HOUSE OF COMMONS

European Scrutiny Committee

Oral evidence: Retained EU Law: Where next?, HC 122

Wednesday 18 May 2022

Ordered by the House of Commons to be published on 18 May 2022.

Watch the meeting

Members present: Sir William Cash (Chair); Jon Cruddas; Richard Drax; Margaret Ferrier; Mr David Jones; Marco Longhi; Anne Marie Morris; Greg Smith.

Questions 74-88

Witnesses

I: Professor Jo Hunt, Professor in Law, School of Law and Politics, Cardiff University; Professor Christopher McCrudden, Professor of Human Rights and Equality Law, School of Law, Queen's University Belfast; Dr Robert Taylor, Senior Lecturer in UK Public Law, Aberdeen University; and Professor Adelyn Wilson, Dean for International Stakeholder Engagement, Aberdeen University.

Examination of witnesses

Witnesses: Professor Jo Hunt, Professor Christopher McCrudden, Dr Robert Taylor and Professor Adelyn Wilson.

Q74 **Chair:** Good afternoon. It is a great pleasure to see all of you—some of you are on screen, and Dr Taylor is here in person. On behalf of the Committee, I welcome you all and thank you for appearing to give evidence this afternoon. This is the fourth session of our inquiry into the future of EU retained law. To date, we have covered the fundamentals of EU retained law; issues relating to the Government's reviews and scrutiny of any changes to the current system; and the doctrine of the supremacy of EU retained law.

During today's session, we are going to look at EU retained law and the devolved settlements—in particular, how they interact and, from recent Government announcements, the potential implications of the Brexit freedoms Bill. We will cover the EU (Withdrawal) Act 2018 and the devolved settlements as item 1, then the Government's September 2021 reviews and the devolved settlements; the different legal arrangements in Scotland, Wales and Northern Ireland; and common frameworks and the internal market Act.

Because this is a hybrid session, we will try our best to direct questions to you individually. If you would like to come in after a fellow witness, please do so. Before we start, for those watching at home, I would like you briefly to introduce yourselves. I am conscious that three of you are appearing remotely, so perhaps we could start with Professor McCrudden, followed by Professor Hunt, then Professor Wilson, and finally Dr Taylor. Would you be kind enough to introduce yourselves in that order?

Professor McCrudden: Thank you, Sir William, and thank you for inviting me to give evidence. My name is Christopher McCrudden. I am a professor at Queen's School of Law, and also a global professor at the University of Michigan Law School. I also practise at the English and Northern Ireland Bars.

Professor Hunt: My name is Professor Jo Hunt. I am a professor of law at Cardiff School of Law and Politics. I am also a member of the Wales Governance Centre there.

Professor Wilson: My name is Adelyn Wilson. I am a professor of law and university dean at the University of Aberdeen. I am also co-director of our Centre for Scots Law and, with Dr Taylor—who is also appearing before the Committee today—was an academic fellow of the Scottish Parliament.

Dr Taylor: I am Dr Robert Taylor. I am a senior lecturer in public law at the School of Law at the University of Aberdeen and, as Professor Wilson mentioned, was an academic fellow at the Scottish Parliament from 2020 to 2021.

Q75 **Chair:** Excellent; thank you very much indeed. I will ask the first question, which I am going to address to Jo Hunt to begin with, in relation to Wales; then Professor Wilson and Dr Taylor in relation to Scotland; and then Professor McCrudden in relation to Northern Ireland. The question is as follows: can you take us through the provisions in the EU withdrawal Act that specifically relate to devolution and EU retained law, and outline how, if at all, the relevant powers have been used?

Professor Hunt: The Act itself, as you know very well, introduces various powers for UK Ministers to introduce changes to existing retained law. It does the job of rolling over EU law into EU retained law, introduces powers for UK Ministers to make changes to that law and, as we know, defines the particular status of that law. Welsh Government Ministers, just as with the Scottish and Northern Irish Ministers, are given the same powers within the fields of devolved competence to correct deficiencies in retained EU law and implement the withdrawal agreement. They have the analogue powers to what is there in section 8 and section 9 for the UK Ministers; schedule 2, through section 11, brings those forward for the Welsh Ministers to use.

Of course, UK Ministers can use those powers for Wales too, although there was a political agreement—the intergovernmental agreement of 2018 between the Welsh Government and the UK Government—that those UK ministerial powers would not be used within devolved competence without the consent of the Welsh Government. So we have the powers for UK Ministers, we have the powers for Welsh Ministers to act within devolved competence to correct deficiencies and implement the withdrawal agreement, and we also have concurrent powers that operate.

There are further powers that the Welsh Ministers did not have, of course—those that did not find a corresponding parallel—most notably the section 12 powers that would have frozen devolved competence, should the UK Ministers have passed regulations to do so, to maintain consistency across the UK ahead of policy making post the UK's departure and the use of the common frameworks as a mechanism to determine that. They do not get the same powers as were there under section 12, which have now been removed.

As far as the use of those powers is concerned, within Wales we have the Legislation, Justice and Constitution Committee in the Senedd, which is the lead Committee that deals with the scrutiny of the instruments introduced by Welsh Ministers under those powers. There was a protocol agreed between that Committee and the Welsh Government about managing the process of scrutiny of the regulations that would come through. There was also a sift process included in the Act, which operates in Westminster as well.

We will hear from across other parts of the UK, but alongside Welsh Ministers passing their own exit SIs on things such as animal welfare, GM and air quality standards, there has been a willingness from the Welsh Government, because of the pressures that have come with the timescale and covid, to allow UK exit SIs to operate for Wales. The Welsh

Government's stated position is that they are content to do that so long as there is no policy divergence and no likelihood of one, and that matters are technical and non-controversial. There is a process around that, as I said: there was an agreement that would not normally be done without consent, and there is a reporting process that is provided for under the Standing Orders.

As we have seen, sometimes those UK ministerial regulations have dealt with rather more controversial issues, such as geographical indicators, which was in an area of disputed competence. There has been significant activity by Welsh Ministers to correct the statute book in areas of devolved competence under both those powers and UK SIs. The legacy report from the Constitution Committee in the last Senedd did reflect some concerns about the extent to which the UK Parliament and Government were legislating within devolved competence. Even with consent, there was a sense that more of the law applying to Wales should have been made in Wales under the powers in the Government of Wales Act.

That is the picture of where we have got up to in terms of using the powers to correct existing EU retained law. Going forward, the same restrictions on how amendments can be made in the future to retained EU law, which we see set out in section 7 of the withdrawal Act, apply equally to legislation made by the Senedd and by UK Ministers. We are yet to see any significant divergence between Wales and the UK in the exercise of those powers.

Perhaps we will come on to continuity legislation. We do not have a formal piece of continuity legislation in Wales. We know that the Welsh Government have said that they share common policy interests with the EU on various social and environmental rights, so we may see the potential for that in the future, but for now there has not really been much use of that. A large part of that is because of the holding position that was in place before the UK formally left, or the end of IP completion day, and a willingness—or a readiness—to give the common frameworks space to work. That is my overview of the picture in Wales.

Q76 **Chair:** Thank you very much. I am going to move to Professor Wilson and Dr Taylor in relation to Scotland. We had quite an exposition from Professor Hunt, so I would be grateful if you could distinguish, where you think it is appropriate, the circumstances that apply in Scotland, so that we do not have to repeat everything.

Professor Wilson: Certainly. What Professor Hunt has outlined for Wales very much applies in Scotland as well, regarding the schedule 2 and section 8 powers. Scotland did not have an intergovernmental memorandum requiring consent, but none the less, the convention was that consent was sought by the UK Government.

In practice, that meant that the Scottish and UK Governments would agree on how to correct the deficiency of EU law. The Scottish Government would then notify the Scottish Parliament, which would scrutinise the proposals in outline and approve the Scottish Government's consenting.

That consent would be given, and then the UK Government would go ahead and make the exit SI, after which point the Scottish Government would report back to the Scottish Parliament that that was now in effect and would note any deviations from the original outline proposal.

Proportionally speaking, around 200 exit SIs were made at Westminster that affected Scottish devolved matters, compared with 70 pieces of Scottish delegated legislation. What that means is that approximately three quarters of the secondary legislation correcting retained EU law on devolved matters for Scotland was made at Westminster. About 80% of that was technical, but 20% was more significant—that might be to give effect to a policy decision, such as the creation of a new advisory committee, or to transfer functions, in particular legislative functions, to the Secretary of State or the Scottish Ministers.

When it comes to the Brexit freedoms Bill, there is a large proportion of exit SIs that affect the Governments who have the power to implement and reform the law and to make policy decisions, and affect the procedures for the Scottish Parliament to scrutinise proposals. But the chances are that if the Brexit freedoms Bill is passed in the way that it seems to be conceived, the Scottish Government and Scottish Parliament would have quite a large interest in it.

Chair: Thank you very much. Dr Taylor, do you have anything to add to that in relation to Scotland?

Dr Taylor: No. I can answer another question.

Chair: Okay—certainly. How about you, Professor McCrudden, in relation to Northern Ireland?

Professor McCrudden: Thank you, Sir William. I will not repeat what Professor Hunt and Professor Wilson have said with regard to Scotland. Where the Northern Ireland/Ireland protocol does not apply, the current arrangement for retained EU law applies in very similar terms to that in Scotland and Wales, except that Northern Ireland Ministers may amend, replace or repeal in areas of devolved responsibility. Effectively, what has been said so far about Scotland and Wales applies in Northern Ireland where the protocol does not apply.

The major difference from Scotland and Wales—I am sorry if this is going to add to the complexity of an already complex subject—is where the protocol does apply. There, the current status of retained EU law differs from in the rest of the UK in several respects, and I will mention three respects that are particularly important.

First—I emphasise again that we are talking about areas where the protocol applies—the operation of the common frameworks is subject to the protocol, so the common frameworks cannot override the protocol. The protocol has priority. That is by virtue of several provisions in the 2018 Act, but particularly the crucial section 7A. That is not to say that Parliament could not repeal or amend section 7A. For the moment I am

assuming that we are talking about the current position legally, rather than any changes that might be introduced. The first point is that common frameworks will apply only subject to the protocol.

Secondly, where articles 5 and 7 to 10 of the protocol apply—those are basically the customs and single market provisions—EU law as such, not retained EU law, applies, with important implications. The charter of fundamental rights applies; dynamic alignment applies; the courts have to apply relevant ECJ jurisprudence, current and future; references to the ECJ are possible from Northern Ireland courts, and breaches are subject to European Commission infringement proceedings before the Court.

That connects to the question about the status of retained EU law because, to the extent that retained EU law overlaps with the provisions of articles 5 and 7 to 10, and in particular with the provisions in annex 2, any departure in GB from retained EU law, with the position in Northern Ireland remaining the same, will lead to greater divergence between GB and Northern Ireland. In other words, amending, replacing or repealing retained EU law in GB has potential implications for opening up divergence with Northern Ireland in the areas where articles 5 and 7 to 10 apply.

The third area of divergence from Scotland and Wales—again, where the protocol applies—is with regard to article 2 of the protocol. The Committee has been involved with article 2 in the past, so you will know that, in that context, it is the provision that guarantees non-diminution of Good Friday/Belfast agreement protected rights—human rights and equality. Where article 2 applies, the implication is that the EU underpinnings of those rights, including EU underpinnings that are currently retained EU law, have to remain in place or be replaced with something equivalent. Otherwise, there would be a diminution of the rights under article 2, which would be a breach of that article.

There is, therefore, a special status under article 2 to retained EU law where it underpins rights under the Good Friday agreement. That special status applies to not only the so-called annex 1 anti-discrimination directives, but all EU retained law that underpins the Good Friday agreement protected rights. In other words, the annex 1 anti-discrimination directives have an additional protected status, but so too does the rest of retained EU law—unnamed—where it has the effect of underpinning the Good Friday/Belfast agreement rights. There is an important judgment of the Northern Ireland High Court in the SPUC case, which is on appeal to the Northern Ireland Court of Appeal in October.

I will conclude on this point. In short, the danger is that a wholesale removal of EU retained law that does not take into account its relationship with article 2 or the other articles I have mentioned could unintentionally lead to either divergence with the rest of the UK or the diminution of the Belfast/Good Friday agreement protected rights, leading to a breach of article 2. My apologies for a somewhat technical analysis—I hope you will forgive me.

Q77 **Chair:** Thank you. Just to put a cap on that, the European Union

(Withdrawal Agreement) Act 2020, in section 38(2)(b), provides specifically for the removal of both direct effect and direct applicability, notwithstanding the provisions of the previous enactment. In other words, as you gather, it overrides both. Although I hear everything that has been said with respect to the current situation, what if legislation were to be introduced, the effect of which would be to implement the powers that are not simply a restatement of the sovereignty provisions, because they are expressly, specifically and particularly referred to under section 38(2)(b)? This is a bit technical, but I just wanted to put that on the record, because that is something against which one will have to make a judgment as to what is going to happen next, or indeed make a judgment about what is done, if it is done under section 38.

Professor McCrudden: May I very briefly add a footnote to that? It is clear—this is why I stated it in my initial presentation—that parliamentary sovereignty means that section 7A can be overridden. There is, however, a dispute as to whether it can be done without new primary legislation. I think that is the question that arises.

Q78 **Chair:** I understand that and I didn't suggest that it would be done by any other means in this context. Section 38 provides the opening of a door for new primary legislation were it to be necessary—that is, I think, probably the case.

Professor McCrudden: I would not dissent from that. It does not override parliamentary sovereignty in the sense of primary legislation being available, of course.

Chair: That is extremely helpful, Professor McCrudden; thank you very much. Now I am going to ask Marco Longhi whether he would be good enough to ask the next question. And could we keep the answers a bit shorter? I gave a lot of latitude there, because we have three different devolved Administrations, and you have done a very good job in giving us an overview, but we need to move on a bit. Marco, would you be kind enough to ask question 2?

Q79 **Marco Longhi:** We may well have covered some of this ground. The Government have announced that they will bring forward a Brexit freedoms Bill, which will include a mechanism to make it easier to amend or replace retained EU law. Are there any particular issues that should be taken into account, from the Welsh, Scottish and Northern Ireland perspective? Perhaps we could start with Professor McCrudden.

Professor McCrudden: Thank you for the question; it is obviously highly pertinent. The gist of what I was suggesting was that there are two particular respects in which I would advise the Government to be careful. The first relates to the potential divergence between Northern Ireland and the rest of the UK. The more retained EU law is replaced, amended, withdrawn and so on for GB, the more divergence there is going to be with Northern Ireland in the areas of the single market and customs. That would be a choice for the UK, obviously, to make, but the current position is that, under the protocol, EU law, in those areas, applies and that cannot

be amended through the provisions of something like the Bill that you are mentioning. That's point 1.

Point 2 is a rather different situation that arises under article 2 of the protocol. That is that retained EU law currently is part of the structure of law that underpins the Belfast/Good Friday agreement provisions on human rights and equality. The article 2 commitment and requirement on the UK Government is no diminution of those rights. If you were to remove the retained EU law without replacing it with something equivalent, that would lead to a diminution in the rights and therefore a breach of article 2.

The short answer is that, in both those respects, I think British Governments need to be quite careful in terms of the implications of the amendments that they are planning to introduce.

Marco Longhi: Thank you very much. Professor Hunt?

Professor Hunt: Clearly, the issues affecting Northern Ireland are of a different magnitude from those impacting Wales through this, but it is still the case that constitutional issues would arise through it. The assumption is that the powers wouldn't simply be for UK Ministers and that they would also bring in powers for all parts of the UK, to make it easier to address issues—notwithstanding the situation in Northern Ireland. So there would be a change in competence. It would engage the Sewel convention. There are also the issues, as we have seen before, around concurrent powers, if we see those coming through again. There will be concerns about that use of concurrent power, if it is introduced. When UK Ministers can also use powers under the Brexit freedoms Bill in devolved areas, what controls might there be over that?

As we have seen, there have been instances where commitments have been made in intergovernmental agreements. Equally, there have been instances where controls have been written on the face of the Bill. That would be something that would be very much sought, should those concurrent powers be introduced, from the devolved Governments.

The common frameworks process that has been undertaken will be the mechanism through which the Governments work together, through which collaboration takes place in areas that were previously brought together by EU law. We know that those common frameworks are very much built upon EU retained law, and there are very clear processes within those frameworks, as they are being established, in terms of how you manage the decisions to develop policy within those frameworks. Any process that is written into that Bill will need to consider those frameworks.

More widely, the intergovernmental relations terrain, which we know has been so very contested, has seen some real breakthroughs. We had the Government's review published in January 2022. We need to pay attention to where this sits within the broader territorial constitution.

Marco Longhi: I would like to get a Scottish perspective from Dr Taylor.

Dr Taylor: I am happy to come in on this one; thank you. A lot has been said there of tremendous relevance. In terms of Scotland and the Scottish experience, one thing that we have discovered is the importance of scrutiny of these provisions.

Assuming that any Brexit freedoms Bill wants to introduce some kind of secondary legislation-making power to change, repeal or amend retained EU law, equivalent to what we saw under the 2018 Act, it is important that there are similar scrutiny mechanisms, as we saw under that. Obviously, when it came to Westminster passing any statutory instrument that had a UK-wide implication, it would still be subject to a sifting process, to ensure that it was going through, whether a negative or an affirmative process.

The important thing to stress for Scotland, as my colleague Professor Wilson mentioned, is that many SIs were passed at Westminster that applied to Scotland under retained EU law. That was with the consent of the Scottish Government and the approval of the Scottish Parliament. A protocol was put in place to allow the Parliament essentially to approve any intention by the Scottish Government to consent to these changes. That meant that they came up with their own scrutiny process, to look at proposals, not the SIs themselves, because they wouldn't have access to those.

There was the opportunity to ensure that they could have a look at what was going on, and to ensure that they were happy with the changes. Those were often happening in parallel. You had intergovernmental discussions about what changes we should do. When they agreed that, the Scottish Government went to Parliament, tried to get their consent first, and then that would go through Westminster. That all sounds very complicated, because those were two parallel scrutiny processes. They didn't intersect, and the Scottish one was purely political, not legal. It was obviously very important, given the scale of the changes happening.

Under the 2018 Act, most of those changes were meant to be technical in nature. Indeed, most of the notifications issued in relation to UK exit SIs that related to Scotland were seen as purely technical. The one thing to remember with the Brexit freedoms Bill is that, at least from what we know, there is the suggestion that it might make more sweeping or substantive changes to existing retained EU law; in which case, scrutiny becomes ever more important.

The key to effective scrutiny is timing. If we think about what happened in 2018, the Bill had to turn into an Act very quickly. Exit day obviously changed many times. IP completion day then came in, and there was a strong push to try to get as much of this law amended, to avoid a cliff-edge scenario. That meant that, often, times were not met—scrutiny availability times. You did not always get enough time at the Scottish Parliament to look at some of the proposals within the promised timeframe; they would not get to see the exit SIs, even in draft form. Often, the thing to bear in mind is that since Exit day, an IP-completion date is no longer an issue. One thing is to build in enough time to allow Scotland, and perhaps the other devolved Administrations—not just the

Governments, but the Assemblies—to look at those proposals as a way to feed in.

Q80 **Marco Longhi:** Would you like to add anything, Professor Wilson?

Professor Wilson: No; I think my colleague covered it.

Chair: I am going to change the order of the questioning slightly and ask Margaret Ferrier if she would be kind enough to ask the next question, and then I will call Richard Drax and Jon Cruddas.

Q81 **Margaret Ferrier:** This question is for Professor Wilson and Dr Taylor. To what extent, if any, could future changes to retained EU law made under the Government's Brexit freedoms Bill affect the Scottish Government's commitment to keeping pace with EU law?

Dr Taylor: The first thing to stress is that since the UK left the EU, Scotland no longer has to comply with EU law moving forward, and it is not limited in any way—as it was previously—in having to legislate in conformity with EU law. That is all well established. There is no commitment in law, as it were, and there is no obligation under international law for the Scottish Government or Parliament to keep pace, but as we know, they have taken on a commitment to doing so politically. Indeed, legislation passed at the end of 2021 gives power to Scottish Ministers to pass secondary legislation to try to keep pace with EU law developments. I stress that that is a policy commitment, and powers have been given in relation to it.

I think it is fair to say that any Brexit freedoms Bill—particularly if it does as we suspect by granting sweeping powers to potentially change retained EU law—is probably going to affect Scotland's ability to keep pace with EU law developments. First, if indeed any powers are used to amend, change or replace retained EU law, that may lead to greater divergence in what retained EU law looks like in Scotland and what it looks like in the EU. It already does differ, of course, because retained EU law is slightly different—there have been changes—and the UK is no longer signed to every aspect of it. If that changes, the gap between retained EU law in Scots law and EU law widens, making any attempts to keep pace a little harder because there is less of a base to build on.

The second element where this might be relevant is the supremacy of EU law. If that requirement under the withdrawal Act ever changed, you would obviously have a significant shift in the domestic legal order of EU law that would further create divergence between Scots law and EU law, and would therefore make it harder to keep pace. There are some areas where they might be able to do that because they are not as dependent on retained EU law as it exists, but fundamentally, the bigger the gap between Scots domestic law and the EU law, the harder it will probably be to keep pace.

Q82 **Margaret Ferrier:** Before I bring in Professor Wilson, you mentioned, Dr Taylor, that legislation was brought in by the Scottish Parliament at the end of December—the UK Withdrawal from the European Union

(Continuity) (Scotland) Act 2021. Can you comment on the fact that, so far, there has been no use of the powers in that Act, and there are no plans to use them? The reason the Act was brought in related to keeping pace with future developments in EU law. Have you any idea why it has not been used so far?

Dr Taylor: No, I do not have any extra insight into the Scottish Government's thinking on that. It did pass relatively late last year. I know that there is a reporting requirement under the Act and I think the first report was issued a couple of months after the Act was passe. As you said, it said that there was no use of those powers. They plan to report again later this year, but the report could say the same thing.

The other point to mention, I suppose, is that the power in and of itself was not necessarily required either. There are other ways in which Scotland could keep pace: through Acts of the Scottish Parliament and, potentially, under other types of secondary legislation. That is certainly not the only mechanism by which it could be achieved; it is obviously the most explicit.

The only other thing to mention is that it is not a duty. There is no duty there for a Scottish Minister to use it—it is a power, so they can exercise discretion. It might be that they just haven't seen any appropriate scenarios yet. It is certainly more limited in its use. The suggestion is that it is for things like environmental protection, animal health and welfare and so on. It might be those opportunities have not come up yet. Beyond that, I am afraid I could not speculate any further.

Margaret Ferrier: Professor Wilson, would you like to come in?

Professor Wilson: No, I believe my colleague has covered everything.

Q83 **Richard Drax:** Good afternoon to you all, if you can hear with the noise of the helicopter. As part of its review of retained EU law, the Government are looking at how to remove the principle of the supremacy of EU law. Are there any particular implications for the devolved Administrations, their legal systems or their settlements? Dr Taylor, do you want to kick off?

Dr Taylor: Yes, I can certainly make a start on that. As I have already briefly mentioned, the thing to remember with the supremacy of EU law is that it is a rule of priority. Essentially, if you have a conflict between retained EU law and pre-IP completion day domestic legislation, we know that it should be the retained EU law that prevails. Now, if that were to disappear, that would constitute a change in the law. The domestic/EU law situation would be turned almost on its head. On that basis, I think the problems for Scotland would be the same as for the rest of the United Kingdom. It is an issue that they are all going to have to deal with.

As I have said before, it is important to note that, unlike pre-IP completion day, there are no legal limits on Scotland's ability to legislate for the EU and so on, so the dropping of the EU supremacy requirement isn't a major issue there. The one thing to remember is that if this principle were

removed, and you have this substantial change in the law, you are presumably going to have to either repeal or replace the EU (Withdrawal) Act 2018. That is of course a protected Act under the Scotland Act, so the Scottish Parliament cannot change it. You would probably be looking at Sewell there; in other words, you would need the consent of the Scottish Parliament on that, or at least would need to request it, as a constitutional convention. I suspect many of the problems in Scotland would be those faced by the other UK nations, but there would be that extra element. As we all remember, consent was sought on the EU (Withdrawal) Act 2018; it was not given, but it was sought. I suspect any changes under a Brexit freedoms Bill, especially if it was to change this sort of element, would require consent to be sought.

Richard Drax: Professor Hunt, anything to add?

Professor Hunt: As we have heard, supremacy is effectively a conflicts principle in these cases. It is establishing which measure should be applied where there is a conflict between a provision of EU retained law and a provision of domestic law, when they were both created prior to implementation completion date. Domestic law, under the withdrawal Act, would be either disapplied or quashed, depending on its status.

The distinction that we see in the devolved jurisdictions or the devolved legal orders is that, under the Government of Wales Act, Welsh legislation, including primary legislative Acts—before we left, if it did not comply with EU law, it was not law. It would be void—quashed, effectively. There is that difference between Welsh primary law and Scottish primary law, and Acts of Parliament, reflecting clearly the sovereignty of the Westminster Parliament. If we do remove it, we have the situation where the potential for Welsh legislation to be quashed or disapplied would be lifted—if we remove that principle of supremacy.

Of course, as we have heard, the reason we have got that is in the interests of legal certainty and predictability. I think there are real concerns about losing that. Of course, the further we get away from the point of departure from implementation completion date, the further into the background the principle will fade. I am of the pragmatic, "let it run its course" school.

Richard Drax: Professor McCrudden?

Professor McCrudden: Again, the answer has to be in two parts, I'm afraid. With regard to the areas not covered by the protocol, the points that have been made about Scotland and Wales apply in the same way, so I will not repeat those. However, with regard to areas that are covered by the protocol, there are two implications to retained EU law no longer having supremacy. The first is that in the areas covered by the direct EU law that applies in Northern Ireland, of which there is a substantial amount—not retained EU law, but direct EU law—whether or not retained EU law is made supreme in the UK does not matter at all because under section 7A, the EU law that applies directly in Northern Ireland has already

been given supremacy. Tinkering around with retained EU law does not affect supremacy.

With regard to areas that are covered by article 2, however, where the article 2 requirement applies and retained EU law is part of that, making it not supreme in UK law again makes no difference whatever because article 2 requires it to have priority, in terms of the protocol. That is again guaranteed under section 7A. The short answer is that it has important implications if you are no longer to make retained EU law not supreme, in terms of increasing divergences between Great Britain and Northern Ireland, but in major respects it will have no effect in Northern Ireland other than that.

Richard Drax: Finally, Professor Wilson.

Professor Wilson: Thank you. I think my colleagues have answered that quite comprehensively.

Q84 **Jon Cruddas:** Good afternoon, everybody. Can I add to the complexity of this by asking questions about the courts and retained case law? We have heard from witnesses in some of our sessions about the need for a purely domestic interpretation of case law—one witness said that decisions of the European Court could be gone tomorrow—whereas others have said that if you allow individual tribunals to depart from pre-existing precedent, you end up with multiple conflicting lines of interpretation, complexity, uncertainty and chaos. Professor Hunt, should the range of UK courts and tribunals that can depart from retained EU case law be further extended?

Professor Hunt: We know that has been extended to include the Court of Appeal and the High Court of Justiciary, along with the Supreme Court. The balance struck by restricting it to those higher courts is appropriate. You have heard some before your Committee stress concerns about it leading to legal uncertainty and divergence among decisions. We see the potential for there to be divergence within and across jurisdictions within the UK. There are particular concerns around that. As I said, the balance is to leave it to the higher courts.

You sometimes get the sense that UK judges do not know how to work with EU law, but of course that is not the case; this is what they have been doing for 50 years. There may be a readiness among some lower courts, if you give them the opportunity to interpret retained EU law, to look to what the European Court of Justice is doing now, rather than following retained European Court of Justice decisions. There may be new interpretations, so that would add additional layers of complexity if that route were opened. It does work towards that certainty and predictability in how the law operates within the country. My take is that it should not be expanded from where we already are.

Q85 **Jon Cruddas:** You describe it as "appropriate", and earlier you talked about being pragmatic about these things. Can I invite Professor Wilson and Dr Taylor to make some comments about the particular implications

for courts in the different legal systems—in Scotland, and then Professor McCrudden about Northern Ireland in this respect.

Professor Wilson: Scotland has a separate legal jurisdiction, albeit the UK Supreme Court remains the highest civil court, and the High Court of Justiciary the highest for criminal matters. Professor Hunt raises an interesting point in distinguishing between European case law that happens after IP completion day, at which point section 6 says that the UK Courts, whatever their level, are not bound by those decisions but can have regard to them. In Scotland, that is something that our court system is very used to doing, and we take a lot of comparative reference, most obviously with respect to judgments from the courts in England and Wales.

With respect to European court decisions after IP completion, section 6 said that that no longer had to be binding on the UK Supreme Court or High Court of Justiciary. That was subsequently extended to the Court of Appeal, as well as Scotland's Court of Session Inner House by delegated legislation. The test that was applied for a departure, however, was that it had to be at the same level as if it was the UK Supreme Court departing from its previous judgments. That level is very high. It is not bound by its own previous decisions, but it will only depart when it is appropriate to do so. In previous case law both from the former House of Lords and from the UK Supreme Court, the phrase often used is "rarely and sparing".

The Scottish Court of Session Inner House has yet to deliberate on this matter—this legislation has been in place for only about six months. However, the Court of Appeal has looked at three cases where they have considered this matter too with a particular level of debt. On each occasion, they referred back to that UK Supreme Court test, and have found that in those situations, that issue has not yet been met. They are particularly taking note of the fact that there has not been legislative change in those areas that would require departure from the prior interpretation of the court.

We cannot say that if these courts were expanded in how they could depart that they necessarily would, but there is an increased chance that they will. That, of course, leads to a risk of divergent interpretation, particularly across jurisdictional barriers.

Jon Cruddas: That is very clear. Do you want to come in, Dr Taylor, or is that covered?

Dr Taylor: No, nothing further to add.

Jon Cruddas: I invite Professor McCrudden to answer the same question about divergence.

Professor McCrudden: The same question, but a rather different answer, I am afraid. The reason for the different answer is that there are specific provisions in the protocol that require, in certain circumstances, the interpretation to not just have regard but to conform to European Court of Justice jurisprudence, particularly with regard to, again, the single market

and customs affected by articles 5 and 7 to 10. In those areas, it will not be optional; the courts must apply ECJ jurisprudence—dynamically as well, so current and future jurisprudence.

With regard to the article 2 area, it is somewhat more complicated. There is a requirement with regard to the annex 1 directives that are listed—that is basically the anti-discrimination directives. Again, those will be interpreted in the light of Court of Justice jurisprudence, current and future. With regard to non-listed annex 1 directives—in other words, if it is not listed in annex 1 but is still retained EU law that underpins a Good Friday agreement right—the requirement is that that will be interpreted as at the end of the transition period. Again, that is a requirement of the protocol.

The effect therefore is—if I can sum it up—the more freedom to depart from Court of Justice jurisprudence that the courts in England, Wales and Scotland have, the more potential divergence there will be with the courts in Northern Ireland. In this context, the role of the Supreme Court is particularly intriguing, because the same provision if it arises in England, Wales and Scotland may be given one interpretation under this increased freedom to depart, but the court will not have the freedom to depart if the case arises with regard to the same provision in Northern Ireland. In this context, you have the dilemma encapsulated in the function of the Supreme Court as being a Supreme Court for England as well as Scotland and Northern Ireland.

Jon Cruddas: That is great. Thanks very much.

Q86 **Chair:** I am going to ask the next question. This is directed exclusively to Professor Hunt. To what extent—if any—could future changes to EU retained law under the Government's Brexit freedoms Bill affect the ability of the Welsh Assembly to legislate in devolved areas that have been returned from the EU?

Professor Hunt: So changes brought about under the Bill?

Chair: Yes, any future changes to EU retained law under the freedoms Bill. To what extent would those affect the ability of the Welsh Assembly to legislate in devolved areas that have been returned from the EU?

Professor Hunt: Obviously, we look to the powers that the Senedd has, and we know that they are determined by the Government of Wales Act. Also, there have been consequences for legislative power that the Senedd might have that have come through the withdrawal Act, and presumably the Brexit freedoms Bill similarly, to the extent that it says anything about the powers that the Senedd might have and where it is required—or not—to legislate through primary legislation. If it affects the legislative power of the Senedd, that would engage the Sewel convention.

In terms of the concerns we got coming through about limitations on the Senedd's ability to legislate, we saw those concerns equally in Scotland. I know from the work that colleagues here have done in relation to the statutory instruments—the exit instruments—that those instruments

contain ministerial powers coming in and operating within fields of devolved competence, so there is a big-picture concern about the impact on competence and civil issues, but a more specific concern about the instances in which the concurrent use of powers by UK Ministers may cut across the competence the Senedd has.

Chair: Okay. Anne Marie Morris has a question specifically for Professor McCrudden.

Q87 **Anne Marie Morris:** Indeed. Professor McCrudden, it is almost an identical question, but with regard to your jurisdiction of Northern Ireland. To what extent, if any, could future changes to retained EU law under the Government's Brexit freedoms Bill affect the ability of the Northern Ireland Assembly to legislate in devolved areas returned from the EU?

Professor McCrudden: The answer to that depends on a bigger issue, which is, essentially, what happens with common frameworks. Let us leave aside the effect of the protocol. In terms of the larger question, however, in areas that are not governed by the protocol, it will in part depend on what issues are retained—if I can use that word—in Westminster and those that are devolved back to Northern Ireland. Clearly, some of the areas that are going to be in play are currently devolved, but are, as it were, delegated to the EU. Once the EU retained law drops out, there is a question as to whether it goes to Westminster or to Northern Ireland.

In the context of the Northern Ireland arrangements, there is a difficulty that you will be aware of, which is that the more powers that are given to the Northern Ireland Assembly—if I can put it crudely—the more areas of dispute there are likely to be. So my answer to the question is more practical than strictly legal. The more powers that are given to the Northern Ireland Assembly, the more questions of cross-community consent arise, and therefore, practically, potentially the more areas for dispute leading to difficulties in actually legislating in those areas at all.

Anne Marie Morris: Thank you.

Chair: We have one last question from David Jones. This is for all of you to wind up. I invite David Jones to ask the next one.

Q88 **Mr Jones:** Thank you, Chair. My question is about common frameworks. What role do common frameworks play in cases where either the United Kingdom or the devolved Administrations seek to amend EU law that is relevant to areas that fall within devolved competence? I will start with Professor McCrudden.

Professor McCrudden: I have already suggested part of my answer in some ways. In terms of the non-protocol areas, I have suggested that it will depend on which way the powers are given, whether they go to the devolved Administration or not. In terms of the protocol-governed areas, the common framework is simply subject to the other provisions of the protocol. In other words, the common frameworks cannot go against the

protocol distribution of powers and the exercise of those powers. Sorry, that is not a particularly good answer, but I hope it satisfies.

Mr Jones: Thank you. Professor Hunt?

Professor Hunt: In terms of the operation of the common frameworks, the intersect with EU retained law, and the consequences for what can be done, we have a situation now whereby coming up to around 30 frameworks are in operation, even if they have not had the sign-off. We are not at the stage where they have all been through the various scrutiny procedures, but they are operating. We have mechanisms for collaborative governance across the United Kingdom. We have seen the breakthroughs through the IGR reports that are reflected back into the frameworks that are coming through, which are agreements around how the Governments and legislatures will collaborate and work together. It will differ from policy sector to policy sector how much divergence can be withstood and what is deemed to be acceptable, but there are structures and processes within these common frameworks that are designed to be followed where there is a decision to legislate.

It is clear that the power and the competence is not affected, yet there is a political commitment around how that will be done. With IGR having been in such a delicate position and under so much challenge, there are concerns around too much of a readiness to allow an ease with which retained EU law might be removed to roll over into the common frameworks areas. The majority of them have no primary legislation associated with them. It is all secondary legislation, based around EU exit SIs. There is a concern there about getting the balance right again.

Mr Jones: Thank you very much. Professor Wilson?

Professor Wilson: The interesting thing about common frameworks is that their purpose is to ensure a common approach to retained EU law policy areas, based on previous practice while we were a member of the EU. At the beginning of this process, 152 different policy areas were found to intersect with one or more of the devolved Administrations, about 100 of which intersect with Scotland. As Professor Hunt says, most of those have not required a framework agreement, because there is minimal risk of divergence or because there is an existing intergovernmental agreement in place that is supporting that work.

Some 29 of the policy areas require support through delegated legislation. The exit SIs that have been agreed—certainly, those agreed with the Scottish Government—have been instrumental to implementing those frameworks. That has been the case even when it was thought that primary legislation would be required at the outset. The decision to maximise the use of delegated legislation through this process has been for expediency, to ensure arrangements were in place, so retained EU law was corrected in advance of IP completion day. That is why, as Professor Hunt says, only three have actually required primary legislation because of the additional expansion of negotiation and agreement through the exit SIs.

Mr Jones: Thank you. Dr Taylor, do you have anything you would like to add?

Dr Taylor: Just something else to add on top of that. If you think about the Brexit freedoms Bill, I suppose the unknown question is the extent to which it will take into account common frameworks. We saw with the Internal Market Act, for instance, the provision for the power of Ministers to provide exemptions and so forth. Will that be replicated here?

As has already been mentioned, secondary legislation, in terms of amending retained EU law, is a major part of common frameworks. If we are talking about a Bill that is essentially going to create a similar, but a more sweeping power to get rid of or change more of retained EU law, how will that affect the common frameworks? Or can we get exemptions to existing frameworks? There is a lot to be considered there. A lot of work has gone into common frameworks, although there have been delays over the last few years as a result of the Internal Market Act and, of course, the covid-19 pandemic.

Mr Jones: Thank you.

Chair: Thank you all very much for coming. By way of conclusion, having listened to this extremely interesting exchange, the exam question, which is a rhetorical one in this context, could be along these lines: have the Government applied to the devolved Administrations the criteria that were envisaged by the Schleswig-Holstein question?

I will leave it at that, because there are some quite interesting questions that they are going to have to ask. I think we have made some progress in getting from some experts their views on how they see retained EU law in relation to each devolved Administration, but given the withdrawal agreement Act and, as I mentioned, section 38 on top of that, not to mention the protocol, Professor McCrudden, the reality is that a lot of fairly deep questions remain on the table. I hope that the Government take the opportunity to see these exchanges in order to try to unravel the Schleswig-Holstein question in this context.

Thank you very much indeed.