Yes", they say, through gritted teeth, "of course we respect the vote of the people on 23 June 2016, but actually it would be safer to stay in a protectionist customs union and a single European market in whose governance our elected representatives will have no say, and with Parliament trammelled by unelected judges constrained to follow the developing practice of the European Court of Justice". If parliamentarians do not trust Parliament, why should the people do so, and then what happens to our democracy? I say gently to my noble and learned friend Lord Goldsmith that this is not about ideologically driven hatred of the European Union, as he suggests in today's *Guardian*, but about commitment to the renewal of parliamentary democracy.

3.45 pm

I am not a lawyer and I am happy to be corrected if I am wrong but, as I understand it, the charter, like other EU law so long as it is retained in the UK, permits—indeed, requires—judges to disapply parliamentary legislation which they determine is inconsistent with it. This supremacy of EU law largely explains the revulsion of so many in our country from the European Union. That the courts should have power to disapply statute seems to many Britons to have turned our constitution inside out and back to front. A majority of them voted to take back control of our law and our system of justice. Let us not offend them by giving the charter a further lease of life in our system of law.

The proliferation of human rights documents since the Second World War and the gains within the political realm of rights-based culture have, I recognise, been the achievement of much moral endeavour and are legitimately seen as a historical advance of liberal values. The noble Lord, Lord Pannick, gave as his third reason for wanting to incorporate the charter his view that the Government have a doctrinal hatred of human rights. That was a rhetorical flourish but not a very substantive argument. Certainly, for my part, I have no hostility to human rights, but the charter is not the finest flowering of this culture, expressing as it does the judicial activism of a European Court of Justice that can fairly be characterised as imperialist. Nor has anybody been able to explain how in practice the charter can be accommodated to our national legal traditions. The noble and learned Lord, Lord Brown of Eaton-under-Heywood, spoke of constitutional incongruity.

We should also recognise that the price to be paid for the entrenchment, as enthusiasts would have it, of rights in law is a curtailment of democratic politics. The discernment, interpretation and application of human rights by the courts, in an ever more crowded field of rights, in which rival and conflicting rights and interests have to be reconciled as best they may, becomes increasingly a political task. Should we as politicians ask the judges to undertake such political tasks? Are we shirking our responsibilities? I think we are.

The Government assure us that the rights set out in the charter are either already protected by our law or, if any go missing, can be so protected if Parliament chooses to legislate for that. Indeed, they can be added to by Parliament. We will do better to proceed on that basis. The right to dignity proclaimed in Article 1 of the charter—if such a right can in reality be protected by law—can therefore be safe in our hands. As we cease to be a member of the European Union, we should not commit the parliamentary indignity of appropriating the Charter of Fundamental Rights of the European Union to the law and constitution of the United Kingdom. I say to noble Lords who were happy with the tide of EU law coming in that that tide has now turned and it is futile to resist it.

Lord Cavendish of Furness (Con): My Lords, if I may, I will give another non-legal observation. It is a pleasure to follow the noble Lord, Lord Howarth, whose speech I agree with—and how very eloquent it was.

It is a regret of mine to live in an age which is so much obsessed with human rights and so little concerned with human responsibilities. Saving their presence, I rather think that the spiritual Bench below me might reflect on how little it has succeeded in teaching the parable of the good Samaritan and similar stories. Collectively, those stories almost do away on their own with the provisions of the absurd CFR. My point is that the good Samaritan behaved as he did of his own

volition, not because he was told to by a bunch of lawyers and professional politicians. We tend to look at social problems through the wrong end of the telescope: we need a change of culture, not another set of often duplicated rights.

Specifically, as has been mentioned, the charter is EU-specific and EU-centric. It would therefore need extensive retailoring to fit in with our own laws. To a layman, a major defect—as again has been mentioned—of placing CFR into UK law is that it would empower courts to disapply Acts of Parliament. The noble Lord, Lord Pannick, tried to deal with this, but he did not deal with it accurately; I will, however, leave that to other lawyers. To disapply a law is different from us changing a law when it comes on to our statute book in due process. It strikes me as inevitable that such a move would conflict with the Human Rights Act, the ECHR, our own common law or all three.

The charter has come in for criticism over the years from Tony Blair, Alastair Campbell, the noble Lord, Lord Hain—who is, sensibly, not in his place—and, most notably, the noble and learned Lord, Lord Goldsmith. It was also eloquently attacked by my right honourable friend Kenneth Clarke. Why was there a change of heart? It was never explained before, and I look forward to hearing why there is a change of heart now.

Some of the provisions are so woolly and aspirational as to render them unsuitable and even dangerous if incorporated into our own law. They include the right to respect for physical and mental integrity and the right to pursue an occupation and a guarantee of a high level of environmental protection. Those are not the sort of things that ought to appear in this sort of document. Such vagueness is surely an invitation to what has been described as judicial adventurism in the courts.

I have no intention, of course, of putting in jeopardy the livelihood of the noble Lord, Lord Pannick, although I strongly disagree with him that his amendment adds certainty. The charter mounts to virtue signalling on an industrial scale. Governments need to govern, not to rehearse constantly how virtuous they are. It is time that we destroyed this amendment and voted it down.

Baroness Lister of Burtersett (Lab): My Lords, I support the amendment and would like to return to three points that I raised in Committee that Ministers have not adequately addressed.

First, I have asked four times how the fundamental requirement in the Good Friday agreement for an equivalent level of human rights protection in Northern Ireland and the Republic will be maintained if citizens of Northern Ireland can no longer look to the charter. The only substantive response that I have received so far was the irrelevant and erroneous point that, because the Good Friday agreement preceded the charter, it will not be affected by it. That is entirely to miss the point, because as I and other noble Lords, including my noble friend Lady Smith of Basildon, have said time and again the point is about equivalence. For the fifth time now, how will the foundational Good Friday agreement principle of equivalence of human rights protection be maintained in the absence of the charter? I can only conclude that I still have not received a convincing answer because there is no convincing answer.

Secondly, I asked the Minister in Committee whether he rejected the analysis of the Joint Committee on Human Rights of the Government's right by right analysis, which identified a number of rights that will be lost in the absence of the charter. I draw attention in particular to children's rights, to which we will be returning later at Report. It is a particularly important matter. The JCHR analysis said:

"Article 24 of the charter sets out the rights of the child. The Government states that the source of this right is the *UN Convention on the Rights of the Child*. This is not incorporated into domestic law and therefore does not confer enforceable rights upon individuals".

The Minister's response was:

"We have considered that analysis, and that is why I indicated that we were still looking at this. As I said, if rights are identified which are not in fact going to be incorporated into our domestic law in the absence of the charter, we will look very carefully at ensuring that those are not lost".—[*Official Report*, 26/2/18; col. 570.]

The noble Lord, Lord Pannick, has already referred to the fact that certain rights will be lost. What has happened to this careful look again? I have not seen the government amendment which will ensure that we keep these rights. Not only the Joint Committee on Human Rights but the Equality and Human Rights Commission, as the noble Lord, Lord Pannick, said, the Bingham Centre and many others have identified a series of rights that will be lost. Does the Minister reject the Joint Committee on Human Rights' analysis, the legal opinion given to the Equality and Human Rights Commission and everything that the highly respected Bingham Centre has said on this? What are the Government going to do about the rights that we will no longer have if we lose the charter?

Thirdly, in response to a claim by the noble Lord, Lord Faulks, that the Government have made clear that they have no intention of repealing the Human Rights Act, I quoted the last Conservative manifesto—bedtime reading for me, of course—which stated:

"we will consider our human rights legal framework when the process of leaving the EU concludes".

I asked the Minister for an assurance about the Conservative Party's long-term commitment to the Human Rights Act, but answer came there none. If the Government are planning to consider the human rights legal framework post Brexit, surely that is the time to look at the charter so that Parliament—I take the point made by my noble friend Lord Howarth, although he is perhaps not quite such a friend at this moment—can look at the whole human rights landscape holistically. That is when we should consider what happens to the future of the charter.

Baroness Deech (CB): My Lords, there are good legal reasons to oppose this group of amendments. I will be brief. I shall not go into equivalence; for example, we already have child protection in English law.

First, we never intended to adopt the charter and did our best to opt out. It has never been analysed, debated or adopted by this House or indeed the other place. It entered our law only in 2013 after being rejected as unnecessary and confusing. It is badly drafted with its references to principles and other rights. Article 3, which refers to the prohibition of

[Baroness Deech]
eugenic practices and the selection of persons, whatever that means, could be used by those who oppose embryo and stem cell research to block our leadership in that field. The wording in that article is more suitable for the much more conservative, unregulated and, indeed, backward European practices. The articles relating to dignity and scientific research are vague and woolly. Its scope and application are uncertain and meant for European institutions, not individual rights. Interpretation of the charter, if retained, would be a bonanza for lawyers involved in litigation. I can see decades of lucrative litigation stretching ahead, and I point out that I am not a practising lawyer.

Secondly, it offends against the rule of law and parliamentary sovereignty, in that it would allow our judges to invalidate British law, not just to declare it incompatible with human rights or to treat other laws as having priority but to set it aside and nullify it. If you believe in parliamentary sovereignty now and its full recovery after Brexit, if you believe that this House should make and unmake laws, while judges interpret and apply them, then the power to set aside our laws is unacceptable. It is in Article 51(1) of the charter and has been used on at least one occasion—with unfortunate results, as my noble and learned friend Lord Brown has just pointed out. The charter's continuance would elevate judicial policy views over the elected Parliament and give judges the very contentious interpretation powers that they have indicated they do not wish to have in relation to EU law. This is the reason for opposing the amendment put forward by the noble Lord, Lord Faulks. Although one can understand where he is coming from, the interpretation of scope would be a nightmare, and cherry picking, as both amendments do, is surely not allowed in European areas.

4 pm

My third reason is that, if it were retained, there would be more uncertainty, offending against the rule of law. This is because the retention of the charter would be a Trojan horse with a tapeworm in its intestines; its interpretation would depend on the ongoing, never-ending, twisting and turning judgments of the ECJ. For years, legal writers have pointed out the shortcomings of the ECJ. It is largely composed of civil servants and professors from the 28 countries, not judges as we know them. No dissenting judgments are allowed. The tenure of judges is short enough, and their pay substantial enough, to make the prospect of non-renewal by their countries after their short term a real one that can be perceived as affecting their independence. The court, unlike our courts, has an avowed mission: the furtherance of the EU and its integration. This is not the Supreme Court that we are talking about. To include its judgments in our law after Brexit would be to give the ECJ superiority over the Supreme Court and Parliament-made law, completely contrary to centuries of common law.

And what a failure the charter has been in protecting human rights in Europe. On Poland's interference with the judiciary, Hungary's interference with higher education, the imprisonment of Catalonian independence leaders, the diminished freedom of the press in Slovakia and Bulgaria, the rise of extremist right-wing parties and the treatment of Roma and migrants, the charter is impotent. For these reasons, a vote for the amendments to keep the charter is tantamount to a vote of no confidence in the ability of our judges and this Parliament to make and interpret the law.

Baroness Ludford (LD): The noble Baroness just gave a number of instances where she said the charter was of no use. That is for the very good reason that the charter applies only to EU institutions or member states' implementation of EU law. If she is arguing that the charter should have gone further and deeper into national law that has nothing to do with EU law, that is a very debatable point, but it does not.

Baroness Deech: The noble Baroness makes a very good point as to why the retention of the charter would not be of any use once we have left Europe.

Lord Faulks (Con): My Lords, the arguments in favour of the amendment seem to come down to two. One is that we are leaving the EU so we need all the rights that we can possibly get, and we need them as protected as widely as we possibly can. The second seems to be, "Why pick on the charter if you are retaining the rest of EU law?" I will not repeat all the arguments that we have already heard, and I will endeavour to be brief.

I have studied the Government's analysis of the various rights contained in the charter, and almost all of them seem to be covered by our law in statute, by common law or by the European convention that is now part of our law by the Human Rights Act. Indeed the noble and learned Lord, Lord Goldsmith, was right all those years ago when he said that the charter added nothing. Important though rights are, and ensuring their protection must be a fundamental part of what we do in this House, we should not presume that every convention, charter or other aspirational document must necessarily result in justiciable rights—that is, rights that you can sue on. If the amendment is passed, I will be able to bring a claim on the basis that my dignity has been invaded. Of course dignity is very important, but if we had thought that it was something that ought to give rise to a claim for damages then over our long legal history either our judges would have invented such a claim or Parliament would have done so. We seem to have got on reasonably well without it. How are judges supposed to make sense of this to make it legally coherent?

Many noble Lords may have noticed that the amendment specifically excludes the preamble to the charter and Chapter V—understandably, because Chapter V is to do with European elections. But the preamble frames the charter and explains what it is all about. It is quite a lengthy part of the charter, and begins:

> "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values".

So the whole charter is premised on membership of the European Union.

Let me take just two further examples from the charter. Article 16 confers,

> "freedom to conduct a business in accordance with Union law and national laws and practice".

Article 36 states:

"The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union".

We are leaving the European Union. As the noble Baroness, Lady Ludford, said, the charter specifically deals with EU institutions acting in the scope of the EU law. How we are supposed to have it in our law to be relied on—justiciable—after we have left the European Union does not seem to me to make much sense. Much good law has come from Europe, I entirely accept, but we should not take a theological attitude towards it and assume that it has some greater status than anything passed by our legislature.

My final concern is that the amendment would directly frustrate the purpose of the Bill, which is to provide legal clarity as we leave the European Union. Profitable litigation is far more likely to flow if the charter is a part of our law; not the other way round.

I have an amendment to the clause, as the noble Baroness, Lady Deech, pointed out. The charter, a relatively recent document, was supposed to reflect the jurisprudence of the European court, and I do not quarrel with it as a summary of the way in which the court has approached various issues. It was in those circumstances that I thought it might be helpful to suggest that when one was interpreting a particular piece of retained law, if and in so far as the charter was part of it, one might look at the charter. We certainly do not want to be bound by the charter in future. My noble and learned friend may tell me that the answer to my amendment lies in Clause 5(5), although I have read that more than once and find it somewhat difficult to understand.

Suffice it to say that if we have the charter as part of our law in future, it will make very little sense. Who will interpret the charter? Of course, it is the European Court of Justice, with all the shortcomings pointed out by the noble Baroness, Lady Deech. This would be a great mistake.

Lord Cashman (Lab): My Lords, I may offer a slightly different opinion on our discussion. It is really interesting as a member of a minority. Over the years, generations of lesbians and gay men and others of different minorities have stood before Parliament and requested equality—requested a life without discrimination. The arguments have gone back and forth, and laws went ahead that denied us equality and participation as equal citizens. We often then had recourse to the courts. Before the Human Rights Act, that was often painful, expensive and outside the choices of most ordinary men and women.

As a gay man having, at the age of 67, lived virtually all of my life without equality, it is interesting to hear the different legal arguments for a charter that enforces my right, among others, to non-discrimination, which does not exist anywhere else in UK domestic law. That it widens it further into the principle of non-discrimination and into every country of the European Union, where I would have freedom of movement and protection in those countries, is something that I welcome.

For me, the charter is a repetition of many rights that currently exist, but actually the formulation of some rights that hitherto were not listed and enumerated. For me, the repetition of a right does not weaken that right, especially when we are seeking equality and equal protection. The repetition of a right reinforces it. I care not if it is repeated again and again—from convention to charter to charter—because ultimately, if we seek equality and equal citizenship, we should have as many legal instruments on which to argue as we can.

I commend the noble Lord, Lord Pannick, on moving this amendment so eloquently. I welcome the arguments he outlined: to look again at a charter that lists your rights. To be able, within that charter, to know that you are either a victim or being denied a right offers a simplicity that brings with it, I believe, accountability—accountability of parliaments and accountability through the courts. I too am suspicious of the Government, and I say that to some of my friends who are in government. I have watched time after time as members of the Conservative Party in the European Parliament have voted against equality and non-discriminatory measures. That worried me for the 15 years I was there. I worry, too, that the Conservative manifesto 2015 said that it would scrap the Human Rights Act. I also worry, as my noble friend Lady Lister outlined, that the Conservative manifesto 2017 said:

"We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next parliament".

When it comes to the European convention and the charter, I want commitments beyond Parliament.

These rights are not for the Government to ditch. Indeed, the Government have no mandate to detach the Charter of Fundamental Rights from the rights that we have achieved in this country, and no mandate to detach the charter from the EU retained law. I believe that maintaining the charter brings greater legal certainty, not less. The Government's declaration that the Charter of Fundamental Rights is not necessary is disingenuous. They cannot say on the one hand that it is not necessary and then argue passionately against its inclusion. That makes no sense whatever, but maybe I have not been in your Lordships' House long enough.

Within the charter, rights exist that do not exist elsewhere in the European Convention on Human Rights: the inviolability of human dignity, the non-discrimination, the right to be forgotten, the rights of the elderly, data protection, and so on. Ministers and others have argued that it is not necessary to reaffirm the rights in the charter. I ask simply: why not? Why not reaffirm rights? We need reassurances for our rights and their protections now more than ever. This country has never been more divided and more hostile to the opinions of others. Discrimination and victimisation are not diminishing; they are on the increase. We face great challenges and unprecedented change, so we need more certainty and reassurance, not less. Reassurance is absolutely necessary if we are to embark on a journey whose destination is unknown, and the journey there needs to unite this divided country, not imperil it.

The rights are codified into a simple charter, and they come with a long history of the denial of rights and out of the commitment of a group of nations

[Lord Cashman]
never again to return to the horrors of the past. As the noble Baroness, Lady Ludford, said, they cannot do all things with all situations—but, even if it is aspiration, what an aspiration to laud and support. The horrors of the past were faced by individuals and individuals who made up minorities, who were seen as different, as outsiders, and were defamed, misrepresented and made unpopular. They were painted as unworthy of equality, a threat. Those times and sentiments never disappear; they hover, waiting for the political opportunity, and wait they still do.

4.15 pm

I shall finish on this. I believe that today when we vote we must honour the generations of the past and their sacrifices. We must place ourselves in their positions, their times and situations. As Shakespeare brilliantly said, "Imagine you are the stranger, with your children upon your back, your family at your side and your belongings at your feet. Imagine you are a stranger and bid them removed, and show 'your mountainish inhumanity'".

Baroness Deech: Can the noble Lord explain why the Equality Act 2010, with a very comprehensive list of non-discrimination, is inadequate?

Lord Cashman: Because in rights newly achieved we can never have too much challenge or support for a principle that came out of the treaty of Amsterdam of 1997, which for the first time gave a legal basis to the Community to take action based on non-discrimination on the grounds of race, ethnicity, religion, belief, age, disability and sexual orientation. Arguably, the very rights to which the noble Baroness referred came out of the treaty of Amsterdam of 1997.

I finish on this—on other generations of the past and their sacrifices by defending the charter, along with the Human Rights Act and the European Convention on Human Rights, both of which, as I have said, have been singled out rather worryingly in the 2017 Conservative Party manifesto. Let us retain the charter and reassure those generations that, when it comes to the defence of human rights and equalities, our arsenal is not depleted but well stocked and ready.

Lord Cormack (Con): My Lords, of course we should recognise those who have made sacrifices for us in the past, and at the same time we should not forget how many of them were British.

We have had some very eloquent speeches in this debate, and I have perhaps made the mistake of listening to all of them. I hope that no one in your Lordships' House would question my commitment to human rights, nor question my commitment to staying in the European Union—and I have spoken to that effect many times in your Lordships' House. I very much hope that, if Brexit comes to pass—as I fear it will—it will be a soft and understanding Brexit. But I have been persuaded this afternoon by the very eloquent speeches not of the noble Lord, Lord Pannick, who nearly always persuades me, but of the noble and learned Lord, Lord Brown of Eaton-under-Heywood, the noble Baroness, Lady Deech, and my noble friend Lord Faulks.

The fact is that we are—deeply as I regret it—moving away from the European Union. I hope that we will indeed be able to move out with the deep and close relationship about which the Prime Minister is always talking. But we are moving out, and when this particular document was being adopted no one argued more eloquently against its generalisms than the noble and learned Lord, Lord Goldsmith. He did not see why we should sign up—but we did. If we were remaining in, we would of course remain signed up; it would be the right thing to do. However, as we are moving out, we have to dismiss the preamble and Chapter V.

We also have to ensure that this country, which through the centuries has been both a bastion and a beacon of liberty and human rights, honours its own history and continues to give an example to others. At the end of the Second World War, people looked to us and we, more than any other country, helped to put Germany together again as a democratic nation leading not only in Europe but in the world. We have not forgotten all those things, nor given up all those abilities and techniques—and we will have to exercise them again in the future.

Last week, without any hesitation, I voted for two amendments. I know that I shall be voting for others, because I think they are essential. In doing so, I shall be voting for the other place to reconsider and think again, although I have always acknowledged—and do again now—that the ultimate power rests at the other end of the Corridor. However, I have been persuaded this afternoon that this amendment is something that we do not have to do. Although I came into the Chamber rather thinking that I would abstain, which is an honourable course but not a comfortable one, I will not support this amendment, because I do not think that it is necessary or realistic. The powerful speeches which the House has heard this afternoon from those who are learned in the law do on balance, in my mind at least, outweigh for once—it is an unusual if not unique occasion—the forensic ability and marvellous eloquence of the noble Lord, Lord Pannick.

Baroness Jones of Moulsecoomb (GP): My Lords, I hold the legal profession in high esteem. However, in Committee, it was obvious to me as a lay person—a person on the Clapham omnibus—that the lawyers disagreed and kept disagreeing. That was very upsetting for me, because it meant chaos instead of clarity—and the same thing is happening again. When I support this amendment, all I can do is apply my intelligence and political knowledge and think about what the safest thing to do is.

In Committee, we heard some noble Lords on the Government Benches insisting that the charter was some sort of bureaucratic bogeyman created by the EU to destroy parliamentary sovereignty and create a whole load of new rights that were fundamentally opposed to the British way of life. Now, later, other noble Lords, including the Minister, assert that the charter does absolutely nothing of significance and that all the charter rights exist elsewhere. Both those points of view cannot both be right—and in fact neither of them is right.

I am not convinced that what we heard is a fair representation of what exists. If two views are so opposed, what are we to believe? We are losing rights

that are fundamental to our modern way of life. Very many people outside your Lordships' Chamber think that Brexit is nothing more than an attempt by elites—that is us and others like us—to tear up everyone's rights and freedoms. I voted for Brexit, but that was not the Brexit that I had in mind. If we lose the Charter of Fundamental Rights today, I will feel that I have been complicit in doing exactly that. I will leave it to other more learned Lords to try to work out what the exact effect would be of retaining or losing the charter. However, on the Clapham omnibus it feels as if we are spinning round in circles.

I will ask a very simple question. If I am unusually kind and give the Government the benefit of the doubt and accept that the charter rights are all in our law elsewhere, one question would remain. Why would your Lordships' House replace a simple codified charter with a complex and diffuse legal mess? I simply do not understand that. The general trajectory of good law-making is to take complexity and make it simpler and more elegant. This House often takes a chaotic mix of case law, statutes and treaties and rewrites them in codified statutes which put them all together in one place and make them easier to understand. I cannot think of another example in this or any other Bill where this House has been asked to take a simple legal situation and make it infinitely more complex while seeking to achieve exactly the same thing. It simply does not make sense to scrap the Charter of Fundamental Rights. It is our duty as a revising Chamber to make sure that people outside understand exactly what we are trying to preserve, which is fundamental rights and freedoms.

Lord Mackay of Clashfern (Con): My Lords, I will say a few words about this amendment. First, it is important to notice that the charter applies only when the EU law is implemented; therefore, the non-discrimination that the noble Lord, Lord Cashman, talked of is applicable only when EU legislation is implemented. There is a recent case in the Supreme Court which says exactly that. It did not allow claims of non-discrimination in a case where the law which was being implemented was not EU law. Therefore, this charter is very restricted in that respect. In addition, while we are in the EU we are implementing EU law, but there is a serious question as to whether we will be implementing EU law at all after Brexit. This is a matter of how you interpret the idea of bringing EU law into our law on Brexit day. However, it is extremely important that the whole charter is being incorporated by this amendment, including these serious restrictions, which are not easily applicable in Northern Ireland or elsewhere. I was interested to hear in Committee about the situation as regards Northern Ireland. The implementation of the charter in its present form in our law would be extremely defective.

Secondly, once we are out of the EU, surely the fundamental part of our constitution should be respected—that is, that the courts of Westminster Hall, as they were, and the courts of justice of our land have no jurisdiction to set aside Acts of Parliament. One of the fundamental aspects of this charter is that it professes to give the right to set aside Acts of Parliament when they are in breach of these particular responsibilities. In my submission it has been a fundamental part of our constitution for many years that Acts of Parliament cannot be set aside by the judiciary. That is nothing to do with the qualifications of the judiciary; it is to do with setting a reasonable control in a democracy in the hands of the elected representatives. You have only to look at the United States to know how different it is where the Supreme Court has the ultimate authority over the constitution of the United States and what the House of Representatives and the other aspect of its legislature can pass.

4.30 pm

It is notable that when the noble and learned Lord, Lord Irvine of Lairg, whom I am glad to see in his place, brought forward our Human Rights Act there was considerable respect shown for that doctrine. Human rights are very important. So far as I am concerned, they are of fundamental importance and the European Convention on Human Rights is extremely important. I have sought to vindicate it at every possible stage, including getting Parliament to implement it when the courts in Europe have made a judgment. It is a fundamental treaty that was made after the war. I think a very important part of that treaty was to incorporate an international court because the problems of democracy in some of the European countries were so serious that only an international court was likely to have the kind of authority to deal with them. I suppose Germany is the most blatant example.

The authority of the courts is extremely important, but in our democracy it is limited, and limited for the extremely good reason that the ultimate control in a democracy should be in the hands of the elected representatives. However much we think this charter may have contributed, it can make only a very limited contribution and I am very interested to know, for example, how the noble Lord, Lord Pannick, will deal with Article 1. It applies only when you are implementing European legislation. What happens the rest of the time to your human dignity? This is the sort of problem the charter raises and, so far as I know, there is no solution.

Lord Judge (CB): I very rarely disagree with the noble Lord, Lord Pannick, and there is a very good reason for that. On every occasion when I have had to give a judgment in a case which he has argued, I have found against him, and on every occasion when he has appealed my judgment he has succeeded. That is more or less accurate.

The issues that arise here can be very briefly summarised by reference to Article 50. It is not a point I would have made if the noble Baroness, Lady Lawrence, had been sitting in her place. In 2003, the previous Labour Government brought forward a provision that did away with the prohibition on a second trial—the ancient common law principle of double jeopardy. Faced with the prospect of new and compelling evidence, for example by further research through DNA and the like, with which we are familiar, the Act was passed. Article 50 prohibits that provision that was made in primary legislation. The result would have been that two men now serving imprisonment following conviction for murder of that innocent boy would never have been prosecuted to conviction.

Lord Shinkwin (Con): My Lords, I put on record my thanks to the noble Lord, Lord Howarth of Newport, with whose arguments on Amendment 15 I entirely agree, for his long-standing championing and reaffirming of disability rights both in this House and in the other place.

However, I have a question that I am struggling with and it relates to the brilliance of the noble Lord, Lord Pannick, of which we have just heard. I might be disheartened by the noble Lord's arguments but his genius fills me with confidence that Parliament is well able to assert itself and to advance and protect rights after Brexit. Do we not believe in ourselves and in our proud history of championing rights? I believe that we have much to be proud of, and I personally have much to be grateful to our Parliament for, and your Lordships' House in particular, due to the invaluable help it has given me and the charities I had the privilege of working with for almost 20 years spent in the voluntary sector.

I recall the crucial support that your Lordships' House gave the Royal British Legion's Honour the Covenant campaign when I was its head of public affairs. As a result, David Cameron, to his lasting credit, enshrined the principles of the Armed Forces covenant in law. I remember vividly the pivotal role that your Lordships' House played in saving the crucial position of the chief coroner during the passage of the Public Bodies Bill, thereby securing long-overdue reforms to the coroners service to the great benefit of bereaved Armed Forces families and, indeed, bereaved families in general. However, I do not recall that those campaigns and changes to the law took place at the behest of the EU, the ECJ or the European Charter of Fundamental Rights. Indeed, the EU, as I recall, barely got a mention.

As a child, my condition meant that I was for ever breaking my legs. I lost count of how many times I had to learn to walk again. You would think that you would remember something so basic, but you do not—not after months in bed with your leg in traction and not when you are afraid to put one foot in front of the other for fear of a fracture. You forget how to walk. I fear that we too have forgotten how to walk, and we need urgently to remember. We need to remember how to walk tall.

We need to reflect the simple fact that the people have spoken and they have chosen, by a clear majority, to leave the EU and to take back control of our laws. The UK is their country, not ours; the UK Parliament is theirs, not ours. We may have been their masters once; we are not now. We are their servants. They are the masters, and they have spoken in a once-in-a-generation referendum.

We do not need this charter. We in this great British Parliament set the benchmark for human rights. That was not done by the EU and certainly not by the ECJ, whose judgments, as we have already heard, are informed by the centrifugal force of everything that emanates from the rejected EU political project of ever closer union.

I conclude by agreeing with the noble Baroness, Lady Deech, that a vote in support of Amendment 15 would be a vote of no confidence in Parliament and in your Lordships' House. It would be a vote of disdain for the clear majority of the British people, who voted to leave the EU. I urge noble Lords not to support the amendment.

Baroness Ludford: My Lords, I must have explained myself poorly in my intervention on the noble Baroness, Lady Deech, or else the noble Lord, Lord Faulks, has misunderstood me. I think I said that the charter did apply when national law implemented EU law, not just when it is EU institutions, and this Bill is meant to freeze EU law. I do not think there has been a response to the point made by the noble Lord, Lord Pannick: why, uniquely, should the charter be the only element that is left out? As one commentator, Professor Steve Peers, has said, taking the charter out of the case law is like trying to take the egg out of the omelette.

The charter is the key to the rest of retained EU law and its exclusion runs counter to the claim of continuity and certainty that this Bill is meant to deliver. The Explanatory Notes to the Bill say that:

"As a general rule, the same rules and laws will apply on the day after exit as on the day before",

and that one of the four main functions of the Bill is that it,

"converts EU law as it stands at the moment of exit into domestic law before the UK leaves the EU".

It will then be for Parliament, and where appropriate the devolved legislatures, to make any future changes. Why should the charter be different from the rest of EU law which is retained under this Bill?

It is perfectly possible to retain the charter and deal with any redundant sections after exit, just like for every other part of retained EU law. If the charter genuinely adds nothing useful, then that can be sorted out in the same way as for other EU law provisions. The arguments can take place later. Yet the only exception to the Government's general approach is Clause 5(4), which provides that the charter will no longer apply in UK domestic law after exit day. As the noble Lord, Lord Pannick, has said in Committee and now, that position is simply unsustainable.

The Government's rationale that it is not necessary to retain the charter because the rights it contains can all be found elsewhere in domestic law, and consequently that there will be no loss of rights, is disagreed with in advice from Jason Coppel QC for the Equalities and Human Rights Commission. He highlights that there will be gaps in protection—for instance, in relation to children's rights, data protection and non-discrimination.

Various articles of the charter have been referred to in the debate so far. Article 1, providing that "Human dignity is inviolable", was objected to, but it has been used by the European Court of Justice to help protect LGBT asylum seekers from inappropriate psychological tests and in cases concerning the extradition of individuals to countries where they would face unacceptable detention conditions. That is not some airy-fairy right that we should not care about.

Mention has been made of Article 8:

"the right to the protection of personal data".

I find it a bit rich that this was relied upon until the Secretary of State pulled out of what was originally the David Watson case, in his successful challenge to

DRIPA. Article 8 will not be fully and clearly replicated after withdrawal, even with the retention of the general data protection regulation.

4.45 pm

Article 24 on the rights of the child is a stand-alone right not to be discriminated against. It has no domestic equivalent in UK law. Although the UK has ratified the UN Convention on the Rights of the Child, it has not been incorporated in full into UK law and, therefore, unlike the right in the charter, it is not directly enforceable and cannot be relied upon by children whose rights have been infringed. This is also true of Article 26 on the rights of persons with disability. It goes further than domestic law, including providing for specific measures to be put in place to ensure independence, social and occupational integration and participation in community life.

Article 47, on the rights to an effective remedy, is broader than the Article 6 convention right to a fair hearing in the determination of civil rights and obligations because it extends to cover areas such as immigration hearings which the convention does not protect. This is timely, given what we have heard about Windrush cases in the past week. It might also apply to closed material procedures in order to ensure a satisfactory guarantee of fairness. It has also been interpreted as requiring legal aid to be provided in cases where not doing so would make it impossible to ensure an effective remedy.

The ins and outs of how far these and similar rights should continue to apply as retained EU law is or is not modified is a debate that can be held in the future, along with all the other provisions in the Bill. There has not been a good answer in this debate to the uniqueness of getting rid of the charter.

The notion that the charter merely recognises rights existing elsewhere in EU law and adds nothing new is certainly not the view of Suella Fernandes MP, who is now a Minister in DExEU. She wrote in the *Daily Telegraph* last November of how lawyers will love the extra layer of rights in the charter. So certainly, someone who is now a Minister in DExEU believes that there are extra rights in the charter which do not exist elsewhere. It is strange that three days after that article, Dominic Raab, who was then a Minister, told the other place that the Government were unequivocally committed to avoiding any reduction in substantive rights by omission of the charter.

We have had a series of conflicting assertions—that the charter adds nothing and that it adds an unnecessary layer of rights—but it cannot be both. To the extent that it is necessary, that can be decided, at leisure, along with the rest of retained EU law.

The Joint Committee on Human Rights examined the Government's right-by-right analysis and concluded that the charter does protect rights which do not have equivalent legal protection elsewhere in UK law. As well as the Davis and Watson case, the article on data protection was in the Google "right to be forgotten" case and there was a judgment the other day on the right to be forgotten.

The Bingham Centre, which has already been mentioned, has pointed out that the charter has much more than interpretive status. It provides a freestanding course of action by which direct challenges can be made to laws and effective remedies obtained, including the setting aside of primary legislation, as the Supreme Court did in the Benkharbouche case. That has been objected to by some people, but it did secure rights which would otherwise have been excluded.

Professor Catherine Barnard, an expert in EU law at Cambridge, told the EU Justice Sub-Committee that it was all very well to say that the general principles of EU law would be retained, but she contended that the charter is at least reasonably transparent on what the rights are, although the general principles are not clear:

> "I imagine that every lawyer in this room would come up with a slightly different list of what constitutes a general principle".

The point is that we know what is in the charter but no one has been able to produce a list of the general principles—and we have the problem in Schedule 1 to the Bill, which provides that the general principles do not have direct effect and cannot be enforced. If you cannot enforce the general principles, by definition, you cannot get a remedy. Frankly, the Government's case as to why we do not need the charter, and specifically why we need to get rid of it now, is full of holes. Why can we not deal with it in the same way as we will the rest of retained EU law? If we do not retain the charter, we could find ourselves in the very odd position of applying retained EU law that the EU has found to be in breach of the charter. We would keep the law but would have got rid of the protections which have already struck down the law according to the European Court of Justice. That would be a rather strange position to find ourselves in.

Another anomalous result would be if, after exit, EU citizens are protected by the charter while UK citizens are not. Article 4 of the draft withdrawal agreement suggests that that may well be the case. I think that we can rely on the European Parliament, which demanded in a resolution a year ago that the withdrawal agreement must be in conformity with the treaties and the charter, failing which it will not get the consent of the European Parliament. We could discover that a next-door neighbour who is an EU citizen continues to enjoy the benefits of the charter of fundamental rights under the withdrawal agreement, while we do not.

Lord Low of Dalston (CB): My Lords, I think that we are probably reaching the end of the debate.

Baroness Ludford: I am just concluding my remarks. I want simply to support what was said by the noble Baroness, Lady Lister, about the importance of the Northern Ireland issue. You cannot have differing rights on each side of the border. The European Commission has said that the Good Friday agreement requires equivalent standards of protection of rights on both sides of the border. I simply remind noble Lords that Jacob Rees-Mogg has opined that EU sanctions for breach of the withdrawal agreement would go against the EU's own charter of fundamental rights. The irony and hypocrisy of that statement require no elaboration from me.

Lord Trevethin and Oaksey (CB): My Lords—

Lord Goldsmith (Lab): My Lords—

Noble Lords: Front Bench.

Lord Goldsmith: My Lords, I take the sense of the House to be that the Front Benches should now speak. The noble Baroness, Lady Ludford, has spoken, I shall speak, then the noble and learned Lord, Lord Keen, and then the amendment will go back to the noble Lord, Lord Pannick. We debated the position of the charter quite fully in Committee, but it is interesting that the charter has cropped up time and again in other amendments, which indicates how important and pervasive this issue is to many people. Noble Lords have repeatedly raised the position of the charter in areas such as general equality, non-discrimination, the rights of children, workers' rights and the rights of the elderly. Moreover, the concerns that have been expressed in this House are mirrored by concerns expressed by civil society in the form of distinguished non-governmental organisations and many others. My personal postbag has contained more about the charter than any other aspect of the Bill.

I want to say a word about the development of human rights. Of course, I fully accept that this country has played an important and proud role in that. We were very much a part of the drafting of the European Convention on Human Rights, particularly after the Second World War. However—this is part of the genesis of the charter—the convention is essentially limited to classic civil and political rights, such as the right to association and the right to a fair trial. As was demanded when it was brought in, the charter deals with not only those rights—because it is intended to be comprehensive—but many other, more modern, economic rights, which mean a great deal to many people in this country.

I am grateful to the noble and learned Lord, Lord Keen, for meeting with my noble friend Lady Hayter and I to discuss this issue. However, I have to tell him that he has failed to persuade me that the Government's reasons for excluding the charter from the EU laws that will be downloaded on exit day are good. I am not alone in that. Your Lordships have heard about, and been reminded of, what was said by the Joint Committee on Human Rights and by the distinguished Bingham Centre for the Rule of Law. They said that it was clear beyond doubt that this decision would result in a diminution of protection. Others have made the same point; the noble Lord, Lord Pannick, referred to the well put together opinion of Mr Jason Coppel QC.

As the debate has progressed, I have sensed movement. Whereas in Committee, a view appeared to be put forward on behalf of the Government that the charter did nothing, I now detect that that is not the position; it is accepted that the charter does something, as said by the noble and learned Lord, Lord Brown of Eaton-under-Heywood, but what it does is not liked. That is a very different position. The noble Baroness, Lady Jones of Moulsecoomb, who is not in her place, put it very well: this is a debate between lawyers. That is not what we should be dealing with at this stage. The question now should not be whether this provision of EU law alone should be excluded from the EU law download, and it should not turn on nice, detailed legal argument, particularly argument that is contentious. Even if the charter does only a little, if it does something—the view of many people is that it does a lot more than a little—then, in accordance with the Government's promise, that should be incorporated into domestic law at this stage like every other provision of EU law. Its removal or modification, if desired, should be done through the process that this House and the other place decide is the right way for us to modify retained EU law—whether that is primary legislation, which would be our preference and was the preference of this House when it voted last week on certain rights, or some other process of delegated legislation. The key point is that if the Government want to modify how the protection of the rights of workers, citizens, the elderly and children appears in the charter in any way, it should be through that process.

As the noble Lord, Lord Pannick, reminded us, rightly, at the beginning—because it is what this is all about—the Government's position is that the Bill is intended to be straightforward and to put on the UK statute book, on exit day, the provisions of EU law currently in force. Thereafter, radical policy changes and choices will be made—there will be occasions for that—and once the scrutiny of the Bill in this House and the other place is complete, we will know whether those routes are to be solely through primary legislation or through delegated legislation. There will be a process for that if we think it should happen.

For now, the issue is simple: should the promise from the Government—indeed, from the Prime Minister herself—in the foreword referred to by the noble Lord, Lord Pannick, that the rights on the day after exit will be the same as those on the day before, be respected or not? As has been said more than once, including by the noble Baroness, Lady Ludford, what is unique about this issue that means we apply a different process to it from that applied to everything else? That is the point I invite noble Lords to consider as we vote, as I hope we will, although it will be for the noble Lord, Lord Pannick, to say.

5 pm

I will make a couple of points—I do not want to be very long about it because of the time that has already been spent—on what has been said. For example, I could not ignore the point made by the noble and learned Lord, Lord Judge. I am not sure that my record of success before him is quite as good as that of the noble Lord, Lord Pannick, or before those in the higher courts, but there is one point about the charter that I have mentioned before in Committee and in other debates relating to it that tends to be forgotten. There are things called the explanations, which have been published in the *Official Journal* and provide more detail on how certain rights in the charter are to be interpreted and applied. That is an important part of its architecture.

I shall look at the explanation relating to Article 50, which the noble and learned Lord, Lord Judge, mentioned. The explanations are referred to specifically in the protocol that applies to United Kingdom. That is part of the law that will be carried across on exit day if the charter is not excluded. It refers to Article 4 of Protocol 7

to the ECHR, which provides the general prohibition for being tried a second time, but then there is an exception:

"The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case".

I remember dealing with this in the body dealing with convention. It is there precisely because of this country's idea at that stage that we would move to have some exceptions to this, having regard to the case to which the noble and learned Lord referred. This is much less vague than some noble Lords think. I commend their attention to it.

Lord Marks of Henley-on-Thames (LD): On the point made by the noble and learned Lord, Lord Judge, is the noble and learned Lord, Lord Goldsmith, not assisted by the fact that the charter applies only to EU law and that the law on murder is not Union law?

Lord Goldsmith: It is always good to have a second argument when you are in front of the noble and learned Lord, Lord Judge.

Lord Judge: Perhaps, then, we had better find out what "the sovereignty of Parliament" means.

Lord Goldsmith: I come back to the central point I want to make. The Government made it clear and promised that rights would remain the same on exit day, but they could then be subject to change through the processes agreed and determined by this Parliament. Of all EU laws, the charter alone is being excluded. That drives one to question why that should be. Is it an ideological reason? Is it not wanting to see something that has "EU" attached to it? Or is it—which will be even more sinister and would worry me enormously—that there is an unhappiness and suspicion about fundamental rights? If there is any element at all that what lies behind this is a suspicion about fundamental rights and a suspicion that people should not be able to exercise those rights, that would be deeply unsatisfactory and a very good reason for not accepting the Government's exclusion of this.

Baroness Deech: Would the noble and learned Lord agree that what is special about this is that the judges of the ECJ, whatever sort of court he estimates that to be, will keep interpreting those rather vague principles on and on, decade after decade, and that all those interpretations will have to be brought back here, unforeseeable and maybe irrelevant as they are? That is what is different about it.

Lord Goldsmith: I am advised that that is not a request for clarification which is appropriate on Report. I have dealt with this question before. After exit day, it will be British judges who interpret the EU retained law. There are questions about regard they will have to decisions which relate to the same law afterwards—those we will debate at another time during Report—but the idea that, if the charter is included, there will be references to the Court of Justice of the European Union is simply not right.

I have been driven, and I apologise for it, to the view that it is an ideological reason, and we have heard one or two speeches which seem to support that, but the people outside here—it is delightful that we still call them the people on the Clapham omnibus in court and in this place—will wonder what it is. They will look at the charter; they will see the rights in it, all of which they would think are very good things to have—they would not perhaps understand all the details as when they apply and when they do not—and wonder what the Government are doing in saying that it alone is excluded. There has never been a good answer for that. I do not anticipate that we will get it now either. The noble and learned Lord asks why not. It is because he and I have spoken about this several times and I have not heard it yet.

A noble Lord: Experience, dear boy.

Lord Goldsmith: I will listen attentively to what the Minister says, of course, but I do not anticipate that we will hear anything new. In those circumstances, I hope that the noble Lord, Lord Pannick, will ask the House to state its opinion. I will be glad to go in the Lobby with him then, as I hope will many Members of the House.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, I thank all your Lordships for an interesting debate which has addressed some of the issues in considerable depth. In a short but telling address, the noble Lord, Lord Howarth, noted that he was not a lawyer, but he exhibited a depth of understanding and a delicacy of touch in respect of our constitutional settlement that is absent from many lawyers, including, I fear, one or two who have spoken in this Chamber.

Noble Lords: Oh!

Lord Keen of Elie: Why should I say that? Let us be clear: the Charter of Fundamental Rights of the European Union applies only to a member state where it is directly implementing European Union law. As my noble and learned friend Lord Mackay of Clashfern observed, that point was reinforced in a judgment of the United Kingdom Supreme Court just a few months ago, when it said that it is not enough to address something within the scope of EU law. The charter has applicability only where a nation member state is directly implementing EU law. That has to be borne in mind.

When we leave the EU, whether you wish it or not, we will not be a member state and we will not be directly implementing European Union law. We will have a body of law brought into our domestic law under the heading "retained EU law". It is a body of law which will diminish over time and diverge from European Union law over time as the latter develops.

What do we find in a document, the Charter of the Fundamental Rights of the European Union, that will assist us after exit, and on what constitutional basis are we to maintain it? The noble and learned Lord, Lord Goldsmith, helpfully referred to the explanatory

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notes to the charter. It is worth bearing those in mind, because the preamble to the charter, which I appreciate the noble Lord, Lord Pannick, would exclude from his amendment, tells us that,

"the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter".

So the charter is a living document because it is subject to explanations, which, as the noble and learned Lord pointed out, may assist in our approach to the charter itself. But it goes further than that. We may decide, as is suggested by the amendment, to ring-fence the charter within that body of law referred to as retained EU law. But, as the noble and learned Lord, Lord Hope, observed in Committee, if that was to be attempted, the charter,

"will have to be largely rewritten if we introduce it into our law, but it is not designed for the kind of situation we are facing after Brexit. It is designed for use within the Union and to be interpreted by the CJEU".—[*Official Report*, 26/2/18; col. 544.]

In that respect he was entirely correct.

However, just saying that the charter is going to be ring-fenced into domestic law is not even half the story. One has to have regard to the content of the charter itself—something that will apply only to a member state implementing EU law. If I am a little tedious on this point, I apologise in advance, but it is worth noticing some of the terms of the articles within the charter itself; one or two were referred to by my noble friend Lord Faulks. In the context of non-discrimination, it is to be looked at,

"within the scope of application of",

the treaties. In the context of workers' rights to information and consultation, it is to proceed not only under the conditions of "national laws and practices" but,

"under the conditions provided for by Union law".

We will come back to that. In respect of the protection in the event of unjustified dismissal, it is to be considered not only in the context of national law but,

"in accordance with Union law".

Article 34, with regard to social security and social assistance, is to be addressed,

"in accordance with the rules laid down by Union law",

not just national law; that also applies in the context of social and housing assistance. With regard to economic interest, under Article 36, the objective is,

"to promote the social and territorial cohesion of the Union".

Environmental protection is to be,

"integrated into the policies of the Union".

Consumer protection is concerned with "Union policies". The right to an effective remedy and a fair trial refers to everyone,

"whose rights and freedoms guaranteed by the law of the Union are violated",

so again we have to have regard to the law of the Union. Within the field of application itself, we have already noted that the charter applies only when a member state is directly implementing Union law.

What do we mean by "Union law"? Well, it is not international law and it is not national law. The Government, exercising the royal prerogative, can enter into international treaties at the level of international law. That is precisely what they did in 1972. That has no impact on domestic law. It is only when this Parliament decides to draw down those international treaty obligations into national law that those laws become binding upon us. That is where Parliament has to decide. So what is union law? Since at least the decision of the European Court of Justice in Van Gend en Loos in the 1970s, it has been stated repeatedly by the courts of justice in Europe that EU law is not a species of international law. It represents a new legal order for the members of the Union. That is Union law. In a sense it is a form of federal law: a law that applies to all the member states of the Union.

5.15 pm

It is in that sense no different, in a way, from the federal law of the United States. Every state in the United States of America may make its own laws, but there is a further body of law, which is the federal body of law that applies to all the member states of the union. That is the closest, most obvious, parallel to what is Union law. It is the law that applies to member states. When we leave the Union, Union law will be foreign law, just as much as the federal law of the United States of America. It will be a foreign body of law.

What are we to make of the suggestion that, going forward, Acts of our sovereign Parliament should be capable of being struck down by reference to a body of foreign law? That would, I respectfully suggest, be one of the greatest constitutional outrages since 1689. It would also indicate a total abdication of responsibility by this Parliament. Why would we do that? We are told in the first instance by some that they do not trust this Executive to maintain individual human rights.

Noble Lords: Oh!

Lord Keen of Elie: There we go.

The next stage is to say that we as a Parliament do not trust our ability to hold the Executive to account. Then we go on to the next stage to say, of course, that we do not trust the electorate to return a Parliament that is capable of protecting their fundamental rights. What happened to the mother of Parliaments? What happened to the concept of the sovereignty of this Parliament? We are apparently prepared to abandon it in favour of a body of foreign law because we no longer trust ourselves to protect our own fundamental human rights. Is that what we have really come to? It is a shocking dénouement: whether you wish to leave the European Union or you do not wish to leave the European Union, the idea that we are going to have to cling on to a body of foreign law in order to maintain fundamental human rights in this country is simply astonishing. As I indicated before, it would reflect not only a constitutional outrage but a total abdication of our responsibilities.

Looking to Amendment 15, what is it actually going to do? It is going to bring into our domestic law a charter that relies upon union law—a developing body of foreign law going forward. Are we going to monitor this, because we are not ring-fencing the

terms of the charter if we bring it into retained EU law? It will be subject, going forward, to the Explanatory Notes; it will be subject, going forward, to the development of Union law; and on the back of that, where we are supposed to be directly implementing EU law—and I can only infer that the intention of the amendment, although it is not stated and cannot be found there, is that this applies to retained EU law rather than EU law itself—the intention is that we should therefore be bound to watch while primary legislation of this Parliament is struck down on the application of a foreign body of law. We need to wake up to why the charter in its present form does not sit with our future constitutional settlement after we leave the EU and why it does not fit with the body of retained EU law that is referred to in the Bill.

Lord Thomas of Gresford (LD): If the charter is incorporated, does it not become retained EU law? Therefore, it would be subject to the mechanisms that are set out in Clause 7 of the Bill, which would enable Parliament, or Ministers—however we decide—to change it afterwards, with proper debate. What is going to happen to the rights contained in the charter which are above the rights that we have at the moment, as he has conceded and as has been conceded by other people? What is going to happen to those rights? They will fall away; they will not become part of retained EU law and therefore will not be part of the law of this country.

Lord Keen of Elie: With great respect to the noble Lord, just because the charter is made part of retained EU law in terms of the Bill does not mean that Union law, which is the linchpin and anchor of the entirety of the charter, is then retained EU law. Union law remains Union law. Therefore the charter will continue to develop. Even though it is ring-fenced within retained law, the body of the charter will be subject to Union law. You cannot have it both ways.

The noble Lord also mentioned the loss of rights. As we indicated, we have done an analysis of rights, which has been published. We have indicated that if, once this Bill is passed, it is apparent that any substantive rights are lost, we will address that. With great respect, it appears to me that the noble Lord misses the fundamental point, which is that we are effectively going to be submitting to a body of foreign law after we exit the EU if we proceed in this way. I am afraid that is the case. We cannot say we are going to be directly implementing European Union law when we are no longer a member. We will not be. It amounts to that.

I accept that various views have been expressed by various parties about the scope of the rights that will be retained after we leave the EU without the charter, and there is a lively debate about that, but let us remind ourselves again that the charter has application only when we are directly applying EU law. My noble and learned friend Lord Mackay of Clashfern made the point. What happens to the right to dignity in circumstances where we are not directly applying EU law? Of course it still exists. We recognise that. We would have no difficulty in recognising that, and we do not require Article 1 of the charter for that purpose. In these circumstances, noble Lords have indicated, quite rightly, that to incorporate, or even to attempt to incorporate, the charter, particularly in the form of this amendment, is to do serious damage to our entire constitutional settlement, particularly post Brexit. I hear someone say, "Outrage", and I agree with them.

I now come to Amendment 18, which was tabled by the noble Lord, Lord Beith. He suggested that his amendment would be a necessary consequence if Amendment 15 is carried, but I do not accept that it is a necessary consequence in those circumstances. His amendment, which seeks to remove the power in paragraph 2(2)(b) of Schedule 1 and the related provisions in sub-paragraph (3), is not appropriate. Schedule 1 generally ends the ability to bring challenges on EU law validity grounds to what will become retained EU law after we leave. After exit, individuals would continue to be able to challenge EU decisions before the CJEU and to have them annulled, in so far as they apply in the EU. The converted form of the decision would, however, remain in force within the United Kingdom. Domestic courts currently have no jurisdiction to annul an EU measure or declare it invalid, and we do not think it would be right to hand them a wide-ranging new jurisdiction which asks them effectively to assume the role of the CJEU. The noble Lord's amendment does not alter that general exclusion.

Where we differ is that the Government recognise that, in some circumstances, individuals and businesses may be individually affected by an EU instrument which has been converted and should have a right to challenge it. For example, it would be strange if after exit a UK business were able to challenge and have struck down an EU decision which prevents it carrying out certain trading activities within the EU but would not have any equivalent right of redress in relation to the form of that decision which has been retained as part of UK law. It is for that reason that provision is made for this power. I note the noble Lord's observation that it may be exceptional and may never be used. I accept that, but it is felt that it should be there as a safety measure. I urge the noble Lord not to insist on that amendment.

With regard to the position of the noble Lord, Lord Pannick, I ask him to think again about Amendment 15. I ask him to think very carefully about the form of it and what he is actually attempting to bring into domestic law, because it simply does not fit. It is in those circumstances that I invite him to withdraw his amendment.

Lord Pannick: My Lords, this has been a powerful and passionate debate and I thank all noble Lords who have spoken, whether they have supported Amendment 15 or opposed it. In particular I thank the Minister, even though he thinks I lack—what was it?—the delicacy of touch that is appropriate in these circumstances. I am going to go away and work on it.

I shall attempt—briefly, because we have had a long debate—to answer the main points that have been made against the amendment. The noble and learned Lords, Lord Brown of Eaton-under-Heywood and Lord Mackay of Clashfern, expressed concern that the charter of rights will enable courts to strike down legislation. The noble Lord, Lord Howarth, expressed

[LORD PANNICK]
a similar concern: "What about parliamentary democracy?" was his theme. The Minister put his case very high: he said it was "shocking" and a constitutional outrage that we should be bound after exit by a body of foreign law. I have to ask him to read his own Bill because under the Bill, if a statute enacted before exit day is inconsistent with any part of retained EU law, the statute gives way. It is the supremacy of retained EU law—see Clause 5(2). So a concern about parliamentary sovereignty is no basis for excluding the EU Charter of Fundamental Rights from retained EU law. Legislation that is enacted after exit day will take priority over all retained EU law, which, if the amendment is passed, will include the charter. That is how the Bill asserts the sovereignty of Parliament, together with Clause 7, so this is a complete red herring. Amendment 15 has nothing whatever to do with the sovereignty of Parliament. The Bill deals with the sovereignty of Parliament in a perfectly acceptable way. It maintains the sovereignty of Parliament. We can do what we like after exit day, whether or not Amendment 15 is approved.

The noble Baroness, Lady Deech, criticised the drafting of the charter. However, in the context of a Bill that is designed to secure legal continuity on exit day, it cannot be right for noble Lords to point to individual provisions in the charter that they do not like or which are poorly drafted. The reason is that noble Lords could carry out the same exercise on every regulation or directive that is to be part of retained EU law and is being read across. Again, that is no basis for singling out the charter.

Then there were complaints from the noble Baroness, Lady Deech, and the noble Lord, Lord Faulks, expressing concerns about judgments by the European Court of Justice. Under Clause 6 of the Government's own Bill, though, it is only judgments handed down before exit day that are binding, and only up to the level of the Supreme Court. Judgments that are given by the Court of Justice in Luxembourg after exit day are simply not binding on our judges; it is up to our judges whether they follow what the Luxembourg court may say in future. I emphasise a point I made in opening this debate: neither the noble Baroness, Lady Deech, the noble Lord, Lord Faulks, the Minister nor anyone else has given any examples of judgments given by the Court of Justice in Luxembourg on the charter to which they take exception.

Finally, the noble Lord, Lord Cavendish of Furness, told the House in a striking intervention—I hope I quote him correctly—that the good Samaritan did not need a bunch of lawyers to tell him what do. I say to him and to the House that, unfortunately, government and other public bodies often need to be told by judges what to do. I say to the noble Lord, Lord Shinkwin, that Parliament has often failed to protect fundamental rights. Without enforceable human rights, the victims of injustice and discrimination can and do go unremedied in the context of employment, equality or property rights. I say to the noble Lord, Lord Cavendish, and others on his Benches that if a Labour Government under Mr Corbyn were to be elected, they would be glad of the ability of courts to listen to human rights cases to secure remedies against arbitrary state action. They should think about that point, which I put forward as a Cross-Bencher.

As I said in opening this debate, to exclude the charter from retained EU law is unprincipled and unjustified. The House has heard no coherent defence of the Government's position. I wish to test the opinion of the House.

5.31 pm

Division on Amendment 15

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Crathorne, L.
Cumberlege, B.
De Mauley, L.
Dear, L.
Deech, B.
Dixon-Smith, L.
Dobbs, L.
Duncan of Springbank, L.
Dunlop, L.
Eaton, B.
Eccles of Moulton, B.
Eccles, V.
Elton, L.
Empey, L.
Evans of Bowes Park, B.
Fairfax of Cameron, L.
Fairhead, B.
Falkland, V.
Fall, B.
Farmer, L.
Faulks, L.
Feldman of Elstree, L.
Fellowes, L.
Fink, L.
Finkelstein, L.
Finlay of Llandaff, B.
Finn, B.
Fookes, B.
Forsyth of Drumlean, L.
Framlingham, L.
Freeman, L.
Freud, L.
Gadhia, L.

Gardiner of Kimble, L.
Gardner of Parkes, B.
Geddes, L.
Geidt, L.
Gilbert of Panteg, L.
Glendonbrook, L.
Gold, L.
Goldie, B.
Goodlad, L.
Goschen, V.
Grabiner, L.
Grade of Yarmouth, L.
Green of Deddington, L.
Greenway, L.
Griffiths of Fforestfach, L.
Hague of Richmond, L.
Hamilton of Epsom, L.
Hanham, B.
Harding of Winscombe, B.
Harris of Peckham, L.
Hay of Ballyore, L.
Hayward, L.
Helic, B.
Henley, L.
Hill of Oareford, L.
Hodgson of Abinger, B.
Hodgson of Astley Abbotts, L.
Hogan-Howe, L.
Holmes of Richmond, L.
Home, E.
Hooper, B.
Hope of Craighead, L.
Horam, L.
Howard of Lympne, L.
Howard of Rising, L.
Howe, E.
Howell of Guildford, L.
Hunt of Wirral, L.
Inglewood, L.
James of Blackheath, L.
Jenkin of Kennington, B.
Jopling, L.
Judge, L.
Kalms, L.
Keen of Elie, L.
King of Bridgwater, L.
Kinnoull, E.
Kirkham, L.
Kirkhope of Harrogate, L.
Laming, L.
Lamont of Lerwick, L.
Lang of Monkton, L.
Leigh of Hurley, L.
Lexden, L.
Lindsay, E.
Lingfield, L.
Lisvane, L.
Liverpool, E.
Lothian, M.
Lucas, L.
Lupton, L.
Lytton, E.
MacGregor of Pulham Market, L.
Mackay of Clashfern, L.
Magan of Castletown, L.
Maginnis of Drumglass, L.
Mallalieu, B.
Mancroft, L.
Manzoor, B.
Mar, C.
Marland, L.
Marlesford, L.
McGregor-Smith, B.
McInnes of Kilwinning, L.
Mone, B.
Montrose, D.
Morris of Bolton, B.
Mountevans, L.
Moynihan, L.
Naseby, L.
Nash, L.
Neville-Jones, B.
Neville-Rolfe, B.
Newlove, B.
Nicholson of Winterbourne, B.
Noakes, B.
Norton of Louth, L.
O'Cathain, B.
Oppenheim-Barnes, B.
O'Shaughnessy, L.
Palumbo, L.
Patten, L.
Pidding, B.
Polak, L.
Popat, L.
Porter of Spalding, L.
Powell of Bayswater, L.
Rana, L.
Redfern, B.
Renfrew of Kaimsthorn, L.
Ribeiro, L.
Ridley, V.
Risby, L.
Robathan, L.
Rock, B.
Rotherwick, L.
Rowe-Beddoe, L.
Ryder of Wensum, L.
Saatchi, L.
Scott of Bybrook, B.
Seccombe, B.
Selborne, E.
Selkirk of Douglas, L.
Selsdon, L.
Shackleton of Belgravia, B.
Sheikh, L.
Sherbourne of Didsbury, L.
Shinkwin, L.
Shrewsbury, E.
Skelmersdale, L.
Slim, V.
Smith of Hindhead, L.
Somerset, D.
Spicer, L.
Stedman-Scott, B.
Sterling of Plaistow, L.
Stevens of Ludgate, L.
Stoddart of Swindon, L.
Stowell of Beeston, B.
Strathclyde, L.
Stroud, B.
Sugg, B.
Suri, L.
Swinfen, L.
Taylor of Holbeach, L. [Teller]
Taylor of Warwick, L.
Thurlow, L.
Trees, L.
Trefgarne, L.
Trenchard, V.
Trevethin and Oaksey, L.
Trimble, L.
True, L.
Tugendhat, L.
Ullswater, V.
Vere of Norbiton, B.
Verma, B.
Vinson, L.
Wakeham, L.
Waldegrave of North Hill, L.
Wasserman, L.
Wei, L.
Whitby, L.
Wilcox, B.
Williams of Trafford, B.
Wilson of Tillyorn, L.
Wolfson of Aspley Guise, L.
Wyld, B.
Young of Cookham, L.
Young of Graffham, L.
Younger of Leckie, V.

5.49 pm

The Deputy Speaker (Lord Geddes) (Con): My Lords, Amendment 15 having been agreed to, I cannot call Amendment 16 due to pre-emption.

Amendment 17

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

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

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

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

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

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

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

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

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

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

(a) an assessment of how such amendments to domestic law would have impacted gender equality and work life balance in the United Kingdom had the United Kingdom remained a member of the EU or EEA beyond exit day, and

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

Baroness Lister of Burtersett: My Lords, Amendment 17 simply requires the Government: first, to report to Parliament on developments in EU law in the areas of family-friendly employment rights, gender equality and work-life balance for parents and carers which would have affected UK legislation had we remained in the EU; and then to consider whether they should incorporate these changes into domestic law to ensure that such rights are not diminished or are no less than

they would have been were the UK still a member of the EU. What it does not do is bind the UK into implementing future EU law. It is supported by a number of organisations, in particular Working Families, whose assistance I am grateful for.

In Committee, I warned that I might want to return to this issue because, for all the Minister's very positive words about dilution of existing rights in this area, and in particular his very welcome assurances on the working time directive, he gave no argument why the Government could not accept this amendment, or something on similar lines. Yet, from everything he said last time, I can see nothing in this amendment with which the Government might disagree. Of course, it does not mean that future Governments cannot also look elsewhere for policy inspiration, but given that this Bill is about what happens when we leave the EU it is only right that the amendment is confined to future developments in the EU. Moreover, we remain a member of the European family, which has always been a leader in such matters.

Noble Lords will be relieved to hear that I do not intend to repeat the substantive arguments I put in Committee, other than to produce two new pieces of evidence in support. The first relates to the discussion we had around the extent to which the UK has been a leader or follower in this area. It is a newly published analysis of the development of the EU gender equality framework conducted by two leading scholars from Manchester University. It challenges the rather rosy picture painted by the Minister in Committee and in a subsequent letter, for which I am grateful. I am also grateful for the meeting that we had earlier today, which was very helpful. In summary, the researchers note that,

"far from being a pace setter in the area of European gender equality law, the UK has usually sought to stall, dilute or divert legal measures".

They conclude that,

"decoupling from the EU's equality framework due to Brexit will harm the pursuit of gender equality in the UK",

and risks,

"a more insular approach to policy design".

This amendment is designed to avoid just such an outcome, and it could be of particular significance in Northern Ireland, where there could be real problems if employment rights diverge in future across the island of Ireland.

The second piece of evidence is the recent report of the Women and Equalities Select Committee, *Fathers and the Workplace*, which provides strong support for the kind of improved parental leave provisions for fathers contained in the draft work/life balance directive. I accept that the directive is still at proposal stage, as the Minister pointed out in Committee, but that does not invalidate the case for considering it once we have left the EU. Indeed, it makes it more likely that it will be too late for us to be bound by it.

In Committee, the Minister summed up fears that the Government will use the opportunity of Brexit to cast rights aside with the metaphor of scraping,

"the barnacles off the boat to allow the ship to move faster".

He then assured the Committee that these rights,

"are integral parts of the engine of the ship and we shall not be discarding them".—[*Official Report*, 5/3/18; col. 953.]

That was very welcome. But this amendment is not about existing rights, crucial as they are. It is about where we go from here. Surely we want to keep the engine fine-tuned in future so that it keeps up with other ships in European waters on these issues, the importance of which he himself underlined. Indeed, it is difficult to see why the Government would not want to appear forward-looking and open-minded when steering the ship into post-Brexit waters, especially in view of recent public attitudes research by the IPPR that indicates strong public support for continued alignment with the European economic and social model.

I therefore seek two further assurances: first, that the Government will undertake to meet the spirit of the amendment after we have left the EU and, secondly, that in particular they will give serious consideration to whatever emerges from current negotiations on the work/life balance directive, and give Parliament an opportunity to consider it. If the Minister is unable to give those very modest assurances, I ask him to give a clear explanation as to why not. As it is, I am afraid that the Government will send a very negative message to the parents and carers of this country who are struggling to balance paid work with their caring responsibilities, and to the many organisations looking for reassurance about the country's future direction on family-friendly employment rights, gender equality and work/life balance for parents and carers. Refusal would also cast doubt on the Brexit Secretary's recent claim that Britain will remain a dynamic and open country and that we will lead a race to the top in global standards. Those are fine words; this amendment will go some small way to turn them into deeds. I beg to move.

Baroness Crawley (Lab): I underline my noble friend's point about the enthusiasm with which the Minister told us in Committee that there would be no dilution of these rights and that it is the Government's intention that these rights would be the foundation for an ever-developing family-friendly agenda that they want to advance. Yet the Minister did not give my noble friend or any of us involved in that Committee any idea why the Government do not want to monitor evolving EU law in this area. Surely, if we want to be in the vanguard of EU law we have to be able to monitor it. Why can we not do that? It is such a modest ask.

Baroness Altmann (Con): I shall speak to the amendment, to which I have added my name. I urge my noble friend the Minister to give us the reassurances that we seek. I believe that the Government want this country to be at the forefront of equality rights, work-life balance, improvements for parents and carers and family-friendly employment. I hope he can reinforce the commitment to aspire to the race to the top in these protections for what are such important rights in terms of equality.

Baroness Gale (Lab): My Lords, the contributions from my noble friends Lady Lister and Lady Crawley and the noble Baroness, Lady Altmann, have made

[Baroness Gale]
the case quite clearly for why we need this proposed new clause, as laid out in Amendment 17. It explains in detail the importance of including this in the Bill, and would require the Minister to report to Parliament whenever there are new or amended EU laws in the area of family-friendly employment rights, gender equality and work-life balance for our parents and carers.

As the other noble Baronesses have explained, there is concern that the UK could fall behind the EU on gender equality and employment rights if we do not automatically, in a sense, have to follow EU laws. The amendment would allow Parliament to be informed on EU laws and consider whether to incorporate them into UK laws. I am sure the Minister, like the noble Baronesses who have spoken, believes that there should be no weakening of maternity or paternity rights, adoptive parental rights or the rights of pregnant and breast-feeding women, which we discussed in Committee.

I hope that the Minister will give guarantees tonight in relation to the amendment. Equality rights need continual progress and amendment. That is why it is essential that we look at what the EU is doing and whether that is something we could, and would want to, incorporate into our laws. We are asking tonight for reassurance from the Minister that equal rights, which have been hard fought for over many years, will not be watered down in any way. The amendment would continue to offer protection, as well as ensuring that women's equality rights do not fall behind those in future EU laws. I hope the Minister will give a positive reply.

6 pm

The Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office (Lord Duncan of Springbank) (Con): I thank the noble Baronesses for their contributions. I believe, and am comfortable saying, that when we exit the EU the corpus of EU law on which we will build our foundations will be a strong one. At our last gathering, I was able to give assurances on the working time directive, which I hope were welcomed on all sides of the House. The key aspect here is simple: we should not solely be looking towards the EU as we consider what is happening on the wider question of family-friendly employment.

I had a pleasant discussion earlier today with the noble Baroness on the key elements of the amendment. She knows that I am not able to give the words of comfort that she is looking for, but I am able to give different ones. They are not specific to the Bill but are, more broadly, about what the Government intend to do and how we will do it. I will iterate those in due course. For example, the work-life balance directive is at present in its very early stages in the European Union. Because of where it is in the process, there is every prospect that it will not have secured enough progress before the European Parliament rises for the elections. Thereafter it will have to be retabled and greater time spent bringing it back to its current state. I would much prefer that the elements contained in that directive were taken forward by the Government in good time and good order. Post Brexit, it must be our ambition not to await what others are achieving but to see the direction in which they are facing and move as quickly as we can. Your Lordships' House, and the lower House, must be at the forefront of these endeavours.

I spoke in Committee about these policies not being barnacles on the boat. It is absolutely clear to me that they do not drag us back; they are integral to the engine that drives us forward. Equally, it is important that the committees of both Houses recognise their roles both in holding the Government to account and in casting their eyes as widely as they can to initiatives, policies and case studies that make a difference across the globe. There is much that we can learn, not just from the EU but from its member states. For example, it is not the EU itself but some member states inside it that are driving forward wider LGBT issues. Malta and the Netherlands are pushing far beyond where the EU stands, as are we ourselves. Looking at some of the wider gender equality issues, I would never paint where we are as rosy. Until we have reached absolute parity and certainty, there are not enough roses in the garden to say that. It is always a journey and we need to be moving toward that. We can learn lessons from examples across the globe. I hope that committees of this House and the other place are able to act as the antennae, seeing and hearing what is out there; to develop invaluable reports; and to hold the Government to account for recognising what those reports can achieve as we cast our eyes more broadly.

I cannot give the words of comfort on the amendment that the noble Baroness would like. In some respects, I am disappointed that I cannot. However, I commit, on behalf of the Government, to meet the noble Baroness, and to write to her and other noble Lords, setting out clearly and exactly what the UK Government intend to do in this area, where we are, what the rights are that we need to move forward on and how we intend to do that. I suggest that that happens regularly, not just once. The regularity and frequency has yet to be determined but I suggest that we have a dialogue about it. The noble Baroness will be aware that I am not the lead Minister on this, just the lead Bill Minister in this area, but I am committing, on behalf of my colleagues in the Government, to fulfil that obligation. I hope that will give some comfort. This is a journey and we are not yet far enough along. I am sorry to disappoint the noble Baroness on this occasion, but I cannot give her the words of comfort she would prefer to hear on the specifics of her amendment.

Baroness Lister of Burtersett: My Lords, I am very grateful to those who have spoken in support of the amendment, particularly the noble Baroness, Lady Altmann, from the Benches opposite. They all used the word "reassurance" and, as he said, the Minister does not feel able to give me the reassurance I was seeking. I understand that, but welcome the fact that he has tried to go as far as he can. In a sense, he has implicitly acknowledged the case, even if he is not giving me reassurance. At the outset, I made it clear that this in no way stops us looking to other countries as well as to the EU, but we are—and will still be—a member of the European family. I will always be a European, as we all will, and that is where we should look first.

I welcome the Minister's commitment on behalf of the Government. It is not just about meeting with me. I suggest a formal or informal all-party grouping of Peers who have supported the amendment, such as the noble Baroness, Lady Altmann, and organisations such as Working Families, to take this forward. Once the Bill is out of the way, perhaps we could have a meeting to discuss the appropriate mechanisms to do that. None of us can speak on behalf of committees and so forth, but if we are able to map out a possible way it would give us something.

I am disappointed, but I did not expect that much. I take a few crumbs of comfort from what the Minister has said and I am grateful to him. I hope that, once the Bill is out of the way, we can use those crumbs to build something of a loaf. With that dreadful metaphor, I beg leave to withdraw the amendment.

Amendment 17 withdrawn.

Amendment 17A

Moved by ***Lord Warner***

17A: After Clause 5, insert the following new Clause—

"Public health protection

Article 168 of the Treaty on the Functioning of the European Union, so far as it requires a Minister of the Crown or a public authority to have regard to the principle that a high level of human health protection must be ensured in the definition and implementation of all policies and activities, forms part of retained EU law."

Lord Warner (CB): My Lords, I will move Amendment 17A in my name and those of the noble Lord, Lord Hunt, and the noble Baronesses, Lady Jolly and Lady Finlay. The purpose of the amendment is to improve the legal protections of public health post Brexit. It does that by ensuring that those parts of Article 168 of the Lisbon treaty that are concerned with public health are part of retained EU law after exit day. I will try to explain briefly why this is an important matter of such concern to so many people involved with public health who have briefed your Lordships throughout proceedings on the Bill.

Clause 4 of the Bill includes within retained EU law directly enforceable provisions of the EU treaties. The legal advice that I have been given by three professors of European law at the Universities of Sheffield, Essex and Cambridge is that it is not clear whether it includes other provisions of the EU treaties, such as Article 168 of the Lisbon treaty. As far as I can see, the Government have been unwilling to say that it does cover those other provisions. So far on the Bill, Ministers have simply asserted that the amendment is unnecessary because our public health policies are excellent and often better than many in the EU. That, of course, fails to answer the exam question: is Article 168 part of retained EU law under the Bill? The latest letter to Peers from the noble Lord, Lord O'Shaughnessy—whom I am glad to see in his place—which incorporated Jeremy Hunt's article, still fails to tackle the exam question.

Why am I making so much fuss over Article 168? I will not repeat all I said in Committee. However, I will remind the House of Mr Justice Green's High Court judgment on 16 May 2016, on plain packaging of tobacco products, in which, at paragraph 441, he emphasised that Article 168 places public health,

"at the epicentre of policy making … and how '*all*' EU policies must ensure a '*high level of human health protection*'".

This was a significant element in his finding in favour of the Government, and Mr Justice Green's findings were further endorsed by the Court of Appeal, rejecting the tobacco industry's appeal in its judgment dated 30 November 2016. At paragraph 201 of the Court of Appeal's judgment it says:

"The judge was entitled to place the weight he did on the public health objectives of the Regulations: his approach was in line with the high level of human health protection provided for in EU law".

It is one of life's little ironies that this Government have benefited from these EU protections. Two clear and reasonable inferences can be drawn from the Court of Appeal judgment. First, the public health protections in Article 168 should be regarded as part of retained EU law after Brexit, and secondly, the EU legal public health protections may well be more robust than those in UK law.

I turn briefly to the level of public health support for this amendment. The uncertainty caused by the Government's approach has united the Medical Royal Colleges and wider health community, all of whom have given consistent support to this amendment. To date, 52 organisations, including the Royal College of Physicians, the Faculty of Public Health and many major charities such as Cancer UK, Diabetes UK and the Alzheimer's Society are backing the amendment. They do so, in my judgment, because they fear that after Brexit, hard-won legal protections for public health will be sacrificed in a rush to do trade deals. Given the speeches of some Ministers, who can blame them?

The simplest way to satisfy all these concerns is to put matters beyond legal doubt. We are well past the time for further warm words from the Minister. Matters need to be made clear in the Bill by an amendment along the lines of Amendment 17A. I provided the Minister with a little more time to think about this at our meeting last week by deferring consideration of the amendment until today. I hope that he has used the time wisely and that he can now agree to accept it. I beg to move.

Lord Duncan of Springbank: I have some points which may be helpful to make at this moment, before the full discussion gets under way, and I may seek to clarify our position. However, I will of course respond to the wider debate in due course—I am not trying to cut off any of the points which might be made. The noble Lord, Lord Warner, was indeed kind to me last week; we sat down and he agreed to allow me a greater amount of time. I will therefore say words which may bring him some comfort with this point in mind.

Public health is a vital issue—there is no doubt about that. I accept that we have not thus far provided sufficient assurance to the noble Lord or to his noble backers on the issue of public health. I am therefore grateful that we have had this extra time to look at the issues that underpin the matters before us today. I have

[Lord Duncan of Springbank]
used that time wisely in meeting with both the noble Lord, Lord Warner, and my noble and learned friend Lord Mackay of Clashfern. I thank them both sincerely for their time.

6.15 pm

I will make two points. The noble Lord made reference to Article 168 and its importance in the 2016 tobacco packaging case, particularly its influence in the decisions of the High Court and the Court of Appeal. In that case the High Court declared, as the noble Lord reminded us, that public health—Article 168—was,

"at the epicentre of policy making",

in the EU. Going forward, the elements of this and other cases which refer to the key role of public health are, to the extent that they are relevant to EU law, preserved by Clause 6(3). This ensures that retained EU law is to be interpreted in accordance with the pre-exit case law to which it is relevant. Therefore, after exit our courts, while interpreting retained EU law, will be able to draw upon those judgments and the utilisation of the public health concept as enshrined in Article 168—indeed, the judgment which was cited. Further, all EU legislation in the area of public health which becomes part of retained EU law and domestic legislation implementing EU public health requirements will, by virtue of Clause 6, continue to be interpreted—I stress that point—by reference to relevant pre-exit case law and treaty provisions. This means that Article 168 and the fact that it was described by the High Court as being at the epicentre of EU policy-making are available to our domestic courts in future.

I also make it clear that the effect of Article 168 in the domestic law of this country before exit will continue after exit by virtue of Clause 4. I will explain. Clause 4 provides that:

"Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which … are recognised and available in domestic law",

immediately before exit,

"by virtue of section 2(1) of the European Communities Act … continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)".

Therefore, in that instance, Article 168—in so far as it was utilised by the courts when Mr Justice Green drew upon it and recognised that it was "at the epicentre" of European policy-making—will be available in the future to UK courts to draw upon, both its elements and its interpretation, and those elements will be available afterwards. I hope that those remarks are helpful in clarifying where we stand; I will of course return later on to engage with the full debate.

Lord Mackay of Clashfern: My Lords, I had the privilege of hearing the noble Lord, Lord Warner, explain the position in Committee. When I heard him speak, it roused in my mind the thought that the decision in the packaging case was extremely important. In particular, the doctrine that the noble Lord, Lord Warner, seeks to establish must have been relied upon by the Secretary of State to defend that decision; important rights of the tobacco companies were at issue as well, such as complicated trademark legislation. When I looked at this, I thought it was absolutely clear that Mr Justice Green was relying upon Article 168 and the principle of the high value of human health in his judgment in favour of the Secretary of State. Therefore, that must have been part of our law at the time when Mr Justice Green was deciding the case, which was in 2016. If it was part of our law then, it will remain part of our law in light of the provisions in the Bill when Brexit comes along.

I was not privy to the earlier situation which the noble Lord, Lord Warner, described, and there may have been some difficulty in having this clarified. Mr Justice Green was deciding this in the High Court. The case went to the Court of Appeal, where in one judgment given by three judges—they say that they all contributed to the judgment—they absolutely affirm that the judge was right and that his approach was in accordance with EU law. That is EU law as it was; part of the law of the United Kingdom in 2016. Therefore, I consider that it must be preserved by the retention of the EU law that we have here. In my view, what the noble Lord the Minister has now said makes it clear that the Government now accept that position. It does not depend so much on the Government's word as on the fact that the courts recognise this principle as part of EU law applicable in 2016. I cannot see any answer that can be given to try to rule it out. Therefore, I am content with what the Government have come out with and glad they gave me the opportunity to discuss this with them this afternoon. There were quite a number of members of the department there and we had a fairly frank discussion which has, I am glad to say, produced what I think is a reasonable result.

Baroness Finlay of Llandaff (CB): My Lords, it is most helpful that the Minister has given a reassurance and further clarified the position. However, I have a lingering concern about what happens if we do not have Article 168 in the Bill. If a trade deal and negotiation end up going to court, something has already gone terribly wrong. The advantage of having this stress on public health in the Bill is to strengthen the arm of the Government to make sure that public health is not inadvertently compromised.

I found a recent review of the Trans-Pacific Partnership Agreement, which looked at the health impact in the context of trade negotiations. Particular areas of concern related to food labelling, alcohol labelling, tobacco control and the cost of medicines. As this House knows, we have a major problem with obesity in this country. If people are to make real, sensible choices over what they are buying, they have to know that food labelling covers all aspects of food safety, including exposure to toxic pesticides, herbicides and so on, and animal husbandry methods, which have been of concern.

Our producers may not want that degree of labelling because it may damage their profits. I can see that in negotiating trade deals there will be, at times, a balance between profits and establishing the trade deal and holding back in some areas because of public health. The same may happen with atmospheric pollution. and so on. So while I fully accept the intention of the Government to make sure that as, in that article, public health protection and health improvement will remain unequivocal and at the centre of things, I have

a lingering concern that there may be drift over time and difficulty in negotiations if we do not have this formally in the Bill.

Baroness Jolly (LD): My Lords, I shall speak very briefly. I totally agree with what the noble Baroness has just said. This debate seems very much like the one we had during the passage of the Health and Social Care Bill about parity of esteem for mental and physical health. We were told by the Government that we did not need to have it in the Bill; we could assume that they would treat mental and physical health equally. That patently had not been the case. You might wonder whether they are treated in the same way now but the intention to treat them the same way was put in the Bill and so is on the record. This is very similar. The Government are saying: "We do not need this. You can trust us". We might possibly trust the current Government. I see no reason why in most instances we should not trust them, but there are Governments coming down the track who may not be as reliable and trustworthy as the current one. So my instinct at the moment is to listen to what the Minister says when he winds up the debate on this amendment, but I would rather that it was in the Bill than not.

Lord Hunt of Kings Heath (Lab): My Lords, this has been a short but very interesting debate. The noble Baroness, Lady Jolly, really put her finger on it when she talked about trust. It seems to me that there are two threads running through the argument. The first is the legal one, about which the noble and learned Lord, Lord Mackay, has spoken so eloquently. Then there is the issue of trust in the Government on public health. In a sense, the two run together.

The Minister is not a Health Minister, and I have to say to him that the reason for the lack of trust is the Government's record. First they transferred public health in England to local government and then they slashed the budget, which means that even essential public health services are struggling to be performed effectively. Secondly, there is the Government's reluctance to legislate in the areas of public health, preferring voluntary agreements with the food and drinks industry and so on to deal with things such as alcoholism, obesity and other public health issues. Thirdly, there is the fear about future trade deals—when it comes to it, the Government will be so desperate for trade deals with countries such as the US that public health and farming interests will be swamped by the desperation to reach a deal. That surely is one of the risks.

None the less, this is a debate on the terms of the amendment. I found the Minister's intervention very helpful. I also found the intervention by the noble and learned Lord, Lord Mackay, helpful. However, this has only just come and I would like time to consider it. The noble Lord, Lord Warner, will make his mind up as to whether he pushes this to a vote tonight. It would be extremely helpful if the Minister would indicate that if we ask for time to look at the detail of his intervention, we could bring it back at Third Reading. That would be a constructive and very helpful outcome to the debate.

Lord Duncan of Springbank: This has been a short debate but an instructive one. I am somewhat sorry that we have not had longer to share with noble Lords the remarks that I made this afternoon. The key thing about the statement I made earlier, and I suppose it was one of the aspects at the heart of the concluding statements from the noble Lord, Lord Hunt, was about the notion of trust. I am tempted to say, as I used to say many years ago, "You can trust me. I'm a doctor". but my doctorate is in palaeontology so I am afraid that that is perhaps not quite as useful in this regard. The important thing is not that noble Lords trust the Government or, indeed, any Government, but rather that the case law itself can be used to hold that Government to account.

In the case cited, the UK Government were the principal beneficiary across the entire EU when it came to the packaging of tobacco products. As the noble and learned Lord, Lord Mackay of Clashfern, confirmed, we did not explain well enough that these particular rules and aspects of Article 168 are and will be available post Brexit. They will allow for the Government—if need be—or others, to be challenged, drawing on the elements of Article 168 as they stand today and as they will stand after Brexit.

In truth, the Government are broadly neutral on the concept of the amendment, primarily because we recognise that the functionality of Article 168 will not be undermined by what happens as we go forward. For that reason, I am afraid that I am not able to give greater comfort on this occasion. Indeed, should the noble Lord wish to test the House, I shall in due course suggest that he does so.

However, before I get there, it is important to stress that the UK Government were a principal beneficiary of the Article 168 approach and the concept of public health being at the epicentre of law-making. Due to the broadly established case law and, ultimately, the interpretation that will rest in the hands of the domestic courts, I believe that we are in a strong position. I know that matters of wider trade were raised, and there will be opportunities to discuss those as we look at these questions at another time, but as far as the amendment is concerned, I believe that as my noble and learned friend Lord Mackay affirmed, we are now in a good position to offer certainty, which is worthy.

6.30 pm

Lord Hunt of Kings Heath: Perhaps I may ask the Minister to clarify what he said about providing no comfort. Speaking for the Official Opposition and, I think, for the Lib Dems, we have not had sight of the intervention that the Minister made this afternoon. I found that intervention helpful, as was the interpretation given by the noble and learned Lord, Lord Mackay. I am suggesting to the House and to the noble Lord, Lord Warner, a way forward. If the Minister agrees that this matter can be brought back at Third Reading, we will have time to read that intervention. I think that that is a constructive response from the Opposition Front Bench. The noble Lord, Lord Warner, will have to decide what to do but clearly, if we are not allowed to come back to this at Third Reading, we will probably have to test the

[Lord Hunt of Kings Heath]
opinion of the House. It seems to me that a sensible, consensual way forward is to give us time to look at what the Minister said.

Lord Mackay of Clashfern: My Lords, perhaps I may break the rules of Report and intervene. The Government have said repeatedly that they cannot do anything about this or that. They have said, "If you want to vote on this, you have to do it now and not at Third Reading". However, this is a rather different situation in that their position has been made clear rather close to dealing with this amendment, and it is only reasonable that the House should be given an opportunity to study it. I do not think that that would be a breach of the general rule that we try to get rid of everything before Third Reading, and I do not anticipate that those who have tabled the amendment will want anything else.

An important point is that the amendment has raised an issue which I think the Government now accept is covered by the terms of the Bill as it was—the principle of the value of human health recognised in EU law. They have accepted that and the Bill carries it forward. It is only right that those who have brought forward the amendment should have the opportunity to study what has been said. I know that that is not in accordance with the general rule that the Government have set for Ministers but I think that this is an entirely exceptional circumstance, and I will certainly be very disappointed if, instead of getting an agreement, which I believe we have, we have an unnecessary vote.

Lord Grocott (Lab): I very much agree with the point that the noble and learned Lord has made. It may not be within the normal rules of a Report stage debate to have the kind of circular arguments that we have had but, without having the *Companion* in front of me, I am pretty certain that I am accurate in saying that this is precisely the kind of occasion when it is appropriate to consider a matter again at Third Reading. The rules on when you can bring forward amendments at Third Reading are quite restrictive but, where the Government effectively announce a change of policy or, at the very least, give a further clarification which this side of the House has no opportunity to consider in detail, I cannot see that anyone loses any face whatever. It is entirely consistent with the way in which Third Reading operates for the Government to say, "We may or may not be able to accommodate it but we'll look at it again at Third Reading".

Lord Duncan of Springbank: For the good of my own health, we will reflect on this matter and we will be able to come back to it in due course. In the meantime, we will ensure that the intervention is circulated widely so that noble Lords can see exactly where we stand on this matter. I hope that that is helpful.

Lord Warner: Well, my Lords, if you just sit here, things work themselves out. I am grateful to the Minister for his intervention and I am extremely grateful to the noble and learned Lord, Lord Mackay of Clashfern, for all the help that he has given behind the scenes and to me personally on this matter.

What I have to say to the Minister is aimed not so much at him as at a few of his colleagues. They have been a bit slow in coming to the party. These legal judgments have been around for quite a long time and one would have expected DExEU to have mastered these things at an earlier stage. However, in the circumstances, and with my thanks to the Minister for showing flexibility while he was on the Bench, as well as in his interventions, we will come back to this at Third Reading. I will make sure that all the backers of the amendment have time to read everything, and I beg leave to withdraw the amendment.

Amendment 17A withdrawn.

Schedule 1: Further provision about exceptions to savings and incorporation

Amendment 18

Moved by ***Lord Beith***

18: Schedule 1, page 16, leave out lines 11 to 15

Lord Beith: I beg to move an amendment that I regard as, in broad terms if not technically, consequential on our earlier decision.

6.36 pm

Division on Amendment 18

Contents 285; Not-Contents 235.

Amendment 18 agreed.

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6.50 pm

Amendment 19

Moved by ***Lord Pannick***

19: Schedule 1, page 16, line 21, leave out paragraph 3

Lord Pannick: My Lords, we debated Amendment 19 earlier. I remind the House that it would remove the provision in Schedule 1, paragraph 3, which says that although the general principles of EU law are to be part of retained EU law they cannot provide a cause of action. I wish to test the opinion of the House.

6.51 pm

Division on Amendment 19

Contents 280; Not-Contents 223. [The Tellers for the Not-Contents reported 223 votes; the Clerks recorded 222 names.]

Amendment 19 agreed.

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7.04 pm

Clause 6: Interpretation of retained EU law

Amendment 20 not moved.

Amendment 21

Moved by ***Lord Pannick***

21: Clause 6, page 3, line 34, leave out subsection (2) and insert—

"(2) A court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU where it considers it relevant to the proper interpretation of retained EU law."

Lord Pannick: My Lords, Amendment 21 is in my name and those of the noble and learned Lords, Lord Goldsmith and Lord Wallace of Tankerness, and the noble Viscount, Lord Hailsham. It concerns the powers of courts and tribunals to have regard to judgments of the European Court of Justice in Luxembourg handed down on or after exit day.

When we debated this topic in Committee, there was widespread agreement that Clause 6(2) needed to be amended to give clear guidance to the judiciary. I and other noble Lords have had many meetings and discussions with the noble and learned Lord, Lord Keen, and with the Solicitor-General. I thank them on my behalf and that of the noble and learned Lord, Lord Judge, who cannot be present for this debate, for the care with which they have considered this important topic. I am very pleased that the Government have tabled Amendments 23, 24 and 25, which I think will remove the main concerns about Clause 6(2). Government Amendment 24 removes the opening words of the existing Clause 6(2), which suggested a default position of the court or tribunal not having regard to judgments or decisions given on or after exit day. Amendment 25 removes the requirement that courts or tribunals should ask themselves whether it is appropriate to have regard to judgments or decisions given on or after exit day. The amendment rightly states that the criterion is whether the court or tribunal considers the material relevant to the matter before the court. I am content with government Amendments 23, 24 and 25, subject to four points on which I would welcome assurances from the Minister.

First, Amendment 23 introduces new opening words for Clause 6(2) which make the subsection subject to Clause 6(1) and (3). Some concern has been expressed that these opening words somehow negate the substance of Clause 6(2). I do not believe that is so, but it is the Minister's view that matters. Can he therefore please confirm that those opening words are intended simply to reinforce the duty of the court or tribunal on or after exit day to follow the detailed requirements in Clause 6(3) and to reinforce the duty under Clause 6(1) to interpret and apply retained EU law without being bound by anything decided in Brussels or Luxembourg on or after exit day, by contrast with what the courts have sometimes suggested is the obligation to follow the case law of the European Court of Human Rights under the Human Rights Act? But—this is the important point—the new opening words are not intended to affect the power of the court or tribunal, given by the substance of Clause 6(2), to have regard to judgments and other decisions in Luxembourg and Brussels given on or after exit day when domestic courts and tribunals interpret retained EU law.

Secondly, Clause 6(2) refers only to,

"anything done on or after exit day".

Anything done before exit day will of course be part of retained EU law, subject to the limits stated in the Bill. However, it is possible to think of cases where a judgment of the European court given before exit day is relevant to the issue before the domestic court, even though that judgment is not part of retained EU law. Let us suppose, for example, that Parliament enacts new legislation on medicinal products to replace the existing law. If there is a dispute about the meaning of a section of that statute, the court may consider relevant a decision of the European court given last year on similar requirements.

It is also easy to envisage cases where a judgment of the European court handed down on or after exit day may be relevant to an issue in our courts which is not an issue about the interpretation of retained EU law. I therefore ask the Minister to confirm that Clause 6(2) is not intended to prevent a court or tribunal having regard to decisions of the European court handed down before or after exit day in cases not concerned with the interpretation of retained EU law, just as our courts may consider it relevant to have regard to a judgment of the Supreme Court of Canada or the High Court of Australia.

Thirdly, your Lordships' Constitution Committee recommended in paragraph 142 of our report that Clause 6 should state that in deciding what weight to give to judgments or decisions of the European court or other European bodies given on or after exit day, our courts and tribunals should be able to take into account the terms of any agreement between the UK and the EU that the court or tribunal considers relevant. I moved an amendment to that effect in Committee. I see nothing in Clause 6 to prevent courts or tribunals taking such material into account if they consider it relevant to the issue before them. Does the Minister agree and will he confirm that this would be a matter for the judgment of the court or tribunal?

Fourthly and finally, the Minister knows that the attention given to the wording of Clause 6(2) has in part been because of concern to protect the judiciary against criticism that it is making a policy choice if and when it decides to have regard to judgments of the European court on or after exit day. The Supreme Court will also have to make judgments under Clause 6(3) as to whether to depart from judgments of the European court which are part of retained EU law. After the abuse directed at the Divisional Court following its judgment in the Gina Miller case in November 2016—I declare my interest in the case, not in the abuse—the noble and learned Lord, Lord Keen, was clear and forceful in his speedy defence of the independence of the judiciary, unlike the then Lord Chancellor. Can the Minister assure the House that when judges exercise their powers under Clause 6, the Lord Chancellor will see it as his role to defend the independence of the judiciary against any repetition of such abuse? I beg to move.

The Deputy Speaker (Baroness McIntosh of Hudnall) (Lab): My Lords, I should inform the House that if either Amendment 21 or Amendment 22 is agreed to, I cannot call Amendments 23, 24 and 25 for reasons of pre-emption.

Lord Faulks: My Lords—

Lord Keen of Elie: My Lords, I wonder whether, with the permission of the House, I might respond to the noble Lord, Lord Pannick. I appreciate that there may be other contributions, which I will seek to answer, but it may help the House if I indicate the Government's position on the four propositions put forward by the noble Lord, Lord Pannick, so that we can be clear on the way forward. I shall seek to move government Amendments 23, 24 and 25, which directly address and respond to the concerns raised by many noble Lords when your Lordships last debated the matter in Committee. I hope that noble Lords will support those amendments; I note in passing that they bear a striking resemblance to Amendment 21, tabled by the noble Lord, Lord Pannick, and Amendment 22, tabled by my noble friend Lord Faulks, whom I cut across a moment ago.

For the avoidance of doubt, I want to make clear that the provision in Clause 6(2) does not seek to legislate to give effect to the content of a withdrawal agreement or implementation period. If there is a role for the Court of Justice as part of that agreement, as has been set out in the joint report on citizens' rights, it would be legislated for under the separate withdrawal agreement and implementation Bill. I reiterate that Clause 6(2) has always intended to make clear that, after exit, UK courts will no longer be bound by future judgments of the Court of Justice. Instead, our courts will be free to take them into account when making their decisions, just as they would also be able to consider anything done by another EU entity or the EU itself. This approach reflects the Government's core belief that our domestic courts are best placed to consider whether, and to what extent, to have regard to post-exit Court of Justice case law.

7.15 pm

There has never been any intention to draw judges into making policy decisions but rather a recognition that, as we exit the EU and our domestic courts are restored as the ultimate judicial authority on law in the United Kingdom, it is right and appropriate that they have the authority and discretion to decide how to interpret all UK law themselves, including retained EU law. However, I recognise that, for some, the wording of Clause 6(2) as originally tabled failed to convey this intention with what many would regard as sufficient clarity. We have listened to and reflected carefully on those concerns, which is why we have responded with these amendments. I will not take your Lordships through each amendment; the noble Lord, Lord Pannick, has already addressed them. Therefore, I will turn to the four questions he posed.

First, I accept that what was said by the noble Lord, Lord Pannick, on Clause 6(2), subject to Clauses 6(3) and 6(1)—with reference to Amendment 23—is correct. The opening words intend to clarify what has always been the policy position in the Bill. Of course, he raised an important qualification about the opening words not being intended to affect the power of the court or tribunal—which is given by the substance of Clause 6(2)—to have regard to judgments and other decisions given on or after exit day. I accept that his analysis is correct. Clause 6(2), after amending, will be clear that all courts will have regard to post-exit case law so far as is relevant to any matter before the court or tribunal. This ability has always been subject to what the rest of Clause 6 provides for, including, importantly, the provisions in Clause 6(3) on the binding effect of pre-exit Court of Justice case law. Our courts should be able to have regard to post-exit Court of Justice judgments but not to the extent that they are no longer bound by retained EU case law. For the courts below the Supreme Court, post exit, Court of Justice case law may be relevant if, for example, it concerns a previously undetermined question of EU law that is also relevant to retained EU law.

[Lord Keen of Elie]

The second point made by the noble Lord, Lord Pannick, was on the question of judgments when courts are not interpreting retained EU law. Again, I accept that his analysis of the position is correct. Clause 6(2) is inevitably concerned with things done post exit, but we have expressly enabled the courts to consider post-exit judgments when considering any matter, not just when interpreting retained EU law. Nothing in the clause should be read as being intended to imply that our courts are not entitled to look to pre-exit day Court of Justice judgments in contexts other than the interpretation of retained EU law. I hope that clarifies that point.

The third point made by the noble Lord, Lord Pannick, was on the court's regard to the withdrawal agreement. Again, I do not take material issue with his observations. We do not consider that Clause 6 prevents a court or tribunal taking such material into account, but we should be clear that more specific provision will be necessary to give proper effect to any withdrawal agreement. Clause 6 does not seek to deal with how our courts should have regard to the content of any withdrawal agreement. Clearly, that will have to be legislated for in due course.

On the fourth and final point made by the noble Lord, Lord Pannick, I reiterate that the Lord Chancellor has been absolutely clear in his commitment to steadfastly defend the independence of the judiciary. I acknowledge that we have a world-renowned judiciary, a court system that is open to all and a system of justice that everyone in this country can be confident in and that lives up to our deep-rooted sense of justice and fairness. I assure the House that the Government—and the Lord Chancellor, in particular—understand the fundamental importance of this; the Lord Chancellor will continue to defend the independence of our courts. With that, I recognise that there may be further observations to be made.

Lord Faulks: My Lords, the genesis of this debate is at least in part the evidence that the former President and current President of the Supreme Court gave to the Constitution Committee of your Lordships' House. We had a good debate in Committee. It is clear that the judges wanted clarity as to how they should approach decisions of the European Court of Justice post Brexit, perhaps not least because of the difficulty they had relating to the Human Rights Act in determining what "taking into account" meant. Clarity would certainly have followed if they were told either to follow or to ignore the decisions, but that would not have been sensible or what the Government wanted.

As a result, we were engaged in something of a struggle to find the right formulation. The word "appropriate" in the original Bill received an almost unanimous no. "Relevant" is clearly important, but in some senses it is hardly necessary because the court will not take into account a decision that is irrelevant. I tabled an amendment, which is before the House, saying "relevant and helpful". I readily concede that "helpful" is not a word that often finds its way into statute. However, I was quoting precisely what the noble and learned Baroness, Lady Hale, recently said about how the court would regard, for example, foreign law and whether it would follow it because the reasoning was persuasive, rather than because it was bound to follow it.

Therefore, "relevant" on its own is, frankly, suboptimal, but I have been nevertheless persuaded by what my noble and learned friend said. It is the result of a number of heads being put together and the best conceivable solution being found. I was particularly reassured by his answer to the four points raised by the noble Lord, Lord Pannick, not least his answer to his fourth point about the position of the Lord Chancellor, which I am sure everybody in this House would support.

Lord Thomas of Cwmgiedd (CB): My Lords, I will make one or two observations, having raised this matter at Second Reading. I am very grateful to the Minister for his amendment, which certainly brings about clarity and certainty. But, having discussed the matter with others, I want to make sure that the certainty and consequences are clearly understood.

The draftsmanship is elegant, because although under subsection (2) a court may have regard to decisions made by the European Court of Justice after exit so far as they are relevant to any matter before the court, making that provision subject to subsections (3) to (6) means that a court could do so only to clarify the meaning or effect of retained EU law as at the date of exit. It therefore has the effect of confirming what I describe as the ossification of retained EU law as at the date of exit. Only the Supreme Court is permitted to depart from any retained EU case law under the test set out in subsection (5).

Although certainty is therefore brought about, it is at the price of ossification, other than by appeal to the Supreme Court. Ossification is a principle alien to the common law, which, while it has always sought certainty, has also always allowed a significant degree of flexibility to enable the law to develop and adapt to changing times. The principles of common law development are thus denied in the application of retained EU law to any court other than the Supreme Court.

A further feature of the clause is that the Supreme Court is given no guidance as to how it may exercise its right to depart from decisions of the European Court of Justice, save by reference to the 1966 practice statement and the subsequent case law. I think it right therefore to remind the House that it is giving the Supreme Court a very considerable degree of untrammelled power, subject, of course, to the right to reverse any such decision. I am very grateful to the Minister for the assurance he has given that if, in the exercise of that power, decisions are made they will be fully defended, but it is a considerable power.

I will make two further observations. First, a consequence of confining the power to depart from European Court decisions to the Supreme Court may well mean a significant increase in the case load of the Supreme Court. As we know, it has much else to do. I therefore ask the Minister if he would reconsider amending subsection (5) to permit the Courts of Appeal of England and Wales and of Northern Ireland, and the Inner House in Scotland, to be given a similar power. Not only would that alleviate the burden on the Supreme Court, but the experience of many sitting in

the Supreme Court has shown that it is generally greatly assisted if it has a prior judgment of the Court of Appeal or Inner House on the question before it.

The final observation I will make echoes what the Minister said. As was often said in Committee, the Bill seeks to provide for a functioning statute book on exit in the event that there is no agreement with the EU. It has also been said there will have to be significant amendment by at least one further Bill in the event of agreement. If, for example, it is agreed that certain fields of our law or regulation must remain aligned for the purposes of non-tariff barriers, it will be necessary to ensure that the courts can take this into account in interpreting retained EU law and therefore have regard to subsequent European Court decisions to ensure that the law or regulations remain completely aligned. It is therefore, I regret to say, a matter that, in the event of an agreement, we shall have to return to at a subsequent stage. Again, I emphasise my thanks to the Minister for the discussions he has had and the certainty and clarity he has brought about.

Lord Hope of Craighead (CB): My Lords, we have the luxury of having three different formulations for a possible amendment to Clause 6(2) thanks to the ingenuity of the noble Lords, Lord Pannick and Lord Faulks, and the Minister. For my part, I prefer the Minister's version, which seems to be, in a subtle way, a little more generous than the formulation of the noble Lord, Lord Pannick, which is:

"A court … may have regard to anything done … after exit day … where it considers it relevant to the proper interpretation of retained EU law".

The government amendment says,

"relevant to any matter before the court or tribunal".

I suspect that most of these issues will be issues of interpretation, but it is perhaps wiser to have the broader formulation just in case the formula in the amendment from the noble Lord, Lord Pannick, is too tight to include something else.

As for "relevant and helpful" from the noble Lord, Lord Faulks, one can regard something as relevant and unhelpful as well as helpful. Therefore, I am not sure that it really adds very much. Obviously, a court would not do anything with it if it is unhelpful. I suspect that those words are surplus to what one is really talking about.

I have two other points. So far as Amendment 23 is concerned, the additional words:

"Subject to this and subsections (3) to (6)",

are necessary because of the change from the prohibition in the original formula—that is,

"need not have regard to"—

to the new formula, "may". When you use "may" it is as well to have the cautionary words just to make it clear. There is another view: that the amendment is unnecessary because the court will, of course, look at the entire section in understanding what it is supposed to do, but it does no harm to put those words in. In the interests of clarification, it is helpful to have them there.

Finally, I add a word of support to the point the noble and learned Lord, Lord Thomas, made about allowing the Court of Appeal and the Inner House, as well as the Supreme Court, to consider themselves not bound by retained EU case law. One has to bear in mind that the only way these issues will reach the Supreme Court under the formula in the Bill is by means of an appeal. It is not suggested that there would be a direct reference to the court. I am sure the court would not want that, because it would wish to have the issues properly focused by proceedings in the lower court.

I may be corrected if I am wrong, but I suppose that use can be made of the "leapfrog" procedure: if something comes up at first instance, it is possible to leap over the Court of Appeal direct to the Supreme Court. That may be a useful avenue in urgent cases. Usually, the Supreme Court is helped by the decision of the lower court. If the argument is focused at the lower court, it may not agree with it but it will at least have flushed out points that need not trouble the Supreme Court when dealing with the issue at the later stage. There is therefore something to be said for allowing the appeal courts to take up the same position as the Supreme Court in this field.

I simply endorse what the noble and learned Lord, Lord Thomas, said as something that the Government might like to consider. I do not know whether they are considering discussing the matter with the President of the Supreme Court to get her view, but there might be something to be said for that as well.

7.30 pm

Lord Wallace of Tankerness (LD): My Lords, it was obvious from contributions at Second Reading and in Committee that this was a particularly thorny and sensitive issue. It is to the credit of the Government and not least to that of the Minister that they have been in listening mode and that a sensible arrangement has been reached. I heard what he said in response to the questions asked by the noble Lord, Lord Pannick, not least his affirmation of the independence of the judiciary. We have reached a satisfactory point. There is nothing I can usefully add. I will prove the point by not continuing to speak but by resuming my seat.

Lord Spicer (Con): My Lords, I shall give a brief lay man's perspective. Being brief, I shall follow the advice of the late Cecil Parkinson, who said to after-dinner speakers, "Get up, say you're very proud to stand before them and sit down". I shall be a little longer than that, but not very long.

I think that we can all agree on one thing: that pretty well all of us had a fixed view on Brexit before this Bill even reached this House. Tactics is a different matter. I am very interested in the remain tactics so far as the generality of the Bill is concerned; I shall come to the specifics in a moment. They seem to be along the lines of: "We absolutely agree that we are coming out—no, we're serious; we agree we're coming out—but we're coming out to a new single market backed by a strengthened court in such a way that it is quite indiscernible that we have come out in the first place". This debate is about the court and what part it is going to play in all this. I think that it is generally accepted that the court is not only very powerful but foreign—my noble and learned friend brilliantly summed up the foreignness of the law being introduced—and different. It is based on politics rather than on precedent in law.

[Lord Spicer]

I first came to this in 1992. On 3 June of that year, I tabled an Early Day Motion which started the rebellion against the Maastricht treaty, so I have some form. What is the relationship between a debate which was then concerned with the single currency and today's debate and amendment? There is a close relationship with matters to do with the currency. As Henry VIII recognised, the currency is immensely important. "This Realm of England as an Empire" was all about changing our currency back to gain control over it. The currency is vital, and the question is what the relationship between it and today's debate is. If we did not come out of the European Union, I would not rely on us retaining our currency and our control over it. It is unimaginable that the European court would decide to run a competitive trading arrangement with the one country left to manage its own economy. It is therefore of enormous importance not only to the future of this country but to this amendment.

We debated earlier whether it counts for anything that we have become so deeply embroiled in foreign law. I suppose that where I differ from lawyers is that I believe that there are things in politics that matter as symbols, even if the lawyers can prove otherwise. It is therefore vital that we kick out Amendment 21 today.

Lord Goldsmith: My Lords, the noble Lord, Lord Spicer, has made a very interesting observation, but it seems to go wider than the amendments which the House is being asked to approve, so I shall not say anything about the issues that he has raised. He referred to the "remain tactics". I am not aware that there are any remain tactics in relation to this amendment. On the basis that we are leaving, all the amendment is about is making sure that it works properly. That has certainly been the guiding principle as far as I am concerned.

On the formulation of the amendment, I do not want to use the word "helpful", because that is the one word that I do not like—the noble Lord, Lord Faulks, knows that. The problem with "helpful" is that it is a little subjective. A noble Lord, who is not in his place so I shall not identify him, told me in the previous debate that he was going to say something. I said, "Okay. Is it going to be helpful?" He said, "You might think so". Let me tell you that it was not helpful at all. He might have thought it was, which is the problem with "helpful". In any event, I do not imagine that the courts will have regard to something that they do not think is helpful for the purpose of the issue before them, so I am happy with "relevant". The important point is that it will not be perceived as a political decision being made by a court in wanting to follow a decision from the European court. That is the point that we were making in earlier stages on this part of the Bill, and I thank the Minister and his department for dealing with it.

That leads to the fourth question asked by the noble Lord, Lord Pannick, which was about the protection, safeguarding and upholding of the independence of the judiciary. We raised that on the previous occasion; it is hugely important. I join the noble Lord in congratulating the noble and learned Lord, Lord Keen, on coming out and supporting the judiciary at a time when others in government sadly were not. The assurance on that sought by the noble Lord, Lord Pannick, is important, and I am grateful that the noble and learned Lord has succeeded in answering it already—it was slightly out of turn, but it was good. I shall ask him to go a little further, because the obligation to uphold the independence of the judiciary does not rest just on the Lord Chancellor. I believe that the Constitutional Reform Act which set that out imposes that obligation on the whole of the Government, and it is important that it should. We cannot have a situation in which one Minister, in perhaps one of the more political jobs, is able to say unhappy and unhelpful things about the judiciary and think it okay because the Lord Chancellor will stand up and say, "We shouldn't really be doing that; we should be protecting them". It is important to recognise that it is the whole Government. I would single out as well the Attorney-General as one who should uphold the independence of the judiciary. When I was in that office, I certainly regarded it as part of my job, although the Lord Chancellor was in that primary position. I would be grateful if the Minister when he replies for the second time could touch on that point and see what assurance he can give.

The noble and learned Lord, Lord Thomas, raised an important point about ossification, as he put it, which is the one worry I have. As this structure works, so far as the Government are concerned, I think that the effect is that, in the areas to which the subsection would apply, the lower courts will be bound to follow decisions within that scope and it is only the Supreme Court that will be able to depart from them. That leads to the risk that the law will ossify and that cases will have to go to the Supreme Court which really do not need to because they are not that important—although it is important to clarify the law. The noble and learned Lord's suggestion that the Government should look at the possibility of widening this so that the courts of appeal in different parts of the United Kingdom would be able to depart from what would otherwise be binding law is a good one.

I think that this suggestion would also be welcomed by some others—although I have not specifically raised this with them—who are worried about this provision. They are aware that there are rights—for example, in the field of workers' rights—where there is some movement in EU law and are concerned that, as it stands, the retained EU law that we will have will lag behind what happens in other jurisdictions, which we all hope will still be partners, although not partners in the same Union. They are concerned that if this has to go to the Supreme Court it may create an unhappy difference between them. There may be circumstances where we all know that a particular piece of law is right for consideration by the top court, but it takes time to get there and it may not always get there.

I was going to ask the Minister whether he could give any assurances about how the Government would assist, at least where they are the other party, in getting cases to the Supreme Court where there is good reason to think that a relevant decision will be departed from. But it seems to me that opening this up to the courts of appeal would actually be a neater and more traditional

way of doing that. I look forward to hearing what the Minister has to say about that. I should have mentioned at the outset that my name stands on the original amendments as well.

Lord Keen of Elie: My Lords, I am obliged to noble Lords for the contributions that have been made. With respect to the point raised by the noble and learned Lord, Lord Goldsmith, about the position of the Lord Chancellor and the rest of the Government, perhaps I might repeat what I said earlier: I assure the House that the whole Government, the Lord Chancellor especially, steadfastly defend the independence of the judiciary. I believed I had said that before but I am happy to repeat it.

On this question of the ossification of the law, which has been raised, particularly by the noble and learned Lord, Lord Thomas—indeed, it is a matter that we have discussed—we have to remember that until exit only the Court of Justice of the European Union is in a position to see us depart from a previous decision of that court. The timeline for taking a case through the CJEU does not bear scrutiny in comparison with the timeline for taking a case to the United Kingdom Supreme Court. The feeling of the Government is that if we are removing the Court of Justice of the European Union, it is appropriate to put in its place the United Kingdom Supreme Court in that context, and that is what we have sought to do and what we intend to do.

That is a policy decision, I appreciate, and there is a suggestion that perhaps it can be brought down to the Inner House of the Court of Session, and the Court of Appeal. That has been considered, but we do not feel at this time that that is the right way forward, so I cannot give any reassurance that we intend to revisit that point. I feel that the decision we have made is the appropriate one in the circumstances but clearly we will have to consider in due course whether that gives rise to any difficulties with respect to the reference of cases to the Supreme Court.

As the noble and learned Lord, Lord Goldsmith, is aware, it is open to the Supreme Court to, in effect, accelerate cases that it considers to be of particular materiality of importance. Therefore, that facility is already available. But I have discussed this matter with the noble and learned Lord, Lord Thomas, and it is not our intention to revisit it before Third Reading. I hope that noble Lords will be able to support the government amendments.

7.45 pm

Lord Pannick: I thank the Minister for giving the assurances that I sought on each of the four points that I raised. He has been exceptionally helpful in addressing these issues under Clause 6 which have caused great concern, and Clause 6 is much improved by the government amendments. I beg leave to withdraw Amendment 21.

Amendment 21 withdrawn.

Amendment 22 not moved.

Amendments 23 to 25

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

23: Clause 6, page 3, line 34, at beginning insert "Subject to this and subsections (3) to (6),"

24: Clause 6, page 3, line 34, leave out "need not" and insert "may"

25: Clause 6, page 3, line 35, leave out from "the EU" to the end of line 36 and insert "so far as it is relevant to any matter before the court or tribunal."

Amendments 23 to 25 agreed.

Amendment 26

Moved by ***Lord Callanan***

26: After Clause 6, insert the following new Clause—

"Status of retained EU law

(1) Anything which—

(a) was, immediately before exit day, primary legislation of a particular kind, subordinate legislation of a particular kind or another enactment of a particular kind, and

(b) continues to be domestic law on and after exit day by virtue of section 2,

continues to be domestic law as an enactment of the same kind.

(2) Retained direct principal EU legislation cannot be modified by any primary or subordinate legislation other than—

(a) an Act of Parliament,

(b) any other primary legislation (so far as it has the power to make such a modification), or

(c) any subordinate legislation so far as it is made under a power which permits such a modification by virtue of—

(i) paragraph 3A, 3C(3)(a) or (4)(a), 3F(3), 5A(3)(a) or (4)(a), 5B(2)(a) or 5C(3) of Schedule 8,

(ii) any other provision made by or under this Act,

(iii) any provision made by or under an Act of Parliament passed before, and in the same Session as, this Act, or

(iv) any provision made on or after the passing of this Act by or under primary legislation.

(3) Retained direct minor EU legislation cannot be modified by any primary or subordinate legislation other than—

(a) an Act of Parliament,

(b) any other primary legislation (so far as it has the power to make such a modification), or

(c) any subordinate legislation made under a power which permits such a modification by virtue of—

(i) paragraph 3A, 3C(2), 3F(3), 5A(2) or 5C(3) of Schedule 8,

(ii) any other provision made by or under this Act,

(iii) any provision made by or under an Act of Parliament passed before, and in the same Session as, this Act, or

(iv) any provision made on or after the passing of this Act by or under primary legislation.

(4) Anything which is retained EU law by virtue of section 4 cannot be modified by any primary or subordinate legislation other than—

(a) an Act of Parliament,

(b) any other primary legislation (so far as it has the power to make such a modification), or

(c) any subordinate legislation made under a power which permits such a modification by virtue of—

(i) paragraph 3A, 3C(3)(b) or (4)(b), 3F(3), 5A(3)(b) or (4)(b), 5B(2)(b) or 5C(3) of Schedule 8,

(ii) any other provision made by or under this Act,

(iii) any provision made by or under an Act of Parliament passed before, and in the same Session as, this Act, or

(iv) any provision made on or after the passing of this Act by or under primary legislation.

(5) For other provisions about the status of retained EU law, see—

(a) section 5(1) to (3) (status of retained EU law in relation to other enactments or rules of law),

(b) section 6 (status of retained case law and retained general principles of EU law),

(c) section 13(2) and Part 2 of Schedule 5 (status of retained EU law for the purposes of the rules of evidence),

(d) paragraphs 8 and 9 of Schedule 8 (status of certain retained direct EU legislation for the purposes of the Interpretation Act 1978), and

(e) paragraph 19 of that Schedule (status of retained direct EU legislation for the purposes of the Human Rights Act 1998).

(6) In this Act—

"retained direct minor EU legislation" means any retained direct EU legislation which is not retained direct principal EU legislation;

"retained direct principal EU legislation" means—

(a) any EU regulation so far as it—

(i) forms part of domestic law on and after exit day by virtue of section 3, and

(ii) was not EU tertiary legislation immediately before exit day, or

(b) any Annex to the EEA agreement so far as it—

(i) forms part of domestic law on and after exit day by virtue of section 3, and

(ii) refers to, or contains adaptations of, any EU regulation so far as it falls within paragraph (a),

(as modified by or under this Act or by other domestic law from time to time)."

The Minister of State, Department for Exiting the European Union (Lord Callanan) (Con): My Lords, the way in which retained EU law will be treated in our domestic statute book—what has been termed the "status" of EU law—is undeniably an important issue. It has been one of the key themes of our debates on the Bill, and the Government's attempts to deal with it are woven throughout the Bill. The Government have always recognised the importance of getting this right—above all, in the context of the question of amendability.

These amendments, which deal with the amendability of retained EU law by secondary legislation, are to a large extent about ensuring its enhanced protection. As noble Lords will know, the House debated one way of giving enhanced protection to some parts of retained EU law last Wednesday, when it agreed to add a new clause to the Bill. Before setting out the government amendments, I will take a moment to explain to the House why the Government consider that the approach adopted last Wednesday is not the answer.

Amendment 11 in the name of the noble Baroness, Lady Hayter, carried last Wednesday, prevents crucial corrections being made in time for exit day. By failing to define key terms, and by introducing into the Bill arguably undefinable concepts such as "technical changes", it introduces a high level of risk to attempting to take forward even the most uncontentious of corrections by secondary legislation. We have always been clear that most corrections, however innocuous and benign, require some limited policy choices.

Those corrections are how we ensure that current protections continue to operate. Our analysis is not complete but we believe that a very significant proportion of the planned secondary legislation programme, if made, would be at real risk of legal challenge, so the result of that amendment could be an enormous increase in the volume of needless primary legislation, which this House would then have to consider before exit day. In the end, we might be unable to achieve our core objective of ensuring a functioning statute book on exit day.

The volume of legislation required to keep pace with developments is already too great for it all to be done through primary legislation and this is likely to increase when we take on the legislative responsibilities of the EU. It is incumbent upon all of us to ensure that we put in place a balanced system. That system must enable the House to fully scrutinise the most significant changes to legislation and maintain the existing protections that we all value, while allowing for flexibility to keep pace with a fast-evolving world. It would be a dereliction of our duty to put in place a system which leaves Parliament unable to make important changes or updates which would enhance existing protections, such as the regulating of new hazardous chemicals or extending standards to new marine contaminants.

Parliament has debated at great length the speed at which our legislation should diverge from that of the EU but, whatever that pace, we must not leave Parliament hamstrung. The Government's approach is to respect the balance between maintaining protections and the flexibility to reflect developments.

I know some noble Lords were in favour of deeming elements of retained EU law converted under Clauses 3 and 4 that are not already part of our domestic legislation to be one or another type of domestic legislation. Unfortunately, it is not that simple. For example, to deem an EU regulation primary legislation has all sorts of impacts, ranging from the problematic to the bizarre, such as requiring it to be printed on vellum and stored in the Queen Elizabeth Tower. Some noble Lords also wish to treat all retained EU law that is not already domestic legislation as if it were primary legislation. I recognise that noble Lords who have advocated this have the best of motivations, but it would leave the law so rigid and inflexible as to be virtually inoperable. The EU adopted just under 500 amending pieces of tertiary legislation in 2017. If this Parliament takes on the role of doing the same when those powers are returned to this Parliament by primary legislation only, we face a serious risk of these regimes ceasing to function.

I know the House loves examples, so let me provide one. Say that the Commission adopts delegated Acts under the biocidal products regulation to restrict active substance entry to the market. This is clearly an important

public health matter which should continue to be adjusted rapidly and without primary legislation. Incidentally, that is also something that Amendment 11 would prevent. There are many similar examples in EU legislation and they vary as much as our domestic delegated powers. Therefore, instead of treating all direct EU legislation as domestic primary legislation for all purposes, the Bill sets out how retained EU law is to be treated in a number of specific situations, such as for the purpose of the Human Rights Act. Our amendments to the Bill for several of those purposes draw a similar distinction to that which the noble Baroness, Lady Bowles, has drawn in her Amendment 39. That is that EU measures adopted under co-decision or ordinary legislative procedure are to be treated as primary legislation.

We have proposed, broadly, that EU regulations and Clause 4 rights should be treated as primary legislation for the purpose of amendability and that tertiary legislation should be treated as subordinate legislation. Regulations and Clause 4 rights will therefore be amendable only by primary legislation and the very limited stock of powers to amend primary legislation on the statute book. Even then, those powers will operate only where the context will permit. This will ensure that the frameworks of retained EU legislation are maintained and can be adjusted only in the same way Acts of Parliament can, but that the technical matters underneath them can be adjusted by subordinate legislation to react quickly to the changing circumstances of the day, as now.

Our amendments provide that, in the future, Parliament will need to agree any new delegated powers to amend a specific regulation, or regulations. This House will be the gatekeeper that ensures there is no bonfire of EU regulations. This will include all the powers that we are transferring under the Bill from the Commission to UK Ministers and authorities. These are generally very tightly drafted and it will have to be clear to the House where and how they can amend regulations. If Ministers cannot justify this to noble Lords, they will not be granted these powers. However, I hope your Lordships will agree, for example, that the Secretary of State should be able to adopt measures such as the wine oenology implementing regulation to ensure that our wine producers are not left behind the rest of the world as technology advances. I know that would be a subject close to many noble Lords' hearts.

Beyond amendability, there are a limited number of other places where matters turn on whether a law is found in primary or secondary legislation. This is the case in relation to the Human Rights Act, where the remedies available in response to challenges are different in different cases. We have therefore also reflected the distinction that EU regulations are to be treated as primary and EU tertiary legislation as subordinate for the purposes of the Human Rights Act. This will mean that, as with primary legislation, claimants will be able to receive a declaration of incompatibility in the event of a successful challenge to an EU regulation. I should point out that this is a very rare measure, which I am not aware that Parliament has ever ignored. For challenges against amendments to EU tertiary legislation, our courts may, if appropriate, strike down the legislation.

We have addressed in the Bill the areas of importance where matters turn on the distinction between primary and subordinate legislation. Our discussions outside this Chamber, including with academics and others, have not identified any other such matters. I am happy to return to the issue at Third Reading if other areas are raised in debate.

I have not yet addressed directives, which I know the noble Baroness, Lady Hayter, is very interested in. Directives, of course, do not form part of our domestic legislation. They have already, over the years of our EU membership, been implemented in primary legislation and under a range of delegated powers but principally in regulations made under Section 2(2) of the European Communities Act. The status of these regulations is clear. They are and should remain statutory instruments. I know that these regulations contain important protections which some noble Lords wish to ensure cannot be easily eroded, but it would be constitutionally deeply questionable and practically unnecessary to attempt simply to declare these instruments to be anything different.

All regulations made under Section 2(2) of the ECA will be preserved following the repeal of that Act by the Bill. There will then be almost no powers on the statute book; I cannot be absolutely definitive, but my officials have found only a handful which, within the scope of the policy area, might be able to amend regulations made under Section 2(2). Therefore, almost all of these regulations will need to be modified by primary legislation or new powers, which this House would of course have to approve. Nevertheless, the Government have heard the concerns raised in the House about the level of scrutiny of modification of these regulations. We are committed to ensuring that the protections provided in regulations made under the ECA are maintained throughout the process of exit, and that any future modifications as the Government continue to build on these protections are properly scrutinised.

The Bill already provides for statements in relation to the SIs under it, so government Amendment 112A therefore requires Ministers and other authorities making statutory instruments under powers outside this Bill after exit day to make statements explaining the "good reasons" for any changes to regulations made under Section 2(2) of the ECA and the effect of the amendment or revocation on retained EU law. There will be no escaping the scrutiny of this House.

I am sorry for the detailed explanation, but I hope I have provided an appropriate explanation of why these amendments both give clarity to the status of retained EU law and are the right way to protect it as we transfer it on to our statute book. I recognise that the status this legislation should hold is a particularly complex issue, on which legal and academic minds have differed. I pay tribute to all noble Lords who have applied themselves to the task. We have listened and I appreciate all the contributions that have been made. Our amendments reflect a sensible approach, one that recognises and reflects the existing hierarchy within EU laws, balances the need for effective parliamentary scrutiny while giving Parliament the flexibility it needs

[LORD CALLANAN]
to amend an extremely large body of legislation, and allows this place to truly take back control of our laws. I beg to move.

Lord Pannick: My Lords, your Lordships' Constitution Committee recommended at paragraph 51 of our report—HL 69—that the Bill should address the legal status of retained EU law; that is, whether it has the status of primary legislation, secondary legislation or something distinct. I am pleased that the Government have considered this matter—I am grateful to the Minister—and have produced the amendments in this group. My understanding is that they address the problem by ensuring that any domestic law which becomes retained EU law under Clause 2 continues to have the same legal status that it has at the moment: it is either primary legislation or secondary legislation.

In relation to retained EU law under Clauses 3 and 4, the amendments do not so much confer a legal status as address the problem by reference to the circumstances in which the retained EU law can be modified. The provisions are complex, and, I fear, necessarily so, given the inherent difficulty of the exercise.

8 pm

My remaining concern is that by addressing the question of legal status by reference to the power of amendment, with the exception of saying that retained EU legislation is primary legislation for the purposes of the Human Rights Act under paragraph 19 of Schedule 8, the Bill continues to provide less than adequate guidance on other issues which may arise in relation to retained EU law. The legal status of retained EU law matters, as the Bingham Centre's report identified, if, for example, the court is asked to decide which rule takes priority if there is a conflict between different elements of retained EU law or if the question arises on what grounds may the content of retained EU law be challenged in court as invalid and what remedies are available if the legal challenge is successful. Paragraph 1 of Schedule 1 prevents a challenge on EU law grounds, but not, as we were told in Committee, on domestic law grounds if the instrument has the status of subordinate legislation.

I was pleased to hear the Minister helpfully say that he is happy to return to these issues at Third Reading. They are complex and the amendments are complex. I hope that before Third Reading the Minister will be prepared to meet noble Lords and noble and learned Lords who have any concerns in relation to this, but I am very grateful to the Minister and the Bill team for the care and attention that has been given to this matter.

Baroness Bowles of Berkhamsted (LD): My Lords, my Amendment 39 is buried among the government amendments in this group. I will speak to it and in doing so elaborate some questions I have concerning the government amendments. I thank the Minister—the amendments sounded better when he explained them than when I read them. I liked that he kept repeating that it will require primary legislation to change what I shall describe in a shorthand way as policy-making legislation, which is what my amendment is about.

My amendment is short and concerns life after Clause 7—life after implementation of the Bill—which is this Parliament's legislative future. I hope this group of amendments paves the way to ensure that Parliament has a principal role, which is not how I took it when I read them. As the Minister said, my amendment provides that retained EU law enacted in the EU by co-decision—the ordinary legislative procedure—may be modified only by an Act of Parliament. I know that the Minister knows that "the ordinary legislative procedure" is just the new name for co-decision under the Lisbon treaty.

I selected that legislation, which is a subset that I spoke about in Committee, quite simply because the European Parliament had a full scrutiny and amending role in making the legislation and in any amendments to it, and I do not see why in future this Parliament should be in a lesser place than the European Parliament. The Minister has perhaps gone some way towards pointing out that that might be the case, but I will read what he said carefully to make sure. I have covered the full range of matters covered by co-decision. They are things such as company law, financial services and other issues that were not in the sensitive areas that were covered in Amendment 11 which we voted through last Wednesday. My amendment covers directives as well as direct EU regulations. It is important that policy-making legislation is not changed too easily. Again, the Minister may have sown seeds to put my mind at rest on that, but I want to examine what he said more carefully.

Another reason why it is very important for this legislation to come to Parliament to be changed is that, despite the good efforts of the EU committees, there are quite large swathes of legislation about which this Parliament is relatively ignorant. I do not say that disparagingly; it is just the way the law was made. As we go forward, it is very important that this Parliament clearly understands laws that affect major industries, even if subsequently it chooses that some of them are to be delegated to regulators. We have a system of delegation. Sometimes there is regrettably rather too much delegation, but it is very clear that if any of that is going on, it needs to have full scrutiny.

My final point relates to where we are going to use existing legislation to amend retained EU legislation after it has been converted. The legislation that we might use was not made to cover legislation that used to be done in the EU because it was well known that those policy areas were reserved to the EU. Extending the scope of that legislation so that policy-making legislation can be amended by secondary legislation is extending it further than was contemplated, and it may go beyond the reasonable expectations of that legislation. Constitutionally, that gives me a problem. Perhaps some members of the Constitution Committee can mention this. I have circled paragraph 3 of Schedule 8, which refers to powers on subordinate legislation before exit day,

"as being capable of being exercised to modify … any retained direct EU legislation".

I submit that none of that existing legislation could have been made in contemplation of amending that type of legislation. Unless it was clearly elaborated

that that was the case, I am unhappy with that provision as it originally stood and as it now stands. I am a little more unhappy with the amendment to Schedule 8 because it has been stretched to cover the rights that are going to be retained by virtue of Clause 4, which was not in the original paragraph 3 of Schedule 8. I am a little worried about having rights taken away by legislation that was not made in contemplation of taking those rights away. Those are the reservations I still have and I would welcome the opportunity to discuss with the Minister whether we can sort them out and return to this at Third Reading.

Lord Cormack: My Lords, I thought the Minister was a little harsh on the noble Baroness, Lady Hayter, and on the amendment which the House passed by a very large majority last week, but let that pass for the moment. I am grateful to my noble friend for making a genuine attempt to understand some of the concerns which can be summarised very briefly. This House is very concerned that taking back control means Parliament taking back control, not the Executive amassing more power to themselves, so he must understand that we will all want to read what he said. Some of it seemed very helpful but we will want to look very carefully at what the Government are actually proposing. It seems a gentle move in the right direction but, just as we have to consider carefully what the Minister has said, I say to him with great respect that he has to reconsider what the House decided last week, because it decided by a very large majority.

A final word of thanks to my noble friend: he has been dismissive of a number of pleas that some matters should be returned to on Third Reading. One understands why, but at least he has been emphatic tonight in realising that we will have to come back to some matters on Third Reading, and for that I thank him.

Lord Goldsmith: My Lords, I think three things emerge from that. First, there is a recognition, with thanks, that the Minister and the department have accepted that their previous approach to how you identify the status of retained EU law is not acceptable. That was the primary point made in the reports that we discussed at earlier stages of the Bill, and that is the first point that the noble Lord, Lord Pannick, made. I entirely agree that that is undoubtedly a step in the right direction.

The second point that emerges is the one made by the noble Lord, Lord Cormack, that this touches on the amendment passed by the House and moved by my noble friend Lady Hayter, and the Government therefore have to take account of what this House has said. That leads to the third point, which is that this is very complicated, which was apparent from what was said by the noble Baroness, Lady Bowles, and it is perhaps difficult for us all to completely grasp the implications. Under normal circumstances it would have been enormously helpful if the Government had tabled something like this at an earlier stage so that it could have been considered by our very expert committees, the Constitution Committee and perhaps the Delegated Powers Committee. It makes it more difficult for us. However, the Minister has recognised that more needs to be said about this and more needs to be discussed, which is why he proposes that—as the noble Lord, Lord Cormack, says, perhaps alone of the matters that we have discussed—this issue can come back at Third Reading.

I am not quite sure at the moment exactly what the Minister has in mind. Does he want to press these amendments today and then discuss them—or just leave them until Third Reading, which would be very welcome? I am glad that he is giving a nod that that is what he has in mind, which is what I would hope. In those circumstances, meetings with noble Lords, and indeed noble and learned Lords, can be organised to consider the matter further. Obviously we will read what he said very carefully in *Hansard*, and if there is any further information that the Minister can give before the meetings then that would be helpful as well. On that basis, we express qualified support for the principle of the movement that the Minister has indicated.

Lord Callanan: My Lords, I can be very brief in the light of the debate. I thank all noble Lords who have contributed. I express particular thanks to the noble Baroness, Lady Bowles, for tabling her amendment, which has resulted in this helpful debate.

As I said in opening, I recognise that the state of this legislation is a complex and vexed issue. As a non-lawyer, I have been struggling to get my head around it all as well. The approach that we have taken is one of pragmatism, recognising the existing hierarchy within EU law and seeking to balance effective scrutiny with the need to ensure that the law continues to function. This has not been an easy task but obviously I believe that the solution that we have arrived at is the right one. I accept that the remarks I made earlier were long and detailed and Members will want to reflect on them, so I shall repeat what I said: we think we have addressed the areas of importance where matters turn on the distinction between primary and subordinate legislation. Our discussions so far with many both inside and outside this Chamber have not identified any other such matters, but I repeat that I am happy to return to the issue at Third Reading if other areas are identified.

I thank my noble friend Lord Cormack for his contribution. I hope my remarks were not seen as dismissive of the House's amendment the other day; of course we accept the decision that was made, but I thought it helpful for us to outline our initial thinking on the possible effects of that amendment at the earliest possible occasion. I also thank the noble Lord, Lord Pannick, for his remarks. I am happy to confirm that either I or officials are happy to meet any other noble Lords who have concerns once they have had a chance to read the remarks that I made earlier today. With that, I hope I have convinced the House that our approach is the right one, and I beg to move.

8.15 pm

Lord Cormack: My Lords, I thought that when my noble friend nodded in assent to the noble and learned Lord, Lord Goldsmith, he was indicating that he would be bringing back something a little more extensive at Third Reading following conversations that were going to be held.

Lord Callanan: I wanted to move the amendments now. I am happy to reflect further if any points are identified in the meantime that can be brought forward at Third Reading, but I still want to move the amendments.

Lord Goldsmith: I was asking the Minister whether he was prepared to leave these amendments to be moved at Third Reading or whether he wanted to proceed with them and then allow amendments to them. I had understood from the body language that was exchanged between us that he would move them at Third Reading, which would allow time for discussions and possible tweaking or perhaps something more radical. If he is going to move them now, though, it is important that he confirms he would not have a problem if amendments to his amendments were put forward at Third Reading, because that at least would mean that whatever was required could be dealt with then, rather than him moving his amendments now and for us to be told at Third Reading, "Sorry, too late, that amendment has been passed. You can't bring it back". Could he confirm that? Again he is nodding but I am reluctant to interpret the nod without an element of verbal assurance. Perhaps he can help with that.

Lord Callanan: Yes, I am happy to provide that assurance. As I said, it was a long and detailed speech on this area, and Members will want the opportunity to read it in detail and reflect further on it. I think I want to move my amendments now while indicating that, if there are still concerns, we would be prepared to return to the issue at Third Reading.

Lord Goldsmith: Forgive me; would he accept that amendments could be made even to these amendments? I am not suggesting that he will accept our amendments, but does he accept that they can be made?

Lord Callanan: I accept that, yes.

Amendment 26 agreed.

Amendment 27

Moved by ***Baroness Brown of Cambridge***

27: After Clause 6, insert the following new Clause—

"Maintenance of EU environmental principles and standards

(1) The Secretary of State must take steps designed to ensure that the United Kingdom's withdrawal from the EU does not result in the removal or diminution of any rights, powers, liabilities, obligations, restrictions, remedies and procedures that contribute to the protection and improvement of the environment.

(2) In particular, the Secretary of State must carry out the activities required by subsections (3) to (6) within the period of three months beginning with the date on which this Act is passed.

(3) The Secretary of State must publish proposals for primary legislation establishing a duty on public authorities to apply principles of environmental law established in EU law or on which EU environmental law is based in the exercise of relevant functions after exit day.

(4) The Secretary of State must publish proposals for the establishment before exit day of an independent institution with the purpose of ensuring compliance with environmental law by relevant public authorities.

(5) In making proposals under subsection (4), the Secretary of State must include proposals to the effect that—

(a) the chair of the independent institution must be appointed by the Secretary of State with the agreement of the first ministers of the devolved administrations and the approval of a committee of either House of Parliament charged with approving such an appointment;

(b) the independent body must receive funds judged by the Comptroller and Auditor General to be sufficient for it to carry out its functions;

(c) the independent body must report annually before 30 June on compliance with environmental law by relevant public authorities, including the Secretary of State's compliance with the terms of the Statement of Environmental Policy published in accordance with subsection (7); and

(d) the Secretary of State must publish a response to such a report annually before 30 September.

(6) The Secretary of State must publish—

(a) a list of statutory functions that can be exercised so as to achieve the objective in subsection (1); and

(b) a list of functions currently exercised by EU bodies that must be retained or replicated in UK law in order to achieve the objective in subsection (1).

(7) The Secretary of State must before 1 January 2020 lay before Parliament a Statement of Environmental Policy which sets out how the Government will give effect to the principles set out in subsection (8).

(8) The principles referred to in subsection (3) include—

(a) the precautionary principle as it relates to the environment,

(b) the principle of preventive action to avert environmental damage,

(c) the principle that environmental damage should as a priority be rectified at source,

(d) the polluter pays principle,

(e) sustainable development,

(f) prudent and rational utilisation of natural resources,

(g) public access to environmental information,

(h) public participation in environmental decision making,

(i) access to justice in relation to environmental matters, and

(j) full regard to the welfare requirements of animals as sentient beings.

(9) Before complying with subsections (3) to (7) the Secretary of State must consult—

(a) each of the devolved administrations;

(b) persons appearing to represent the interests of local government;

(c) persons appearing to represent environmental interests; and

(d) such other persons as the Secretary of State thinks appropriate."

Baroness Brown of Cambridge (CB): My Lords, I move this amendment on behalf of the noble Lords, Lord Deben and Lord Inglewood, the noble Baroness, Lady Jones of Whitchurch, and myself. The protection and improvement of our environment is critical to our health and well-being, to our economic growth and for future generations. The Government recognise the importance of this, as we have been reminded on several occasions during the Bill. The Prime Minister has stated that this will be the first Government to leave the environment in a better state. The Environment Secretary, the right honourable Michael Gove MP, has announced a consultation, first some months ago and

repeated subsequently, on the establishment of a world-leading environmental watchdog to replace and indeed improve on the current EU role in compliance. The intent is clear, and very welcome.

However, nothing has happened, so the risk is growing that on exit day there will be a serious environmental governance gap. There are two major elements of this gap. The first is that the Bill does not adequately retain the key roles of EU environmental principles—that is, interpreting the law, guiding decision-making and as a basis for legal challenge, as the noble Lord, Lord Deben, highlighted on Amendment 12 last Wednesday. The second is that the Bill does not provide a replacement for the role of the EU in holding the Government to account on environmental issues—for example, when key air or water quality targets are missed.

Action to address the governance gap is needed urgently, because exit day is less than a year away; because the implementation period is not yet a certainty; because consultation can be delayed, especially when, as it appears, some departments, including the Department for Transport and the Treasury, would not welcome an independent environmental watchdog to hold the Government to account; and because establishing a new watchdog in law and appointing its members will not be quick.

The amendment aims to reduce the risk for the Government that leaving the EU will lead to failure to achieve their stated goal—that of maintaining and improving the environment. To this end, it requires the Secretary of State to publish proposals to establish before exit day an independent environmental watchdog; proposals for primary legislation establishing a duty on public authorities to apply EU environmental principles in the exercise of relevant functions after exit day; and a list of functions currently exercised by EU bodies that must be retained or replicated in UK law. This is urgent, so it requires the Secretary of State to publish this within three months of the date of this Act being passed.

The amendment reduces the risk to our environment of EU exit and helps the Government to deliver on their strong and welcome environmental commitments. I beg to move.

Lord Inglewood (Con): My Lords, as much as by anything else, I was prompted to sign the amendment because I was unclear as to precisely what the Government's plans might be in this area. As we all know, one of the basic principles of the Bill is to parachute existing EU law into domestic legislation so that on Brexit day minus one and Brexit day plus one, the rules to be adhered to will be the same—albeit that the constitutional framework and administrative structures around them may be quite different—so that, in the real world, it is a seamless transition.

Failure to bring that about will not only breach the principles behind the Bill but, probably at least as important, it is likely to bring chaos. One attribute of environmental law—I generalise—is that it is principles-based in its operation, involves a whole range of bodies and is in turn integrated with a whole lot of laws of different kinds around the world. I am concerned that the way that this sector works could mean that the seamless transition that we are looking for and discussing will not work in this context in accordance with the principles behind the Bill, because of recent political discontent echoed about some aspects of it. I am looking for reassurance.

Lord Deben (Con): My Lords, the Government have been very clear in their promises, and this has helped many in their consideration of the Bill. I know that the Minister and I do not always agree, but I must say that I have been very impressed by the way the Secretary of State for Defra, with whom I also do not agree on the subject of the European Union, has been determined to ensure that our exit from the European Union will not mean that the protections we now have for the environment would be lessened. He has made that clear again and again.

I am indebted to a noble friend who pointed out that the Secretary of State nodded vigorously when the right honourable Sir Oliver Letwin said in the House of Commons:

> "I am now confident that the Government will bring forward proper new primary legislation to create an independent body outside the House with prosecutorial powers that will replace the Commission as the independent arbiter to enforce environmental rules and to ensure that the Government are taken to task in court without the need for the expense of class action lawsuits".

I think the whole House can accept that, wherever else we may disagree, we have come to the conclusion that the Government are serious in their intention in this area.

As chairman of the climate change committee, I have been very happy to celebrate recent decisions by the Government about the environment. The request for us to advise on how we might implement the decisions of the Paris agreement to move towards the goal of 1.5 degrees is welcome to all of us. I therefore want to see the promises made by the Secretary of State for Defra and the Government as a whole carried through. I am sure my noble friend understands why we have tabled the amendment: because of the urgency and uncertainty to which the noble Baroness, Lady Brown, referred.

Sir Oliver Letwin was very clear about this. He said:

> "I am delighted to say that we have talked sufficiently to Ministers to be confident that they will be bringing forward both the consultation and the legislation in time to ensure that it is in place before we exit the EU. Of course, I would also want to wait until January to see the consultation to ensure that that engagement is fulfilled, and I am sure that the other place will want to look at what is said in the consultation and to assure itself that the new statute is coming forward before it consented to allow this Bill to proceed".—[*Official Report*, Commons, 12/12/17; col. 227.]

That is why we have tabled the amendment. I know that my noble friend will accept that it contains only what the Government have said they wanted to do. It has done so in a way that, as nearly as possible, reflects the Climate Change Act, which has been so successful, and which the Government have been foremost in celebrating in this, the 10th year of it having been passed. What we want is to engage the Government in their own assertion. In this, I have to say that we have been supported right across the House. The Liberal Democrats, for example, have done a great deal to press this. The Cross-Benchers, the Labour Party and the Conservative Party have united in seeing this, as have Brexiteers and non-Brexiteers. I am sorry

[LORD DEBEN]
that my noble friend Lord Spicer is not in his place, but this is no plot of remainers; it is only a reflection of what the Government have promised to do.

I finish by saying to my noble friend that the reason we want this in the Bill is that it is crucial for people concerned about the environment to know in detail that this is protected. The problem with the environment, as my noble friend Lord Inglewood said, is that its protection is often not in individual laws but in the acceptance of the precautionary principle that we should not do anything that damages the environment. It is those things that make the difference.

I was converted to all this as a very young man when I first read Rachel Carson's book *Silent Spring*. It reminds us that there was a time when people ignored all this. They did not think about it or believe that it mattered. We have moved from that to a point at which these principles are accepted. If we leave the European Union, there will be no way in which that is included within our legislation because the protocols, preambles and indeed, the generalised acceptances, are removed from this Bill.

This therefore is a reflection of what the Government say they want and adds nothing to it. I very much hope that they will feel that this is a moment when, however different we may be—I have sometimes been rather tough on the Government's views—this at least is something that can be wholly accepted because it will carry through what the Government themselves said they would do.

8.30 pm

Baroness Bakewell of Hardington Mandeville (LD): My Lords, I rise to support Amendment 27 and to fully support the comments of the noble Baroness, Lady Brown of Cambridge, and the noble Lords, Lord Deben and Lord Inglewood. As noble Lords from all sides know, this amendment was strongly supported on the Liberal Democrat Benches in Committee and it should be key to the environmental principles of all in this House

Given the time, I do not wish to rehearse all the arguments deployed in Committee, but I emphasise strongly the importance of proposed new subsection (4). It is vital that an independent institution is set up before exit day to ensure total compliance with environmental law by all public bodies. If a public body is not responsible to, and monitored by such a body, how can the public expect that private bodies will uphold environmental law?

The public at large have now taken the state of the environment to their hearts. They wish to see our lands and oceans preserved in a fit state for both animal and human habitation. We in this House have a duty to ensure that we do our utmost to make this happen for them. The Secretary of State for Defra has given a commitment to setting up a monitoring body, but we have yet to see the detail. There is talk of an environmental Bill in the future. Given the current parliamentary timetable, this crucial Bill could be some way away.

We cannot afford to leave this matter to chance. We must ensure that at the point of exit in March next year, the public, politicians and all those who care about the environment will know that an independent body is in place with the sole purpose of monitoring compliance with environmental law, as it stands today, and is not watered down to suit the interests of others. The Secretary of State has made it clear that he wishes Britain's environmental watchdog to be a world leader. We should help him to achieve this by passing this amendment and ensuring that there can be no wriggle room for those wishing to avoid the principle of the "polluter pays". This issue is too important to be confined to party politics. Should a vote be called, I urge all Peers across the House, along with those of us on the Liberal Democrat Benches, to support the amendment. In the meantime, I wait to hear what the Minister has to say on this matter.

Lord Cormack: My Lords, there are plenty of people around to go into the Lobbies tonight, so it is terribly important that the Minister responds very clearly to my noble friend Lord Deben and the others who have spoken.

We must not be complacent about this. We are a land not without litter; we are a land which still has polluted waterways; we are a land with beaches that are, frankly, a disgrace. Much has been achieved, and much that has been achieved has been because of standards laid down by the European Union. We wish to go not backwards but forwards. I made two long journeys yesterday: I drove from Lincolnshire to Staffordshire and from Staffordshire to London and, as always when I am driving, I was deeply depressed by the amount of litter in our countryside. We want a body to be set up that has real teeth, we want regulations and real penalties, and we want a land that we can all be proud of, even those who believe that mistakes have been made over the whole issue of the European Union.

As my noble friend Lord Deben so eloquently said, this ought to be an issue on which we can all unite. The amendment is extremely good, and I hope the Minister can assure us that something very like it will be in the Bill before we send it back to another place.

Lord Smith of Finsbury (Non-Afl): My Lords, I rise very briefly to give strong support to this amendment and assert the need for an independent environmental institution. As the noble Lord, Lord Deben, said, this is entirely in accord with what Ministers have said they want. However, it is really important that, when the actions are put on to the words, we get the real protections that we require.

I well remember when the coalition Government came in in 2010; I was chairman of the Environment Agency at the time. The then Secretary of State for Defra made it very clear to me that she welcomed private advice from the Environment Agency about the condition of the nation's environment, but she did not want us to make waves in public—she did not want us to give public, independent advice. It is absolutely crucial that, whatever body is established after the Bill passes, it will give public, independent advice and be effective in holding the Government's feet to the fire to make sure our environmental protections are safeguarded.

Baroness Jones of Moulsecoomb: I think it is obvious that I rise in support of Amendments 27, 28 and 41. In Committee, there were so many noble Lords who wanted to put their name to the amendment that I was not able to. Of course, they have my wholehearted support and I agree with everything that has been said so far. The Government are well aware that the public care very much about the environment these days, and not accepting this amendment will be a real problem for the Government. They will hear a lot from the public.

I was speaking to a Conservative Peer last week, and that Peer was shocked and surprised that the Government were not bringing over all EU law into UK law as they promised. I shall save that Peer's blushes by not revealing a name. I then asked that Peer if they ever listened to anything I said in the Chamber, and they said no. But the point is that that person was shocked because it was believed that the Government would honour their promise to bring over all EU law, but they are not doing so. I do not want to go on again about that, but I feel very cheated, quite honestly, and the Government have to understand just how angry they have made a lot of people who voted to leave. They feel cheated as well.

I have to repeat the very serious point that, of all the issues that lose out with this Bill, the environment is the biggest loser, and we have to make changes to the Bill to make sure that that does not happen. The EU's environmental principles and standards are the cornerstone of environmental law in this country. Successful legal challenges have been brought, and there are ongoing cases in our courts that seek to apply the environmental principles further. As the Bill is currently worded, we risk losing huge chunks of environmental law and the crucial enforcement role currently undertaken by the EU. The Government have admitted that there will be a problem when we leave the EU. The Secretary of State for the Environment seems to be promising a new Bill every week, in stark recognition that a wide field of environmental law must be retained and improved.

We were promised an update on the consultation before Report, and we have not had it—another broken promise. The consultation is supposed to feed into a Bill that is supposed to make sure that there is a new body. I have the list of EU Bills here—the guide to EU exit Bills—and I cannot see that Bill on the grid, so where is it? It is already going to be incredibly difficult to produce all the Bills that have been promised and get them through before exit day. I simply do not believe it can be done; the Government would have to perform a miracle, which is not something they are famous for. The consultation could anyway lead to nothing, or to a much weaker, unsatisfactory proposal. We just do not know.

These are not special interest amendments, trying to get something better than what already exists. They do nothing more, and nothing less, than ensure that environmental law in our country will be the same on 30 March as it was on 28 March. This is the seamless transition to which the noble Lord, Lord Inglewood, referred. The Government have had the opportunity to address all our concerns but so far they have chosen not to. They have left this House with no choice but to amend the Bill yet again.

Lord Whitty (Lab): My Lords, Amendment 41 is in my name and those of the noble Lords, Lord Judd and Lord Wigley. I had a dilemma as to whether I should group it with these other amendments or return to a list of agencies to which the UK is at present a party and which are important in enforcing laws on the way we trade and on how our industrial and agricultural processes work. I have been banging on about the post-Brexit relationship between the UK and the EU agencies from the beginning of this Bill and I have yet to get a satisfactory answer from the Minister or any of his colleagues on how they see relations with those agencies—if at all—beyond exit day or, indeed, into the transition period. A slightly higher authority has given me a bit of a hint. The Prime Minister herself has said that we need to maintain a relationship with, for example, the European Chemicals Agency, which is referred to in this amendment.

My amendment interrelates with Amendments 27 and 28. If the independent environmental body to which Amendment 27 refers has full scope; if it is genuinely independent, as my noble friend—ex-friend—Lord Smith underlined; and if it has the powers of prosecution of other public bodies, which is vital, it will be able to replace some of the powers which are currently within the Commission and other European agencies. However, we do not know what that body looks like. As the noble Baroness, Lady Jones, said, it was hinted pretty heavily that the basis of that body, at least, would be presented to the House before the end of the Bill. It is vital that the Minister gives an indication tonight, and a detailed report prior to Third Reading, as to what that body looks like and whether it can actually fulfil the functions currently fulfilled by European agencies, some of which are referred to in my amendment.

This is not just a question of how the UK manages its own environment beyond Brexit. Every bit of industry, and every one of our agricultural and land-use processes, has an important trading dimension with Europe. Hitherto, the standards, and how they are enforced, have been set by Europe. In some cases, this is by particular agencies, in other cases by the Commission. It is therefore not just that this sceptred isle will have a Michael Gove-type, high-powered environment agency to oversee what happens within these shores, but that almost everyone within them trades with the outside world one way or another. The environment does not respect boundaries.

An example is our arrangements for, for example, the chemicals industry and the REACH processes. The European chemicals industry could not function without that being centralised at European level. Many of the companies concerned are multinationals which transfer substances internally within the countries of Europe and follow European standards. The same is also true of many other sectors. The agencies listed in the amendment need an effective replacement which also has a continuing relationship with the agencies of the remaining 27 EU countries. Since the beginning of the Bill, I have asked the Government how those relationships are going to operate.

[LORD WHITTY]

The Prime Minister, in her Mansion House speech, said that she was looking at associate membership. That is an important move, but will not necessarily deliver us much influence. Generally speaking, associate membership in European institutions does not give you a vote. It is therefore important that we have a clear idea of what the relationship will be with these agencies here and with many others of the 40-odd agencies that exist within Europe, some of which I will return to later in the Bill. It is also important that we have a relationship which replaces the Commission's power to enforce—for example, on air quality and on land management standards, partly through cross-compliance against CAP payments, which is a pretty effective form of enforcement. Unless we get answers or at least the outline of answers as to how that will happen after Brexit, I am afraid we will have to return to these matters. Tonight the Minister needs to spell out how that will happen.

8.45 pm

There are two other dimensions. One is that the matters we are talking about within the United Kingdom are for the most part devolved. That means that the answer has to cover the relationship between central government and the devolved Administrations after Brexit. The other absolutely crucial issue is that at the moment, the EU's position paper on transition says that the UK will cease to be party to the agencies of Europe, not from the end of the transition period but from Brexit day. In other words, we will no longer be influential in the food standards authority, the chemicals agency, the European Environment Agency and many other agencies. Our industry may still work on the same rules, but it will stop being part of the process and the enforcement. This is a crucial issue on which the Government have to give clarity, not just to this House but to the many industries and the people who work in them, who are dependent on the continuation of that framework.

I hope the Minister is in a position to be a lot clearer that he has been hitherto. If he is not clear tonight, we will have to consider whether to put this to a vote. However, perhaps he can at least indicate that he is prepared to come forward with something very close to the framework for the environment body which has been promised, and explain how we will interact with the remaining European agencies in future.

Lord Judd (Lab): My Lords, I strongly associate myself with what my noble friend just said, which is why my name is on his amendment.

I cannot say how glad I am to see this amendment from the noble Baroness, Lady Brown, and the noble Lord, Lord Deben, on the Marshalled List. It would be a sad day if, in our preoccupations, we were so absorbed with the constitutional and legal dimensions of the issues before us that, by default, we let go of our responsibilities as guardians of our natural and environmental inheritance and our responsibility for what we bequeath future generations. I am therefore fully behind the main amendment we are debating. My own amendment deals with a special aspect: biodiversity. Just this morning, the urgency of the situation was clearly brought home when we were reminded that the recent report on the state of the world's birds shows that one in eight bird species is threatened with extinction. That includes puffins, snowy owls and turtle doves.

The role of the European Union has been important. The Joint Nature Conservation Committee put it clearly, as I explained in Committee. It said:

> "The EU plays a crucial role in developing policy and legislation to protect the environment and meet its objective for sustainable development. The EU has specific targets for biodiversity conservation with legislative protection for key habitats and species … The EU and global biodiversity targets are partly delivered through a range of legislative measures, which place obligations on Member States to protect biodiversity and the natural environment. The EU and Member States have shared legal competence—shared responsibility—in forming and implementing legislation for the environment".

As I said, the committee makes a third point about,

> "the great importance of the directives on the conservation of wild birds and on the conservation of natural habitats and wild fauna and flora".—[*Official Report*, 7/3/18; col. 1130.]

Can I just for a moment put some flesh on the issues before us? To give one important example, the balance between trees, pests and pathogens is fragile and vigilance is needed to monitor and correct imbalances where they occur before they reach an irreversible state. Invasive non-native species and pests can be at an advantage in new environments where trees have not evolved alongside them and developed the necessary biological defences or cultivated the necessary predatory species. Where this happens, the results can be devastating economically and ecologically. Trees are important in their own right and are the foundation of pieces of woodland, providing a scaffold for entire ecosystems. Beyond woods themselves, they are a vital connective habitat for numerous species to move through in response to other drivers of change, such as climate.

Through European Union membership as it stands, we already have free-flowing information sharing with our fellow member states in the area of biosecurity. These connections should surely be maintained and indeed strengthened, not least because human agency is often the cause of tree pests and pathogens moving to new areas. If we are to protect the UK from future threats—

Baroness Goldie (Con): I thank the noble Lord. I think the House would welcome specific attention to the amendment in the context of his remarks.

Lord Judd: With great respect, I am, of course, speaking to my own amendment. If we are to protect the UK from future threats, such as emerald ash borer, then we need to maintain existing protective measures. The issues before us cannot be overemphasised and all I want is that we get an absolute assurance from the Minister that whatever happens in terms of the withdrawal Bill, we will have the same safeguards and certainty that is beginning to be generated by the international co-operation we have been achieving under the European Union.

Lord Wigley (PC): My Lords, I support Amendment 27, as moved by the noble Baroness, Lady Brown of Cambridge, Amendment 28 on biodiversity, to which the noble Lord, Lord Judd, has just spoken, and Amendment 41, addressed by the noble Lord, Lord Whitty, to which I have my name. I will be very brief. Amendments 27

and 41 propose new clauses and partly cover similar grounds. I acknowledge that Amendment 27 has one advantage in that it would establish in its proposed new subsection (4) a new governmental environmental body to enforce standards. That would be in place of the work undertaken at present by the ECJ and the European Commission. This is something which the Secretary of State, Mr Gove, has announced—and noble Lords have welcomed it tonight—but which, I understand, seems to be opposed by the Treasury and even by other departments.

The consultation, which has been announced in principle, has still not materialised, as we heard earlier. Amendment 27 would require the Government to act on this matter. Perhaps the Minister will indicate the Government's good intent by accepting the amendment or by committing to bring something forward themselves by Third Reading. Amendment 27 also has the advantage of putting into statutory form through proposed new subsection (6) the EU's environmental principles. As with the Charter of Fundamental Rights, these are not laws and so do not come within the Government's idea of "retained EU law". Subsection (1) of the proposed new clause in Amendment 41 would leave things more open concerning what the new arrangements should be, but the wording in subsection (2) is narrower and more specific about what the new arrangements should cover. It also gives an emphasis relating to the devolved regimes, to which the noble Lord, Lord Whitty, referred a moment ago, and of course I greatly welcome that.

I very much support the noble Lord, Lord Whitty, on the question of membership of EU agencies. If, somehow or other, we can retain full membership, that will be ideal, but if it has to be associate membership, it has to have real bite and involvement and should not be membership on the fringes. These bodies matter. They matter on a day-to-day basis to industries, working people and companies throughout these islands, so I strongly support the practical points that the noble Lord, Lord Whitty, made and I hope that the Government can respond to them.

I would be happy to see either of the new clauses proposed in Amendments 27 and 41 going into the Bill. I certainly hope that something in the Bill can be changed to ensure firm commitment by the Government and not just warm words.

Baroness Miller of Chilthorne Domer (LD): My Lords, I strongly support Amendment 27. There is a stark warning before your Lordships' House in the form of the recent report from the post-legislative scrutiny committee chaired by the noble Lord, Lord Cameron of Dillington, on what has happened following the passing of the Natural Environment and Rural Communities Act. Its comments on how Natural England has been starved of funds, run down and generally depleted under this Government, with its advice on planning issues not taken up, are a stark warning. Can we really, in good faith, rely on a Government who have treated Natural England like that? The subsequent effect on biodiversity has been catastrophic and I support the amendment in the name of the noble Lord, Lord Judd. We now do not have a watchdog with sufficient teeth to make any impact. That report says it all.

Baroness Young of Old Scone (Lab): My Lords, I support Amendment 27. I feel some sympathy for the Minister but it is slightly bizarre that the Government have announced that they want the principles and the environmental watchdog, yet their consultation has not yet emerged. They said that it would take place in the spring. We must all admit that, in view of the weather, spring has been a little late this year but we are rapidly getting into summer and perhaps the Government need to act.

The consultation appears to be mired in politics. We are running out of time. If the consultation does not start soon, we will not have a clear legislative proposal coming forward. We need legislation for the environmental watchdog. There will then be all sorts of practical considerations, such as finding some poor sod of a chairman who is willing to put his neck on the line to speak out against power and report openly on behalf of the public in favour of the environment, as indeed the Environment Agency did in the eight years prior to the noble Lord, Lord Smith, taking up his chairmanship. We still managed to get away with it in those glorious days of the 1990s.

I want to press the Minister on what happens next. The Government cannot go around saying that they want to leave the environment in a better state than they inherited it if, in fact, they are not going to come forward with very positive proposals to safeguard the basic environmental legislation and governance from which the environment has benefited in a major way over the past 30 years. We have to have government consultation well in advance of Third Reading or—what I would prefer, quite frankly—a government amendment which does the same job as this one: to take those government commitments and put them into primary legislation in a simple way.

9 pm

Baroness Jones of Whitchurch (Lab): My Lords, I support Amendment 27 and will speak to Amendment 41. I will explain, as my noble friend Lord Judd knows, our slight concerns about his amendment.

The noble Baroness, Lady Brown, along with a number of other noble Lords from around the House, spoke very eloquently on this issue. In their own way, they have all reinforced the point that this amendment is necessary to ensure that the current environmental protections exist after exit day with the same certainties and enforcement which have helped us shape our world-class environmental standards up to now. We have rehearsed before the importance that the EU has played in setting those standards. To deliver this certainty, we need the same core principles that apply to EU law to be transposed in full, and, more importantly, we need a new organisation to replace the enforcement powers operated by the EU Commission and the Court of Justice, which guarantee the standards that we currently enjoy.

When we debated similar amendments in Committee, they received widespread support from around the Chamber. That has been echoed this evening, and I very much hope that the Minister has heard those calls. In his response to that debate in Committee, the noble Lord, Lord Callanan, tried to reassure us and

[Baroness Jones of Whitchurch]
told us not to worry too much. He said that a number of environmental principles were also included in international treaties, such as the Rio principles, to which the UK will continue to be a signatory. Of course, it is true that some of those environmental principles do exist in other forms, but they are not all covered in the same range and depth as exists in the EU, and we do not have the same recourse to challenge breaches of these principles and demand compliance as we do within current EU structures. If we did, we would have been more successful, for example, in stopping the decimation of the Amazon rainforest, which sadly is causing enormous climate change problems across the globe. The existence of other international treaties is not sufficient grounds for the Government to back-track on this issue.

This brings us to another argument that the Minister used in Committee—that our amendments were not necessary as Michael Gove had already accepted the need for a new comprehensive policy statement setting out the Government's environmental principles. So far, so good, but in a follow-up letter to a meeting we had with the noble Lords, Lord Callanan and Lord Gardiner, the noble Lord, Lord Gardiner, wrote to us to say:

"The withdrawal Bill will preserve environmental principles where they are included in existing EU directly applicable environmental regulations and case law".

Our argument is that this definition does not cover the full scope of environmental principles as they currently exist. If we just use that definition—the definition that is currently in the Bill—we will lose out. That is why a promised new set of environmental principles is so important. But, as we have heard, time goes on and there is no sign of the Government's statement or a timeline for implementation which would ensure that the new principles were in operation by March next year. Our amendment fills that time gap by setting out the key environmental principles currently in operation in the EU which should apply until we are able to agree a more comprehensive package of the kind that we have consistently been promised but which has not yet materialised.

Even more worrying is the governance gap, to which a number of noble Lords have referred. If we do not have an independent body to hold the Government to account after exit day, we will lose out. Michael Gove has acknowledged the need for such a body and has said that he intends to consult upon it but, again, no details have been published and the clock is ticking. It has also become clear that Michael Gove's ambitions for such a body are not necessarily shared by Ministers in other departments—for example, Transport and Treasury Ministers are on record as saying they have a much narrower view of the remit of the watchdog.

The noble Baroness, Lady Miller, referred to the report on the Natural Environment and Rural Communities Act, which not only looked backwards but, helpfully, forward. It mentioned post-EU structures and the great advantages we have had from being in the EU, which we have all rehearsed. It went on to refer to the UK watchdog and said that it needed to be independent and accountable to government, with diffuse sources of funding and the ability to deal with issues raised by individuals and NGOs, including taking government and other public bodies to court. That is the kind of package we are looking for.

However, as noble Lords and my noble friend Lady Young have said, these things take time to set up and, again, the clock is ticking. It is hard to see how this body is going to be up and running by Brexit day. If it is not, our protections will be diminished. We hope the Minister has heard the strong arguments that have been put forward on this.

On Amendment 28, my noble friend Lord Judd knows that I agree with everything he said. The reason we did not put it forward as one of the amendments we wanted to have at this stage as an environmental principle is because it is not currently seen as an EU environmental principle. Therefore, while I agree with everything he said, it might be a battle that we have to fight another day.

We wholly support the amendment of my noble friend Lord Whitty. It had considerable support from around the House when it was debated the first time round and we have heard the same comments echoed this evening. When we debated it before, for example, my noble friend Lord Rooker made a compelling case for our continued involvement in the EU's rapid alert system for food and feed, which provides a 24-hour alert to all EU countries on serious health risks from contaminated products. On that issue, the noble Lord, Lord Callanan, was only able to say that this would be subject to ongoing negotiation.

Similarly, when my noble friend Lord Whitty probed on the issue of REACH—which he again referred to today—the noble Baroness, Lady Goldie, was only able to say that our involvement was the subject of live negotiations but that we could not remain a member of REACH. She sought to reassure us and told us not to worry because work was starting on a new IT system to oversee registrations and regulation. That prospect should strike fear into all Ministers if they expect that new IT system to be up and running on time.

The amendment of my noble friend Lord Whitty is crucial. Food and chemicals are global industries which need shared standards, shared safety levels and shared risk procedures. If we do not use those shared methodologies we are in danger of a massive duplication. Apart from the unnecessary costs, this would also have implications for animal-testing data because we would be in danger of having to duplicate research on animals, with the resulting unjustified impact on animal welfare. This is an important issue.

I hope the Minister has heard the strength of feeling on this—we have been made promises which have not materialised—and that he is in the mood to reach out to us today and provide reassurance. Otherwise, I hope noble Lords who have proposed amendments will be prepared to press them to a vote when the time comes.

Lord Callanan: My Lords, we welcome the sentiments behind Amendment 27, tabled by the noble Baroness, Lady Brown of Cambridge, Amendment 28, tabled by the noble Lord, Lord Judd, and Amendment 41, tabled by the noble Lord, Lord Whitty. While the Government

welcome the amendments as being well intentioned, as I have said before, we believe them to be ultimately unnecessary and in some elements they go beyond the existing environmental regulation that is in force today.

As the noble Baroness, Lady Brown, reminded us, when the Prime Minister launched the 25-year environment plan on 11 January this year, she said:

"Let me be clear, Brexit will not mean a lowering of environmental standards".

We have already taken firm steps towards that goal, as my noble friend Lord Deben remarked. Our recent announcements include an increase in recycling rates in order to slash the amount of waste polluting our land and seas, a consultation on a deposit return scheme later this year and a ban on the sale of plastic straws, drinks stirrers and plastic-stemmed cotton buds. In line with this commitment, the Secretary of State for the Environment, Food and Rural Affairs announced on 12 November our intention to create a new comprehensive policy statement setting out our environmental principles, recognising that the principles on which we currently depend in UK law are not held in one place. It is intended that the new policy statement will draw on current EU and international principles and will underpin future policymaking, underlining our commitment that environmental protection will be enhanced and not diluted as we leave the European Union.

At that time, the Secretary of State also announced our intention to consult on a new, independent and statutory body to advise and challenge government and potentially other public bodies on environmental legislation, stepping in where needed to hold these bodies to account and being a champion for the environment. I can confirm for noble Lords that it is our intention to publish the consultation in time for the Third Reading of this Bill. The consultation will explore, first, the precise functions, remit and powers of the new statutory and independent environmental body and the nature, scope and content of the new statutory policy statement on environmental principles. It is of course important to gather the views of many stakeholders in this area before coming to any conclusions. Amendments 27 and 28 would prejudge the outcome of the forthcoming consultation by setting requirements in legislation now.

As my noble friend Lord Inglewood remarked, the purpose of the EU withdrawal Bill is to convert and preserve the law so that, after exit, the laws which we have immediately before exit day will, as far as possible, be the same as those we have now. This includes the wild birds and habitats directives, transposed through to domestic legislation, as well as the protection and enhancement of biodiversity as requested by the noble Lord, Lord Judd, in Amendment 28. I am sure that the noble Lord will be reassured to know that the UK is already a signatory to many of the multilateral environmental agreements that underpin such regulations, and that will continue to be the case after we have left the European Union.

The environmental principles are framed in the EU treaties as general objectives for the EU rather than having a direct, binding effect on the delivery of EU measures by member states. Amendment 27 goes further than that, in particular by placing a duty on all public authorities to apply the environmental principles listed in the amendment. This duty does not currently exist either in EU or UK law, and it is not appropriate for this Bill to introduce new powers of that kind.

In addition, a significant proportion of environmental policy and legislation is of course devolved. We need to take account of the different government and legal systems in the home nations as well as the different circumstances of the different parts of the United Kingdom. Amendments 27 and 28 risk compromising consideration of these important issues, as well as the wider devolution settlement, by requiring the UK Government to take UK-wide action. This includes requiring the UK Government to publish UK-wide proposals for governance and principles. Our starting point is that the new statement of principles and environmental body should cover England and environmental matters that are not currently devolved. If the devolved Administrations would also like to take action on these issues, then of course we are open to co-designing the proposals to ensure that they work more widely across the United Kingdom.

Finally, Amendment 27 would require the creation of both a list of statutory functions that can contribute to the protection and improvement of the environment and a list of functions currently exercised by EU bodies that must be retained or replicated in UK law to protect and improve the environment. SIs made under the correcting power in the Bill will be presented to Parliament for scrutiny. They will set out which UK body will perform functions, such as regulatory ones, currently performed by EU bodies. It therefore seems unnecessarily bureaucratic to require by law the creation of lists of functions.

9.15 pm

I note that the noble Baroness's Amendment 27 references the "welfare requirements of animals". Your Lordships will be aware that we are due to debate the important topic of animal welfare on Wednesday; I know that many noble Lords are keen to discuss that issue at length then. Your Lordships will also be aware that the Government published draft legislation to address the recognition of animal sentience, which sets out how we could better enshrine the principles of animal sentience in domestic law. The Government are currently analysing the 9,000 responses received to this consultation; they are also eagerly awaiting a response from the Environment, Food and Rural Affairs Select Committee. However, we see the issue of animal welfare as separate from this discussion on the principles and governance of the environment. Therefore, I will not speak at length on this issue today.

Turning to Amendment 41, tabled by the noble Lord, Lord Whitty, and the chemicals industry, we are working to ensure a smooth transition as we leave the EU. Our priority is to maintain an effective regulatory system for the management and control of chemicals to safeguard human health and the environment, respond to emerging risks and allow trade with the EU that is as frictionless as possible. While the UK remains a member of the EU, we will continue to fully participate in the work of REACH and the European Chemicals Agency. As part of the exit negotiations, the Government will discuss with the EU and member states how to

[Lord Callanan]
continue co-operation in the best interests of both the UK and the EU. It would be inappropriate to pre-judge the outcome of those negotiations.

Regarding related concerns on food safety, a number of EU agencies, such as the European Food Safety Authority—EFSA—have been established to support EU member states and their citizens. We are committed to exploring with the EU the terms on which the UK could remain part of those EU agencies. However, our future relationship with the EU and arrangements with regards to agencies such as EFSA are still to be determined and are the subject of ongoing negotiations. I apologise for repeating the words "subject of ongoing negotiations"—I can see that the noble Lord, Lord Whitty, is getting tired of hearing me say them—but that is the current situation.

Several vital food safety functions currently undertaken in the EU will still need to be undertaken when we leave, including risk assessments and approvals of regulated products. Therefore, departments are currently working together to understand the impact that withdrawal from the EU will have across a number of sectors and cross-cutting areas—including EFSA, which provides independent scientific advice and risk assessments covering a wide range of policy areas. Options for the future of risk assessment and scientific advice in the UK are currently being developed by the Government to cover all eventualities, including understanding any cost and staffing implications. Requirements will depend on the nature of the relationship the UK has with the European Food Safety Authority once the UK leaves the EU. It will be our priority to maintain the UK's high standards of food and feed safety and ensure that we take a risk-based, proportionate approach when providing risk assessments.

I hope that noble Lords will agree that the Government have been similarly explicit that our exit from the EU will not lead to a lessening of standards in these areas either. We have been vocal in our belief that our exit from the European Union will likely create new opportunities to further strengthen standards, and the Government are steadfast in their intent to capitalise on these potential improvements.

Lord Whitty: Before the Minister moves on from the issue of future relations with the agency, can he address one point? The EU's position is that we will cease to be a member of those agencies less than a year from today. Would the Government at least indicate that they are looking to an arrangement during a transition period where we continue to participate in those organisations, because we will be following their rules and procedures, but, according to the EU's negotiating position, we will not be party to that? Would he please address the transition period as such?

Lord Callanan: That is not part of the amendment we are discussing, but I am happy to provide the noble Lord with that reassurance. Yes, we are discussing the exact nature of our participation in the various agencies during the implementation period.

I hope the commitments that I have made, in particular on the fact that the consultation on environmental principles will be published ahead of Third Reading, are sufficient for your Lordships to feel able not to press the amendment.

Lord Deben: I am very pleased with what my noble friend said about the environmental principles and the like, but will he confirm that, if the House feels, when those principles are published, that they are not sufficient and that we need to bring at least part of what we tabled here into the law of the land in the Bill, it will be possible for an amendment of that kind to be brought forward on Third Reading?

Lord Callanan: Yes, we are saying that we will be able to address this issue again after noble Lords have had a chance to look at the consultation on the statement of principles and the consultation on the new environmental body.

I hope my reassurances are enough to enable noble Lords not to press the amendment and that they will take the opportunity to consider the contents of the consultation before we get to Third Reading.

Baroness Brown of Cambridge: I thank the very many noble Lords who have spoken and contributed to the debate, all supporting the amendments, which again emphasises that this is an issue of deep concern across the House—one where everybody agrees that urgent action is necessary. As the Minister has now highlighted, it is one where the House is asking very strongly for assurance. I thank the Minister for his detailed response, in particular, as the noble Lord, Lord Deben, has highlighted, the commitment that we will have a policy statement and the consultation on a statutory body in time for Third Reading. I hope that they are in good time for Third Reading, so that we will have plenty of time to discuss them and consider their implications.

Indeed, we would hope to see commitments not only to the policy statement and the consultation but to a legislative timetable, so that there is no governance gap when we leave the EU. It will be good to have a further clear statement from the Prime Minister on the Government's commitment to deliver the independent watchdog with teeth. We will look to see what is in the policy statement and the consultation on the statutory body with great interest. I am pleased that the Minister has been able to reassure us. We do not yet know what will be in these—we will get them before Third Reading—but the implication of that, he has confirmed, is that if the House still does not feel adequately assured, we can bring this issue back. On that basis, I beg leave to withdraw Amendment 27.

Amendment 27 withdrawn.

Amendment 28 not moved.

Amendment 29

Moved by ***Lord Wallace of Saltaire***

29: After Clause 6, insert the following new Clause—

"Co-ordination of foreign and security policy

The Secretary of State must ensure that before exit day all necessary action has been taken to continue co-ordination of foreign and security policy with the EU, including

association with the EU's military staff and the European Defence Agency, and to integrate all relevant EU law and regulations into UK legislation."

Lord Wallace of Saltaire (LD): My Lords, in moving this amendment I stress that the EU's useful and largely intergovernmental structures for the co-ordination of foreign policy, international security and defence have not been imposed on the UK by a hostile, imperially minded Brussels—what Dominic Lawson describes in today's *Daily Mail* as "the vengeful EU", the threatening continent from which we must escape. British Governments, British Prime Ministers and British Foreign and Defence Secretaries have played a central part in developing the framework, from James Callaghan and the noble Lord, Lord Carrington, to Geoffrey Howe and, yes, Margaret Thatcher. When our current Prime Minister repeats, as she often has, that, "We are leaving the European Union, but we are not leaving Europe"—a phrase I am sure we all understand in detail—we have to assume that she intends somehow to maintain close co-operation with those structures after Brexit.

In her Mansion House speech last month, the Prime Minister noted that the outcome of the referendum,

"was not a vote for a distant relationship with our neighbours".

She went on to promise that, after we leave, her Government would work to build,

"a new beginning for the United Kingdom and our relationship with our European allies".

This amendment would require the Government to tell us what that new beginning might look like and what the Government want to build. We cannot expect our neighbours to build an entirely new structure just to suit the British alongside the main multilateral framework that has now been created, within which European states now consult on international issues, work together to manage crises in Africa and the Middle East, and deploy military and civilian resources to those regions and the seas around them. What arrangements for continued association do the Government propose?

Our amendment does not explicitly extend to international development, the focus of the amendment tabled by the noble Earl, Lord Sandwich, and others which the House considered last Wednesday, but the same principles and questions apply to that additional aspect of Britain's role in the world. The history of European co-operation and development policy has also been shaped by British participation and influence.

Dominic Lawson and those who think like him would be happy for the UK to follow Switzerland's example, as again he said this morning, back to proud independence and minimal global influence, but our Prime Minister and our current Foreign Secretary want Brexit to mark a renaissance in Britain's foreign policy—a global Britain striding the world diplomatically and militarily. The Foreign Secretary gives the impression that his image of global Britain excludes Europe, that we will walk tall alongside the Americans, China and India—and, of course, the rest of the Commonwealth—and leave a declining Europe behind, but our Prime Minister knows that this is nonsense, that British foreign policy has always started from managing relations with France, Germany, Spain, the Netherlands and Denmark and that this remains the bedrock for any global role for Britain today.

The most recent European Council, with its solidarity with the UK in the face of Russian invasion of British sovereignty, was a demonstration of the value to Britain of this multilateral framework. However, in less than 12 months we will be leaving the European Council, the Foreign Affairs Council, the 40 to 50 working groups within which officials consult on and prepare common positions, the EU military staff and the European Defence Agency. Parliament is therefore entitled to ask the Government how they propose to manage when we are no longer within those networks and what future relationship they would like to negotiate with them. We are entitled, too, to ask them to give us an answer soon.

We all know why the Government have not yet spelled out their objectives here. It is because they are divided between those within the Government and on the Back Benches in the Commons who want nothing more to do with those nasty continentals and those who accept what the Prime Minister in her Mansion House speech described as the hard realities: that we need continued close co-operation in these vital areas. It would be an act of national self-mutilation in foreign policy to cut ourselves adrift from the networks that we have done so much to build up and to retreat into a new form of splendid isolation in pursuit of an entirely independent foreign policy.

The Prime Minister, in her speech to the Munich Security Conference in February, indicated that she would like to agree a new framework now. She said that she endorsed,

"distinct arrangements for our foreign and defence policy cooperation in the time-limited implementation period, as the Commission has proposed. This would mean that key aspects of our future partnership in this area would already be effective from 2019. We shouldn't wait where we don't need to".

She went on:

"But where we can both be most effective by the UK deploying its significant capabilities and resources with and indeed through EU mechanisms—we should both be open to that. On defence, if the UK and EU's interests can best be furthered by the UK continuing to contributing to an EU operation or mission as we do now, then we should both be open to that. And similarly, while the UK will decide how we spend the entirety of our foreign aid in the future, if a UK contribution to EU development programmes and instruments can best deliver our mutual interests, we should both be open to that".

She called specifically for a close association after Brexit with the European Defence Fund and the European Defence Agency. She did not go so far as to propose a separate new treaty in this field, as she did on co-operation on internal security, but the implication from her speech is clear that that is what is needed.

9.30 pm

Therefore, somewhere in Whitehall there must be some detailed plans on government objectives for future relations with the European Union across our foreign and defence policy, with the intention that these might become, as the PM said, effective in 2019—presumably she means in April 2019. Why are the Government determined not to share these plans with Parliament? Is No. 10 afraid that the Foreign Secretary and the Secretaries of State for Brexit and International Trade would object? Is it scared of attacks from the *Daily Mail*, Dominic Lawson et al? Is it afraid of Jacob Rees-Mogg?

[Lord Wallace of Saltaire]

The hard reality, to use the Prime Minister's own phrase, is that British foreign policy depends on a close and institutionalised relationship with our European neighbours, and that such a relationship can be maintained only if we continue to be associated with these existing multilateral structures. Without that, ideas of regaining our global status, re-establishing our leadership of the Commonwealth, and persuading the Chinese, Indians, Russians and others to take us more seriously than they do now are fantasies. The Prime Minister evidently understands that these are fantasies and has plans to avoid post-Brexit isolation. The purpose of the amendment is to require the Government to share these plans with Parliament and the public.

I will make one final point on fantasies and hard realities. We are 11 months from the target date the Prime Minister set in her Munich speech to have a new set of arrangements in foreign policy and defence in place and ready to go into operation. Formal arrangements will have to be negotiated, agreed and ratified, including by this Parliament. Clearly, informal arrangements are totally inadequate. Is it still possible to manage this process and complete it in the time available, or is the fantasy of an agreement in this field and others, in sufficient detail to be agreed before the end of this year and then ratified before the end of March 2019 in time for a smooth transition to the implementation period, about to hit the hard reality that it cannot be done? I beg to move.

Baroness Smith of Newnham (LD): My Lords, Amendment 29 is also in my name. I would like to say that I agree entirely with my noble friend Lord Wallace—and in many ways I do; I agree with the sentiment of everything he said—but I am a little puzzled. He is suggesting that there must be some document somewhere in Whitehall, that the Prime Minister has a plan, and that all we need is for her to give the Minister permission to tell us what is in that plan. I do not think that that plan exists. It might be nice to believe that there is a blueprint of a future EU-UK foreign and defence co-operation policy but I do not believe it yet exists.

When I was doing my homework for today, I was not rereading the collected speeches of the Prime Minister; I happened on the report of the European Parliament from last week. In one-minute summaries, each of the leaders of the groups in the European Parliament responded to the European Council meeting. Obviously, President Macron had also been present. One of the speakers was therefore the chairman of the European Conservatives and Reformists Group, the Conservative MEP Syed Kamall. He was talking so positively about the future and the existence of EU-UK security and defence co-operation that I thought he could almost be a Liberal Democrat.

I thought that I should perhaps make a note of what Dr Kamall had said, but I could not find a transcript, so I went a little bit further into the internet and discovered something that he had been writing on ConservativeHome. He was so positive about what the Prime Minister had achieved at the European summit meeting. He pointed out that she had pulled off a diplomatic coup by securing unprecedented support from EU leaders for her tough stance against Vladimir Putin. He noted that the Prime Minister had persuaded the Council to toughen up its summit conclusions. This extraordinary solidarity, he continued,

"sent a strong signal to Moscow and once again highlighted Britain's influential role on the international stage. It has also brought into focus the importance of our post-Brexit security and defence relationship with the EU".

Indeed it has, but the point is surely that the reason that the Prime Minister was able to pull off a diplomatic coup was that she was in the room.

As a member of the European Union, the United Kingdom has a seat at the table. The Prime Minister is present at every European Council meeting; the Foreign Secretary is present at every Foreign Affairs Council and we have people in the room every time there is a discussion about European foreign policy. However tight a relationship we seek to have when we have left the European Union, one fundamental change is inevitably going to have taken place: we will not have a seat at the table.

Therefore, while I completely agree with my noble friend Lord Wallace that we need to have clarity on what the Prime Minister is anticipating in relation to foreign and security co-operation once we leave the European Union, there is a more fundamental question: what arrangements are the Government making to strengthen our relationships with our bilateral partners—to strengthen relations with each of the member states—so that we will at least have a direct contact in each of the member states? If we do not have a seat at the table, we will have to put far more effort into our bilateral and multilateral diplomacy. So far, although the Foreign Secretary, when he gave evidence to the International Relations Committee, suggested that the Government had improved their representation in bilateral embassies, there is no clarity on what the Government are doing in hard, practical terms.

Finally, there is a second aspect to this. It is not just a question of what the Government want: it is a question of what the EU 27 are willing to concede. The House of Lords Library briefing on the proposed UK-EU security treaty points out that the European Council has stated that,

"the EU stands ready to establish partnerships in areas unrelated to trade, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy".

However, the briefing goes on to say that the European Commission has stated that,

"while the EU aims for a partnership with the UK on security and justice, the EU's interests must be protected, a non-member state cannot have the same rights as a member state, there must be a balance of rights and obligations and the EU must continue to have autonomy in making decisions".

That applies particularly to internal security, which we will be moving on to, but if you talk to the Norwegians, they will tell you that, however much they want to be associated with EU foreign policy, they do not have a seat at the table. They might be able to tag along when the EU has decided what it wants to do in relation to foreign policy, but the idea that they have an equal partnership is for the birds.

To get beyond fantasies, can the Minister tell us whether the Prime Minister has a plan? Is it hiding somewhere in Whitehall and is he going to be able to reveal it before Third Reading? It is not only on environmental policy that we need to have a sense of

what the Government plan and what they are seeking. It is on that most fundamental aspect of the state: the defence of the realm. At the moment, although I believe that the Prime Minster wants to have a close relationship with the European Union in this area, we need to have some clarity on how she intends to get there.

Lord Judd: My Lords, I thank our noble friends on the Liberal Benches for having put this amendment forward. It seems self-evident in its logic. Indeed, not to respond to what it calls for would be to forgo the responsibility of government to put the defence and well-being of our people in Britain first and foremost. I have had posts in defence and in the Foreign Office and it seems inconceivable that in any significant conflict in which we would be involved we would not want to work with our allies and friends. It is much better to prepare for that and to have the arrangements in place to make sure that we make the best of it. This is not just a matter of fixing something when a crisis arises; it is a matter of having a culture of co-operation in which people feel they have a shared responsibility, that they want to develop that responsibility together, they understand each other and their training and organisation are geared to co-operation with others. From that standpoint, this is a wise amendment and I hope the Minister will respond positively.

Lord Kerr of Kinlochard (CB): My Lords, in 1982 the amazing unanimity of the Security Council in favour of the British position when the Falkland Islands were invaded was the result of discussion led by President Mitterrand in Europe. Mitterrand was the first to ring Thatcher to assure her of his support. The remarkable performance of our Prime Minister at the last European Council on the Skripals, Salisbury and sanctions against Russia deserves high praise. As has just been said, it will be very difficult to replicate the kind of contacts, co-ordination and pressure that can be brought about when you are a member of the club. When you are outside the club, that is going to be more difficult.

The Prime Minister has made two very good speeches this year on this theme. The noble Lord, Lord Wallace of Saltaire, tellingly quoted from the Mansion House speech. I was in Munich and heard the February speech in which the Prime Minister made it absolutely clear that our commitment to the security of our allies and friends, partners and ex-partners-to-be, was absolute and was in no way conditional on any kind of outcome of the current negotiations. That was a very important statement. Some thought that the Lancaster House speech had created doubt on that score. I thought that was unfair, but certainly it was settled in Munich.

I do not think we need any more speeches. I do not think we need great papers and plans. I think we need wiring diagrams. I think it is in everybody's interest that we should stay plugged in. It is in the European Union's interest as much as it is in our interest. This is not a zero-sum negotiation. It has been a mistake that throughout the withdrawal negotiations we have tended to negotiate on their papers. We have not put forward our own papers. This is a locus classicus for a UK proposal, and I do not think it should be a grandiose proposal—they have been made in speeches. It should be an architectural blueprint. We should be proposing joint assessment staff and co-ordination cells. These things are not glamorous. We should be proposing a calendar of meetings and a joint crisis management procedure. That is the kind of wiring diagram that is needed now.

This is an important amendment because it asks for arrangements to be set in hand. The noble Lord, Lord Wallace of Saltaire, is quite correct that are we are now talking not about the end of the transition period but about the end of our membership, and if that comes in March next year, something has to be ready. I do not think it is terribly difficult to do, and I do not think the Government need fear, as I think they have done regarding a number of files in this negotiation, that if they put forward a proposal but did not get all that they had proposed then the *Daily Mail* would attack them. This dossier is a bit different because it is not zero-sum; it is possible that the kind of architecture that would come out at the end of the day might be slightly different but no one is going to kill anyone for that. The case for putting forward a down-to-earth, practical series of proposals quickly is very strong because the 27 will need to take a view, as will the Council Secretary. This is primarily not Commission business but the Commission will take a view, and the European Parliament will take a view. If we do not start soon then it will not happen by March, so I support the proposal of the noble Lord, Lord Wallace.

9.45 pm

Lord Wilson of Dinton (CB): The noble Lords who have tabled this amendment have an important point. I want to add a postscript to the very wise words of my noble friend Lord Kerr. In the 1960s, half a century ago, when we were moving in the other direction, I was privileged to be present at a discussion about whether we should apply again to join the Common Market after we had been rebuffed by General De Gaulle. The discussion involved the former Prime Minister, Mr Macmillan, and the man who had led the Treasury team that made the first application, Frank Lee. All I want to say is that they were agreed that the main reason for applying to join the Common Market was defence, security and being in the room. Of course there were a huge number of economic and other arguments, but they saw Britain as isolated. They thought that we would be more valuable to the United States if we were in the room in Europe; that we had a lot to offer and that Europe would want to have it; and that it was important for the prosperity of this country that we should play our part in the room, in alliance with the rest of the European union. That was probably the most important factor in applying to go in. As we leave, we have to think how we protect ourselves. The noble Lord, Lord Kerr, is absolutely right and the noble Lords opposite have an important point, which is why I support their amendment.

Baroness Hayter of Kentish Town (Lab): My Lords, there is always something very special about hearing history from those who are not reading it from books but were there.

[Baroness Hayter of Kentish Town]

Given the overriding importance of the security of the nation and remembering, even further back, that the EU was born out of the desire to end war, bring peace and establish co-operation across Europe—that was not simply the reason for us being there but, even before that, the reason for its creation—we simply cannot risk just slipping out of the EU's foreign and security policy, which we helped not to fashion at the beginning but to fashion in its development, without a serious debate in Parliament.

In Committee, regrettably, the Minister, the noble Baroness, Lady Goldie, who I think will also respond this evening, claimed that she was "a very lowly mortal"—I doubt that in any circumstances—and was,

"not privy to the detail of the negotiations",

so she could not report on the progress of talks on this vital issue. I have to say I do not think that is good enough, either for this House or for the Bill. I said at the time that Clause 9 refers to the withdrawal deal. It is our fervent hope that before we sign off on that deal—for me, this should be included in that deal—there will be a satisfactory outcome regarding our future co-ordination with the EU on foreign policy and defence. It is still possible that the Government will try to remove Clause 9 but, until they do, the deal is pertinent. It is not good enough for the Minister this evening to repeat her earlier reliance on the so-called meaningful vote on the final deal, which has been promised by the Government. That was her excuse for saying that the Bill was,

"not the appropriate forum to raise these concerns".—[*Official Report,* 26/2/18; cols. 502-03.]

There are two reasons why that argument is at fault. The first is because, at the moment, there is no such thing as a meaningful vote; to the contrary, there is only a meaningless vote, as it will be on a Motion with no legislative consequence. It will be a bit like the Motion that will be in the House of Commons on Thursday on the customs union, which the Government are so afraid of losing that they will not even vote on it. They are going to abstain and when that vote is won, they will ignore it. At the moment, that is the only vote that we have been promised on the deal. Secondly and, I guess, more importantly, I do not think we should be sending the Bill back to the Commons unless we are sure, in the way in which the amendment provides, that the Government are already working on and will take the necessary action before exit date to secure an ongoing continuation of security and foreign policy with the EU. It is no good to say that we can wait until the withdrawal deal—our vote on that could be weeks before we leave—or that it is not for us to discuss it.

In the words of the noble Lord, Lord Kerr, we need a diagram or a plan. I have a better suggestion for the Minister: she should just get the noble Lord to write it for her, because we might then have something that would take us forward. We need to know what is being discussed and, assuming that there is a plan—I hope that the noble Baroness, Lady Smith, is wrong and that there is something on paper—we need to know what it is, so that we have confidence that this will be fully in hand and workable on the day that we leave.

Baroness Goldie: My Lords, I am grateful to the noble Lord, Lord Wallace of Saltaire, for bringing attention to this important issue in his Amendment 29 and I welcome the opportunity to set out the Government's position in this vital area.

I begin by emphasising that the UK is unconditionally committed to European security. We want to continue working closely with our European partners to keep all—all—of our citizens safe. There is mutual benefit in such proximity of relationship; frankly, to think otherwise would be plain daft.

As the Prime Minister underlined in her Munich speech, this is not a time to inhibit our co-operation or jeopardise the security of our citizens. We want to find practical ways to continue working with the EU to protect our citizens and safeguard our shared values and interests. That speech, as the noble Lord, Lord Wallace, suggested, set out the new deep and special security partnership we want to develop with the EU, including our ambition to retain the co-operation we already enjoy with member states and to go further to meet new threats.

The Government are clear that we must do whatever is most practical and pragmatic to tackle real-world challenges. I must thank the noble Lord, Lord Kerr, who acknowledged the importance of what the Prime Minister was saying in her speech. As an example of our ambitions, the UK aims to continue to develop capabilities to meet future threats. On defence, that means agreeing a relationship between the UK and the European defence fund and the European Defence Agency.

It is important to observe that our security interests do not stop at the edge of our continent. As a permanent member of the United Nations Security Council, a leading contributor to NATO and the United States' closest partner, we have never defined our approach to external security primarily through our membership of the EU. On leaving the EU, it is right that the UK will pursue an independent foreign policy, but the interests which we will seek to project will continue to be based on shared values.

Amendment 29 seeks to do something else: to ensure that the Government endeavour to secure future co-operation in the field of foreign and security policy. As I have set out, this is a top priority for the Government. The amendment also seeks to ensure that relevant EU law and regulations are integrated into UK legislation. I suggest to the noble Lord, Lord Wallace, that this is unnecessary in the face of the Bill's explicit provisions. The Bill will incorporate EU regulations and decisions applying in relation to the UK, and any directly effective rights, obligations, powers, liabilities, remedies, restrictions and procedures arising under treaty articles at exit day. Our approach is one of maximum continuity. No further provision is needed to ensure that the Bill can fulfil this vital aim.

It is for those two reasons that this amendment, I would argue, is unnecessary. I therefore ask the noble Lord to withdraw it. I clarify that this is not a matter to which the Government propose to return at Third Reading.

Lord Wallace of Saltaire: My Lords, I regret that that is an extremely unsatisfactory answer. To say that shared values will continue to link us to the European

Union after we pursue our independent foreign policy means nothing, more or less. Shared meetings and shared intelligence are what we need. We have close co-operation with France, which we have had since 1998—reinforced in 2010—and a defence treaty for collaboration; we have co-operated with the Netherlands and others; and we are currently in command of one of the military operations at Northwood, Operation Atalanta. All of that is going into thin air, but apparently we will continue to share values, and that will do. It will not do, and I suggest strongly to the Government that this issue will not go away. It will become more embarrassing as the months go by if the Government do not begin to clarify what they have in mind, particularly given that Ministers cannot agree among themselves what they want to do.

The noble Lord, Lord Kerr, is absolutely right that we need to make some proposals. We would gain enormously in terms of the trust of those with whom we are negotiating if we made some proposals. The Prime Minister's Munich speech implied that we would be making some proposals. The noble Baroness, Lady Smith, was right, and I was wrong to suggest that there is a plan: no such plan exists.

When I was studying history, I used to think that the Conservative Party was about strong foreign policy and strong defence. However, on this fundamental issue, the Conservative Party appears to be about holding itself together, not about strong defence, which these days necessarily means working closely with others. We cannot afford to be an independent military power any longer. We are in a much darker international environment than we were in 2016 when the referendum was fought. We need our friends and partners, and we need to work closely with them.

This is an issue that will not go away. I do not intend to ask to divide the House at this late hour, but the resonance of this issue will grow rather than shrink. It will embarrass the Government and the Conservative Party more and more as we slide towards March 2019 without any clear idea. I regret that on this occasion, unlike when we discussed this issue in Committee, the Foreign Secretary has not been able to join us at the Bar. Never mind—I trust a report will go back to him. I did not recognise he was there at that time.

I will therefore withdraw the amendment, but the Government have to think a great deal more carefully about what they want in the area covered by the Treaty on European Union, rather than by the treaty on the implementation of the European Union. I disagree with the noble Baroness, Lady Goldie, when she suggests that the withdrawal Bill is only about the treaty and therefore does not cover that issue. Look at Article 49 of the Treaty on European Union and the various things which cover foreign policy and defence co-operation. If we are going to have close co-operation, including on intelligence and military deployment, there have to be formal structures and agreements. So I wish to withdraw this amendment, but we and others will have to return to this issue with increasing urgency if the half-promises made by the Prime Minister in her Munich speech turn out to be half-promises and nothing more.

Amendment 29 withdrawn.

10 pm

Amendment 30

Moved by ***Baroness Ludford***

30: After Clause 6, insert the following new Clause—

"Internal security, justice and police co-operation and counter-terrorism

The Secretary of State must ensure that before exit day all necessary action has been taken to continue the United Kingdom's participation in EU measures to promote internal security, justice and police co-operation and counter-terrorism to the extent that—

(a) the United Kingdom has opted in to those measures,

(b) they will be incorporated into UK law as retained EU law, and

(c) they will not remove or diminish any rights of the individual in the criminal justice process."

Baroness Ludford: I find myself in a similar position, in moving this amendment on behalf of myself, my noble friend Lord Paddick and the noble Lord, Lord Judd, to my noble friend Lord Wallace in moving his amendment on foreign and defence policy and external security. This is about internal security, where, in theory, we are rather further forward in designing the wiring diagrams that the noble Lord, Lord Kerr, talked about.

In her speech at the Munich Security Conference, the Prime Minister said a fair amount about these issues of extradition, Europol and data access and exchange. But there are a few little problems on the way. I very much look forward to hearing from the Minister some concrete answers about how a UK-EU security treaty will be taken forward and how it will address some of the problems identified so far. One concerns extradition. The Minister will be aware that in article 168 of the draft withdrawal agreement there is a facility allowing that the EU,

"in respect of any of its Member States which have raised reasons related to its fundamental structures, may declare that, during the transition period, that Member State will not surrender its nationals pursuant to",

the European arrest warrant framework decision, and then the UK could declare similarly that it will not surrender its nationals.

I have to say that when Ministers from the Ministry of Justice and DExEU came to the EU Justice Sub-Committee four weeks ago, they did not appear to know what this article meant. It meant that some countries would not be able to extradite or surrender their nationals to the UK because they would have to change their constitutions. The one we all know about is Germany, which changed its constitution to be able to extradite its nationals to a fellow EU state under the European arrest warrant, but that did not apply to non-EU states. One reason why the surrender agreement with Norway is still not in force 17 years after negotiations began is that I understand there are 88 pages of declarations and notifications surrounding it, a lot of which will be to do with non-extradition of nationals. That would be a very serious omission from an extradition agreement.

Do the Government know which member states have already indicated that, for constitutional reasons, they would refuse to extradite their nationals to us or

[Baroness Ludford]
would find it impossible or politically difficult to change their constitutions, which in some cases might mean a referendum—perhaps no Governments like referenda—either during the transition or as part of the future relationship? What is the extent of that problem? If we are not going to be able to rely on the European arrest warrant, what is the situation in terms of falling back on bilateral agreements or the 1957 Council of Europe convention? How many member states have maintained in their national law the provisions for extradition outside the European arrest warrant and would they be willing to bring things back in just for us?

On Europol, are we looking at something like the Denmark model? Denmark has an opt out from all justice and home affairs measures, even though it is an EU member state and has no option to opt in on a case-by-case basis, so it is a third country for the purposes of Europol, with no decision-making powers and no access to the Europol database. Do the Government seriously expect to do better than Denmark on participation in Europol?

On enforcement and dispute resolution, is it conceivable that it would not be a requirement of a future UK-EU extradition arrangement for the UK to take account of CJEU case law and charter rights post Brexit? For instance, what is the Government's analysis of the Irish court's refusal to extradite to the UK and make a reference to the CJEU because of concerns about lower protections here post Brexit? These difficulties are not just going to arise after next March: they are arising already because of fears that our safeguards and protections are not high enough. I am sure that the Government are extremely grateful that they are being pushed to take these matters into account by this Chamber as well as by the European Council guidelines. Three months ago, the European Commission made a presentation of the main issues affecting police and judicial co-operation with the UK after Brexit. Two very pertinent factors were, first:

"Respect for fundamental rights, essentially equivalent data protection standards",

and, secondly:

"Strength of enforcement & dispute settlement mechanisms".

Those similar factors were stressed in the European Council guidelines of 23 March.

Norway, Switzerland and Iceland must not only make contributions to the EU budget to participate in Schengen laws and policies but also accept the supremacy of the CJEU over their national courts in Schengen matters. How do the Government intend to maintain access to one of the most important databases, the Schengen Information System—at the moment, we have access for the policing side though not for immigration—if they neither contribute to the budget nor accept the supremacy of the CJEU? There is no precedent for a non-EU, non-Schengen country having access to the SIS. Do the Government believe that they can, none the less, manage to gain such access? In her Munich speech, the Prime Minister said that,

"when participating in EU agencies the UK will respect the remit of the European Court of Justice".

However, in the very next sentence, she said that,

"a principled but pragmatic solution to close legal co-operation will be needed to respect our unique status as a third country with our own sovereign legal order".

That rather seemed to undermine respecting the remit of the ECJ. So which is it? Are we going to respect the remit of the ECJ or insist on our own sovereign legal order? I assume it cannot be both.

On the exchange of data, the Government have not, to my knowledge, confirmed that they will seek an adequacy decision from the Commission under the GDPR. They talked in the partnership paper last August about,

"building on the existing adequacy model",

as if we could do better, and then the Prime Minister referred in the Munich speech to a "bespoke arrangement"—a term we have become quite familiar with. Would the Government not find it helpful to accept the retention of the Charter of Fundamental Rights, which we have tried to assist in today, when they try to demonstrate that they are upholding high data protection standards?

One of the issues, to which we have referred several times in this Chamber, is that our data processing for national security purposes will come under the spotlight in a way that does not happen while we are an EU member state, because national security is outside the competence of the EU. However, once we are outside the purview of the EU, our Investigatory Powers Act and other provisions—including quite possibly our co-operation with the United States on intelligence data matters—will be scrutinised as to whether they sufficiently safeguard privacy. The noble Lord, Lord Callanan, who is sitting next to the Minister who will reply, will know as much as I do from our experience from 2013 how difficult those issues can be. The Court of Justice struck down the safe harbour agreement because of worries about data transfers and data access by security agencies in the United States.

I hope I have given the noble Baroness the Minister a few small questions—or rather the noble Lord; I am sorry, it is difficult to keep up—which deserve quite meaty answers. There was no beef in the response on security and defence policy, but the Prime Minister herself has been much more explicit about the possible arrangements on internal security. I draw attention to the wording of the amendment, which includes showing how the measures,

"will not remove or diminish any rights of the individual in the criminal justice process".

We participate in some procedural rights—not as many as some of us would like—but we need to uphold the rights of defendants and victims in the criminal justice process as well as to enable the police to catch criminals. I therefore look forward to learning from the Minister some quite explicit and specific details about how the UK-EU security treaty is advancing. I beg to move.

Lord Judd: My Lords, in warmly supporting this amendment, I will make only two points. First, crime is now global and international; trafficking, drugs and terrorism know no frontiers. When I was serving on the Home Affairs Committee and we looked into these matters, I was impressed by the way in which one

person after another who had front-line operational responsibility said how important the European dimension was to them, how any diminution in the effectiveness of co-operation with Europe would not be in the interests of the protection of the British people, and that we needed our colleagues in Europe. When asked, "But what about those elements of Europe which might not be as well equipped professionally and in other ways to undertake the tasks as we regard ourselves as being?", the answer was, on the whole, very firm. They said, "We had better help them to become as effective and not walk away from them because we shall need them". This amendment is therefore very important and I commend it to the Minister.

10.15 pm

Lord Wigley: My Lords, I support Amendment 30, which seeks to ensure that before exit day all necessary action has been taken to ensure that we continue to co-operate on issues of internal security and law and order with our closest neighbours. It is timely, since fears are growing that the UK could become a more dangerous place as a result of our leaving the European Union. It is also timely because time is running out.

The sharing of intelligence and co-operation between countries will remain as vital in understanding the movement of criminals and domestic and international terrorism in the future as it is now. Security policy is threatened by potential damage to the European police office, Europol, which contributes to more than 13,500 cross-border investigations every year. It could be crippling. Leaving the EU will also make it difficult for agencies such as Eurojust to offer joint investigation teams to tackle a range of crimes from terror to child abuse.

There is considerable worry as to whether the UK will, after Brexit, still be part of the European arrest warrant agreements that allow for the most wanted criminals to be returned promptly. These provisions were introduced in 2002 in response to the growing threat from international terrorism and a recognition that extradition procedures were complex and time consuming.

Another aspect relates to cybercrime, which is the biggest emerging crime problem that we have. It has spread across Europe and indeed across the world and we need international co-operation to tackle it. We seem to be potentially on the brink of another cold war with Russia. We need access to years and years of shared data and resources to ensure robust safeguards. Europol was formed in 1999 and integrated into the EU in 2009, and one of its main functions is cybercrime co-operation.

I am particularly worried about the possible loss of the European arrest warrant, which currently means that most wanted criminals can be returned promptly. Before the European arrest warrant, extradition arrangements could take up to 10 years, whereas now we are talking about people being able to be transferred within a matter of weeks. That has to be maintained. There is a huge amount of legislation to be worked through as a result of the Brexit vote but it is vital that security and policing are given priority by the UK Government.

Furthermore, Brexit is a cause of anxiety for smaller ports in the UK. The North Wales Police and Crime Commissioner, Arfon Jones, is concerned that the new flexible approach to counterterrorism could see resources concentrated in the ports of the south of England, whereas Holyhead and other Welsh ports are underresourced and understaffed. Holyhead is in fact the second busiest ferry port in the UK and handles 2 million passengers each year.

The noble Lord, Lord Carlile, warned back in 2002 that the underpoliced ports were the soft underbelly in the war on terror. It is inevitable that the common travel area will be abused by criminals trying, illegally, to get into the UK. They will find the soft spots to come into the country and we must be prepared and ready to address that issue. We need some clear guidance from the Government as to how the smaller ports will be resourced, especially those with links across the Irish Sea. All these issues are important and they all need early answers to make sure that if Brexit happens according to the schedule that has been planned, at least there is preparation undertaken to meet these vital concerns.

Lord Paddick (LD): My Lords, I will speak to this amendment, to which I have added my name. I have spoken to former colleagues, particularly in the National Crime Agency, who have particular responsibility for European co-operation and they are very concerned about the potential consequences of our leaving the European Union. Clearly, in terms of counterterrorism intelligence, most arrangements are bilateral and therefore will not be affected, but bringing those people identified as terrorists to justice very much relies on European Union co-operation.

No doubt the Minister will say that this is an absolute priority for the Government. I have run out of fingers on which to count the number of absolute priorities that this Government have as far as leaving the European Union is concerned. Whichever Minister responds will say that of course it is in the interests of the United Kingdom and the European Union to maintain current levels of co-operation on these issues, but the important point that my noble friend has already been made, particularly in relation to the constitutional issues around Germany and extradition, is that the UK and the European Union may want the current arrangements to continue as far as possible, but the question is what is legally and constitutionally possible if the United Kingdom becomes a third party country and is not a member of the European Union.

There is one other issue related to the previous amendment, and that concerns the fact that we will no longer have a seat at the table at Europol. At the moment, the United Kingdom is central in directing the operations of Europol and in having influence over what Europol does, but it is not possible for a third party country to have that degree of involvement in, or that amount of influence over, Europol. Therefore, clearly British interests will lose out following any exit from the European Union.

Therefore, I ask the Minister to explain how these legal and constitutional obstacles will be overcome and how we will be able to be as influential and

[LORD PADDICK]
effective as we currently are in working with our European neighbours if we no longer have a seat at the table.

Baroness Hayter of Kentish Town: My Lords, it is really hard to overstate the importance of the issues raised this evening or, indeed, to understate the lack of government progress on them. It was in February of last year that the Government recognised the importance of the issues. Just so, but what action have they taken and what thought has been given to them since then? There was the welcome commitment to negotiate continued or enhanced co-operation in Munich, but what does that mean? We have heard little or nothing.

This evening we have heard from the noble Lords, Lord Paddick and Lord Wigley, and the noble Baroness, Lady Ludford, about Europol, about Eurojust from the noble Lord, Lord Wigley, about the European arrest warrant from everyone who has spoken, about European criminal records and about the Schengen Information System. These are networks that help to keep our people safe. It clearly cannot undermine any negotiations that the Government are having for us to know what they want to achieve, because we assume that they have already shared this with the EU 27. I wonder whether what they worry will undermine the negotiations is their obsession with the red line around the ECJ or their relationship with their own Back Benches. If not, why are we not hearing more?

I want to concentrate on the issue that is perhaps easiest to understand, which is the European arrest warrant, and not simply from the point of view of where the countries named by the noble Baroness, Lady Ludford, might have a difficulty with it. Are we going to recognise any arrest warrant from the other countries? We do not even know that yet. What access will our law enforcers have to the checks, records and intelligence sharing that they use not simply day by day but hour by hour? As the noble Lord, Lord Wigley, says, time is running out. We need some answers to that.

The amendment would ensure that the Government prioritised these issues over their concern with hard Brexiteers, who seem willing for the country to pay any price, even dropping out of the EAW, simply so that they can say, "Yeah, we're shot of them". That is a price that is too high to pay. It would put our security and justice outside an organised, functioning European system—one that has given us great confidence that we are being properly protected. This is an area where the Government need to give some leadership and come up with real proposals that can be implemented to keep all our people safe.

Lord Callanan: My Lords, I am grateful to the noble Baroness, Lady Ludford, for raising the important issues dealt with in her new clause proposed in Amendment 30, as it provides me with an opportunity to set out the Government's position on internal security, law enforcement and criminal justice.

I want to begin by reiterating the Government's commitment to securing the best possible outcomes for the UK in our negotiations with our European partners. As the Prime Minister made clear in her Munich speech, the UK is unconditionally committed to maintaining Europe's security, now and after our withdrawal from the EU. The UK has been instrumental in developing many of the tools which the EU has at its disposal, and is a significant contributor. For example, the UK is in the top three of member states that contribute intelligence each day to the different databases within Europol. We want this to continue in a way that works for both the UK and for Europe so that we can respond quickly and effectively to the changing threats that we face, including from terrorism and serious and organised crime. I am grateful to the noble Baroness, Lady Ludford, for raising this important issue in Amendment 30.

The intention of this Bill is to create a snapshot of EU law as it applies in the UK immediately before exit day and then retain it within our domestic law following our departure. The UK has a long-standing tradition of ensuring that our rights and liberties are protected domestically and of fulfilling our international human rights obligations, which will continue irrespective of exit. The decision to leave the European Union does not change this. However, noble Lords will forgive me for repeating it, but the exact nature of our future relationship is a matter for negotiation. I assure noble Lords that the Government are already taking extensive action to prepare the ground for these negotiations.

The noble Baroness, Lady Kennedy of The Shaws, is not in her place, but she has tabled Amendment 66 in this group. I do not think that any noble Lords referred to this amendment, but it covers some areas that have been mentioned and so I will say a few words about that and about our objectives. Our *Security, Law Enforcement and Criminal Justice* partnership paper published in September last year outlined how we are seeking a relationship that provides for practical operational co-operation, including the European arrest warrant, facilitates data-driven law enforcement and allows for multilateral co-operation through EU agencies, including Europol and Eurojust. We believe that the UK and the EU should work together to design new, dynamic arrangements as part of our future partnership to continue and strengthen our close collaboration.

The Prime Minister has been clear that we are proposing a new treaty to underpin our future internal security relationships. With reference to paragraph (c) in the new clause proposed by the noble Baroness, Lady Kennedy, such a treaty will require an effective and independent means of resolving disputes that is respectful of the sovereignty of both the UK and the EU's legal orders. The appropriate dispute resolution mechanism and the relationship between our courts will depend on the substance and context of the agreement, and so is a matter for negotiations and not for this Bill.

Let me address briefly some of the questions that the noble Baroness, Lady Ludford, asked me, about extradition from the EU using the European arrest warrant and, in particular, the implementation period. We certainly want to continue to be able to use the EAW to extradite people from the EU during the implementation period. The relevant provisions on this in the withdrawal agreement were not agreed and

are hence marked as yellow, and discussions are continuing on this as we speak. However, we believe that it is in the interests of both the UK and EU member states that current capabilities are preserved during the implementation period, and we continue to make that case.

Baroness Hayter of Kentish Town: The Minister has answered only one part of the question—whether it would be possible that we would be able to extradite from other countries. I asked whether we were willing also to respect an arrest warrant from another country and to exercise that here.

10.30 pm

Lord Callanan: It is certainly our intention but, as I have said, these are bilateral relationships and the discussions are continuing. That is one part of the withdrawal agreement that was not quite finalised and so, literally, discussions are continuing on it.

The noble Baroness, Lady Ludford, also asked me about databases and the use of EU data on UK databases and vice versa. This is also a matter for negotiations. Our aim is to ensure that we and our EU partners continue to share and use personal data where there are clear benefits to public safety, subject of course to the appropriate safeguards.

For all of those reasons, and given the Government's clear intentions to continue and strengthen our close collaboration on security, law enforcement and criminal justice after we leave, and given that the new clauses exceed the purpose of this Bill, I invite the noble Baroness to withdraw her amendment. For the sake of clarity, I should say that the Government will not reflect further on this amendment and so, if the noble Baroness wishes, she should take the opportunity to test the opinion of the House this evening.

Baroness Ludford: I am quite cross, really. With all respect to the Minister, that is a disrespectful response. Twenty-one months after the referendum, there was not even as much detail in the Minister's reply as there was in the Prime Minister's Munich speech. For instance, the Minister said that a new treaty will require respect for legal sovereignty. As I mentioned to him, the Prime Minister said:

"when participating in EU agencies the UK will respect the remit of the European Court of Justice".

What does that mean? The Minister has enlightened me not a jot on that, nor on the follow-up phrase about,

"our unique status as a third country with our own sovereign legal order",

which was the only one he talked about.

It is farcical that the Prime Minister can make a speech containing more detail than the Minister is prepared to give in response to an amendment in this House. We are being treated as of no account whatever. The way in which Ministers are responding on this is disrespectful. It is obvious that there are major challenges in getting a UK-EU security treaty. Many commentators are writing about it, with various opinions and insights, but the Government are not among them, at least when it comes to telling us in Parliament. Even though we are the unelected House—I am not aware that they are telling the elected House in any more detail either—it seems poor that this is what we have become and have been reduced to when we seek knowledge about how Parliament will take back control of our future relationship with the EU post Brexit.

We will have to reflect on another way in which to take this issue forward. I hope the Minister will understand that his reply was not worth the paper it was written on. That said, I beg leave to withdraw the amendment.

Amendment 30 withdrawn.

Amendment 30A

Moved by ***Lord Wallace of Tankerness***

30A: After Clause 6, insert the following new Clause—

"Equality and discrimination

(1) The purpose of this section is to ensure that the withdrawal of the United Kingdom from the EU does not diminish protection for equality in domestic law.

(2) Rights under equalities legislation are not to be removed or diminished.

(3) In this section "equalities legislation" means the Equality Act 2006, the Equality Act 2010 and subordinate legislation made under either of those Acts.

(4) In any proceedings in which a court determines whether a provision of primary legislation is compatible with subsection (2), if the court is satisfied that the provision is incompatible it may make a declaration to that effect.

(5) Subordinate legislation is not law if and to the extent that it is incompatible with subsection (2).

(6) Subsection (5) does not apply to a provision of subordinate legislation if made in the exercise of a power conferred by primary legislation which prevents avoidance or removal of the incompatibility.

(7) In any proceedings in which a court determines whether a provision of subordinate legislation is compatible with subsection (2), if the court is satisfied that subsection (6) applies the court may make a declaration of the incompatibility.

(8) Section 10 of the Human Rights Act 1998 (power to take remedial action) applies in relation to a declaration of incompatibility under subsection (4) or (7) of this section as it applies in relation to a declaration of incompatibility under section 4 of that Act.

(9) Section 19 of the Human Rights Act 1998 (statements of compatibility) applies in relation to compatibility with subsection (2) of this section as it applies in relation to compatibility with the Convention rights."

Lord Wallace of Tankerness: My Lords, I beg to move Amendment 30A in my name and those of the noble Lord, Lord Low of Dalston, and the noble Baroness, Lady Lister of Burtersett. I know it also enjoys the support of the noble Lord, Lord Cashman. Today's proceedings on the Report stage of the Bill started with a debate on the Charter of Fundamental Rights and we finish with a debate on equality and rights of a slightly different nature but no less important, albeit that the number of Peers in the Chamber does not quite reflect that. However, that is more likely to do with the time of day.

I put on record my thanks and those of the noble Lord, Lord Low of Dalston, to the noble and learned Lord, Lord Keen of Elie, who took time last week to meet us together with an official from the Equality and Human Rights Commission regarding the protection

[Lord Wallace of Tankerness]
of equality rights after we leave the European Union. It was a constructive meeting but we nevertheless feel that this amendment remains necessary. It is often said that one of the three great promises is, "I am from the Government and I am here to help". This is the other way around; although we are in opposition, we are here to help the Government. The Government themselves said in last year's White Paper about what was then referred to as the great repeal Bill, but which has rather diminished in its title since then, that all the protections covered by the Equality Act 2006, the Equality Act 2010 and the equivalent legislation in Northern Ireland will continue to apply once the United Kingdom has left the European Union.

That is what we seek to secure by way of this amendment. The first subsection of the proposed new clause states:

> "The purpose of this section is to ensure that the withdrawal of the United Kingdom from the EU does not diminish protection for equality in domestic law".

The equality directives currently provide a set of minimum standards in relation to equality rights, and the requirements of these directives are reflected in the Equality Act 2010. It is fair to say that over the years there have been occasions when the European Union has set minimum standards and UK Governments of various descriptions have gone further than those standards, while on other occasions we have required the European Union, as it were, to push us along in securing equality rights. However, the primacy, as we have it today, of European Union law means that domestic laws implementing EU rights-enhancing directives, including those in the Equality Act 2010, cannot be removed while the UK remains bound by EU law, except by agreement at the EU level.

Those equality directives include the race directive of 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The framework directive 2000/78 established a general framework for equal treatment in employment and occupation. The gender goods and services directive of 2004 implemented the principle of equal treatment between men and women in access to and supply of goods and services, while the recast gender directive of 2006 saw the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. In addition to these specific equality directives, also relevant is Article 157 of the Treaty on the Functioning of the European Union which establishes the principle of equal pay for work of equal value, something that has not been far from the headlines in recent weeks. The directives to which I have referred, together with Article 157, collectively provide a set of minimum standards of protection against discrimination at work on the grounds of racial or ethnic origin, sex, religion or belief, age, disability and sexual orientation. The race and gender goods and services directives provide protection against discrimination on the grounds of race and sex in accessing goods and services, while the race directive also extends to social protection and healthcare, social advantages and education. As I have said, the requirements of these directives are reflected in the Equality Act 2010.

However, despite the Government's political commitment not to reduce these protections after the United Kingdom leaves the European Union, there is nevertheless a risk that without embedding the principle of non-regression within the Bill, these rights could be undermined in the future once the minimum standards set by EU law are no longer binding on the United Kingdom. For example, while the right to equal pay for work of equal value and many of our protections from discrimination cannot be removed while the United Kingdom remains part of the EU, they could be removed after we leave.

This matter was addressed by the Women and Equalities Select Committee in the other place. In its report published last February, the committee concluded that,

> "ensuring protections are maintained is not simply a matter of transposing existing EU law. In order to protect rights, the Government needs to take active steps to embed equality into domestic law and policy. The steps we recommend would entrench equality into the UK legal and policy framework and would ensure that the UK retains a strong, undiminished record of equality after it leaves the EU".

What we see in the Bill is a transposition of existing EU law. The Select Committee said that we had to go further than doing simply that and entrench equality in the United Kingdom legal and policy framework. This amendment was prepared in consultation with the Equality and Human Rights Commission and we believe it does just that by providing that existing rights under the Equality Acts 2006 and 2010 will not be removed or diminished. It sets out two mechanisms to do so, mirroring those in the Human Rights Act 1998, by requiring a Minister to state when new legislation is introduced to Parliament whether it is compatible with the requirement not to reduce existing protections, as well as by allowing UK courts to assess the compatibility of new laws with this requirement. We believe that this is in line with the recommendation in the Women and Equalities Committee's report that there is a need to empower Parliament and the courts to declare whether legislation is compatible with UK principles of equality.

The proposed new clause would provide equivalent protections for equality rights after exit day as before because it replaces the foundation of the rights currently provided by EU law with an equivalent domestic underpinning. I assure the House that, in drafting the new clause, attention was paid to concerns raised by the Government in Committee about an earlier proposal to create a new, free-standing right to equality. In response to that debate, the noble Lord, Lord Callanan, stated:

> "The bottom line is that substantive new rights are not consistent with the intended purpose of the Bill, which is about maintaining the same level of protection on the day after exit as before".—[*Official Report*, 7/3/18; col. 1168.]

The proposed new clause would maintain equivalent protection for equality rights after exit day by simply replacing the foundation for our equality rights currently provided by EU law with an equivalent underpinning in our domestic law. In doing so, we respect the United Kingdom's constitutional position by applying the same approach as the Human Rights Act and we respect parliamentary sovereignty because the proposed

new clause would limit the role of the court in relation to primary legislation to making a declaration of incompatibility, rather than invalidating or striking down primary legislation, as is currently the case under EU law. In that sense, it is a somewhat weaker underpinning than the current level of protection, but we believe that this approach would strike an appropriate balance between ensuring non-regression of equality rights after we leave the EU and returning control to Parliament to have the final say on our laws after exit day.

Having been a Minister in both the Scottish Government and the United Kingdom Government, I know that there has to be compatibility in the United Kingdom with the Human Rights Act and the European Convention on Human Rights; in fact, it is wider in Scotland in that there has to be a declaration of compatibility and being within competence. That focuses Ministers' minds and, very often, things are changed. No one is saying that a deliberate attempt would be made to undermine what in that case would be human rights but in this case would be equality, but when the tests are applied and people are obliged to look at them, they may find things there that would reduce rights. Therefore, it is a very good test because it ensures that equality rights are not eroded, even through the unintended consequence of a particular provision.

I do not believe that this is fanciful. As a member of the coalition Government between 2010 and 2015, I put my hands up: concerns were expressed that parts of the Red Tape Challenge could have eroded some equality rights during that period. Indeed, in its January review of sex discrimination law, the Fawcett Society stated:

"Without the backstop of the EU … There are good reasons to believe that this presents a real risk to equality legislation. For example, the 2011 Beecroft report, commissioned as part of the 'Red Tape Challenge', included proposals to cap discrimination damages awards. This was prevented by the Court of Justice of the European Union, which had ruled in 1993 that damages for sex discrimination could not be limited. That report also proposed a number of other retrograde steps, including opt-outs of equalities requirements for small businesses".

I commend this proposed new clause to the House. It will send a positive signal that we still wish to be at the forefront of protecting equality rights once we have left the European Union. We seek here a robust underpinning of these equality rights, as currently guaranteed by the European Union. I beg to move.

10.45 pm

Lord Low of Dalston: My Lords, despite the Government's political commitment that equality rights that currently come from Europe will continue once the UK leaves the EU, there is a risk that without embedding the principle of non-regression in the Bill, these rights could be undermined in the future once the minimum standards set by EU law are no longer binding on the United Kingdom. The Women and Equalities Select Committee recognised this risk and recommended that the Bill should explicitly commit to maintaining current levels of equality protection.

The proposed new clause would respect the UK's constitutional position by applying the same approach as in the Human Rights Act 1998, as we have heard from the noble and learned Lord, Lord Wallace. In particular, it respects parliamentary sovereignty because it would limit the role of the court in relation to primary legislation to making a declaration of incompatibility, rather than invalidating or striking down legislation, as is currently possible under EU law. In that sense, what the new clause proposes is in fact weaker than the current level of protection for equality rights derived from EU law.

What rights might be at risk? While we in Britain should be proud that we have some of the strongest equality law in the world, and in many areas have gone before and beyond what EU law required, some of our important current protections have been driven by developments at European level. Even those that originated in domestic law are often underpinned by EU law. For that reason, they cannot be reduced while we remain in the EU. So when the underpinning of EU law is taken away, there is a real risk that a future Government could seek to chip away at our existing protections. We have already seen this in the Red Tape Challenge, which the noble and learned Lord referred to, under the coalition Government, when the existence of the EU safety net protected much of the Equality Act 2010, but we still saw provisions outside the EU directives being attacked and, in some cases, repealed.

Some of these protections, particularly those that are perceived as financially costly or burdensome to business, might be more vulnerable to repeal under a future post-Brexit Government. Risks that commentators have identified include: the reintroduction of a cap on compensation for discrimination at work; undermining aspects of the prohibition on unfavourable treatment related to pregnancy, which currently reflects the EU position; and chipping away at aspects of equal pay legislation post Brexit. The Beecroft report, which the noble and learned Lord referred to, which came forward as part of the Red Tape Challenge, repeatedly refers to the constraints imposed by EU directives. It recommended that compensation for the loss of earnings part of an award for discrimination dismissal should be capped and that small businesses should be able to opt out of a whole raft of employee rights, including unfair dismissal, the right to request flexible working, flexible parental leave and equal pay audits.

It is possible to anticipate objections that can and might be made to the amendment we are bringing forward—I can almost hear them in my ears before the Minister gets up to speak. The Bill is already transferring or preserving all the equality rights from EU law, so there is no need for this clause—I can hear that being said. The Bill does not transfer the underpinning of these rights currently provided by EU law. At the moment, the rights cannot be removed or diluted except by agreement at EU level. Maintaining the equivalent protection after the UK leaves the EU requires replacing this underpinning with protection in domestic law. That is what the proposed new clause would do.

Secondly, it might be said that this is a new right and that it is not the purpose of the Bill—how many times have I heard that?—to create new domestic rights. The proposed new clause would not create enhanced protection over and above the current position in the UK as a result of our membership of the EU;

[Lord Low of Dalston]
in fact, it is weaker, because it permits only a declaration of incompatibility rather than the striking-down of incompatible domestic primary legislation, as is currently the case.

Thirdly, it might be said that the clause would create confusion. I can think of two kinds of confusion that might be alleged, the first being that it created a new right which overlapped with the rights in the Equality Acts. However, it would create no such rights; it would merely provide that existing rights could not be removed or diminished. Neither a court nor a Minister introducing a Bill to Parliament should have any difficulty determining whether a new legislative provision removes an existing right in the Equality Acts. It might further be suggested that confusion is caused by introducing a Human Rights Act mechanism normally applicable to convention rights, but the Human Rights Act is not a convention mechanism; it is a domestic law mechanism carefully crafted to strike the right balance between respect for fundamental rights and the principle of parliamentary sovereignty. It is therefore entirely appropriate to adopt the same balancing approach in protecting equality rights.

Finally, it may be said that the proposed new clause will not work because some changes will need to be made to the Equality Acts, but it will not prevent technical changes being made to the Acts such as those referred to by the Government in their paper, *Equalities legislation and EU exit*. That paper confirms:

"No planned changes to the Equality Acts 2006 and 2010 or secondary legislation under those Acts, using the powers under the EU (Withdrawal) Bill will substantively affect the statutory protections provided for by that equality legislation".

Such changes can therefore be made without removing or diminishing rights and will not be prevented by this clause. If in the future more substantive changes are required to the rights in the Equality Acts, it remains open to Parliament to make them in accordance with the principle of parliamentary sovereignty. I am entirely convinced of the value of the amendment and am very happy to support the noble and learned Lord, Lord Wallace.

Baroness Lister of Burtersett: My Lords, the noble and learned Lord, Lord Wallace, and the noble Lord, Lord Low, have made a strong case. I am perplexed as to what possible argument the Government could make against writing in the principle of non-regression of equality rights, given the numerous assurances they have given to us on their commitment to such rights and given that, as already explained, the amendment was modified to take account of objections raised by the Minister in Committee. I can only think that the Government want to retain some wriggle room for the future.

That suspicion was strengthened when I read in today's *i* that the International Trade Secretary has pledged to cut bureaucracy and red tape to promote free trade post Brexit. As we have heard, the Red Tape Challenge removed some equality rights and would have removed even more if our membership of the European Union did not prevent it doing so. As the noble Lord, Lord Low, has pointed out, the Beecroft report, which was part of the Red Tape Challenge, repeatedly referred to the supposed constraints imposed by EU directives. Is it surprising that we are rather suspicious that when those constraints are removed, a future Government might wish to resile from some of these equality rights?

Finally, I will go back to something I have referred to more than once because I think it is so important. At Second Reading, the right reverend Prelate the Bishop of Leeds asked us,

"at the end of this process, what sort of Britain … do we want to inhabit?".—[*Official Report*, 30/1/18; col. 1386.]

That is a question that we really must keep coming back to. For me, the principle of equality is absolutely central to the kind of Britain that I want to inhabit when we have—unfortunately—left the European Union.

Lord Cashman: My Lords, I added my name to this amendment but too late for it to be printed in the Marshalled List. I congratulate the noble and learned Lord, Lord Wallace of Tankerness, on the way he moved this extremely important amendment. He referred to our earlier discussions on the Charter of Fundamental Rights, when the House was nearly full, and this connects directly to that debate.

There are deep concerns, not only within the House but outside, among respected and established non-governmental organisations and, indeed, the Equality and Human Rights Commission. I would expect the Government to clutch this amendment with open hands and embrace it to their chest, but I have worked with the Minister in the European Parliament and I know that I am not about to see that happen—although, as my noble friend Lady Lister said, the amendment puts into words the assurances offered by the Government and Ministers.

As I said earlier, there are real, deep concerns that rights will be attacked once we leave the protection of the charter and the treaty establishing the European Union and the Treaty on the Functioning of the European Union. Most of these rights arise out of Article 13 of the treaty of Amsterdam, which gave the European Union a legal basis upon which to act on the grounds of race, ethnicity, religion, belief, age, disability or sexual orientation; gender was covered elsewhere. They define the very societies and countries in which we choose to live.

I look forward to the Minister replying and surprising me by saying that the Government take this amendment on board and will embrace it. If I am not surprised, I will return to this issue. Others outside the House will return to this issue. I believe that it defines the kind of country we want to be post Brexit. Now more than ever, we need to offer reassurances not merely within the two Chambers of this Palace but within the Bill.

Lord Goldsmith: My Lords, one of the privileges I had when I served as Attorney-General was to be able to see government proposals, to consider them, to see where they were compatible with our obligations and sometimes to use incompatibility as grounds for persuading Ministers not to go down a particular path.

In considering this amendment, it is important to understand what is meant by underpinning because it risks concealing the important proposition that there are certain things that the Government simply cannot do at the moment—nor can other Governments who are members of the EU—because of the commitments that have been made. A directive has to be complied with. We cannot override it overnight. In these circumstances, the noble and learned Lord, Lord Wallace of Tankerness, is right to raise this hugely important point: what will be the underpinning in the future?

11 pm

The other thing that I learned was about the techniques to which he referred. For example—and I have made this point before in the House—the obligation of a Minister to give a certificate or statement of compatibility is enormously powerful. Those are the techniques. At bottom, the proposition put forward is a very modest proposal, which is that there should be no backsliding on the existing obligations as to equality. It is not adding something new; it is putting in place a mechanism that will provide the same constraints as exist at the moment, but they will be British constraints. There can be no complaints that they are coming from overseas or from foreigners.

It is not a difficult thing to understand why this is a modest proposal. There are good techniques being proposed to deal with it. It may be that the Minister or his officials can come up with better techniques for doing it, but at the end of the debate—perhaps at the end of today—the question is simply this: what are the Government going to do to ensure that these protections remain? Are warm assurances enough? I do not believe that they are. Having been in government for a number of years, I know that there are good intentions, but I also know that, without constraints of some sort, those good intentions can disappear.

Therefore, let taking back control not be a licence for backsliding on equality. Let it not be an encouragement to unfairness. Nothing for many of our fellow citizens is more damaging or outrageous than inequality or unfairness. We all feel that all the time, so I ask the Minister to answer the question: what are the Government going to do to make sure that equality is not diminished?

Lord Callanan: I thank noble Lords for their time and consideration on the important issue of how we maintain our equality protections as and after we leave the EU. There really is no difference between us in our commitments to these important issues. Amendment 30A, in the name of the noble and learned Lord, Lord Wallace of Tankerness, follows on from the debate we had in Committee in that it seeks to reflect in statute the political commitment that the Government have already made in this area—that is, that we will maintain the existing protections in and under the Equality Acts 2006 and 2010 after our exit from the EU.

I must, however, be clear with the noble and learned Lord that we have three concerns about his suggested approach. First, there is the issue of language, context and potential for conflicting rights. Put simply, the language of a political commitment does not translate to the statute book. Therefore, let me say to my good noble friend Lord Cashman that while our commitment to existing equality protections works perfectly well politically—we are committed to them here and in the wider world outside this place—it must be noted that terms such as "protection" and "diminish" do not have a sufficiently clear and precise meaning for the purposes of statute. As a consequence, the amendment runs a very real risk of creating tensions for real people, with real interests that may be difficult to resolve between existing and potential future rights that we may wish to legislate for.

To give an example, noble Lords may be familiar with the experiences on buses of some passengers who use wheelchairs, and the difficulty that they have sometimes had in accessing the space theoretically available to them when it has been taken by people, often parents with young children in pushchairs. The question arises as to whose rights take priority, especially as, arguably, both parties are covered by "protected characteristics" provided for in the Equality Act 2010. This particular example of potentially conflicting rights is being resolved, following a court judgment that passengers who use wheelchairs have priority. However, I trust this helps illustrate the risk of future developments in equality law being, in effect, struck down in the courts because, while they might benefit certain groups, these benefits might come at the expense of rights in retained EU law secured under this Bill. As has been noted, the Equality Act 2010 is lengthy, detailed and specific in order to avoid questions of competing or conflicting rights. Setting it in stone against any future equality issues we or future Governments may wish to provide for runs fundamentally against the grain of the Act and our developing and dynamic approach to equality rights in this country.

Our second concern is closely related in that we fear this new clause would create considerable legal uncertainty. Indeed, the noble and learned Lord has recognised this by including proposed subsections (4) and (7) which describe what a court may do when faced with an issue of the compatibility or otherwise of new provisions and existing equality rights. I hope he will understand when I say that, especially in the context of our exit from the EU, we think it is vital to keep to an absolute minimum any legal uncertainties that may arise for the good of businesses and individuals, so a new clause that seems positively to embrace such uncertainty is not an attractive prospect. It is not at all clear what businesses or individuals are supposed to make of any rights and obligations that might apply to them pending the emergence of the case law that the new clause anticipates.

Finally, there is the relationship between the proposed new clause and the Human Rights Act 1998, the architecture of which reflects the existence of the European convention. The noble and learned Lord's text uses key concepts from the HRA, notably declarations of incompatibility and their consequences, and proposed subsections (8) and (9) directly cross-refer to sections of the HRA. This simply is not appropriate. Indeed, at the risk of echoing my earlier point, we believe these linkages would lead to uncertainty and confusion. There is, for example, no explanation of what the effect of declaration of incompatibility would be in

[Lord Callanan]
this context. Would the primary legislation continue to have effect or not? There is clearly potential for gaps and contradictions to develop between challenges and actions based on the new clause as opposed to the HRA and its existing reference to the prohibition of discrimination under Article 14 of the European Convention on Human Rights.

I have already alluded to our clear public commitment to maintaining existing equality protections, and I am very happy to repeat that commitment now. While I understand the noble and learned Lord's best intentions in this area, I must gently suggest to him that the interests of equality rights on our statute book are not well served by his proposed new clause and I hope that he will feel able to withdraw it. For the avoidance of any doubt, the Government will not be reflecting further on this matter, so if he wishes to do so, he should test the opinion of the House this evening.

Lord Wallace of Tankerness: The Minister should not tempt me. I am grateful to him for his reply, which was probably a bit more substantive than ministerial replies to the previous two debates, although it was, equally predictably, negative.

I do not think that the Minister's arguments bear too much scrutiny. He complained about the language used in my amendment and said that it is difficult to put a political commitment on to a statutory basis. He was challenged by the noble and learned Lord, Lord Goldsmith. If the wording here is not right, what are the Government proposing to do to give underpinning? I do not think that at any point in reply to this debate did the Minister indicate that there is no need for a proper underpinning of the equality rights we have. Indeed, given the Government's commitment to maintaining them, one assumes that the Government believe that they should continue and be underpinned. If the wording proposed is not right, there is a deafening silence from the Government's side about what words they would use. The Minister raised the declaration of incompatibility and whether that meant striking down. I think I made it clear, as did the noble Lord, Lord Low of Dalston, that we do not mean striking down. What we seek in this amendment is to make it consistent with the principle of parliamentary sovereignty after we leave the European Union.

It is said that the clause conflicts with the Human Rights Act. I confess that my party and I have argued many times for a written constitution for the United Kingdom, but we are always told that one of the benefits of the unwritten constitution is its flexibility. So we introduced into our constitution a Human Rights Act with some very good provisions; the noble and learned Lord, Lord Goldsmith, indicated some of the focus of attention and consideration that that Act places upon Ministers when they consider compatibility. If we have that, what is wrong? What is the constitutional fault in using that good practice to extend into another area where we are talking about something fundamental?

That is the concluding point because this is a fundamental question. The noble Baroness, Lady Lister, and the noble Lord, Lord Cashman, reflected on what kind of country we want to be. The Government set out in their White Paper last March that they want to respect and cherish equality rights. There is common ground on that. What we have not seen from the Government is a way in which they can ensure that that is underpinned as we go forward, so that we can ensure that that characteristic of what kind of country we want to be can be maintained without threat. I find it very regrettable but the night is a bit too late to test the opinion of the House, so I beg leave to withdraw the amendment.

Amendment 30A withdrawn.

Consideration on Report adjourned.

House adjourned at 11.11 pm.