HOUSE OF COMMONS

European Scrutiny Committee

Oral evidence: Retained EU Law: Where next?, HC 1113

Tuesday 30 March 2022

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Watch the meeting

Members present: Sir William Cash (Chair); Jon Cruddas; Mr Marcus Fysh; Mr David Jones; Craig Mackinlay.

Questions 47-73

Witnesses

I: Barney Reynolds, Head of Financial Institutions, Shearman & Sterling LLP; Professor Alison Young, University of Cambridge; Sir Richard Aikens, Arbitrator, Brick Court Chambers, and Visiting Professor, King's College London and Queen Mary University of London.

Written evidence from witnesses:

– [Add names of witnesses and hyperlink to submissions]

Examination of witnesses

Witnesses: Barney Reynolds, Professor Alison Young and Sir Richard Aikens.

Q47 **Chair:** Good afternoon. It is very nice to see you. I hope we have a good session; I am sure we will. Sir Richard Aikens, Professor Alison Young and Barney Reynolds, I would be grateful if you could introduce yourselves. I will make a very short introductory statement and then we will get into the session proper.

On behalf of the Committee, I would like to welcome you all and thank you for appearing to give evidence today. This is the third session of our inquiry into the future of retained EU law. To date, we have covered the fundamentals of retained EU law, what it is, how it differs from traditional domestic law and how it is given effect. We have also looked at issues relating to the Government's reviews and how appropriate scrutiny of any changes to the current system can be ensured.

Today's session will look at the supremacy of retained EU law, how retained EU law is interpreted by the courts and when the courts can depart from EU retained law. These issues are important in themselves, but of all of them the most important is the doctrine of supremacy. We have heard various arguments concerning why it should be changed and ideas for how this could be achieved, taking in the entire statute book or specific sectors or areas of the economy. The way retained EU case law is dealt with now and in the future is therefore of very considerable interest not only to us but to the country as a whole.

The issue of whether UK courts should be bound by pre-Brexit European Court judgments cuts to the heart of the questions regarding what our legal system should look like and how it should function now that the UK is once again a sovereign lawmaker. A series of pre-eminent judgments, including of course Miller, made that abundantly clear only fairly recently.

Before we start, and for those watching at home, we would be grateful if you would be kind enough to introduce yourselves. Perhaps we could start with Professor Young, and then I will move on to Sir Richard and Barney Reynolds.

Professor Young: Thank you, Sir William. I am Alison Young. I am the Sir David Williams professor of public law at the University of Cambridge, and I am also a fellow of Robinson College.

Sir Richard Aikens: I am Sir Richard Aikens. I am a former member of the Court of Appeal of England and Wales. I now practise as an international arbitrator. I am also a visiting professor at King's College London and Queen Mary University of London. Currently, I am one of the editors of "Dicey, Morris & Collins on the Conflict of Laws", so I am directly involved with some of the issues we are going to debate today

Barney Reynolds: I am Barney Reynolds. I am a practising lawyer in the City. I am a partner at the law firm Shearman & Sterling and global

head of financial institutions there, which is about half the business of the firm.

Q48 **Chair:** I will ask the first question, which is to Sir Richard and Barney Reynolds particularly. In its "The benefits of Brexit" paper, the Government say they are looking at how to remove the continued effect of the supremacy of EU law over domestic law, which is the outcome of the legislation that was passed under the withdrawal agreement Act, which was made before the end of the transition period. What is the most effective way to achieve this in terms of legal certainty? Do you have any other comments that you would like to make about the current state of play in relation to the principles of sovereignty as part of the British constitutional arrangements?

Miller looked at this, but there are a number of other cases that have been well researched over the last 20 years. I can think of Macarthys *v.* Smith and I can think of various other cases where Lord Reed has made judgments. In other words, it is a long-standing question. There has been some thinking that existed up to section 38 of the withdrawal agreement Act, which has perhaps been underestimated in its effect because of the use of the word "notwithstanding" in reference, in sections 38(2)(a) and (2)(b), to the issue, for example, of directly applicable or directly effective EU legislation.

It would be helpful to get your assessment on that. If I may, I will start with Sir Richard Aikens. What is your concept of sovereignty, given, for example, the statements that we see in chapter 12 of Bingham's "The Rule of Law"? Those are now well known to a lot of people but perhaps not to this audience. Could you just give me your assessment of where you think sovereignty lies?

Sir Richard Aikens: The concept of parliamentary sovereignty has not changed. The Dicey principle, if I can call it that, in his renowned work on the constitution, remains the law. Personally, I do not think there was any need for section 38 at all. It simply states what the law was and is. Parliament can do what it likes, so long as it follows the correct procedures in passing Acts. It can pass an Act to say the world is flat, if it wants to.

I do not see any problem, therefore, in Parliament passing an Act, if it wished to do so, legislating on the question of supremacy of EU law, as it was. The problem will be that, as things are at the moment, there is no doubt that the courts of this country have to pay attention and have to follow, except in very limited circumstances, existing EU law, as it was before the end of the transition period, in respect of matters that are retained EU law. That is a rather more specialist topic, which we will probably want to come on to later.

Professor Young: I agree that the Diceyan principle of parliamentary sovereignty was and remains a long-standing principle of the UK constitution. I thank you, Chair, for referring to the Miller case. Both

Miller cases reinforced the concept of parliamentary sovereignty as a principle of the UK constitution.

In terms of section 38 of the European Union (Withdrawal Agreement) Act 2020, I agree that the purpose of that in a sense is to continue to recognise that we have the principle of parliamentary sovereignty in the UK constitution. That is what the wording of section 38(1) specifically says and recognises. In a sense, you could say, "It is not changing the law, so why it is there?" Part of why it is there is to reinforce the constitutional importance and significance of parliamentary sovereignty. Then you have the specific explanations in section 38(2) and section 38(3), which make it clear that the provisions of the European Union (Withdrawal Agreement) Act 2020, so section 38(2), refers to specifically 7A, 7B and 7C of the 2018 Act. Apologies for all the references to legislation there. I am sure you will follow me perfectly.

Chair: Precision and clarity are important.

Professor Young: Thank you. 7A, 7B and 7C are provisions of the European Union (Withdrawal) Act 2018. These refer to those aspects of the withdrawal agreement that still have force after IP completion day. This makes it clear that parliamentary sovereignty exists notwithstanding this. Parliament has decided the legal effect these provisions have after IP completion day, reinforcing the sovereignty of Parliament. Section 38(3) refers more generally to the fact that nothing in the 2020 Act derogates from the sovereignty of the Parliament of the United Kingdom.

In my reading of this section, it is to reinforce the fact that it is the UK Parliament that determines how retained EU law and how the provisions of the withdrawal agreement and, if you go further down, the future relations agreement, have an effect in domestic law.

Q49 **Chair:** I was going to perhaps put a slight gloss on that, if I may. At any rate, I would like to invite you to think about this. If you look at the judgments from Lardner-Burke right the way through—we do not need to go into them all now, because it would confuse people—there are so many judgments that have reinforced the points that both of you have made about the intrinsic principle of the sovereignty of the United Kingdom Parliament.

However, when you get to the question of whether or not there would be a change in something that has already been enacted, the use of the word "notwithstanding" has been identified several times, including by Denning and others, providing the words are express and clear. To avoid ambiguity or confusion and to ensure there is certainty in the manner in which the courts will make their interpretive judgment on a given situation, when you come to the question of the protocol, which is a very vexed question, or indeed parts of the withdrawal agreement, the capacity to override both of those is inherent in the word "notwithstanding", providing that it is express and clear, which it is.

I just leave that, as it were, on the table. That is an issue that may yet come up in the lift. We do not know. I am going to move to Barney Reynolds, but I imagine you generally agree with what I just said.

Professor Young: In terms of this element of the section being there to reinforce that Parliament can enact in this way, you have to understand this in terms of, "What are the powers of the UK Parliament in terms of UK law?" What we are discussing at the moment is the powers of the UK Parliament in terms of UK law. The UK has also entered into international treaties with the European Union. They are governed by international law. This is a provision referring to the provisions of the UK Parliament from the perspective of UK law.

Q50 **Chair:** Understood, yes. Hoffmann and many other pre-eminent judges have made this clear. The herring case some decades ago made it clear that it was a matter for the UK Parliament, if it wished to do so, to deal with international treaties as well. There is also that factor to take into account.

Professor Young: Yes, absolutely. Another aspect of the sovereignty of Parliament is clearly that it is for Parliament to decide how it is going to integrate international law into domestic law.

Q51 **Chair:** Yes, absolutely. That is very helpful. Barney Reynolds, would you be kind enough to give your assessment of the position?

Barney Reynolds: Section 38 is significant. Although the courts, through numerous decisions, some of which you have mentioned and some of which are more general, accept parliamentary sovereignty, there have been some divergent views at the margins on the full extent of parliamentary sovereignty and some judicial decisions, interpretive decisions principally, which have started to cut into that.

The significance of section 38 is that, in the context of the withdrawal agreement, the use of "notwithstanding" makes it absolutely clear that there cannot be any undercutting of that principle. It is a restatement of something that lawyers would generally regard as obvious. It reinforces something that benefits from being reinforced.

Q52 **Chair:** Would one not also be slightly surprised and intrigued to note that Miller's case, which was thought to be an inhibition on the role of Government at that particular point in time and which came up with a majority view from a very substantial Supreme Court in terms of the numbers of persons who took part, plus some of the very high-profile members of that court who participated, produced an endorsement of parliamentary sovereignty that surprised a number of people?

Barney Reynolds: Yes, exactly. The issue is acute at this moment in time, because we are coming out of a joint venture arrangement, if you like. Whether it was worth being in or not, or whether we have ended up with rules we want or not, the method that was adopted in the arrangements within the EU is different from ours, in the sense that the

EU law method is based on the code-based civil law systems on the continent derived by the French and German codifications of the 19th century. With that—this is particularly acute and obvious in the context of the financial services industry but also more widely in services and anything that is abstract—you get less legal certainty. It is much more top-down in its method and it involves defining rights, obligations and so on rather than our method, which is derived more from remedies and practical situations as they arise with modifications through statute and by Parliament. That uncertainty is unattractive to businesses. They vote with their feet, as you can see in the financial markets and in certain other sectors. It is also particularly acute in data, which is now emerging as a major area of the economy.

We are coming out of this method, which is top-down. Montesquieu said it in "The Spirit of Law" in 1748, before the French codification of 1804: the judges are no more than a mouthpiece that pronounces the words of the law, adopting the thinking that was reflected in the code. In 1801, the principal draftsman of the code said that the Napoleonic code reflected a great achievement, in that it subjugated all rights and interests to the supreme rights and interests of the state. It is a very different way of looking at law.

In practice, as I say, it is less attractive. We have now imported this method into our system through the 2018 withdrawal Act. We have done it in a way that does not import it exactly, but it requires the law that we have imported to be interpreted using old EU principles as modified by our judges because of the uniqueness of the situation. On the face of it, we have ex-EU law being brought in through the withdrawal Act, but under section 14 we are preserving all sorts of vague and undefined things such as rights and obligations and so on, which our judges are going to have to interpret.

Within the EU code-based approach, the purposive method of interpretation, which is fundamentally different from ours—we are much more literalist in how our courts generally look at statutes—is one in which they can interpolate purposes behind ex-EU measures that are not apparent on the face of the documents. One sees this in practice all the time: officials say, "This is not the purpose."

We will be bringing that all in. We have brought it in. We have two systems. We have one operating with that method. The other, going forward, is going to be our common law system, which evolves from the bottom up in a more evolutionary manner. We also have the statutes on top, with clear provisions that are capable of being interpreted more literally, that Parliament makes. In my view, that is going to create a tension inherent in our legal system. Forgetting whether the policy of the inherited EU laws is desirable to bring in lock, stock and barrel, the tension that arises is this completely different methodology, which needs adjustment due to the fact that we no longer have the EU's purposes. Quite where we are going to end up on that, we cannot predict.

Chair: There is a vagueness about the manner in which the legislation has been devised, because of the purpose of EU law.

Barney Reynolds: Yes.

Q53 **Chair:** Could I ask another question, therefore? You will then end up with, as it were, two public statute laws. You will have that which was governed by the principles of the supremacy of EU law, which you have just explained, with all the complications that generates, but you would also have another set of law, which was post-Brexit, done on what we would call more traditional methods, with the literal meaning and things of that kind being brought into effect regarding that law, as indeed was the case for the law that took effect with Royal Assent before the entry into the European Community. You have two contrasting types of public statute law, which itself would seem to be something of a remedy for uncertainty, because people would not know exactly which bit they fitted into.

The other point I would just like to advance would be the question of the extent to which the making of these laws happens without Hansard, in the Council of Ministers, behind closed doors, by majority vote, for all sorts of different reasons to do with horse-dealing and the rest of it. I have been on this Committee now for 35 years. I have taken part in a lot of proceedings as a result in the EU and over here. It is chalk and cheese. We have Hansard. We know exactly what is said in the House of Commons on a given day. These proceedings here are going to be published so people can look at this themselves.

In the EU, there is no such thing in the same way. There is no Hansard. When the legislation is going through, you have a situation where judges, according to the EU prescriptive system of interpretation, have regard to travaux préparatoires. They can therefore, in theory, look at the manner in which the legislation was passed. I remember discussing this with Lord Scarman many years ago. I lived near him in Shropshire. We had a fascinating conversation about it. The trouble is that in the EU, in the Council of Ministers, it is all done behind closed doors without even so much as a transcript.

There are differences in the manner in which the law is made that go to the heart of the relationship between sovereignty and democracy. Our sovereignty is based on an assumption that the decisions are taken in our Parliament by people who are elected to pass the laws. I just mention that, because it seems to be something that is relevant to be taken into account in deciding what is certain or uncertain.

Barney Reynolds: I agree. There is a democratic point in relation to the inherited EU law. There is a policy point, which is that it was made for 28 rather than 21 at the end of the time we were in, and then there is then a methodological point, which is that the very methods are inferior and also somewhat alien to our system. Our system finds them difficult to grapple with. We have a system that works exceedingly well. People want our

system. They are seeking it out in the Gulf and in other parts of the world. It seems to me that we should have a review—

Q54 **Chair:** Do you have a practice there?

Barney Reynolds: I do. I led a team setting up Abu Dhabi Global Market and drafting the laws and regulations for that system, based on ours and the common law. They sought that out. The same is going on in Saudi Arabia with Neom. People want this. We know how to operate it. We know that businesses flow towards that. Economic research in the US has shown that it leads to greater economic growth and it is better for the financial markets. This is research from people like La Porta. From 1989 onwards there has been extensive research on that. It seems to me that we need to look it again, and we should do it sector by sector. We should get rid of the old methods and move to the new.

Q55 **Chair:** The Government should be taking all of this into account. The Government have apparently stated that they want to remove the continued effect of the supremacy of EU law over domestic law.

Barney Reynolds: Yes.

Q56 **Mr Jones:** Mr Reynolds has anticipated to a large extent what my question is, but perhaps Professor Young could comment. How does the interpretation of retained EU law differ from the interpretation of UK domestic law?

Professor Young: If you look at the 2018 Act, section 6 sets out the extent to which there are differences between the way in which we interpret UK law and how we interpret retained EU law. That section specifically draws attention to the fact that retained EU law is to be interpreted in line with retained EU case law and also draws attention to the fact that it should be interpreted in line with the retained general principles of EU law.

This was then built on by Lord Justice Green in a case called Lipton *v.* BA City Flyer, in which he was interpreting direct EU law and pointed out some of the points we have already made. EU law is drafted in a slightly different way. This was with regard to direct EU legislation. It was about the aspect of retained EU law that was directly made by EU institutions and then became part of domestic law here. Again, there is reference to the fact that a purposive construction had to be applied, including in this instance the background of international law, because this particular piece of EU law was legislated against the backdrop of an international framework. This is the approach.

To the extent that this differs when we look at interpreting UK legislation, there is recent case law from the UK Supreme Court that makes it clear that when we interpret legislation we tend to look first at the wording and we do so against a backdrop of its purpose and context. There is still the element of thinking about purpose and context, but the UK legislation tends to focus more on specific wording. As the Chair pointed out, this is

because EU law is enacted differently from UK law in terms of the wording.

When we are thinking about retained EU law, we have to be careful of the fact that there are different types of retained EU law. So far we have been discussing the particular type of retained EU law where there was a piece of legislation made in the EU that, when we were a member of the European Union, was directly applicable in UK law and became part of UK law. There are also other types of retained EU law. This is the EU law that we have then incorporated through our own domestic measures. There are some pieces of retained EU law where we have UK statutes that have implemented the EU law and other elements of retained EU law where we have UK secondary legislation. For example, the Equality Act is a piece of primary legislation that to some extent incorporates aspects of retained EU law. The working time regulations is secondary legislation that is incorporating an EU directive.

There you have UK-worded legislation, but you will still interpret it against the backdrop of the general principles of EU law and case law. There would not necessarily be the same need for a teleological or purposive approach, because you have the clearer wording of primary legislation. This purposive aspect is more specific to the particular type of retained EU law that is the direct EU legislation that was enacted by the EU. In some sense the difference might not necessarily be as great, because it will depend on the particular type of retained EU law that the courts are interpreting but, yes, there is always going to be the backdrop of retained EU case law and general principles, because that is the instruction set out in the 2018 Act.

Sir Richard Aikens: I am doubtful, personally, about whether there will be such a marked or clear distinction between interpretive methods used by judges in UK courts. I say that because, ultimately, the judges are trained in the common law system. Of course, there are judges, particularly judges such as Lord Justice Green, who have spent their working life as barristers working with EU law. They are very used to that system, and they will be very used to the interpretive methods of the CJEU. Fundamentally, we all grow up in the common law system. Our first thought, when it comes to interpretation, will be to think of it as English, Scots or Northern Irish lawyers. Although the Scots system is different to an extent, when it comes to interpretation there is no difference.

I am not convinced that there will be a vastly different method of interpretation. Yes, Lord Justice Green said in the Lipton case, "You have to look at the purpose," and so on and so forth, but if you think about the way that judges in the UK look at statutes now, yes, the words are supreme, but they have to be looked at in the context of purpose and they have to be looked at given the background of the Act as a whole. In certain circumstances, you can look at what is said in *Hansard*. If you are looking at a domestic UK law that is based on an international treaty, for

example, you are in certain circumstances entitled to look at the travaux préparatoires. There are limits to that. As one judge put it—I think it was Lord Steyn—you can only do so if you are going to get a bullseye as to interpretation. If there is no bullseye, there is no use, but you can do so.

Although I agree, in theory at least, there may be differences, I am not convinced in practice that there will be quite such a clear-cut line between them. That is not to say you do not need to be careful. It may be a topic that we are going to come on to. If there is an overstepping of the line on interpretation, which is not necessarily for the decision in hand, it could have an effect on the way English courts or UK courts generally look at a particular aspect of retained EU law, because of our own system of precedent. This particular danger was highlighted by Lady Justice Rose, as she then was, now Lady Rose in the Supreme Court, in the TuneIn *v.* Warner Music case. That is a slightly different topic.

Q57 **Mr Jones:** The Government have suggested that it should be explicit that retained EU law should be interpreted in the same way as UK domestic law. Is that necessary?

Sir Richard Aikens: It then begs the question of how you would interpret the UK domestic law. As I say, I am not convinced there is any great difference, in fact, so I am not sure it is necessary. If you want to be doubly sure, you could perhaps put that into a statute. That would then have to be interpreted by the judges, and it would not necessarily always be interpreted in quite the same way. Some would give it a very narrow interpretation; others would give it a broader interpretation. The context is the fact that you have this body of law that comes from the EU and from that background. You may just push the ball down the road.

Barney Reynolds: In practice, it is a much bigger point than one might otherwise appreciate. It goes to legal certainty. For instance, George Osborne, then Chancellor, told a group of MPs that there were five cases at the time that the UK had at the ECJ and we were going to win all of them. We lost four of them, and the fifth we won on a technicality. It is an inherently less certain system.

The drafting of EU legislation, if I can call it that—I mean the level 1 and level 2 text, which is the primary legislation, and then you have the amplificatory provisions—arises in the first instance from the European Commission and then goes through a process of amendment through autonomous drafting, to some degree, from the European Parliament. The fact that the text is in all of the different languages presents its own issues. The drafting is not one coherent whole in the way our statute is, where there is a single intellectual owner and thread through the whole thing. People agree on the words in front of them and then they decide to vote on that. We do not get into the purposes that people had when they were voting on a provision.

When we use the word "purposive" our way of using that term is different—in a way it is misleading to use the same term—from the EU's

notion of a purposive interpretation, which they very quickly get to from the text. The text is often not satisfactorily drafted. Then one is digging around for travaux préparatoires and so on. You see this acutely in financial services, where most of the law comes from the EU. It is not normally clear what the rule is. Under our system, the industry is able to go and innovate, knowing, "This is all fine, but you cannot do that". Instead, the industry has to consult officials as to whether they can do things, which is an inherently slow process and a dampener on innovation and entrepreneurship.

It is a very significant point, but it is hidden in the impractical effects of this technique, which may not be obvious on the page. It is great that the judges may feel they know what the law means and how it should be interpreted, but over the decades there have been differences of view as to parliamentary sovereignty itself and the exact nature of that. There are particular differences evident in the context of the Human Rights Act as to exactly what is or is not intended and how you reconcile the Human Rights Act with ongoing UK legislation.

Leaving the inherited acquis as it is without having clear parliamentary instructions as to how it is to be interpreted is a recipe for legal uncertainty and an unnecessary weakening of our system, with no benefit. It seems to me that we ought to have an update of the Interpretation Act, which sets out or reinforces the fact that the EU's methods are no longer to be followed. I believe it is possible to draft legislation that would make clear what that means in practice. Maybe there will be some fringe cases for debate, but it would remove room for disagreements or different interpretations.

Q58 **Jon Cruddas:** Good afternoon, everybody. My question follows from your question there. I am not a lawyer; I will put that on record from the beginning. In one of our earlier sessions, I was struck by something that Sir Jonathan Jones QC said about this. He said, "If you allow multiple individual tribunals to depart from pre-existing precedent, you end up with multiple conflicting lines of interpretation, which creates uncertainty." The Government's direction of travel is pretty clear. In December 2021, a Minister said that we "need to consider the anomalous status of EU case law, and we will be revisiting the issue of which UK courts should be able to depart from retained EU case law, and on what basis".

Their focus is on the extent to which the UK courts are bound by retained EU case law before 31 December 2020, which begs a question for our guests this afternoon. Does the current approach as to which UK courts may depart from the decisions and principles of CJEU when interpreting retained EU law strike the right balance at present, given the direction of travel from the Government? Professor Young, maybe you can go first.

Professor Young: At the moment, it strikes the right balance. You have to think very carefully about the extent to which you are balancing the ability to move away—we recognise that the situation is different; we are

not part of the EU anymore—with, at the same time, the need for legal certainty and the need to prevent aspects of too much litigation.

I would tend to agree with the evidence of Sir Jonathan Jones. If you were to allow all levels of courts, including tribunal, to do so, there could be a danger of legal uncertainty. Whenever you have a legal case, by definition there are winners and losers. There is always going to be somebody who is not happy with a particular outcome or not happy with the backdrop of case law or how the retained EU law has been interpreted in the past. If you allow every court from tribunal onwards to not follow precedent, as a barrister, if you have a client who is unhappy with the current way in which the law is being interpreted, you are going to argue, "Please can you interpret this law differently?"

There are a number of problems with this. Tribunals are not used to a situation where they can depart from case law. They would have to think about what principles they are going to apply, and we would have to wait for those to be developed. You could possibly have an increase in costs. For example, there are a lot of aspects to do with VAT, but there are all sorts of ins and outs and technical elements around how we classify this for VAT to the extent to which this continues in domestic law. If you are unhappy, you might want to challenge a particular classification, which means HMRC is going to have to be involved. We have to think of those possible elements of costs and problems as well.

You also have to think about the extent to which, as we have sadly seen with regard to P&O Ferries, some employers will be thinking about how far they want to follow a law and how far they want to argue to change it.

To add to the possible uncertainty, we also have to read this against the backdrop of changes that are being made in the Judicial Review and Courts Bill, which is changing the extent to which the Upper Tribunal can be subject to judicial review for refusing to hear an appeal from a lower tribunal. It is quite a technical area, but we have decisions of lower tribunals and then you will ask for that to be appealed up to the Upper Tribunal. If you are unhappy with the Upper Tribunal's decision, it is the case, until the law is changed, that you could use something called a Cart judicial review to bring a judicial review against the decision of the Upper Tribunal to not hear an appeal of a decision of a lower tribunal. I am sorry for all the technicalities. I am trying my best to explain a very specific niche aspect of judicial review.

The Judicial Review and Courts Bill is going to limit the extent to which you can have those appeals. Statistically, the Government were concerned that too few of them were being successful and they were causing too much cost. Against that backdrop, you might have a situation, once the law has changed, that you have decisions being made by tribunals that might give rise to particular islands of law in different tribunals, adding to the uncertainty and providing less of an ability to go

away and have that appealed up, should the Upper Tribunal decide that it does not want to hear an appeal in those circumstances.

I am afraid, for a variety of reasons, I would agree with Sir Jonathan Jones that there are risks to legal certainty if we were to give tribunals, for example, the ability to change and not to have to follow CJEU case law.

Jon Cruddas: That is a very thorough response. Thank you very much indeed. I would ask Sir Richard to come in on it as well. You touched on this in some of your earlier comments.

Sir Richard Aikens: Yes. I entirely agree. If you depart from the current broad outline, it is a recipe for chaos, additional litigation and complete uncertainty.

My only qualification is this. At the moment, the test that has to be applied by either the Supreme Court or the Court of Appeal is the 1966 practice test from the 1966 practice direction of the House of Lords as to when it was to depart from its previous decisions. Prior to that, as you will recall, the House of Lords could not depart; it had to follow what it had decided before. It can do so now, but the case law that has grown up about when they should is pretty strong. It says, "You should only do it if there is a danger that the law will not develop or that a result would be wrong or unjust."

As with everything that is to be interpreted by judges, it is a flexible friend. In some cases, the judges have no difficulty in saying, "We have to depart from our previous decisions." In the case of Patel *v.* Mirza, for example, where the law was changed on the effect of illegal contracts, the majority of the Supreme Court overturned 250 years' worth of law without any difficulty at all. In other cases, there are much more circumspect about it.

The general principle is correct, but there must still be room for the higher courts, the Supreme Court and the Court of Appeal, to change. Frankly, we should leave it to them to do it.

Q59 **Jon Cruddas:** Thanks very much for that answer; that is very clear. Mr Reynolds, will there be chaos and uncertainty?

Barney Reynolds: The question is where we want to end up. Where we are at the moment is set out in the 2018 Act. It is not totally clear, in my view. It would be mistaken to make the assumption that the existing situation gives rise to legal certainty. For instance, the Act talks about the continued application of retained general principles of EU law. Lawyers can disagree as to exactly what those are and, more importantly, how they apply in specific instances and how they butt up against our own provisions. I am not convinced that the existing situation is so certain.

Going back to where we want to end up, if we want the full benefits of our system, with all the economic benefits that brings, which the

international market is seeking out, it seems to me that we need better drafted provisions. Ideally, over a period we would look at each inherited sector of law and it would then be rationalised. We would weed out stuff we do not want—there would be policy choices to be made, no doubt—and enact our own statute that is much more clearly and crisply drafted, which then works with our interpretive methods. Our interpretive methods and our legislative approach go hand in hand.

The question is whether we do that incredibly slowly—this would involve leaving in place the vast bulk of inherited EU law, which I regard as inherently unsatisfactory and less certain in practice, and its interpretive method, especially if it is not that different to our interpretive method—or we have a deadline when some of this falls away unless the Government and Parliament have decided to replace it with something. India only recently got rid of the 1948 Companies Act. Unless we look at the thing as a whole in terms of where we want to end up, to my mind there is a danger that we could end up in a position like that. In their case, it was not as acute as it is for us. They inherited a system that they are continuing to apply, which benefits from all the legal certainty we are talking about. In our case, we have an alien system applying alien approaches, which may be with traditional interpretations—

Q60 **Jon Cruddas:** I take the point. I was more interested in the turbulence, uncertainty and possible chaotic character, alongside other changes in the legal system, that would occur in the transition to this nirvana that you are laying out.

Barney Reynolds: The policy is the key thing, but it is a massive step forward in terms of legal method. I have huge faith in our judges to find a solution to creating legal certainty around anything we have got. If they are equipped with legislation from Parliament rather than this inherited morass, we will end up with a better outcome for everyone.

Q61 **Chair:** This is also part of the problem or question that we considered earlier, which is the sovereignty of Parliament. If Parliament has decided that it is a sovereign act of Parliament to leave the European Union, that means leaving sections 2 and 3, which are the provision that relate to the role of the Court of Justice. If we have abandoned that, and that is clear and express, why would we want to get embroiled in a further creation of uncertainty by continuing with a system that is inconsistent with the fact that we have left the European Union? The only reason why there is an appendage to remaining in it—the umbilical cord, if you like—is a provision that was put through in the withdrawal agreement Act at that time as a stopgap, which is all it was. We know that from the statements that have been made by the Government. Otherwise, we would have been making too big a jump immediately.

Once we have made the decision that that has to be done—for example, section 38 makes that clear in certain respects, as indeed does the general proposition about the principle of sovereignty, which we have discussed—it takes us into a new era of law-making. Otherwise, you

could have two sets of public statutes, which could be very chaotic and inconsistent with one another. People might not know whether they are going to get caught up in one or the other of those public statute books. It seems possible to me or, in fact more than possible, extremely likely that Parliament will intend and does intend to pass legislation to achieve a position where retained EU law will be disposed of, because they have said so.

The academic analysis, which I understand, is potentially inconsistent with the ultimate objective, which is surely to have a sovereign Parliament passing its own enactments with a system of interpretation that is understood because that is the way in which we do things. Richard Aikens said that the common law tradition is the basis upon which the decisions are taken. If the precedents are based on EU law, that is not the same as saying the precedents are the same as they would be interpreted under the common law system. It seems to me that we will have to consider these questions in light of our report. The balance of judgment has to be based on what the outcome is going to be in terms of what Parliament actually decides it wants to do.

Barney Reynolds: I agree. The question almost is, "How much Brexit do you want?" We could stop here and have a hybrid system with a massive morass of inherited law that is based on a fundamentally different approach. We can debate exactly how different it would be and so on, but it is different, not least because the purposive method, as meant in the EU system, looks to the EU's own purposes, which are not our purposes.

Chair: Maybe the answer will eventually be whether or not the Government decide, in whatever provisions they make in an EU retained law Bill, which we understand is coming up in the lift, to make it express and clear that this is the basis on which they intend to proceed. That is a matter for another day.

Sir Richard Aikens: Could I add a supplementary point? If you want to get away from the fear that there is going to be a dual system between what you might call domestic law, properly so called, and inherited law from another system that has been domesticated and the problem of different methods of interpreting, the answer is that Parliament is sovereign. Parliament can say, "In interpreting what is now called retained EU law, the courts will not take account of decisions of the CJEU or EU law principles. The courts will consider those solely as if they were Acts of Parliament passed without reference to their origin in the European Union".

If you did that, which could be done in one line or two, the courts would have to obey it. If you do not, the natural inclination of judges will be that, if there is a difficulty about interpreting, to go and look at the sources.

Q62 **Chair:** That is a very interesting observation from somebody of your eminence. It seems to me to be something that we will have to consider

when we get to the position of judging the evidence.

Professor Young: If I may also respond, I agree that it is for Parliament to decide how far it wishes retained CJEU case law to be taken into account by UK courts. In taking that decision, as a Committee you also need to be aware of other factors when balancing the choice you need to make.

Chair: That is why you are here.

Professor Young: Exactly. Thank you very much. For example, you have to recognise that the UK, when it was a member of the European Union, was used to having UK law and EU law working side by side and interpreting EU law in a specific way. For some of the precedents we are talking about, it can be difficult to untangle how far this is a precedent of a UK court interpreting, for example, the working time regulations and how far it is partly influenced by a precedent of the CJEU. You do need to be aware of that element.

In a sense, if we are trying to say, "It looks like we have two different statute books," I do not think that is fully accurate. We have had the experience of having had EU law and UK law. We have tried to continue certainty as best we could in the interim by trying to work out the extent to which we continued with retained EU law, unless and until Parliament has the opportunity, democratically, to decide, as a matter of policy, which of areas of these laws it wishes to retain and which it does not.

Q63 **Chair:** With respect, Professor Young, the reality of section 3 of the European Communities Act 1972 required us to follow the decisions taken by the European Court. That applied to our courts as well by virtue of the 1972 Act. I simply put this on the record. I am glad you accept that.

Professor Young: I agree that it is no longer a requirement, as it would have been when we were a member of the European Union, to interpret decisions going forward in line with this. It was a choice to retain legal certainty.

Q64 **Chair:** That is a decision that the Government and Parliament will have to take.

Professor Young: Yes, absolutely.

Q65 **Chair:** They will have to decide how to deal with this in the context of the very interesting observations made by Sir Richard, in the context in which he just presented them. It is open to the courts, in one line, to say, "This is the way in which it will be dealt with".

Professor Young: It is open to the courts, but you also have to recognise that the courts will want to try to maintain legal certainty. The courts will also be aware that, if they suddenly start departing from previous case law, in some cases that is taking a policy choice.

I keep going back to one example, because it is easier to explain. If we were looking at something like the Working Time Regulations, you have to think about what you mean by "work". If an ambulance driver is on call in a hospital, are those work hours or not work hours? There will be case law that explains that. The UK courts will think about this post-Brexit. If they are told they no longer have to follow CJEU case law, the courts will have to think about whether they want to see this as work or not. Do we want the courts to be choosing that as a policy choice or do we want the courts to be saying, "Previous case law has decided that this is work. It is not really for us to change this classification as this being work. That is better taken by Parliament as a policy choice"?

In some senses, following the previous case law to maintain certainty will allow Parliament to decide for itself, as a policy choice, whether it wishes to change the law as it is at the moment.

Q66 **Chair:** It is the enigma in the riddle, if you remember what Churchill said. I entirely understand where you are coming from. The answer to the question will ultimately be decided by Parliament.

Professor Young: Absolutely, yes.

Chair: Therefore the question can be resolved, although within it there is the enigma and the riddle, and maybe a Russian doll as well. Let us just move on from that.

Q67 **Mr Fysh:** We have touched on this to some degree already, but I just wondered whether you had any thoughts on the appropriateness or otherwise of the current test for a UK court to apply when deciding to depart from decisions of the CJEU or not. I want to expand on what you said before. It would be interesting to hear your comments on this. Sometimes the CJEU takes a purposive interpretation of previous Acts of one kind or another of the European Union. To what degree might those have implications for the interpretation that judges currently undertake in the balanced way that Sir Richard described? What might be an appropriate way to handle that? Would you like to go first, Professor Young?

Professor Young: I will start with the first part of your question and explain what we have been able to discern from the case law so far as to when the Court of Appeal is willing to depart from a decision of the CJEU. As Sir Richard noted earlier, it is in line with the practice direction from 1966, which is that it should be used "with great caution" and "rarely and sparingly".

What the Court of Appeal seems to be doing in a series of cases—this is the TuneIn case, which we have also mentioned previously, and the Chelluri *v.* Air India case, both cases in the Court of Appeal—is thinking about whether the law has changed in some way. Has the domestic law changed? If you are thinking about a backdrop of EU law against an international framework, has that international framework changed? If

that law has changed, that is a good reason for not following a decision of the CJEU. The court will also be thinking about whether there are clear reasons for this change. As much as academics do tend to disagree with each other, some time you find academic consensus that there are negative consequences of a particular judgment. That might be used by the judge to say, "If there is consensus that this judgment is problematic, that could perhaps provide a good reason for not following that particular judgment."

This will then be balanced against legal certainty. When the Court of Appeal is performing this balance between whether there are good reasons to change and whether legal certainty would dictate still sticking with a CJEU decision, they are thinking carefully about the extent to which this is a specialised area where the CJEU might have more expertise. Rather like we, when deciding a medical issue, would think, "I am going to give weight to my doctor because they will know more than I do," if this is a CJEU specialism I might think, "I will give weight to what they are doing, because they might know more than me." They also might not, because the particular area might be something that is more suited to the UK. Of course, they are also conscious about their relative position vis-à-vis Parliament: "Is it for us to make the change or is it for Parliament to make this change?"

This is coming through their statements on how they make this balance. We are finding that there is a balance of thinking very carefully about whether there are good reasons to change from CJEU decisions. Sometimes, the reason might be, "This was to achieve a specific EU aim. We are not in the EU anymore. Are there really reasons to continue interpreting it in this way?" Sometimes this could be an element of EU law that we have been used to in the UK system for a long time that had become domesticated even before we left the EU in a sense. If we have become used to it and we have legal certainty, there might not be any reason for changing it, which means there is no real justification for changing it in these particular circumstances.

That is quite a sensible balance. In some senses, you could say instead of "have to follow" that the UK courts "may follow" when there are good reasons for doing so. That might end up with a similar balance of having legal certainty and looking for a good justification to follow a decision, but it would also make it clear that, because we have left the EU, in some sense these are not decisions that should be binding on UK courts anymore and, if we are following it, it is because there are good reasons within our system to continue following it for legal certainty and because there is no reason to change rather than because we think, "This is the CJEU and we have to follow it because we did when we were members of the European Union".

Q68 **Chair:** That is understood but, of course, one of the objectives of the CJEU's approach and the purposive interpretive system they adopt is to do with harmonisation. After all, the whole purpose of the European Court

and the European Union ultimately is to get that degree of harmonisation so there is a uniformity. In many instances, we are dealing with a need for competitiveness. We will be approaching matters from potentially a very divergent point of view, which is one of the reasons why most of the main participants on the EU side of the debate on Brexit have tended to say, "We think it is better to be harmonised. We think it is better to have a political union", and we are saying, "No, we do not. We want to do it our way".

There is almost an element of philosophical difference that appears in this debate. We need, again, to go back to what Parliament ultimately decides on this. That is the really big difference for those who have been more inclined to want to have political union, although I rather suspect that some of the circumstances arising in the context of the Ukrainian situation are perhaps having quite an impact in other member states, as I heard in Brussels; we have just come back from there. They are beginning to say, "We would like to have our own way of running our affairs." They look at what they do in the EU with some scepticism, because they do not want to be herded into one way of thinking, either in jurisprudence or political outcomes.

I suspect this is going to be a much bigger debate. Thank you very much for that. That is interesting. Sir Richard, did you want to say anything?

Sir Richard Aikens: Yes, I just have a couple of comments. First, the CJEU decisions do not necessarily produce legal certainty for the very simple reason that they do not have a doctrine of precedent in the way we do. One only has to read their cases in particular areas to see that they do not follow a precedent system even informally.

I have spent a large part of the last year having to rewrite the chapter in "Dicey, Morris & Collins" on jurisdiction as a result of us leaving the EU. Therefore, the revised Brussels I has gone. It has crept back, however, in certain respects, which I will not go into now, which has meant that I have had to look at a lot of CJEU cases. The thing that is obvious is that they do not have this system of precedent and, what is more, the actual element of reasoning in many of their judgments is very short indeed. It is two or three paragraphs. It is the bare minimum.

The reason for that is you have a lot of judges, and they all have to agree with the result. You do not have three judges who might even come to the same conclusion but for different reasons.

Chair: There are no dissenting judgments.

Sir Richard Aikens: Yes, there is a single judgment. The idea that decisions of the CJEU produce legal certainty is to be taken with a pinch of salt. That is not to say that it may be that, in an area of law, following what they have had to say, if you can discern it, is good, but it means that, even if you have a retention of a rule that only the Court of Appeal and above can depart, the interpretation of the 1966 practice direction,

or perhaps a rethinking of it, would not be a bad idea to give the necessary flexibility.

Once an area has been considered by the Court of Appeal or the Supreme Court and they come to a decision, that is going to be binding on the relevant UK courts. Then you will have the legal certainty that you need, because our doctrine of precedent will apply.

Chair: That is very interesting. I do not know whether Barney would like to make a further comment on that. This is taking us somewhere, actually.

Barney Reynolds: I agree that the EU law is less certain. I agree that the ECJ decisions, which are much shorter, are much less clear. That is against the backdrop of EU law being less certain anyway and the purposive method that we have discussed.

I would also add, to your point, Chair, that the EU's purposes include harmonisation. They also include federalisation and papering over the cracks of the half-built eurozone system and so on. There are intrinsic issues with the EU system. That is in the financial services context. There are issues with the EU project that the court has to support, naturally. They are not our purposes anymore.

Q69 **Chair:** Could I just add to that? I do not know whether you agree with this. I made the point earlier, which I am certainly well acquainted with in terms of observations, that the way in which the laws are made is they are behind closed doors without the kind of analysis that goes on, for example, in the UK Parliament, where people are fighting like ferrets in a bag over issues of fact, principle, morality and the rest.

In the EU, nobody really has any knowledge as to how the thing came about. The initial proposals come from an unelected Commission in the first place. There is this imbalance or even contradiction between the democratic credentials of the basis on which the laws are made in the EU and that of the UK.

Barney Reynolds: Yes. Maybe the way this was done was the right way at least to get to the starting gate, but we now need to move on. We have inherited a system that, under the scheme of the time, meant that EU law trumped ours, hence the supremacy provision in the 2018 Act. As you say, it is less democratic in its conception. Its purposes do not meet our current purposes. We end up with this uncertain tension between the old and the new, and the pre-1972 stuff.

Listening to Professor Young's analysis of the working time directive and some of the concepts arising from that, what that brings home, I hope, to people is the level of policymaking that judges are engaged in under this scheme that we are now running. We are looking at the rooms as to how they are working this through. I am sure they are going to do a splendid job, but it is a splendid job with a half-built tapestry with some holes here and there. They are trying to piece it together for us. We deserve better.

We should revert to our normal principles of interpretation. All courts at all levels should be doing that. You should not have to appeal to the Court of Appeal in order to be able to get someone who is able to depart from the—

Q70 **Chair:** There is something of an echo here, going back to what I recall from chapter 12 of "The Rule of Law" by Bingham. The whole question of the manner in which laws are made should not include judges making the laws themselves. It is for them to obey the laws that are made by Parliament, but obviously within the range of interpretation as well. We are getting into some quite interesting sensitivities here, which are extremely important and which, for example, Bingham in that particular chapter about the Jackson case castigated Baroness Hale and Lord Hope of Craighead for the way in which they, he thought, were going much further than anyone should reasonably go in their approach to the question of judge-made law. It needs looking at very carefully, but it is a definitive and authoritative judgment that many people would agree with.

Barney Reynolds: I agree. It does—I mentioned this earlier—undercut parliamentary sovereignty to some degree.

Chair: That is actually what he was talking about. He said that it is not for judges to make the law; it is for the judges to interpret and to obey the law. I just want to note that Sir Richard was nodding his head at that point.

Sir Richard Aikens: Yes, of course. No one could disagree with what Lord Bingham had to say on the subject.

Q71 **Chair:** He also calls into account Goldsworthy, on which I know you have written quite a lot. He described Goldsworthy's work as magisterial. Coming from Lord Bingham, that is saying something.

Sir Richard Aikens: Yes.

Mr Fysh: It is also Parliament's duty to make its intentions sufficiently clear so that judges are not put in an awkward position.

Chair: That is a very good point.

Barney Reynolds: In this hybrid situation that we are in, perhaps inevitably and perhaps not, the received EU law has been taken on principally with primary legislation status. Parliament's new legislation will sit alongside it. Parliament has already said that almost all of this stuff is in primary legislation; there are some exceptions, but they are relatively minor. You are leaving it to judges to figure it all out against these competing techniques and so on.

Just hearing the point on the working time directive shows you how much judicial power there is. I am sure it would be exercised in a very sensible way, but it is not power that Parliament has, I would have thought, realised it is giving to people. Having that element of power and

discretion on policy, effectively, is not something that is compatible in the long term with the sovereignty of Parliament.

Chair: Just before we come onto the last question from Craig Mackinlay, I wanted to mention that I did read your book. I actually bought a copy. I wanted to be quite sure I had a copy that I could note up, as indeed with "Bradley, Ewing & Knight", which I have copiously noted all the way through for the last 20-odd years.

Professor Young: Thank you. You are very kind.

Chair: Sadly, Anthony Bradley died only a few months ago. You did say—and it is coming out in this session—in that section on section 38 that it is impossible to underestimate the effect that Brexit has had, because it is in the nature of a revolution, just as going in was a revolution, as indeed we went through a revolution from 1696 to 1700 or 1701, when we disposed with the Stuarts and brought in the Hanoverians, or, for example, in 1660 or 1640.

We are talking about landmark moments not only in British constitutional history but also in constitutional law. Time has moved on; we now have democracy. This is all part of this debate that we are considering and part and parcel of the reason why people decided in Parliament, by sovereign Act of Parliament, to leave the European Union. It is part of one of the biggest landmarks in British constitutional history and law.

I am now going to ask Craig Mackinlay to come in. I am glad you are nodding at that. I do find it incredibly important for us to get this into context. This is not just an academic debate. This goes to the heart of who we are, our instincts, our beliefs and our political will.

Q72 **Craig Mackinlay:** I would like to thank you all for a masterclass in the UK constitution, parliamentary sovereignty and the operation of various levels of courts. It has been really enlightening. To echo what my colleague Mr Fysh said in terms of clear law being helpful, I would invite you to try to untangle the new red diesel regulations coming into force the day after tomorrow, which are part of the Finance Act 2021. There are 15 statutory instruments, a VAT notice and then some verbiage on gov.uk. If you could give me an answer on something very up to date, it would be very helpful.

It might be helpful for me to summarise where I think we are. I just have one question on the back end of this debate that we have been having, and then we can move on to something else. In easy clarity, say we have an unchanged retained EU law. If there has been a CJEU decision before 31 December 2020, that unchanged law will be binding on all levels of court except for the Court of Appeal and the Supreme Court, which can—the golden words are "if it is right to do so"—amend that. That is even old stuff.

An old CJEU decision should be binding, but our upper courts can say, "Yes, we hear that, but it would be right to do something different."

Where you have a subsequent CJEU decision, post 31 December 2020, you can have regard to it, if it is helpful. I have got that. It is a focus of Government to lower the level of courts that can have perhaps more flexibility. That seems to be the direction in which we are going.

The one complication I have is where there has been a subsequent UK modification. Something has gone through this place, and there has been a modification. Maybe it is a modification of clarity or some greater intent. That is where I have some confusion. This is section 5(3) of the EU withdrawal Act. It seems to state that a principle of EU law can still apply if the amendment "is consistent with the intention of the modification". That is where I get a little confused. If we go down the line of lower courts, they may consider that that does not apply. If the litigant, whoever that is, does not get the result they want, they can go up a level and up a level. We may, at the end of the day, have to go to the Supreme Court for some of this absolute guidance in deciding whether that CJEU decision was relevant for a valid decision to be made. It adds to the complication that Mr Reynolds mentioned about the whole fabric we are in.

Can you give us any guidance, Sir Richard? Let us say we have had a modification to retained EU law subsequent to proper withdrawal, and we either do or do not want to look at a CJEU decision that had similarities even though we have subsequently modified the law. Who is going to make the decision that it has changed so much that we do not need apply it or that it has changed so little and is only interpretive so we should? That is a very key point in my view, but maybe I am just barking up the wrong tree, Sir Richard.

Sir Richard Aikens: I can see that difficulties could arise. Let us look at it from the point of view of the judge who has a problem to solve on the interpretation of the modified Acts. I will assume, for the moment, that Parliament has not told me what I can and cannot do specifically, other than that I can have regard. First of all, I would ask myself, "Is it clear now what the Act says?" The Act has been modified. To use a phrase, it is a domestic Act. If it is clear and the words are clear, I do not need to go any further.

If we assume, sadly, that it is not that clear and there is a bit of doubt about it, the judicial reaction would be, "I had better look and see what the original was. I had better see whether or not there is anything that helps on the interpretation of that, including some CJEU material. Then I had better look and see how to fit that in with what has been said, bearing in mind that the object of the modification was to modify, not to keep it the same. Then I will try to come to a result as to what the correct interpretation is."

That might be me sitting as a judge in the first instance in the High Court or in a first-instance tribunal, for example. My view could be repeated in other decisions at that level or it may be considered further up the line. You are right that others may come to a different view and that

ultimately you would have to wait until you got to the Court of Appeal, at the very least, before you had something that was definitive. That is not helpful.

How can you solve that problem? The only way you could solve it easily, in my view, would be to adopt the suggestion that I made a little earlier, which was that anything that is modified should be interpreted without regard to any CJEU decision and without regard to any policy or whatever that the European Union might have had in respect of the old legislation.

Q73 **Craig Mackinlay:** That is very sensible. Thank you. Just to put it on the record, I have known Mr Reynolds for some time. There is a vast amount of retained EU law. There will be an overlap with what we might consider to be the most sensible Brexit freedoms to try to exercise. Are there are sectors on which we ought to focus first, perhaps because it is such a huge corpus of law that needs unwinding or because it is such a big sector that it would be very beneficial to the UK to take its own course in life? Are there sectors that we should be looking at first?

We might first need to understand what the bulk of retained EU law and domestic law looks like, because that is a problem in itself. What is the body we have to consider? Are there sectors that we should look at first that would be most beneficial to UK trade or that have bound-up legal complications that need unwinding at this stage?

Barney Reynolds: Yes. I would say financial services, certainly. The power to do that is in the Financial Services and Markets Act 2000. The Treasury are proposing, by statute, to move the vast bulk of inherited EU regulation to the regulator rulebooks of the PRA and the FCA, which would then be empowered going forward, under the existing FSMA powers, to re-write those rules. The question is, "Do we need an extra impetus from Parliament for that to happen?" There is effectively a working group under Parliament's oversight that could do that, if so inclined or required to do that.

That is pretty unusual if not unique as a situation. In other sectors, you would need to create a technique for doing it. I would address other ones in the service economy. I would look at data further. I know we have started to look at that. We should start with the sort of industries we want and look at how successful they are ging to be. I would look at some of the Silicon Valley-type businesses and big data. Why are we not getting the businesses here? A lot of the answer is to be found in the law. I would look at those.

I would suggest having working groups. We could have blue-sky working groups of people with different aspects of expertise across a particular industry sector in all our main industry sectors. These groups could look at that with a deadline, a sunset clause, a sense of impetus and a mechanic by which Parliament can then look through and decide how to make changes and so on. The modification discussion you raised earlier brings it home in a way. We could end up tweaking EU law and managing

the inherited scheme. That would be disastrous. It brings with it the uncertainty we just talked about inherent in the modification provision itself.

Yes, we should prioritise certain sectors, particularly where there is innovation in the abstract and law is fundamental to the proposition. I also would not leave the other sectors, goods and so on, alone. I would see whether there are things in intellectual property law or things related to standards of manufacturing, where things are changing quite quickly, to see whether we can be more competitive in those as well. In a way, I see this as an opportunity for economic growth for the UK that is available largely for free. Why not seize it? It involves a lot of work. It involves rather a lot of thought. Parliament will have to decide what sort of process it wants to use to address reforms in a particular sector. It is the policy of the inherited EU material and the method that need revisiting. We have this extraordinary opportunity before us, where Parliament can kick things forward very quickly through its own sovereign powers.

Chair: Is that your message to Jacob Rees-Mogg in his new capacity?

Craig Mackinlay: It is interesting to hear that there are some things we can have for free. Who ever heard of lawyers for free?

Barney Reynolds: Once you open up the discussion and indicate to global industry that things are on the table and that they can weigh in with thoughts, things will be driven for you and you will be presented with options to evaluate largely for free, because people will be able to offer up their own thinking as to how things can be shaped. There are consumer protection issues that Parliament needs to oversee and there are all sorts of other policy choices that you need to weigh in with, but you would very quickly have a massive engagement from the world's industries, if this were properly on the table and properly subject to discussion and consultation.

Sir Richard Aikens: Can I add one minor sector? It is to do with my specialist interests, which is transnational disputes and jurisdiction. Please will Parliament not go down the road of wanting to join the Lugano convention?

Chair: You have had your opportunity to make that clear, and you could not have made it clearer. We have covered a lot of ground this afternoon. It has been a very interesting session. I was slightly concerned that it was going to become over-academic. It has not been, because it has been essentially a practical session looking at things that are going to matter in this revolution that is taking place. Fortunately, it is a peaceful revolution.

We will be continuing our inquiry, with other evidence to be taken soon. We will be having Jacob Rees-Mogg appearing at some point down the line. Thank you very much for coming. I am sorry we were a bit late;

sometimes we get diverted a little bit due to the timetable. Thank you very much for coming and for your evidence.