HOUSE OF COMMONS

European Scrutiny Committee

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

Wednesday 9 February 2022

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Watch the meeting

Members present: Sir William Cash (Chair); Allan Dorans; Margaret Ferrier; Mr Marcus Fysh; Mr David Jones; Marco Longhi; Craig Mackinlay; Anne Marie Morris; Greg Smith.

Questions 1-16

Witnesses

I: Sir Jonathan Jones QC (Hon), Senior Consultant, Linklaters LLP, and Eleonor Duhs, Partner, Bates Wells.

Examination of witnesses

Witnesses: Sir Jonathan Jones QC and Eleonor Duhs.

Q1 **Chair:** On behalf of the Committee, I welcome you both and thank you for appearing before us to give evidence this afternoon. As you will be aware, last week we launched an inquiry into the future of retained EU law. As you are experts on retained EU law and the European Union (Withdrawal) Act 2018, which created it, we are very much looking forward to hearing from you today.

The UK's withdrawal from the European Union and the consequent changes that have been made to our domestic legal system amount to a legal revolution. The UK is once again a democratic, sovereign lawmaker; it is unconstrained by the majority voting of other countries, which was not the case before we left the European Union. We are now free to legislate to repeal retained EU law, as the Government has made clear in its public statements and intentions. This includes all that flows from that, including the role of the courts. We are therefore free to regulate or not, as we deem appropriate, in relation to all matters, including all businesses, great and small, and to provide our own economic future in the world. Furthermore, we have now passed section 38 of the European Union (Withdrawal Agreement) Act 2020, including of course section 38(2)(b), which in particular deals with questions relating to direct effect and direct applicability. This could specifically—in fact, does—provide for us to legislate on our own terms as necessary to override the withdrawal

agreement and Northern Ireland protocol. Importantly, retained or copied-over EU law does remain and it is now for the Government and Parliament to determine the future of retained EU law.

Our inquiry will consider a number of important issues relating to the future of retained EU law. We will be covering issues such as how it is interpreted by the courts, the principle of supremacy, mechanisms for its amendment, effective parliamentary scrutiny, and its accessibility. Of course there will also have to be a very substantial mapping exercise, which is currently under way in Government. Basically, it is these matters that the Committee is dealing with, and we have got very considerable experience over the years—I have been on the Committee since 1985, believe it or not. So we have a lot of experience and the requisite high-profile platform on which to look into these matters, with the assistance of people such as yourselves.

Today, though, we are concerned with covering the fundamentals and explaining what at times is in practice a very complicated area of law. We want to try to simplify it as much as possible. So we will cover what retained EU law is, how it became UK law from 1972 through to 2020, how it differs from traditional domestic law, how it is given effect and how it has been interpreted by the courts.

Before we start, and for those watching at home, would you briefly introduce yourselves? Perhaps we could start with Sir Jonathan, followed by Ms Duhs.

Sir Jonathan Jones: Thank you very much for inviting me. I am Sir Jonathan Jones. I am now a consultant at the law firm Linklaters. I was previously Treasury Solicitor and head of the Government Legal Department, from 2014 to 2020, so I was in post at the time of the referendum and during the passage of the 2018 Act, among other things.

Chair: Indeed. Thank you very much. Ms Duhs.

Eleonor Duhs: Thank you very much, Chair. My name is Eleonor Duhs. I am currently a partner at Bates Wells, which is a City law firm. Previously, I was a Government lawyer. I worked in the Department for Exiting the European Union, and I was the lead lawyer on the core provisions of the European Union (Withdrawal) Act 2018.

Q2 **Chair:** I will ask the first question. This is for Jonathan Jones. To set the scene, can you give us an overview of what retained EU law is and why it was created in the first place? Also, what other approaches were considered?

Sir Jonathan Jones: Starting with the fundamentals, which you have asked us to do, although I guess much of this will be very familiar to people, retained EU law has been described as a snapshot of EU law as it stood at the end of the implementation period on 31 December 2020. This was obviously the vast body of EU law that applied to the UK by virtue of our membership of the EU ever since 1993. So the European Union (Withdrawal) Act 2018 provided that this body of law should continue to apply as part of UK law after the end of the implementation period, unless

and until it was replaced or amended by UK legislation. As you know, the 2018 Act also created powers to amend retained EU law in order to cure what were described as deficiencies, in essence to ensure that the law worked as part of UK law once we had ceased to be a member of the EU.

The purpose of retained EU law was essentially to ensure continuity and certainty in the law after the UK's exit, to ensure that there were not gaps in the law, to avoid a mass of litigation as far as possible, and to minimise legal risk or uncertainty for citizens and businesses and any other users of the law. This was clearly essential, given, as I said, the vast body of EU law that applied at the time, the fact that it had become so closely enmeshed into the UK legal framework during our period of membership of the EU, and, frankly, the impossibility and probably the undesirability of trying to replace it all by the time we left. That was the basic approach, which I am sure you will want to explore in further questioning.

You asked about other possible approaches. As we were saying before we started, Chair, you and I had a couple of conversations right at the beginning of this process, and I think it was pretty clear early on that something along these lines would be needed—some way of lifting and dropping pre-existing EU law on to the UK statute book, coupled with a mechanism to amend it so that it worked technically after our departure. Some of the technical detail in the 2018 Bill, which Eleonor will be able to talk about, took longer to sort out, but the basic structure I think became pretty clear fairly early on. If you wanted to avoid huge gaps and uncertainty in the law following Brexit, the only realistic way of filling the gap was to roll forward the pre-existing EU law, and that is what we did.

Q3 **Chair:** Just one point on that. At the time, legislation had not been passed. When a Bill is introduced, you are never quite sure how it will work out, and of course with the state of play at that point in time there was a great deal of uncertainty and we ended up during the last days of the May Administration in paralysis, so we had a very different kind of political context to work within. However, I think it is also simple and true that it was a stopgap arrangement, in that although it was necessary to do it that way for the purposes of trying to ensure the continuity as you described and to avoid unnecessary litigation, the reality was that given the fact that the supremacy of Parliament was the ultimate objective following the provision of the Withdrawal Agreement Act by 2020, the whole situation had changed its nature, so that although EU retained law did in fact fulfil a purpose, it is now in a different context—a stopgap—and that was already intended. When Lord Frost made his comments the other day, it was quite clear that that was intended. In this inquiry, we are looking not only into the supremacy of EU law as it is applied through the Withdrawal Agreement Act for the time being but at other questions such as how you would remove it. These are questions that we will investigate. Eleonor, would you like to come in on that theme and, as you have had the opportunity to look at this for a long period of time, give us your sense of the thing?

Eleonor Duhs: As Jonathan was saying, this was about continuity, so that the law would be the same the day before the end of the transition period

as the day after, which would give certainty to businesses and individuals. But of course it was a stopgap, because after the end of the transition period, the intention was always that this body of law would be looked at by Parliament and repealed and replaced with new domestic frameworks. I think that is very clear from the White Paper.

Chair: That is extremely simple and straightforward. Thank you very much.

Q4 **Anne Marie Morris:** Ms Duhs, it is my understanding that for the purpose of being able to manage that body of retained EU law, it was divided into different categories. Can you perhaps give us a bit of an explanation as to what those categories are? From what I know, one of them seems to be a bit of a ragbag, and I therefore wonder how helpful that particular category is, but I would be very grateful for your explanation.

Eleonor Duhs: There are three main categories of retained EU law. The first one is EU-derived domestic legislation, as set out in section 1B and section 2 of the EU (Withdrawal) Act 2018. EU-derived domestic legislation was our domestic law that gave effect to our EU rights and obligations. An example in primary legislation is the Data Protection Act 2018, but secondary legislation was also saved under that provision. There is a vast number of regulations made under section 2(2) of the European Communities Act 1972. Had we not saved that law, it would have disappeared, because we were repealing the parent Act, which was the European Communities Act 1972. That is the first category, which we can call preserved law—domestic law that is preserved after the end of the transition period.

The next category is direct EU legislation, which is saved in section 3 of the Act. That is converted legislation, because that is EU legislation that applied directly in our domestic law through section 2(1) of the European Communities Act 1972. Section 2(1) was described quite helpfully in the case of Miller as being like a conduit pipe: it allowed EU law to flow directly into domestic law without the need for further implementing legislation. An example of the legislation that was converted into domestic law is the general data protection regulation—an EU regulation turned into domestic law and rebadged as the UK GDPR, or the UK general data protection regulation.

The third category is what you would call the slightly unclear category. Section 4, which is on "rights etc.", came into our law through section 2(1)—through that conduit pipe. That category contains aspects such as directly effective rights that came in through section 2(1)—directly effective rights in the EU treaties, such as article 157, which guarantees the right to equal pay for men and women. We saved that legislation in what we call the sweeper provision, which sweeps up anything else that is not saved in sections 2 and 3.

I should also mention that there are other aspects that are saved, but not through a direct mechanism like the first three categories. In that category you have retained case law. That is the case law of the Court of Justice of

the European Union—an example there is the Shrems II case, which I think people are quite familiar with, to do with international data transfers and the ability of the EU to transfer data, and without further mechanisms, to third countries. That was saved. There is also retained domestic case law—for example, the case of Walker about equal pension rights between heterosexual and non-heterosexual couples. That is also saved. But there is no formal mechanism for saving that case law; it appears in section 6.

The retained general principles of EU law, which are also saved—not explicitly, but they are also relevant. The case law and general principles are relevant to the interpretation of retained EU law so that it means the same thing after the end of the transition period as it did before. Those are the categories that are saved.

I should also mention that directives were not saved. The reason for that is that directives were implemented in domestic law, so there was no need to save both the instructions to the member states set out in the directive to legislate, and the legislation itself. You simply saved the legislation itself.

Q5 **Chair:** May I just add a point in the form of a question about diverging and/or deregulating in relation to these laws. They were made by majority vote by the Council of Ministers under section 2 and came into effect in our law, which was the law of the land at the time. For practical purposes, that was done without transcripts. Viewed from the present time, there was a sort of lack of democratic legitimacy in the manner in which those things were done, but they were done correctly because that was the law at that point in time, and this incredibly important Act was passed—although some people did not like it very much.

The reality, therefore, is that in evaluating future divergence or deregulation, for example, the question of how those laws were made in the first place is extremely interesting and important. The second thing is that unless you get this EU retained law removed, you are still saddled with laws that were made under the old system. At the same time, you have to ensure that you end up with the means to provide a substitute of the regulatory rules that were brought in—in financial services, for example. That is the complexity and the simplicity of the situation. It has to be done, but the question of how and when you do it is a matter of significant importance. Do you agree?

Eleonor Duhs: I think it is very important that we make the right decisions about our future frameworks, of course. I am a data protection lawyer—that is what I do now—and our new data protection framework is going to be absolutely key to ensuring that we can innovate in artificial intelligence and new technologies, that we can do that in a way that is thoughtful and responsible, and that we have a framework that really works for our post-Brexit legal landscape.

Chair: That is the point; it is not a theological question—it is quite complicated. It needs to be coherent and done properly through the new Minister for Brexit freedoms, as he is described, and the Minister of the

Cabinet Office, so that by a combination of work done within those different capacities and Departments, we will hopefully arrive—I am sure we will—at a coherent body of law that makes sense for the user and is not just a matter of theological or conceptual thinking on a basis that does not really relate to ordinary people's daily lives. That is really the object, isn't it?

Let us move on. I call Allan Dorans.

Q6 **Allan Dorans:** Good afternoon. Mr Jones, what are the main ways in which retained EU law is different from traditional UK domestic law?

Sir Jonathan Jones: Perhaps the first point to make is that retained EU law is now UK law. It is a creature of the UK Parliament in the 2018 Act. It falls now to be interpreted by the UK courts, and Parliament can change it if and when it wants to—I am sure we will come on to some of those things. It is now a creature and a species of UK law, but it is obviously a rather special and unusual species.

First of all, obviously it differs in its origins, as the Chair was just saying. Its origins are as EU law created under the EU system of legislation and the EU legal framework. It derives from our membership of the EU, and it follows that it has some of the attributes and qualities of EU law, which we have already been touching on. For example, if you look at the categories that Eleonor has just described, some of it resides in EU regulations. If you want to see the text, you have to go to the EU regulation, and the text is—as it happens now—available on an excellent dedicated website maintained by legislation.gov.uk. That contains all the EU legislation as it applied at the end of the transition period, so the text is there, but the text derives from EU law, and therefore it will look like what it is: law that used to be EU law. Similarly, in interpreting the law, you have to consider any relevant decisions of the European Court—as Eleonor has just been saying—before the end of the transition period. Again, we may come on to that.

Undoubtedly, it is a distinct category of law and it has its own rules of interpretation. For some of it, you have to go to a particular place to find it, and there are specific powers to amend it, which we have already talked about. However, it is now UK law, and the special status and the rules surrounding it are rules created by Parliament. Again, as we have been saying, it is now for Parliament to decide whether and how to change it.

Chair: Thank you very much. David Jones, please.

Q7 **Mr Jones:** Sir Jonathan has just touched on this—

Chair: A former Brexit Minister, by the way.

Mr Jones: Yes, and also a former member of the DExEU team, so I am very pleased to see another one here today. Could you tell us how the interpretation of retained EU law differs from that of other law, and what relevance the case law of the CJEU has to the interpretation of retained EU

law?

Eleonor Duhs: We go back to that theme of continuity. In section 6 of the EU (Withdrawal) Act, the Court of Justice's case law as well as the domestic case law are relevant in interpreting this body of retained EU law so that, as I mentioned, we have that certainty of interpretation. The other aspect that section 6 says we should look at when we are interpreting retained EU law is the competencies of the EU, in terms of the limits of those competencies when it was legislating in relation to measures that it brought forward. There will be areas, of course—national security is one mentioned in the explanatory notes to the EU (Withdrawal) Act—where the EU did not have competence, so the idea is that the retained EU law is not interpreted more widely than EU law would have been. Again, it is that theme of continuity.

Those are two principles there: the former case law of the Court of Justice from before the end of the transition period, as Jonathan has said, domestic case law, and this looking at the competencies of the EU. That is one way that section 6 says we should interpret retained EU law, but I also want to mention that within the savings provisions themselves, there are important signposts about how we interpret retained EU law. For example, EU-derived domestic legislation in section 2 is saved as it has effect in domestic law immediately before the end of the transition period, so all the effects of that law are saved. For example, in the Walker case—which I mentioned—the disapplication of certain provisions of the Equality Act 2010 still applies to retained EU law, so you have that continuity.

Section 3, as well, says direct EU legislation as it has effect in EU law immediately before the end of the transition period. For example, in order to interpret EU-derived domestic legislation, you would potentially look at the legal basis of the measure; you would look at the recitals to the instrument; you might apply purposive interpretation where the meaning is unclear or ambiguous; and you might look at the foreign language versions of that legislation in order to interpret it. These are ways in which there are particular rules for interpreting retained EU law.

Mr Jones: Thank you.

Chair: Which makes the point, does it not, because it is so different from the way in which we would normally, previously, before we came to the 1972 Act, interpret law. Maxwell's "On the Interpretation of Statutes" was the book that people used to refer to; now you say its purpose is different, therefore you have two separate public statute books, have you not? One lot is EU retained law and the other is the law that is made in what we would describe as the constitutionally normal manner, in which legislation is made in the UK. I will now move us on to the next question, from Greg Smith, please.

Q8 **Greg Smith:** Good afternoon. Sir Jonathan, to make things that bit more complicated, will you take us through which courts and tribunals have the ability to depart from retained EU case law? In the limited experience that we have of that so far, do you think that that ability to depart from it

needs to be extended to other courts?

Sir Jonathan Jones: I will do my best. As enacted, the withdrawal Act 2018 provided that the Supreme Court was not bound by retained EU case law, and nor was the High Court of Justiciary in Scotland when acting in certain criminal matters. In deciding whether to depart from retained case law, those courts must apply the same tests that they would apply in deciding whether to depart from their own case law. Essentially, that test is, when it appears right to do so, which you might think is not much of a test, but that is the test.

The withdrawal agreement Act 2020 added a new power for a Minister to provide for other categories of court that could depart from retained EU case law. The Lord Chancellor made regulations under that power to prescribe—I will quickly go through them—the other categories of court that can now do that. It is a bit of a mixture: the court martial appeal court, the Court of Appeal in England and Wales, the inner house of the Court of Session, again the High Court of Justiciary in Scotland when dealing with certain compatibility and devolution issues, the court for hearing appeals under the Representation of the People Act, the lands valuation appeal court and the Court of Appeal in Northern Ireland.

In addition, regulations amend the Competition Act 1998, which provide that in determining certain questions of competition law, courts and tribunals, as well as the Competition and Markets Authority, may depart from retained EU law in certain circumstances. As I said, that is quite a mixture, but certainly many of the higher courts, including the Court of Appeal and the inner house of the Court of Session in Scotland, may now choose, if they think it right to do so, to depart from retained EU case law.

We do not really have a lot of evidence so far to see what will be made of that power. I suspect that the courts will be fairly slow to depart from pre-existing case law. Our doctrine of precedent means that courts normally do follow previous decisions, and if there is significant doubt about the correctness of an earlier decision, they will normally leave it to the higher courts to put it right.

There is one decision—a Court of Appeal decision in a case called TuneIn *v.* Warner Music and Sony Music—where the Court of Appeal declined to depart from the jurisprudence of the European Court and said that the power to do so should be "exercised with great caution". It set out a range of reasons why it might be undesirable to do so, including the risk of creating considerable legal uncertainty.

Basically, that is the risk. If you allow multiple individual tribunals to depart from pre-existing precedent, you end up with multiple conflicting lines of interpretation, which creates uncertainty, unless and until somebody takes the matter on appeal, ultimately to the Supreme Court. As I say, that risk of uncertainty was particularly touched on in the TuneIn case I mentioned.

The basic point is also that if there is significant doubt about the meaning of a case, or there is significant will to change it, ultimately, it is for Parliament to decide whether to change the law.

The other point that I would make is that all litigation has winners and losers. You may come back to that point. As soon as a tribunal departs from a pre-existing decision, they are effectively changing the law, and one party will be disadvantaged by that, presumably, and understandably, having ordered its affairs based on the earlier interpretation. This is the basic point: as soon as you depart from precedent, you are changing the law from what people might have expected it to be, and somebody, probably, is going to be disadvantaged by that. I, myself, would be cautious about extending the range of tribunals that can depart from previous case law in that way, and, so far, I think the indication is that the courts themselves will be cautious about doing so.

Q9 **Craig Mackinlay:** Ms Duhs, you explained very clearly the different strands of EU retained law. The directive type, which has gone through a UK parliamentary procedure to actually give it UK language, is, I think, a little easier to understand because it has come through us. However, the regulations are somewhat more abstract.

Have there been any examples, thus far, of UK courts having to interpret any of those things, and of how they have relied on previous CJEU judgments? I know it is early days yet for those things to have come through the courts, but how have they dealt with various issues of retained EU law thus far?

Eleonor Duhs: As Sir Jonathan said, we haven't got a huge amount of case law. I think one area where there is some complexity, and where we are getting two diverging lines of authority, is where the facts of a case arose before the end of the transition period, but the case is heard after it. The question is, does the court apply EU law, as it was, or does it apply retained EU law? Here, we have two different lines of authority developing, which I can explain in a little more detail.

First, we have a Court of Appeal case called Lipton *v.* BA City Flyer, which has been applied in two other cases. In fact, all three cases are about cancelled or delayed flights, and compensation in that context. In that leading Court of Appeal case, the court applied retained EU law, even though the facts of the case had arisen before the end of the transition period. The court applied retained EU law, as amended by the deficiencies correcting power, which Sir Jonathan mentioned earlier—the power to make amendments, such as replacing references to the European Commission with a domestic regulator. That is somewhat problematic, and has been criticised by some commentators on the basis that the deficiencies correcting power is explicitly said not to be capable of being applied retrospectively.

So, we have some problematic case law, potentially, looking at this issue. We then have this other line of authority where the courts simply apply EU law as it was before the end of the transition period, even though the case

is being heard afterwards. For example, we have the case of Fratila and another *v.* Secretary of State for Work and Pensions in the Supreme Court in December of last year, where the court simply applied EU law, not retained EU law. There was also GibFibre Ltd *v.* Gibraltar Regulatory Authority from November of last year. That was the Privy Council again, which said, simply, "The appeal…falls to be decided by reference to the law prevailing at the date of the decision", which was before the end of the transition period. So, there is some complexity there about whether you apply retained EU law in those circumstances, or EU law. That is a theme that I think the courts will be looking at further—which regime applies—but obviously there is not a huge body of case law, given that the transition period ended relatively recently.

Q10 **Craig Mackinlay:** Let us go a little bit further. This is something that may arise over time to come. Whether it is EU retained or EU law, you have said about those problems across the transition period. Say there is something that has never actually, thus far, been tested in an EU court, but it gets tested in a UK court first, so the UK court has nothing to refer to. I know it does not have to take post-Brexit CJEU rulings as gospel in of any type, but it may refer to them for guidance. The UK court comes up with its interpretation and subsequently another EU state examines exactly the same issue and comes up with a wholly different interpretation. That is going to be an oddity.

I know we would obviously not change our interpretation, but would they look in any way at a UK court interpretation of what has happened? We have given ourselves the requirement to see what their thinking is, and obviously we do not have to take it on board. Would it work both ways? You could end up with the same embedded EU law—our retained and theirs extant—coming up with a completely different interpretation depending on timing?

Eleonor Duhs: That of course is possible, but I think quite often there is discussion about dialogues between courts, so you have dialogues between the Court of Justice of the European Union and the Strasbourg court—the European Court of Human Rights. I think the idea of courts looking at the same rights, for example, and having a dialogue about them is not entirely alien to the legal system. I do not necessarily see that there is a particular difficulty with that, and the courts will consider the facts of the case before them and decide it. I think there is a possibility of that, but I do not necessarily see a difficulty or really that it is particularly unusual.

Q11 **Craig Mackinlay:** Finally, where there are somewhat vague terms in treaties, do you think there is a likelihood of having a different or a rather abstract interpretation? I am thinking about equal pay-type ambitions in some of the treaties of the past.

Eleonor Duhs: The test for direct effect is whether the right is clear in the legislation. If you had something that seems quite abstract, it would be difficult to enforce in a court, either in the EU or potentially the UK, if we looked at particular rights in the TFEU, which might arguably have direct

effect. I think it would have to be something as clear as article 157, which the court said did confer a right of equal pay.

Q12 **Mr Fysh:** Sir Jonathan, I wonder if you can say a bit more about the reasons why the principle of the supremacy of EU law was retained in section 5 of the withdrawal Act, because we have heard about some of the differences between the way it has effect and the principle itself.

Sir Jonathan Jones: The principle of EU law is simply the principle that EU law prevails over inconsistent domestic law, and this has been a fundamental feature of the EU legal system almost right from the beginning—since long before the UK joined. Obviously, it therefore prevailed so long as the UK was a member of the EU. It was largely retained, as you say, in section 5 of the Withdrawal Act for domestic enactments predating the end of the transition period. That was really part of the exercise in securing continuity, certainty and predictability of the law after Brexit.

If you have two inconsistent pieces of law, you need to have some rule for deciding which of them is to prevail. Before we left the EU, the rule was the one that I mentioned: the rule of supremacy of EU law. If you had conflicting EU and domestic legislation, the EU legislation prevails. That was the rule before we left, and Parliament decided in the 2018 Act to keep the same rule if there should be a conflict between retained EU law and domestic law, as I say, that was created before the end of the transition period.

It is really part of that exercise in securing continuity. You take across the existing body of the law, the existing ways of interpreting it and the existing rules for deciding how to resolve conflicts of the kind I mentioned. Any other rule—which we may come on to—would, by definition, mean changing the law and potentially changing outcomes in particular cases. That is what we were trying to avoid. Going back to the question we were just discussing, the fact that there has been relatively little case law since the end of the transition period might suggest that we were tolerably successful, in that we didn't provoke a load of litigation. The law has continued more or less smoothly from a legal point of view, including the rule of supremacy. That is what it means.

Of course, section 5(1) says that "principle of the supremacy…does not apply to any enactment", and so on, created after the end of the transition period. The UK is now free to change the law in any way it wants, and the normal rule in UK law—that later legislation, generally speaking, prevails over earlier—now applies. That is the rule that was retained for legislation applying before the end of transition.

Q13 **Chair:** You made the case regarding the question of the extent to which we would want to continue with the notion of the supremacy of EU law. To most people, this would seem somewhat incongruous at the present time. It was done in 2018 when, as we've agreed, it was a stopgap. So, for practical purposes, the next question would seem to be pretty clear, given we've now left the EU.

The Act of Parliament that was required to repeal the '72 Act and all those things was still taking place. Now, it has happened. In addition, the European Union (Withdrawal Agreement) Act 2020 specifically refers to the sovereignty of Parliament in section 38. Section 38 is the law of the land; it was undisputed by either House of Parliament at the time and it went through Parliament. It provides for that sovereignty, notwithstanding the Act, the withdrawal agreement itself, or the Northern Ireland protocol, as the two are interwoven.

Therefore, as part of their review of EU retained law, one could understand quite clearly—because it is essential—that the Government would need to remove the principle of EU law. As I said earlier, it would be inconsistent to have those two systems of statute law running parallel with one another under circumstances where we have clearly left the EU, both by referendum and, of course, by virtue of a general election, which provided that we would leave the EU. We passed section 38 immediately after that. These are really what I would call the essential ingredients of why the supremacy of EU law now has to be removed. What is the most effective way to do that?

Eleonor Duhs: As Sir Jonathan has explained, this is a principle and a rule about which law takes precedence in a conflict. However, it also goes deeper than that. It is a fundamental principle underpinning the functions of this body of retained EU law, which is now domestic law.

I would like to draw the Committee's attention to "Steiner & Woods EU Law", an excellent work on EU law that is now in its 14th edition. Marios Costa and Steve Peers are now the authors. In chapters 4 and 5, it looks at this principle and how it works. It is actually more fundamental than just a rule of precedence. Costa and Peers say that the principles of direct effect, indirect effect and state liability were all developed in accordance with this principle. It is difficult to remove it without also affecting other aspects that we have retained. We have retained in some ways direct effect, indirect effect and the duty of consistent interpretation, but not state liability. None the less, the way in which we interpret this body of law if you remove supremacy does become quite complex, and I think that to restate that principle could create some real legal complexity and some legal uncertainty.

The other thing about the EU withdrawal Act is that the scheme operates in this way. You use certain principles to interpret retained EU law, but you also use the case law, and the case law has the principle of supremacy interwoven in it. If you take out that principle, you may be taking out case law that is actually relevant to how rights and obligations are still interpreted in domestic law, until this body of law is repealed and replaced.

Q14 **Chair:** But there is no question but that it can be done, and the necessity to do it is embodied, for example, in section 38(2)(b), which clearly refers to both direct effect and direct applicability, and that was clearly passed as an Act of Parliament. So, whatever people may argue about the desirability or otherwise, the reality is that that Act has been passed

and the removal of the idea of the supremacy of EU law, which the Government has clearly expressed a view about—which is that it intends to do so—can be done by virtue of the enactment that I mentioned just now, which is section 38 itself. So, we have the capacity to do it, we have the constitutional need to do it, and we have also got the necessity to have regard to avoiding two separate kinds of parallel statute books.

These are matters that we will obviously be looking at as we go along, but I thought it would be helpful—I am glad you are nodding at this stage—because, given that what you said just now indicated that perhaps there was a case for retaining EU supremacy, it is quite clear that neither the Act of Parliament of 2020, nor the intentions of the Government and the outcome of the referendum and the subsequent general election and so on, really plays into that argument. We would not want to keep the supremacy of EU law, and the method of addressing that is really the next step.

Sir Jonathan Jones: Can I come in on this? I think there is a case for keeping it. To put it another way, I think one has to be very careful about what the consequences would be of getting rid of it unless you do something very clear in its place, because this—again, to repeat myself—is an illustration of the benefits and the certainty that derive from retaining the pre-existing position, including, for good or ill, supremacy as a principle that goes to interpretation and approach. As soon as you take it away, you are by definition changing the law; otherwise, why do it? And that means potentially changing the position or the rights of individual citizens, businesses and so on in ways that are wholly unpredictable. If you change one rule with another rule, or simply take the first rule away and leave it to litigants and the courts to sort out the position case by case, you are by definition changing the position and putting nothing certain in its place.

As I have said, as soon as this becomes tested, it suits somebody to argue, for example, that a particular piece of UK legislation should now be regarded as trumping a piece of pre-existing EU law, where previously that would not have been the case. That will provoke litigation, and we can't be certain where that might arise or what the outcome would be. So, I would say, at the very least, beware of the unintended consequences of doing this.

To go back to a point I made earlier, it is not now really about the supremacy of EU law at all, because we have left the EU. We are not subject to EU law any more. This is partly a rule of interpretation. It is a rule of structure. It is a rule now, as part of the UK legal system. I take your point, Chair, that it is a rule unlike any that would otherwise apply to the law, but it is now a rule of UK law, created by Parliament. Perhaps you could have some different terminology. Perhaps you could just call retained EU law something different. It is now just a category. It is transferred UK law. You could call the doctrine of supremacy "the EU law" or something different. It is just a rule of internal conflict, or something.

It would be much better, I would have thought, to look at the law topic by topic or sector by sector, to see whether any problems arise and whether there are cases where it would be preferable for an inconsistent UK law to apply over a conflicting EU measure. It would be better to then change the law for that particular topic or measure than to adopt a blanket approach that takes away the rule altogether and has the unpredictable consequences that I mentioned. That would be my caution.

Q15 **Chair:** Yes, but by the same token, the reality is that we have left the European Union. By any reasonable standards, it would be incongruous to continue with, for example, the methods of interpretation which were applied before, which is the purposive approach by comparison with a system of precedent. There are also questions relating to the manner in which that law was made. It was not made by the UK Parliament sitting as it does now, outside the European Union. It was done by majority vote, behind closed doors. Deals were done and there was majority voting. There are big issues of a constitutional, practical and democratic nature. Although I can see the argument that it is convenient to try to maintain the idea of supremacy of EU law, the reality is that it is inconsistent with the manner in which we left the European Union and the reasons we did so.

Sir Jonathan Jones: Can I just respond to that? You use the word "incongruous", which I wouldn't necessarily agree with. I accept that this body of retained EU law is unusual in various respects, unlike the rest of UK law. The point is, I would say, to be aware of the consequences of changing that, particularly in a blanket way. You said earlier that what matters is that the law works for individuals and the country. If the price of that is a bit of incongruity, it may be worth paying, at least for a while.

Chair: I think we can resolve that question. If you were to decide to keep certain elements of the EU laws that were passed before we left the European Union, and we saw merit in maintaining those laws for the benefit of the people concerned, we could turn them into entirely domestic laws without regard to the supremacy of EU law. I think we could argue about this for some time, so I will move on now to Margaret Ferrier with the next question.

Q16 **Margaret Ferrier:** My question follows on quite nicely from that, and it is to both of you. On 31 January, the UK Government announced that they will bring forward a Brexit freedoms Bill, which will include a mechanism to make it easier to amend or replace EU retained law. How can this be done in a way that would ensure proper parliamentary scrutiny?

Eleonor Duhs: As I said before, I am a data protection lawyer, and changing data protection law is very central to the Government's post-Brexit policy, if I can put it that way. I would have real concerns about changes being made to UK GDPR, for example, without proper scrutiny.

I want to give you an example of the changes that the Government have consulted on, which the Information Commissioner's Office had some concerns about. The taskforce on innovation, growth and regulatory reform said that the right to a human review of automated decision

making should be removed from UK GDPR. We all remember the A-levels fiasco in 2020, when an algorithm decided what A-level students' results should be. Research showed that poorer students received worse marks than those from a better—more advantaged—socioeconomic background. So, these sorts of decisions are really quite dangerous, potentially.

The Information Commissioner's Office said that it did not agree that human review of automated decision making should be removed. It said that the right to human review of automated decision making had actually been in our law for a long time and even before GDPR came in. It said that it is important that these decisions are "fair and based on accurate information", but that it is also really important to promote "public trust and privacy respectful innovation." It said: "Removing this right could lead to a perception that decisions are made purely by unaccountable algorithms. This could undermine public support for the use and deployment of AI, even where it delivers substantial economic and social benefits."

This is a really significant change that could potentially be made under the category of being minor and technical. It isn't minor and technical. It is really important that Parliament is able to scrutinise and debate this change. We are now at the start of the fourth industrial revolution, and all this automated decision making—this new technology—needs to be done in a way that earns the public's trust. I would have some concerns about these changes being made without proper parliamentary debate.

Sir Jonathan Jones: I agree with that. Eleonor has given a specific and very live example, but there will be hundreds of others. You are talking here about a vast body of legislation, deriving, as we have said, from our decades of membership of the EU and covering every area of policy, essentially, that is relevant to our national life: financial services and the economy, the environment, employment, data, as you have heard, health and safety and so on. These are really big and important areas of policy, and you would think that if there were going to be big changes to them, they would be subject to proper parliamentary scrutiny and debate, democratic accountability and so on. The risk is that because we have this rather esoteric label, "retained EU law", it is treated as a rather technical and boring area and there is the idea that we can tidy it all up by some kind of technical and quick, fast-track mechanism. I would be very wary about that. Eleonor has given you a very good example.

The Government has said, and I think you yourself have said, Chair, that there are concerns about the lack of democratic input into the body of EU law that we have inherited; I understand that point. So I would expect this Committee and other parliamentarians to be concerned that there be meaningful democratic input into whatever system replaces it, so that whatever changes are made to this great body of law—in all the areas I have mentioned and many others—are indeed properly debated and scrutinised in Parliament. I am a bit suspicious of references to special mechanisms or changes being made easier or faster, which is what the Government has said. I assume that would be through secondary

legislation, laid by Ministers, and we know that secondary legislation typically gets minimal scrutiny by Parliament. You will know there is a wider debate about that. It is partly driven by the extensive use of secondary legislation to deal with covid. A number of parliamentary Committees have criticised that trend—the increasing use and overuse of secondary legislation.

So, as I say, I am suspicious of this reference to quick, special mechanisms for changing retained EU law. There may be scope to use secondary legislation to make minor or technical amendments or updates to retained EU law, as happens in other areas of law. Again, my feeling would be that we should be very cautious about that, partly because of the example Eleonor gave, in that what may feel like a technical change may in fact be really important in a particular sector to users of the law or consumers or whatever it may be. I would suggest that any powers to make changes via secondary legislation should themselves be scrutinised very carefully, to ensure that they are framed as tightly as possible and carry appropriate levels of parliamentary scrutiny, so that Parliament can have the proper input into what will potentially be the biggest overhaul of our statute book that any of us can remember.

Chair: That is a very interesting point on which we will end. I will just add a final point. At the beginning, when I made my opening statement, I actually used the word "revolution", because that is exactly what it is, in terms of the change that is going to take place. However, the reason for the revolution is that we want self-government and democracy to prevail. That principle of overriding constitutional significance was provided for by the referendum, which itself was endorsed by Acts of Parliament, because that is how the referendum actually took place. That was then followed by the whole arrangements of section 38 of the withdrawal Act and the rest of it that I referred to earlier, which set out the basis on which the sovereignty of the United Kingdom Parliament will prevail.

I hear what you say, and I understand the reasons for it, but I also say that the nature of the change is so significant, in terms of democratic decision making by the people and for the people, that for practical purposes this is something that the Government have legislated for and have now enacted on our statute book. I think there are dangers, by the same token you described, in having two parallel sets of statute that have effectively differing outcomes, in terms of interpretation. These are matters you can guarantee that we will look at very carefully. The very fact that we set up this inquiry, with this evidence session, to listen to the arguments, to make an evaluation, is all part of parliamentary scrutiny. This Committee has a lot of experience in that field, and we will certainly do the job, in terms of examining all the issues that have been discussed and coming to conclusions about the evidence we receive.

We are extremely grateful to you for coming and for your very interesting analysis. The basic principles of the new revolution that has taken place are all part and parcel of that discussion. Thank you very much for coming. We look forward to perhaps having an opportunity to talk with other people about these questions in the future. Thank you.