Northern Ireland Assembly

Ad Hoc Committee on a Bill of Rights

OFFICIAL REPORT (Hansard)

Briefing by Mr Dominic Grieve QC

12 November 2020

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Ms Emma Sheerin (Chairperson)
Mr Mike Nesbitt (Deputy Chairperson)
Ms Paula Bradshaw
Mr Mark Durkan
Miss Michelle McIlveen
Mr Christopher Stalford
Mr John O'Dowd

Witnesses:
Mr Dominic Grieve QC

The Chairperson (Ms Sheerin): This afternoon, we have a briefing from Dominic Grieve QC on the implications of Brexit for human rights. Dominic joined us earlier in the year, in June, and has agreed to come back to speak specifically about the impact of Brexit on rights.

Dominic, you are very welcome to the meeting, and thank you very much for joining us again.

Mr Dominic Grieve QC: It is a pleasure. I am delighted to be with you.

The Chairperson (Ms Sheerin): Thank you. When you are ready, you can begin your briefing.

Mr Grieve: Thank you very much, and thank you for inviting me.

As I understood it, the last time that we met, what we mainly concentrated on was derogation from human rights, which was the topic that you raised with me and that I sought to address. This time, my understanding is that you are interested in the Charter of Fundamental Rights of the European Union and the implications that flow from our leaving the European Union. There are a lot of uncertainties here, as I will try to sketch out briefly, particularly in the context of Northern Ireland, which I will come back to in a moment.

I will say something briefly, and I hope that I am not repeating anything that you have already heard from other specialists who have come to address you. When the UK Government announced that they were leaving the EU — this was under Theresa May — they made it clear that they were going to retain EU law or most EU law in our domestic law to prevent there being a void into which we ended up with a sort of anarchy because nobody knew what the law was any more. The EU has contributed enormously to our national law, and I sometimes think that it is impossible to comprehend the extent to which it has pervaded national law in the United Kingdom, whether in England, Scotland or Northern Ireland.

At the same time, however, the UK Government made it quite clear in 2017 that they wanted to throw off the aspects of EU law that they did not much care for, and one thing that they had not liked over quite a long period was the impact of the EU Charter of Fundamental Rights on our national law. That goes back quite a long way. When the charter was first put forward, the United Kingdom insisted that it was merely or should merely be a declaratory document that set out the fundamental principles of EU law, many of which are, in fact, a reflection of what is already in the European Convention on Human Rights (ECHR). However, the UK Government did not want the charter to be used as what I call a "stand-alone mechanism" by which people could claim rights and get them established in our courts.

Bear it in mind that, unlike at UK level and unlike the ECHR and the Human Rights Act 1998 (HRA), which can at most lead to a declaration of incompatibility with UK and Westminster-made law, which is different, of course, for Northern Ireland, Scotland and Wales, European Union law can in certain cases trump UK statute. The UK Government were concerned that this would or could happen and, thereby, areas of national sovereignty, as they saw it, would be lost. To a certain extent, the United Kingdom's concern about this was not completely misplaced, because there have been instances since where individuals who bring forward claims have brought them under the Human Rights Act and the Charter of Fundamental Rights. They have found that, unlike the Human Rights Act, which could at most have led to a declaration of incompatibility, they have been successful in getting a law overturned.

The classic case, which I set out in my paper, is called Benkharbouche. That case concerned a lady who was employed in an embassy — it was about employment rights — and she had been improperly treated. The question was, in view of the fact that the UK gives special status to embassies and other diplomatic missions, whether, in fact, EU law trumped the national statute that did that. The court found, first, that there was a breach of human rights because she had not been able to recover the rights to which she was entitled. Secondly, the court said that we could make a declaration of incompatibility. However, as it happens, article 47 of the Charter of Fundamental Rights allows us to set aside the clauses of the State Immunity Act 1978 that breach article 47. That is an illustrative example of how the charter has at times been used.

When the Government came to enact the European Union (Withdrawal) Act 2018, they produced an extraordinary series of categorisations of rights. I set those out in paragraph 2 of my paper, and I do not think that I will go through them again because, as I point out in paragraph 3, if you find it muddling, you are in very good company. It is extraordinarily difficult to follow. They tried to separate out EU legislation and to preserve it so that it could still be used in courts of law, even after we have left and finally come out of transition in January. However, at the same time, they were quite determined that the Charter of Fundamental Rights be excluded. It allowed the general principles of EU law to survive and, to a very limited extent, the charter, in that, if you were trying to interpret what retained EU law means, you could make reference to the charter and the general principles of EU law. However, what you cannot do, or what you will not be able to do after January, is to use the charter, as I said, as a stand-alone right that says that there is a breach of the charter and that it can not only overcome ministerial action but overcome primary legislation.

Before I move on to the muddling aspect of all this, perhaps I should say something else. The UK Government have created a very strange situation, because, if the EU is anything, it is a legal system. That is unlike the UK, where Parliament is ultimately sovereign, whereas the law is sovereign in the EU. That is why the European Court of Justice (ECJ) is in such a massively grand building in Luxembourg. It is a legal order, and the anxiety has always been that, if the EU is not ruled by its own very tight set of rules, EU law could operate abusively. In a very curious way, therefore, the Government have done something very odd in getting rid of the charter while retaining EU law, and that is because the charter is a way in which EU law can be checked. The Government's rationale always was that getting rid of the charter did not matter. In December 2017, they carried out and published a right-by-right analysis of the charter's rights and claimed that the substantive rights that were protected by the charter would not be weakened after exit from the EU. They said that the charter did not contain any new rights but was simply a reflection of what EU law had always been. They said that, in any case, the Government were going to retain those underlying principles.

You might want to look at a very good document from the Equality and Human Rights Commission and the Joint Committee on Human Rights, which was published at about that time in Parliament. It disagreed with the Government and said, for the reasons that I have just given, that, although in many cases the principles would be maintained, the way in which the remedies are available to people might well be different and that some areas of rights would disappear completely. Some of them have to disappear because some of the charter concerns, for example, the rights of EU citizens to vote in EU elections. Clearly, if we are no longer in the EU, you cannot preserve those rights, so they disappear,

and a whole section covers that. It is also right to say that some of the rights are covered by similar rights in the European Convention on Human Rights, but they are not identical.

Northern Ireland is different, but it is not altogether clear at the moment how different it will be. That is because, last year, the Prime Minister, Boris Johnson, after negotiating with Leo Varadkar and the EU, came to an agreement whereby he created the Northern Ireland protocol. That protocol plainly provides that elements of EU law will survive in Northern Ireland. Those are of direct effect and application, and are ultimately subordinate to the jurisdiction of the European Court of Justice in Luxembourg after we have gone. They include the equality of opportunity provisions in the Belfast/Good Friday Agreement, which are set out in annex 1 of the protocol and are reflected in a series of EU directives. Clearly, those EU directives will have to continue to be applied. Unless I have wholly misunderstood the position of what the Government are trying to do, it seems that, if they are to be applied, any individual would be entitled to invoke the charter, including having the potential to bring a direct action in the UK through a Northern Ireland court under the charter, if they considered that their rights had been violated. However, I emphasise that there is nothing that I have seen at the moment, unless it appears in the statutory instruments (SI) that are, I gather, being enacted in the House of Commons this week — it may also have been last week, but I have not seen them — which spells this out. Of course, it was all left for negotiation with the EU, and that negotiation is intimately linked to whatever negotiation takes place for a free trade agreement. That is because, depending on the terms of that agreement, it may have a bearing on how the protocol, as we know, will operate in Northern Ireland.

The other areas in the annexes are trade, VAT, electricity and state aid, which are probably more economic rights than individual rights. Again, however, there might be rights there in which an individual or company might seek to use the charter in order to get a right that would not exist elsewhere in Great Britain.

We now have the Internal Market Bill, and, as you will be aware, it contains some very controversial clauses. I have spoken out about those and pointed out the potential breaches of international law. Indeed, the breaches are not just potential, because I think that the introduction of clauses 42 to 47 was a breach of international law in itself, and no responsible Government should ever have done it. However, of course, if those were to go through Parliament, I think that the UK Government have an override mechanism on every aspect of the protocol, and we are simply not in a position to say how they would use that. Again, it can all be done by statutory instruments. In one way, a consideration of the charter's rights with regard to Northern Ireland may be a bit premature because, until you know what the long-term outcome of the negotiations between the UK and the EU will be, it is difficult to know exactly how they will be framed. It is also difficult to know exactly what the Government will try to do with the Internal Market Bill.

I should say that, at the moment, I do not think that the Internal Market Bill is going anywhere; I think that the House of Lords will throw it out. It has taken out those clauses and, if the Government try to put them back in, the Lords will stick to its guns, which could mean that the Bill falls. That would land the Government with an immense headache, because, unless they decide to have a prorogation immediately and a new session of Parliament, they cannot get the Bill through in its current form, and they need it by 31 December because there is no internal market within the United Kingdom without it. They have quite a big crisis coming down the track. It may be that they are hoping that we will have a free trade agreement by then, in which case they can just quietly drop the clauses, and the rest of the Bill will go through. That is one possibility. The other possibility, I suppose, is that they might reintroduce the Bill without the offending clauses, which they could do, and rush it through as an emergency.

It is a feature of all this that legislation is being so rushed. To my mind, as a lawyer, I know that Governments do things when they are forced into it, but we really are living in a strange world where almost the entirety of this complex area of law is being made by statutory instrument. That is what was done under the withdrawal agreement Act. The entirety of the Northern Ireland protocol and its implementation is left to SIs, and, similarly, the new powers that the Government are trying to take in the Internal Market Bill are entirely dependent on statutory instruments and, indeed, to oust the jurisdiction of the courts, which is another reason that the House of Lords has pretty clearly indicated that it will not have it, so it also took out clause 47, which does that.

I have taken a few minutes to summarise my paper, which I hope will help to contribute to your discussion. I had the benefit of listening to Professor McCrudden last week online, so I am familiar with some of the things that he has been talking about. I am obviously familiar with the broad outline of what the Northern Ireland Human Rights Commission was thinking of with regard to a bill of rights, and

we discussed that when I was here in June. I am very happy to help you in any way that I can. I was asked to go on Radio Ulster this morning and was being pushed as to what line you should take. I want to emphasise that I am here to help. I have my personal views, but, ultimately, the line that you decide to take is a matter for you. Thank you very much.

The Chairperson (Ms Sheerin): Thank you, Dominic. My apologies if I oversimplified your brief for today in my introduction. I know that you are right in that you were asked to talk specifically about the Charter of Fundamental Rights. As you pointed out in your paper and in your evidence just now, this is all very complicated. Can you expand on your point that the Internal Market Bill is not going anywhere? We are having this conversation and are 50 days away from the deadline. The big thing that we hear over and over again is that there is a lack of clarity, so we are not quite sure what will happen. That is specific to the charter and the Internal Market Bill and whether or not it will proceed. You cannot see it going ahead, and you think that the clauses that have been removed by the Lords will either stay removed or the entire Bill will fall.

Mr Grieve: It is difficult to know. The reasoning behind it all is very complicated. Just to make the point clear: the Internal Market Bill falls into two parts. The first part is about creating an internal market in the UK and mainly concerns Scotland and Wales, although there is also a Northern Ireland element. You could make criticisms of the way in which it has been handled, and I have heard such criticisms from nationalists in Scotland, but there is probably at least a degree of consensus that maintaining an internal market in the United Kingdom is quite important. If you do not have an internal market in the United Kingdom, you would have complete economic and trade mayhem, with catastrophic consequences. It is vital that there is a free flow of goods and services between different parts of the United Kingdom. The argument about the first part is whether the UK Government could have done it in a different or more consensual way or by giving an effective veto on the repatriated powers from Brussels in the hope that, in reality, no Government in the devolved areas would be mad enough to decide to break up the single market. At the end of the day, somebody has to carry the ultimate responsibility. Therefore, although I think that one can criticise the Government's approach, I have some sympathy for them, as the internal market needs to be protected.

The second part of the Bill is an extraordinary series of override clauses. Just to explain: the UK has always seen itself — I have been Attorney General — as an observer of the rules-based international system. We helped to create it and have signed up to some 14,000 treaties, which are still binding on us. They vary from maritime access deals to the United Nations charter and the European Convention on Human Rights. About 800 of them, I think, have arbitral mechanisms by which you can resolve disputes over interpretation. In a sense, all that the European Court of Justice is is an arbitral tribunal that rules on the treaty to which we have signed up. We are out of it now, although we are still bound by it, but it happened to be a rather important treaty.

I cannot think of any Government in modern times in the UK — I am not even sure that I can think of any Government in post-18th-century history — who have deliberately set out to breach an international treaty obligation. In this case, the Government would breach an international treaty obligation that the Prime Minister signed up to, finally, 10 or 11 months ago and that was enacted into law by primary legislation in January. Suddenly, the Government are saying, "Oh, we think that the EU will misuse the powers in the protocol, so we will take the necessary powers so that we can override the protocol if we think that it is necessary". The justification was to make sure that the supermarket shelves in Northern Ireland would stay full.

I have no idea what has been going on in the negotiations, but I must say that I am a little startled by the idea that the EU would wish to create economic mayhem and raise the political temperature in Northern Ireland by preventing the free flow of goods from Great Britain into Northern Ireland and vice versa. I can see that it could technically do it, but, as the whole purpose of the protocol is to uphold the Belfast Agreement and that would hardly be upholding the spirit of the Belfast Agreement, I find it hard to believe that the EU ever made that threat in negotiations, and no real evidence has ever been advanced for that. Interestingly, the arguments put forward by the UK Government that they believed that that threat existed were all made after they had introduced the legislation. The legislation seems to have been introduced to blackmail the EU and say, "Look at how serious we are. If you continue with that and we end up with no deal, we will regard the protocol as something that we can rip up if it interferes with the UK single market". I simply cannot read the Government's behaviour. I cannot understand the behaviour of my successors as law officers in ever allowing it to go through. You noted that the Treasury Solicitor, who is the senior civil servant lawyer in government, resigned. Ultimately, Lord Keen, the Advocate General for Scotland, resigned as well, although he seemed to be prepared to at least try to steer the Government in a reasonable direction and to accommodate them to an extent. Eventually, however, he felt that he had run out of road.

The reaction in Parliament and in the UK, certainly in England, has been one of horror. The horror is not confined to Remainers or ex-Remainers. It includes supporters of Brexit such as Michael Howard, Lord Howard of Lympne. A retired Lord Justice of Appeal, Sir Richard Aikens, who is a very distinguished lawyer but has been an advocate of Brexit, said that the idea that you could do this was totally unacceptable. He recently wrote a very good article on it in 'Prospect' magazine. That is why the Government lost in the House of Lords by, I think, 435 to 165, or it may have been 465 to 135; I cannot remember the exact figure. It was a massive loss, with a huge Conservative rebellion. I do not see the Conservative peers backing down, and I certainly do not see the Cross-Bench peers changing their position. They have now taken the offending clauses out of the Bill.

Senior retired members of the judiciary who are in the Lords also criticised it. The ouster clauses, which prevent judicial review of ministerial decision-making, are also seen as being exceptional in nature. Now that all of that has been taken out, I would be very surprised if their position were to change. The Bill goes back to the House of Commons in, I think, early December, if I have understood correctly. Once that happens, the Government could, I am sure, use their parliamentary majority in the House of Commons to put the clauses back in, although there would, presumably, be another rebellion by some Conservative Members, and bear it in mind that some abstained. Whether that is enough to get rid of the Government's majority in the Commons I do not know, but it would be harder for the Government to put the clauses back in in the Commons than it was for them when they successfully resisted their being taken out in the Commons. I think that a lot of MPs would go quietly to the Whips and say, "This is crazy. What are we doing?". Even if they succeed in doing it, I think that the Lords will hold out. The rules of the House of Commons are that, if the ping-pong, as it is called, with the Bill being batted between the Lords and the Commons, happens three times and there is insistence on the disagreement, that is it: the Bill, in its entirety — not just the offending clauses but the entire Bill — collapses.

If the Government wanted to bring it back and force it through under the Parliament Act, they would have to prorogue Parliament, have a new Queen's speech, start a new session and then push it through the House of Lords against the will of that House. Is that possible? Yes, but, as I say, it is a very strange situation. The irony is that, if it was designed to show the Government's strength, it does not seem to have worked. On the contrary, the Government have attracted a lot of criticism, and it is hard to see why they did it. If, indeed, the EU behaves in the perfidious way that has been identified, and if we leave with no deal and the EU starts playing dangerous games with the spirit of the Belfast/Good Friday Agreement, in February/March next year, the same legislation could be brought back, but it would raise the same problems with international law. This time last year, some of us pointed out to the Government that the Northern Ireland protocol was fraught with risk for the economic unity of the United Kingdom, and we just were not listened to. It cannot have taken the Government by surprise, although sometimes, with this Prime Minister, I do not really understand what it is that he bothers to read.

The Chairperson (Ms Sheerin): Thanks, Dominic. I get a sense that you are bemused and frustrated in equal measure, and I suppose that we all feel the same at this stage. I want to get an understanding from you. The previous time that you were here, you spoke about the fact that the charter rights are, in some ways, add-ons to the convention rights. The UK Government have stated clearly that they do not think that the loss of the charter is a loss of rights. You have pointed out in your presentation that you think that their view is an error.

Last week at the Committee, Chris McCrudden said that there was a potential that, if we in the North tried to implement some of the charter rights through a bill of rights, we would come up against the fact that they are reserved matters but that there is a possibility for us to do that within the transition period. If we tried to implement some of those rights through a bill of rights for the North but the Internal Market Bill proceeds, allowing for Westminster to repeal legislation made in the North, given that the British Government are of the belief that the loss of the charter is not a loss of any rights, would that leave us in a catch-22 situation, in that it may be our belief that some of these rights still apply in the North, but when it comes to their being realised, they do not?

Mr Grieve: I think that Chris McCrudden rightly identified that this is extremely complicated. Forget for one moment about the Northern Ireland protocol. When you look at the charter in its totality, bear in mind that it is a rather odd document. Even under EU law, some of the rights in the charter have usually been held to be only declaratory. One example is the right to health, article 35. Lawyers may argue around this, but the current state of EU law suggests to me that that is not an enforceable right; it is an aspirational statement. It could not enable somebody, I think, to bring a stand-alone claim in the United Kingdom that they had been deprived of their right to health, although there may be all

sorts of other places where they could go to try to do that. Of course, discrimination law might kick in, but it does not appear at the moment to be a stand-alone right.

As my paper says, when considering simply taking the charter and deciding to turn it into a Northern Ireland bill of rights, you have to bear a couple of things in mind. One is that some of the charter rights are probably not really rights at all but aspirational statements. Others will, undoubtedly, fall into reserved areas. So, if you attempted to enact a bill of rights on them, you might well be subject to legal challenge and end up in the Supreme Court over whether you had the power to do that.

On the other hand, there are lots of rights in the charter. I should say that this is not a completely definitive list. I have not had the chance to debate this with fellow lawyers, and they might say that I have left some out. In trying to go through the charter and apply my mind to it, I tried to make a list of rights that probably fall within devolved areas. There is nothing, in principle, to prevent you as an Assembly from legislating in your own devolved areas as long as doing so does not intrude into reserved matters. You can do that.

In a sense, the famous paper from the Northern Ireland Human Rights Commission (NIHRC), which we discussed in June, was, in some ways, an attempt to take lots of charter rights and turn them into legally enforceable rights. Of course, it attracted a lot of controversy because some said that it was not at all what had been envisaged in the Belfast Agreement and that it was creating an overarching rights structure for Northern Ireland of a kind that was not intended in the Belfast/Good Friday Agreement. That is a debate, and I think that I indicated in June that I could understand the force of that argument. It was not quite how I had seen it at the time when the Belfast Agreement was put together.

That having been said, ultimately, if you as an Assembly and Government are prepared to take on the cost of creating an overarching rights structure, which, of course, would be the cost of potentially surrendering powers to the judiciary and the potential economic cost, it is your right to do that. Where does the Internal Market Bill come into that? In a way, I do not think that it comes into it one way or the other. What is the case is that there are undoubtedly rights in the charter. That was what Professor McCrudden said last week, and I agree with him. You cannot have the Northern Ireland protocol without EU law continuing to apply to Northern Ireland in the areas in which the protocol bites. Therefore, Northern Ireland was intended, post 1 January 2021, to be subject to a very different relationship with EU law from the rest of Great Britain. I stress that I do not have the detail of that and do not think that Professor McCrudden had that either, or he would have told you about it. Something may have happened with the statutory instruments that makes that clearer, but I have not seen it yet. I also think that it was to be the subject of negotiation.

It is clear that the Internal Market Bill has a real bearing because it is quite possible that, if it goes through in its current form, the Government might simply get rid of those rights, should they choose to do so. Even if they did not get rid of the rights, they might, for example, insist that the rights be interpreted in Northern Ireland courts in accordance with what I would call "English GB practice", which would mean that the charter was incapable of being invoked to give you a direct right of action, as opposed to being used an interpretative aid. I do not know the answer to that question, because I cannot read the minds of the Government.

The Chairperson (Ms Sheerin): Yes. The reality is that a sizeable proportion of the population of the North will still be EU citizens after the December deadline. It is difficult.

This is my final question. You talked about discrimination and the socio-economic element of things. Chris McCrudden gave us a presentation last week and spoke about the different models of enforceability and how those might be enforced. We have a situation in which you could say that there is discrimination against two specific sections of society. Abortion was decriminalised at the end of last year in the North, but early medical abortion services have not been implemented through the trusts in the way that we would like. We also have a situation with transgender services. The Health Minister has provided the rationale, but there are not the resources to facilitate healthcare for transgender individuals in the North, and we have a waiting list of more than four years. In both cases, one section of the community is affected. If it were the case that healthcare was a right that had to be enforced, people who were suffering could use that as a challenge. My argument is that, if healthcare was a right that was enforced, we would see an end to discrimination.

Mr Grieve: Yes, but that could happen in one of two ways. If you were to have a Northern Ireland bill of rights that specifically covered healthcare — your drafting would have to be quite careful in how specific it was — that might provide an avenue. It is possible that, if the protocol applies as is intended, rights might be claimed under the non-discrimination directives of the EU that survive after

transition. However, without doing a lot of work on that, I would not want to make a pronouncement, because those rights may not extend as far as that. Undoubtedly, there are rights for men and women in those directives.

You find yourselves in a rather strange position. If the protocol goes ahead as intended, on many equality areas of the law, the law will stay as it is in Northern Ireland after 1 January. That seems to me to be the possible line because that is what was promised in the protocol. However, as I say, it is slightly opaque because no detail has been fleshed out on it or on what the EU will require under the protocol. You might wish to discuss that. The subject may have already been discussed with the EU directly. Clearly, if the Internal Market Bill provides a mechanism by which to override the protocol, you may lose those anyway. However, that would still allow you to bring in, if you wanted to, a Northern Ireland bill of rights, as long as it concerns only devolved matters and does not touch on reserved ones. That option has always been there. That is why the NIHRC produced its detailed blueprint. However, as I say, some people said that it went too far. I can understand that, because creating socio-economic rights is a controversial topic. It has not been done in Great Britain. It was specifically considered and rejected when, in the late 1990s, the Labour Party introduced the Human Rights Act 1998, because it was felt that it was a step too far from parliamentary sovereignty.

The Chairperson (Ms Sheerin): I understand. None of this is straightforward, Dominic. Thank you very much.

Mr Grieve: I hope that that is clear *[Laughter.]*

The Chairperson (Ms Sheerin): Crystal. Thank you.

Mr Nesbitt: Dominic, as ever, thank you for your wisdom. I will start with a confession: I missed your appearance on Radio Ulster this morning. However, I understand that you had to begin by correcting an assertion about the Committee's role, which is not to bring forward a bill of rights but to consider the merits of one.

Mr Grieve: To consider the merits of a bill of rights. Yes, I did.

Mr Nesbitt: It is always worth putting that on the record, although it may well be that our deliberations end up with a recommendation that we do so.

You began by talking about a number of uncertainties. I realise that your answer may involve the words "string" and "length", but how long do you think that it might be before we get certainty rather than uncertainty?

Mr Grieve: I think that you will get — you must get — greater certainty by January, because one of two things will have happened by then. There is no suggestion that the transition period is about to be extended. I suppose that it could happen at the very last minute. Indeed, I do not think that we should entirely rule out the possibility that, at the very last minute, if there is a deal but insufficient time to get it ratified in the Parliaments of EU nations, we might just end up with an emergency meeting of the European Council and agreement to extend transition as an extra treaty between the UK and the EU by four to six weeks. If there is a deal, people would probably accept that. However, at the moment, we have to act on the assumption that we are out of transition on 1 January. That means that, by 1 January, there needs to be some clarity. There ought to be clarity on what the protocol will do and how it will operate. Obviously, if the protocol operates in the way in which I think was envisaged and intended — I say "think" because it is a very opaque document, and, bearing in mind that I am out of Parliament, I was not present for the debates in January, although my impression is that it was given very little scrutiny — some rights under the Charter of Fundamental Rights will continue to be enforceable in Northern Ireland in exactly the same way as they were previously, even though they will not be in mainland Great Britain. That is how I read it.

Clearly, if the Government persist with the Internal Market Bill and get the power to interfere with that, you could end up with something different in January. I do not wish to counsel you to delay, but, from the point of view of considering your bill of rights, you will probably want to wait until January or February so that you can finally be told definitively at the Assembly by your staff and others what the current framework of your rights now is. Without knowing that, it is a bit difficult to start crafting your own bill of rights.

Mr Nesbitt: You will probably be aware that there is a feeling among some in Northern Ireland that we are heading to a position where your rights will depend on whether you consider yourself to be a British citizen or an Irish citizen. From what you are saying, that ain't necessarily so.

Mr Grieve: Yes, I am not completely certain about that. I remember that we debated this back in 2018 in Parliament. It is true that there will be, living in Northern Ireland, a significant number of people who may identify themselves as Irish — of course, they may identify as Irish and British; you can do that if you want to as well — and therefore will see themselves as EU citizens. Leaving aside the protocol for one moment, they will be EU citizens living outside the EU. I have not been persuaded that they are about to enjoy separate rights from the nationals living in Northern Ireland who say, "No, I'm not Irish. I'm British". It seems to me that they will all enjoy the rights that are conferred on them by the protocol. Without the protocol, there are no rights. The EU rights will not apply because we have left except insofar as the UK Parliament wishes to grant them, which is what the current issue is all about. I think that everybody will have the same rights. The question is whether rights derived from our EU membership will survive in Northern Ireland in certain forms, in which case they will be, I think, applicable to everybody.

Mr Nesbitt: That is most interesting. Thank you.

I have one final thought, Dominic. The Chair talked about the right to healthcare. I understand that concept. You mentioned the right to health, which strikes me as being a much broader concept. I wonder how broad that can go. For example, it impacts, surely, on education in that we would have a duty to make sure that people are educated about exercise and diet. Could a citizen go to the courts to try to get tobacco outlawed because it is bad for your health? Could they try to get alcohol banned from sale because it is bad for your health?

Mr Grieve: We must not get too carried away. I think that I am on record expressing some reservations about rights of an extensive nature like that. You could say that my career has been blighted by my support for human rights. I have always taken the view that human rights should be civil rights and basic; they should not be extended too far, although they should cover what we identify as being core human rights, such as the right to life, the right to a fair trial and the right not to be tortured or ill-treated.

I have always been slightly anxious about rights that are, clearly, heavily dependent on the socio-economic climate that exists. After all, if you are in the middle of an economic crisis, there may be some healthcare things that you cannot afford. What do you do about it? If you look at the NIHRC proposals, you see that it understood that. Although it wanted those sorts of rights, it said that they should be within the bounds of what is socio-economically possible. The question that then arises is this: who decides what is socio-economically possible? Is it the Assembly, or Parliament in the United Kingdom? If so, that is just as things are now. After all, in Parliament in Westminster and, I am sure, in the Assembly, issues of healthcare are debated all the time. Ultimately, the buck stops with you. Or will you end up in a situation where a judge sitting in the High Court in Belfast says, "The Assembly Government are under an obligation to do x, y and z because, otherwise, they're in breach"? That may cost millions of pounds. If the millions of pounds are not available, how do you strike the balance between that and spending the millions on something else? Those are the issues.

That having been said, there are some countries, like Canada, that have followed a model that goes down that road. I listened to what Professor McCrudden said. He identified some possible halfway houses. Those are not disreputable things to do, but you just need to think through what you want. One of the merits of devolution is that you can have what you want if you, collectively, come to an agreement that that is what you want. It is not for me, as an English resident of the United Kingdom, to say that you cannot or should not have it. You just need to think through the implications carefully.

Mr Nesbitt: That phrase, "if you, collectively, come to agreement", is highly pertinent today. Dominic, thank you very much.

Ms Bradshaw: Thank you very much for appearing before the Committee again. My question follows on from Mike's and is about healthcare. You said that you could get around this with discrimination laws. I was thinking more about disability rights. We in Northern Ireland are quite far behind in some aspects of disability rights, and there has been talk for years about a single equality bill to bring everything up to speed. Could that meet the needs of human rights compatibility or requirements, or would it fall short and do a disservice to, for example, the disability sector?

Mr Grieve: I do not see why it should. It is worth bearing in mind what a bill of rights is. A bill of rights is a piece of legislation passed by the Assembly that sets out legal rights, possibly in general terms rather than highly specific terms, that is subsequently capable of implementation. In that sense, it is no different from any other piece of legislation, unless it is intended to provide some form of entrenchments. As you know, at Westminster level, that cannot really be done. The Human Rights Act could be overridden if somebody wants to pass a subsequent piece of legislation. The only thing, of course, is that at Assembly level you are bound by the Human Rights Act. You cannot legislate outside of it.

The Welsh Assembly Government decided to go ahead and make legislation on children that is taken from the United Nations Convention on the Rights of the Child. That has not been done in England, although there are children's Acts, before we get too carried away with the differences. Wales decided that it wanted to do that. It is just a stand-alone piece of legislation, but it has, undoubtedly, added to rights, as one would understand them, in Wales.

If you want to do something on disability, as long as it is within your devolved competence, you can do it. I do not think that that is selling people short. There may be an argument that, rather than getting carried away with overarching bills of rights, if there is consensus in the Assembly that there are certain things that you would like to tackle, which may not be called a bill of rights but are, effectively, rights-based issues, and you want to do them on an ad hoc basis, the end result is not necessarily going to be significantly different. Indeed, there is no reason why it should be different at all. It is just that you would cover one topic rather than try to look at a series of things at the same time.

Ms Bradshaw: I suppose that that would get away from some of the symbolism and difficulties that some parties and sections of society have with having a stand-alone bill of rights per se.

What has come through for me from previous contributors is the pre-legislative scrutiny stage, where we would have a framework or matrix that we would have to filter everything through. Apologies, but I cannot remember whether you touched on that in your last contribution, but would the pre-legislative scrutiny stage be a key component for us in making sure that everything going through this place has that human rights compliance?

Mr Grieve: Yes, but just to be clear about this, any piece of legislation that is introduced at Westminster has to be signed off by the law officers — I used to do that — for its compatibility with convention rights. I am pretty sure that you must have the same mechanism in Belfast, because you are absolutely bound by the Human Rights Act, so I expect that any legislation is crawled over by your lawyers and is HRA-compatible.

What you could do — I think that this is what Professor McCrudden was talking about — is enact primary legislation saying not just that any legislation that you pass must look at the HRA — that, of course, would override it anyway, because, if you pass legislation in breach of the HRA, it can be struck down eventually in the Supreme Court and would just come to an end — but that you are considering whether it meets a number of other benchmarks that you had set for yourselves and that you would require that to be fed into your own legislative process. I think that that is what I understood him to mean. Forgive me, I have not read his paper, but I listened online to the previous hearing because I was interested to hear what he had to say. That is what I understood him to mean. There is absolutely no reason why you cannot do that, if that is what you want to do, and it would mean that you are constantly informing yourselves of this matter, the impact that it might have in certain areas and whether it is meeting things.

When I was Attorney General for England and Wales, I had a slight tendency to say to my colleagues in government, "Please do not bring in symbolic legislation". There has been a tendency, in the last 25 years, to legislate for symbolic reasons. At times, the Government at Westminster set themselves targets that were not supposed to be justiciable. They could not be enforced in the courts but were declarations of intent about meeting certain targets. As a lawyer, I was never very comfortable with it, and I said, "It either means something, or it means nothing, and you are just misleading the public". That is different, I think, from saying, "We will make sure that, in our own legislative procedures in Northern Ireland, certain things will always be considered beforehand, and we will show that we have given it consideration before we legislate". It might not need primary legislation at all; it might just be a matter of changing your practices and Standing Orders in the Assembly. I do not know; you would have to look at that.

Ms Bradshaw: Yes, it was that latter point. It is not necessarily about the draftsmen or the people behind the scenes, that is, the Clerk and the Committee officials, but more about us, the legislators, being very much involved in that part of the process so that it is at the forefront of our thinking and our working when we are doing the scrutiny at Committee.

Mr Grieve: Yes, pre-legislative processes are really valuable, and, let us face it, Westminster legislation is, I am afraid, a pretty poor model. I know that, ideally, with Westminster-style legislation, you should have a Green Paper, then a White Paper, then you sometimes bring in a draft Bill for pre-legislative scrutiny, then you enact the legislation and, of course, you have the House of Lords. It is a bicameral system, so there is an extra check. However, in the Westminster system, it is noteworthy the number of times that the poor old House of Lords picks up the pieces when the detail is not as good as it should be, and the reason for that is that politics means that legislation is often rushed.

You are a unicameral Assembly, and the more pre-legislative scrutiny that you do and the more that you can build consensus, particularly because of the very unusual nature of the political system in Northern Ireland with power-sharing, the more it may be capable of giving mutual confidence that you are looking together at similar issues and are coming to the right conclusions on them. That will then enable you to go forward conceptually, which is very important. I think, particularly in the Northern Ireland context, that that could be extremely valuable.

The Chairperson (Ms Sheerin): I can see that Mark has his hand up. Mark, do you want to ask a question?

Mr Durkan: Yes, thank you, Chair. Thank you, Dominic, for the presentation. I was going to ask a couple of questions about article 2(1) of the protocol, but you have already touched on that, Chair, and Dominic answered, and I am afraid to ask any more because that will just give us more questions, I think, rather than answers. That is no fault of yours, of course, Dominic.

I want to ask about something that is not strictly related to Brexit, but perhaps you will indulge me while you are here. The Government, I believe, have launched a review of administrative law, chaired by Lord Faulks QC, that will consider the scope of judicial review. Judicial review has been a very important mechanism for people here in Northern Ireland to assert their rights, as seen recently in legacy issues like victims' pensions. In your view, would any curtailment of access to judicial review undermine the rights agenda in the agreement, and might that be incorporated in a bill of rights?

Mr Grieve: Yes, it might undermine the rights in the agreement. It might even be in breach of the protocol. It is rather complicated. JRs can often be based on EU law, so it could do that. I should explain that I find it very hard to read what the Government intend to do with this review. It has come in for quite a lot of flak at Westminster. I am not sure what Lord Faulks will do. Its origins lie in the events of last year. They seem to centre around issues like the royal prerogative and prorogation as well as the royal prerogative and triggering article 50. There is a general view that judicial power has been expanding in a way that some people criticise as undermining Parliament. They say that the accountability should be between Ministers and Parliament and that there should not be this judicialisation of our lives. I have some limited sympathy that we have to be careful. However, if you want to follow this with interest, look at what Lord Sumption said about the risks of judiciary intruding more and more into the political sphere. Although a lot of it has often happened because Parliament has decreed that it should, he has made a number of perfectly reasonable points that judges cannot replace the democratic process and that, if they try to, you will end up in a very unsatisfactory place. I should add, though, that he has never called for the repeal of the Human Rights Act — never. He has made a perfectly good critique.

I think that the Government are barking up the wrong tree. Unless the report is hijacked by a group of people with rather extreme views, particularly those in Policy Exchange, which is the think tank that has done the judicial powers project, I would not necessarily get too worked up that you are suddenly going to end up with judicial review recommendations for changes that are entirely different to what we have. In any case, justice is devolved. Unless the Northern Ireland Assembly wishes to follow what will be done in England and Wales, where it will be limited, I do not think that it will have an impact on Northern Ireland at all.

Mr Durkan: OK. That is good to know. Thank you for that, Dominic.

Mr O'Dowd: Thank you, Dominic, for that presentation. It was very interesting. I think that the bar to access a judicial review is actually lower here than it is in England and Wales. We have a more

favourable system in that sense. Whether the bar is set at the right level is a debate for another Committee meeting.

This is also not directly linked to the work of the Committee, but I was interested in your comment about when legislation is necessary. We sometimes have an environment where there is a Bill for every ill. I was formerly a Minister, and I did not always adhere to that principle. Problems can often be solved through policies and in other ways. Do you want to make any further comments on that?

Mr Grieve: Although I have been kicked out of the Conservative Party, I remain a conservative with a small c. As I said, I worry about symbolic legislation cluttering up the statute book. Good legislation is well drafted, specific, targeted, clear and understandable — that is what it should be to me, as a lawyer — so that somebody looking at it can see exactly what it intends to do. There has been a tendency towards this for political reasons, certainly at Westminster level. I should add that I am not commenting about Northern Ireland, because I have not followed your legislative processes closely enough to comment. Over the years, certainly in my time in Parliament, I have worried that we were enacting legislation that was, bluntly speaking, pretty vacuous. It enabled the Government to get a headline saying that they were doing something, but, actually, when you looked at what they were doing, you saw that it did not amount to very much. It was often not clear what it was that the legislation was doing. A classic example is setting targets. There were targets on reducing emissions, for example. I used to say to colleagues, "Be careful what you are doing. Do you want a judge ultimately to decide this, or do you not?". I was sometimes hearing, "Oh, no. The way that we have drafted it, it will never be interpreted in that way. A judge cannot force this on us. They are declarations of intent". Well, I said, "If it's a declaration of intent, it doesn't have to be made in the statute. You can make your declaration of intent standing at the Dispatch Box in the House of Commons and telling the House of Commons that you intend to do something". A law is a law. Laws have consequences, and breaking them can lead to penalties, so we should be careful about enacting law that does not mean what it says or that is not intended to do something. That is my only point on that.

Mr O'Dowd: OK. Thank you.

The Chairperson (Ms Sheerin): Dominic, thank you very much for joining us again this afternoon. Your contribution has been helpful, as always. I appreciate that. Thank you.

Mr Grieve: It is a great pleasure. Thank you very much for asking me. I look forward with interest to seeing what you come up with and with particular interest to finding out in the next eight weeks exactly what the charter rights regime will be for Northern Ireland on 1 January.

The Chairperson (Ms Sheerin): We will all be watching with bated breath. Thank you.